

## 16.3 TYPES OF RULES

Three specific types of rules have been recognized as falling within the APA's broad definition of a rule—legislative rules, procedural rules, and interpretative rules.<sup>1</sup> The three types differ in their purpose. However, regardless of the rule type, all rules are subject to the rulemaking requirements of the APA.<sup>2</sup>

Legislative rules are those the purpose of which is to make substantive law pursuant to powers delegated to the agency by the legislature.<sup>3</sup> Legislative rules require specific statutory authority.<sup>4</sup>

The purpose of procedural rules is to set forth the nature and requirements of formal and informal procedures relative to the administration of official agency duties to the extent that they directly affect the rights of or procedures available to the public.<sup>5</sup> The most common procedural rules are those governing contested case practice before individual agencies.<sup>6</sup>

Interpretative rules are not defined in the APA.<sup>7</sup> Indeed, before their appearance in case law, they were never expressly mentioned in the APA. They have been described in case law as those rules the purpose of which is to make specific the law enforced or administered by the agency,<sup>8</sup> for example, by making more specific the acts that the agency will deem a

<sup>1</sup> MINN. STAT. § 14.38, subd. 1 (2014). The statute uses the term “substantive” rules and not “legislative” rules, although the case law uses the terms interchangeably with the same meaning. *See Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 667 (Minn. 1984) (“This court has recognized three types of agency rules: legislative, interpretative, and procedural”); *Minnesota-Dakotas Retail Hardware Ass’n v. State*, 279 N.W.2d 360, 365 (Minn. 1979) (“Legislative rules . . . are enacted pursuant to delegated powers to make substantive law, and, in contrast to interpretative rules, have the force and effect of law.”); *McKee v. Likins*, 261 N.W.2d 566, 577 (Minn. 1977) (“[T]hree definite types of rules came to be delineated by the commentators and later court decisions . . . procedural, legislative, or interpretative”). *See generally* Note, *Definition of “Rule” under the Minnesota Administrative Procedure Act*, 7 WM. MITCHELL L. REV. 665, 676–79 (1981).

<sup>2</sup> *Cable Commc’ns Bd.*, 356 N.W.2d at 667 (“Regardless of rule type, however, this court has held that all rules are subject to the rulemaking requirements of MAPA.”); *White Bear Lake Care Ctr., Inc. v. Minn. Dep’t of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982) (“Rules must be adopted in accordance with specific notice and comment procedures established by statute . . . and the failure to comply with necessary procedures results in invalidity of the rule.”); *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 242 (Minn. 1980) (“Interpretive rules fall within the statutory definition of ‘rule.’”); *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) (“The Minnesota APA requires agencies to promulgate, as rules, all formal and informal procedures of an agency.”); *Donovan Contracting of St. Cloud, Inc. v. Minn. Dep’t of Transp.*, 469 N.W.2d 718, 722 (Minn. Ct. App. 1991) (“Interpretative rules must be adopted by following the procedures set forth in the Administrative Procedure Act.”).

<sup>3</sup> *Cable Commc’ns Bd.*, 356 N.W.2d at 667; *Minnesota-Dakotas Retail Hardware Ass’n*, 279 N.W.2d at 365.

<sup>4</sup> *State v. Lloyd A. Fry Roofing Co.*, 310 Minn. 528, 534, 246 N.W.2d 696, 700 (1976).

<sup>5</sup> MINN. STAT. § 14.06(a) (2014).

<sup>6</sup> *See, e.g.*, MINN. R. §§ 7829.0100-.3200 (2013) (rules of utility proceeding, practice, and procedure before public utilities commission).

<sup>7</sup> The federal APA expressly mentions interpretative rules and exempts them from the notice requirements, 5 U.S.C.A. § 553(b)(3)(A) (2014), and the publication and service requirements, 5 U.S.C.A. § 553(d)(2) (2014). The federal APA, however, similarly fails to expressly define *interpretative rule*.

<sup>8</sup> *Cable Commc’ns Bd.*, 356 N.W.2d at 667; *Minnesota-Dakotas Retail Hardware Ass’n*, 279 N.W.2d at 364;

violation of the law.<sup>9</sup> Interpretative rules must be adopted pursuant to the APA.<sup>10</sup>

### 16.3.1 Legal Effect of Types of Rules

Substantive, procedural and interpretative rules have the force and effect of laws if adopted pursuant to the APA.<sup>11</sup> If properly adopted, they should be afforded the same recognition as a statute.<sup>12</sup> Rules bind not just the public but also the agency itself. An agency is bound by the rules it has adopted and may not disregard them even though their adoption was discretionary with the agency.<sup>13</sup> The principle that an agency is bound by its own rules is not, however, hard-and-fast. The Minnesota Supreme Court has found that an agency has implicit power to impose reasonable standards to effectuate the purpose of the legislature even though to do so is inconsistent with rules of the agency.<sup>14</sup> Commentators have observed that underlying factors of justice, prejudice to parties, and policy implications of rigid adherence to rules explain the absence of a firm rule.<sup>15</sup>

*In re Application of Q Petroleum*, 498 N.W.2d 772, 781 (Minn. Ct. App. 1993) (citing *City of Mapleton Cmty. Home, Inc., v. Minn. Dep't of Human Servs.*, 391 N.W.2d 798, 801 (Minn. 1986)); *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995) (finding department's interpretation an interpretative rule where the interpretation made federal and state medical assistance statutes more specific).

<sup>9</sup> *Cable Commc'ns Bd.*, 356 N.W.2d at 667; *Minnesota-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 364.

<sup>10</sup> *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 242-43 (Minn. 1980); *St. Otto's Home v. Dep't of Human Servs.*, 437 N.W.2d 35, 42 (Minn. 1989) ("All rules, including interpretative rules, must be adopted in accordance with the Minnesota Administrative Procedure Act."); *Dullard*, 529 N.W.2d at 445.

<sup>11</sup> MINN. STAT. § 14.38, subd. 1 (2014) (providing that every rule, whether known as substantive, procedural, or interpretive, has the force and effect of law five working days after publication of its notice of adoption in the State Register, unless a different day is specified by statute or rule); *Cable Commc'ns Bd.*, 356 N.W.2d at 667; *Minnesota-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 365; *Dullard v. Minn. Dep't of Human Servs.*, 529 N.W.2d 438, 445 (Minn. Ct. App. 1995).

<sup>12</sup> See *State v. Hopf*, 323 N.W.2d 746, 752 (Minn. 1982); see also *In re Rate Appeal of Benedictine Health Ctr.*, 728 N.W. 2d. 497, 507 (Minn. 2007) (reiterating that unpromulgated rules were not entitled to deference).

<sup>13</sup> *Springborg v. Wilson & Co.*, 245 Minn. 489, 493, 73 N.W.2d 433, 435 (1955) (holding industrial commission bound to follow own rules of practice requiring hearing on employee petition for penalty against employer); *State ex rel. Indep. Sch. Dist. No. 6 v. Johnson*, 242 Minn. 539, 548, 65 N.W.2d 668, 673-74 (1954) (requiring state board of education to follow own rules requiring notice and warning before termination of state school aid); see also *Boedingheimer v. Lake Country Transp.*, 485 N.W.2d 917, 921 (Minn. 1992) ("[For department to] say initially that the fee schedule does not apply to hospitals and then to turn around and abruptly say that it does, would amount . . . to impermissible rulemaking."); *In re Lawful Gambling License of Eagles Aerie 2341 v. State Lawful Gambling Control Bd.*, 533 N.W.2d 874, 876 (Minn. Ct. App. 1995) (denying the board's application of a new unwritten definition of "emergency" where the board had previously promulgated a clear written definition of the same).

<sup>14</sup> *Koronis Manor Nursing Home v. Dep't of Pub. Welfare*, 311 Minn. 375, 379-80, 249 N.W.2d 448, 451 (1976) (denying nursing home accounting procedure option where allowance of option would have resulted in double reimbursement for welfare patients and thus would have conflicted with legislative purpose in establishing program).

<sup>15</sup> See generally 1 K. DAVIS & R.J. PIERCE ADMINISTRATIVE LAW TREATISE § 6.5 (5th ed. 2001); 1 F. COOPER, STATE ADMINISTRATIVE LAW 270-72 (1965).

### 16.3.2 Historical Overview of Interpretative Rules

While procedural and substantive rules have long had the effect of law, it has not always been clear that interpretative rules have had the force and effect of law.<sup>16</sup> There was no mention of interpretative rules in the APA before their first appearance in dicta in the opinion of the Minnesota Supreme Court in *McKee v. Likins*<sup>17</sup> in 1977. Thereafter, in *Minnesota-Dakotas Retail Hardware Association v. State*,<sup>18</sup> the Minnesota Supreme Court developed the concept of interpretative rules. There it was said that interpretative rules are mere statements of agency policy and do not have the effect of law.<sup>19</sup> Their weight and effect as applied to a particular fact situation were therefore to be judicially determined on a case-by-case basis.<sup>20</sup> In *Minnesota-Dakotas*, a rule originally adopted to be a legislative rule was found instead to be a legitimate interpretative rule. The court was precluded from finding the rule valid as a legislative rule having the effect of law because of insufficient statutory rulemaking authority.<sup>21</sup>

After the *Minnesota-Dakotas* decision, and in response to it, the legislature amended the APA to provide that all rules, whether legislative, procedural, or interpretative, have the force and effect of law.<sup>22</sup> Since the amendment of the APA and the *Minnesota-Dakotas* decision, the appellate courts have had other opportunities to discuss interpretative rules and their legal effect, as is discussed in section 16.4.

### 16.3.3 Retroactivity

No distinction has emerged in Minnesota among the three types of rules in terms of whether they can be retroactive. In a case dealing with substantive rules, the Minnesota Supreme Court observed that rules can be retroactive.<sup>23</sup> The court there applied the same standard to rules as is applied to statutes—no retroactive effect is presumed unless clearly and manifestly intended by the legislature.<sup>24</sup> Commentators have observed that the traditional general rule is that legislative rules are prospective in nature because they make law, and interpretative rules are retroactive by nature, since they clarify law that has existed all along.<sup>25</sup> Constitutional limitations, such as the prohibition against impairment of contract

<sup>16</sup> See Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act*, 7 WM. MITCHELL L. REV. 665, 678, 681 (1978).

<sup>17</sup> 261 N.W.2d 566, 577 (Minn. 1977).

<sup>18</sup> 279 N.W.2d 360 (Minn. 1979).

<sup>19</sup> *Id.* at 365.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See MINN. STAT. § 14.38, subd. 1 (2014). Minnesota cases, such as *McKee*, 261 N.W.2d at 577, and *Minnesota-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 365, refer to interpretative rules rather than "interpretive" rules as does the statute. The terms are synonymous.

<sup>23</sup> *Mason v. Farmers Ins. Cos.*, 281 N.W.2d 344, 348 (Minn. 1979). See generally 1 K. DAVIS & R.J. PIERCE, ADMINISTRATIVE LAW TREATISE § 6.6 (5th ed. 2001).

<sup>24</sup> *Mason*, 281 N.W.2d at 348.

<sup>25</sup> Asimov, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 569–72 (1977); see also Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act*, 7 WM. MITCHELL L. REV. 665, 682–83 (1981).

and the requirements of due process, may apply to restrict the retroactivity of a rule.<sup>26</sup>

<sup>26</sup> See *Ashbourne Sch. v. Dep't of Educ.*, 43 Pa. Commw. 593, 403 A.2d 161, 165 (1979) (“Agencies may, of course, adopt retroactive regulations so long as they do not disturb vested rights, the impairment of contracts, or the principles relating to due process.”).