

18.2 THE REVISOR'S RULE DRAFTING PROCESS

In 1945, the legislature adopted the first attempt at a “uniform” rulemaking procedure.¹ All rules then in existence, and those subsequently adopted, were to be prepared by the agency and filed with the attorney general.² Each rule was subject to the attorney general’s approval as to its form and legality.³ However, no attempt was made to achieve consistency in the format and style of the rules. The attorney general did reject rules because of technical defects such as spelling, punctuation, and grammar.

In 1975, the commissioner of administration was given authority to refuse to publish any rule in the *State Register* if it was not submitted according to the form or in the manner the commissioner prescribed.⁴ The commissioner’s form requirements, however, were minimal and did not lead to a consistent style and format.

In 1980, significant changes in the rulemaking process were made by giving the revisor’s office several new responsibilities.⁵ First, the legislature required the revisor’s office to create a rule drafting department “to draft or aid in the drafting of rules or amendments to rules for any agency in accordance with the objective or other instructions which the agency shall give the revisor.”⁶

Second, the revisor’s office was given control over the form of rules. The law required the revisor of statutes to “prepare and publish an agency rules drafting guide which shall set out the form and method for drafting rules and amendments to rules, and to which all rules shall comply.”⁷

Third, the legislature required that the revisor’s office certify its approval of the form of all proposed and adopted rules, whether permanent or emergency in nature.⁸

Lastly, the office was directed to prepare and publish the compilation of permanent agency rules and all supplements or future compilations.⁹

Revisor staff attorneys, legal editors, and support staff provide rule drafting assistance and approve the form of agency rules. Each attorney works on rules in the same subject areas in which he or she drafts bills. The attorneys draft proposed and adopted rules and prepare them for submission to the *State Register* or the Office of Administrative Hearings (OAH). The attorneys are prohibited from assisting an agency in preparing a statement of need and reasonableness for a rule or serving as legal counsel for the agency before the administrative law judge (ALJ).¹⁰ The attorneys provide a professional, neutral, and confidential¹¹ drafting service to produce rules documents consistent with the objectives and instructions of the agency. The office also publishes “Rulemaking in Minnesota: A Guide” as

¹ See 1945 MINN. LAWS ch. 452, at 869-71.

² *Id.* § 2, subd. 2, at 869-70.

³ *Id.* § 2, subd. 4, at 870.

⁴ 1975 MINN. LAWS ch. 380, § 12, at 1291-92.

⁵ See 1980 MINN. LAWS ch. 615, §§ 40-60, at 1559-67 (amending and enhancing key responsibilities of the revisor’s office).

⁶ *Id.* § 57, subd. 1(e), at 1566; see MINN. STAT. § 14.07, subd. 1(a)(1) (2014).

⁷ 1980 MINN. LAWS ch. 615, § 57, subd. 1(f), at 1566; see MINN. STAT. § 14.07, subd. 1(a)(2) (2014).

⁸ 1980 MINN. LAWS ch. 615, § 57, subd. 2, at 1566; MINN. STAT. § 14.07, subd. 2 (2014).

⁹ 1980 MINN. LAWS ch. 615, § 57, subd. 1(a), at 1565; see MINN. STAT. § 14.47, subd. 1 (2014).

¹⁰ MINN. STAT. § 14.47, subd. 2 (2014).

¹¹ *Id.* § 3C.05, subd. 1(a).

a reference to the law and rules governing the procedure for adopting rules in Minnesota.

Agency staff members often draft proposed rules before submitting them to the revisor's office for the required approval. During that approval process, revisor attorneys suggest revisions to improve the quality of the draft. Attorneys work closely and cooperatively with the agencies to produce well-written, legally consistent, and unambiguous rules.

The revisor's office has the duty to determine the form of rules and amendments to rules, and all agencies are to comply with the form set out in the revisor's rule drafting guide, published under the name *Minnesota Rules Drafting Manual* with styles and forms.¹² The public may obtain a paper copy of this manual from the revisor's office or a PDF of the manual from the revisor's web site. The manual describes the basic form of rules as well as the standards for clear drafting. The different types of rules documents are discussed: all-new permanent rules, amendatory rules, modifications, adopted rules, exempt rules, and other types. Examples are provided to illustrate the proper style of virtually every form. The revisor is generally free to establish all form requirements for administrative rules. However, *Minnesota Statutes*, chapter 14 provides four specific form requirements.¹³ The revisor is required to minimize duplication of statutory language, to require documents incorporated by reference to be conveniently available to the public, to use plain language in rules and avoid technical language, and to amend former rules in a manner that provides adequate notice of the nature of changes. The types of documents and publications that may be incorporated by reference were also regulated by the law.¹⁴

The revisor's drafting manual explains how to draft rules and includes pages of examples that illustrate the text. The manual establishes the form and style of rules and offers guidance on clear, concise drafting and adherence to rules of grammar. The manual's advice to drafters begins with rulemaking basics: the definition of a rule and an overview of statutory construction principles which apply to rules as well as to statutes. This "basics" section also treats the problem of improper discretion and the words and phrases that trigger it. The manual also urges drafters to know the law behind their rules.¹⁵

Several principles of drafting emerge from the revisor's manual. One of the most important principles is that agency rules should be clear and understandable to the public and to persons affected by them.¹⁶ The manual recommends focusing on the reader's ability to understand the rule.¹⁷ For the most part, rules applying to the general public should be written so that they can be read and understood by people of ordinary education. Drafters should keep the sentences short and the number of difficult or technical words to a minimum. When written for more knowledgeable or specialized audiences, the rules can reflect a more technical orientation and may use language of the trade.

¹² *Id.* § 14.07, subd. 1(a)(2).

¹³ *Id.* subd. 3.

¹⁴ *Id.* subd. 4.

¹⁵ MINN. OFFICE OF THE REVISOR OF STATUTES, MINNESOTA RULES DRAFTING MANUAL 1-9 (1997).

¹⁶ The idea of plain language rules is in line with the "plain English" movement in legal drafting generally. The movement began in 1977 when New York passed its first plain English statute. Rosemary Moukad, *New York's Plain English Law*, 8 FORDHAM URB. L. J. 451, 451 (1979) (crediting 1977 N.Y. LAWS ch. 747 as "the first . . . legislation requiring plain language in consumer transactions"). Minnesota and other states followed suit with laws of their own. *See, e.g.*, MINN. STAT. §§ 325G.29-.36 (2014) ("Sections . . . may be cited as the "Plain Language Contract Act"); *see also id.* § 14.07, subd. 3(3) ("[T]o the extent practicable, use plain language in rules and avoid technical language.").

¹⁷ MINN. REVISOR, *supra* note 15, at 28.

The manual directs rule drafters to remain consistent in the use of terms and to avoid obsolete or vague words or phrases.¹⁸ Headnotes are often used as points of reference by readers, and although not part of the rules themselves, they enable the reader to make quick reference to the rules and to perceive their method of organization. However, the rules must make sense *without* the headnotes.¹⁹

When rules incorporate other documents (such as a national code) by reference, the manual requires that the date of the document incorporated be included.²⁰ Vague incorporations, such as an incorporation of “all applicable codes, rules and regulations” are strongly discouraged.²¹ The manual also discusses the statutorily-required form of an incorporation by reference in rules.²² The revisor will not approve an incorporation by reference of certain documents and publications unless the material is conveniently available to the public, meaning that it is “available for loan or inspection and copying to a person living anywhere in Minnesota through a statewide interlibrary loan system or in a public library without charge except for reasonable copying fees and mailing costs.”²³ In practice, the revisor has determined that this statutory definition allows for the incorporation by reference of electronic materials that can be viewed and copied from public computer terminals at a public library.

Organizational approaches to rule drafting are also suggested in the manual. In most cases, the order of an agency rule will consist first of the definitions relied on in the rule, next, the basic provisions, and finally, special cases or exceptions if the rule requires such distinctions.²⁴ In many cases the rule will describe procedures in the normal time sequence for the subject.²⁵ If a chronological ordering of provisions in the rule is not appropriate, the topics or subjects of the rule may be alphabetized. Organization of rules and the lettering and numbering of parts, subparts, items, and subitems are described by the manual.²⁶

Rules of construction are not ordinarily placed in rules, since Minnesota's statutory rules of construction²⁷ provide guidance for construction of rules.²⁸ Effective date provisions are also not necessary, unless the agency intends the rules to be effective at a time other than five working days after publication of the notice of adoption in the *State Register*.²⁹

¹⁸ *Id.* at 33.

¹⁹ *Id.* at 30.

²⁰ *Id.* at 68.

²¹ *Id.* at 69.

²² MINN. STAT. § 14.07, subd. 4 (2014).

²³ *Id.* subd. 4(b).

²⁴ MINN. REVISOR, *supra* note 15, at 29.

²⁵ *Id.*

²⁶ *Id.* at 10-27.

²⁷ MINN. STAT. §§ 645.08-.43 (2014).

²⁸ MINN. REVISOR, *supra* note 15, at 3-7; MINN. STAT. § 645.001 (2014).

²⁹ MINN. REVISOR, *supra* note 15, at 59. Effective dates of rules are governed by statute. *See* MINN. STAT. § 14.18 (2014).