

Chapter 18. Drafting Rules and the Revisor of Statutes

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18.1 Creation of the Office of the Revisor of Statutes

In 1939, the legislature created the office of the revisor of statutes to compile and publish the state's laws.¹ In 1947, the legislature also directed the office to draft bills for the legislature, the governor, and the various departments of government.² In 1980, the legislature directed the revisor to provide drafting and editing services for administrative rules.³ Drafting and editing remain principal functions of the office.

18.2 The Revisor's Rule Drafting Process

In 1945, the legislature adopted the first attempt at a "uniform" rulemaking procedure.⁴ All rules then in existence, and those subsequently adopted, were to be prepared by the agency and filed with the attorney general.⁵ Each rule was subject to the attorney general's approval as to its form and legality.⁶ 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.⁷ 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.⁸ 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."⁹

¹ 1939 Minn. Laws ch. 442, at 1042.

² 1947 Minn. Laws ch. 617, § 1(1), at 1118.

³ 1980 Minn. Laws ch. 615, § 57, subd. 1(a), at 1565.

⁴ See 1945 Minn. Laws ch. 452, at 869-71.

⁵ *Id.* § 2, subd. 2, at 869-70.

⁶ *Id.* § 2, subd. 4, at 870.

⁷ 1975 Minn. Laws ch. 380, § 12, at 1291-92.

⁸ See 1980 Minn. Laws ch. 615, §§ 40-60, at 1559-67 (amending and enhancing key responsibilities of the revisor's office).

⁹ *Id.* § 57, subd. 1(e), at 1566; see Minn. Stat. § 14.07, subd. 1(a)(1) (2020).

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."¹⁰

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.¹¹

Lastly, the office was directed to prepare and publish the compilation of permanent agency rules and all supplements or future compilations.¹²

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).¹³ The attorneys provide a professional, neutral, and confidential¹⁴ 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 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.¹⁵ 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.¹⁶ 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

¹⁰ 1980 Minn. Laws ch. 615, § 57, subd. 1(f), at 1566; see Minn. Stat. § 14.07, subd. 1(a)(2) (2020).

¹¹ 1980 Minn. Laws ch. 615, § 57, subd. 2, at 1566; Minn. Stat. § 14.07, subd. 2 (2020).

¹² 1980 Minn. Laws ch. 615, § 57, subd. 1(a), at 1565; see Minn. Stat. § 14.47, subd. 1 (2020).

¹³ Minn. Stat. § 14.47, subd. 2 (2020).

¹⁴ *Id.* § 3C.05, subd. 1(a).

¹⁵ *Id.* § 14.07, subd. 1(a)(2).

¹⁶ *Id.* subd. 3.

types of documents and publications that may be incorporated by reference were also regulated by the law.¹⁷

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.¹⁸

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.¹⁹ The manual recommends focusing on the reader's ability to understand the rule.²⁰ 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.

The manual directs rule drafters to remain consistent in the use of terms and to avoid obsolete or vague words or phrases.²¹ 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.²²

When rules incorporate other documents (such as a national code) by reference, the manual requires that the date of the document incorporated be included.²³ Vague incorporations, such as an incorporation of "all applicable codes, rules and regulations" are strongly discouraged.²⁴ The manual also discusses the statutorily-required form of an incorporation by reference in rules.²⁵ 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

¹⁷ *Id.* subd. 4.

¹⁸ Minn. Office of the Revisor of Statutes, Minnesota Rules Drafting Manual 1-9 (1997).

¹⁹ 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 (2020) ("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.").

²⁰ Minn. Revisor, *supra* note 18, at 28.

²¹ *Id.* at 33.

²² *Id.* at 30.

²³ *Id.* at 68.

²⁴ *Id.* at 69.

²⁵ Minn. Stat. § 14.07, subd. 4 (2020).

without charge except for reasonable copying fees and mailing costs.”²⁶ 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.²⁷ In many cases the rule will describe procedures in the normal time sequence for the subject.²⁸ 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.²⁹

Rules of construction are not ordinarily placed in rules, since Minnesota’s statutory rules of construction³⁰ provide guidance for construction of rules.³¹ 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*.³²

18.3 Approval of Form

No agency decision to adopt a rule is effective unless an agency obtains the revisor’s approval of the form of the rule. An agency may not submit proposed rules for publication in the *State Register* unless those rules contain the revisor’s approval in regard to form.³³ By law, if any agency submits a complete rule draft to the revisor just for approval of form and indicates that it wants no drafting advice, the revisor’s attorney will disapprove the rule unless it fully complies with the revisor’s style and form requirements. The revisor’s attorney must specify the reasons for the refusal and the modifications necessary to permit the rule to be approved.³⁴ In practice, however, this statutory procedure is not followed. Agencies rely on the revisor to prepare revised drafts that satisfy the office’s style and form requirements. The changes the attorney makes on the agency’s draft beyond those required to comply with the style and form requirements depend on the agency’s directions. The attorney will also suggest form or style improvements not mandated but recommended by the revisor’s style and form standards. The attorney will advise of constitutional or legal problems of which the attorney is aware and offer to redraft to try to alleviate the problems. However, the rule remains the responsibility of the

²⁶ *Id.* subd. 4(b).

²⁷ Minn. Revisor, *supra* note 18, at 29.

²⁸ *Id.*

²⁹ *Id.* at 10-27.

³⁰ Minn. Stat. §§ 645.08-.43 (2020).

³¹ Minn. Revisor, *supra* note 18, at 3-7; Minn. Stat. § 645.001 (2020).

³² Minn. Revisor, *supra* note 18, at 59. Effective dates of rules are governed by statute. *See* Minn. Stat. § 14.18 (2020).

³³ Minn. Stat. §§ 14.14, subd. 1a, .22, subd. 1(a), .389, subd. 2 (2020); *see also id.* § 14.3895, subd. 5 (repeal of obsolete rules).

³⁴ *Id.* § 14.08(c).

agency, and if the agency rejects the advice and directs the attorney to make the minimal changes necessary for form approval, the attorney will do so.

After drafting or review is complete, the revisor's office produces a final copy of the draft with a certificate of form approval attached to the rules. The agency has the choice to file paper copies or electronic copies of the rule with the Office of Administrative Hearings (OAH).³⁵ If requested in paper, the revisor's office provides the agency with four copies for use during the rule adoption process.

An agency must also obtain the revisor's form approval of modifications made by an agency to proposed rules when they are submitted to the Office of Administrative Hearings.³⁶ Just as with original drafting, the revisor's office prepares the modifications to the proposed rules according to its form requirements and indicates changes to the text with strikeouts and underlines.³⁷

Finally, the revisor's form approval must be obtained for an adopted rule, whether it is adopted after public hearing,³⁸ adopted without public hearing,³⁹ or adopted as an exempt or expedited rule,⁴⁰ before its filing with the secretary of state.

The agency must submit a copy of the adopted rules to the Office of Administrative Hearings. OAH then requests certified copies of the rules from the Revisor. The Revisor has five working days to certify the form of the rules. If the form of the rules is approved, the revisor issues a certificate of approval.⁴¹ If the form of the rules is disapproved, the revisor must notify the agency and the OAH of this fact.⁴² The notice will revise the rule so that it is in the correct form.⁴³ Because the form of the proposed rules and the form of modifications have already been approved, there is little possibility of anything occurring that would merit disapproval. If the OAH requires changes in the rule in that office's final review, then the revisor will review the form of those changes.

18.4 Editing, Compiling, Publishing, and Preserving

Legislation passed in 1980 created *Minnesota Rules*, the current compilation of Minnesota agency rules. The 1980 law mandated comprehensive changes in the publication of rules effective July 1, 1980.⁴⁴ It directed the revisor of statutes to formulate a plan for the compilation of both permanent and temporary agency rules in a manner convenient for public use, to publish this compilation and any necessary pamphlets, supplements, or new rule compilations, and to sell them for a reasonable fee. Before 1980, agencies' rules were being published by the department of administration in a form known as the *Minnesota Code of*

³⁵ *Id.* § 14.05, subd. 7.

³⁶ *Id.* § 14.08(a); Minn. R. 1400.2100(A) (2021).

³⁷ Minn. Stat. § 14.07, subd. 3 (2020).

³⁸ *Id.* § 14.20.

³⁹ *Id.* § 14.28.

⁴⁰ *Id.* §§ 14.386(a)(1), .388, subd. 1.

⁴¹ *Id.* § 14.08(b).

⁴² *Id.* (a).

⁴³ *Id.* (c).

⁴⁴ 1980 Minn. Laws ch. 615, §§ 57-59, 63, at 1565-668.

Agency Rules (MCAR). MCAR was a collation of all the different state agency rules, which had not been previously subject to any uniform requirements.

The year 1980 also marked a change in the official status of the published form of the rules. Although the publication of MCAR was mandated by law, the law was silent in regard to what effect the courts should give to that publication. By law, *Minnesota Rules* is prima facie evidence of the text of rules.⁴⁵ This makes the rules equivalent in status to the laws published in *Minnesota Statutes*.⁴⁶

During the recompilation, the revisor could change the order of rules and their format but could not rewrite the rules or change the meaning of any rule. Part of the recompilation task included the preparation of appropriate tables, cross-references, explanatory notes, and indexes.⁴⁷ These finding aids were not part of MCAR.

Minnesota Rules was first published in June 1983.⁴⁸ The 1983 edition contained a concordance table showing the MCAR number and the corresponding *Minnesota Rules* number assigned to it in its recompiled form. In 1985, the concordance table was reprinted with an additional part including those rules adopted after the original cut-off date in 1983. The combined tables provided users with a complete table reflecting the recompilation of all administrative rules from MCAR to *Minnesota Rules* format.

The full edition of *Minnesota Rules* is published every odd-numbered year and is supplemented each even-numbered year in a one or two volume supplement. The set contains the text of the agency rules, an index, citations to the statutory authority for each rule, historical notes, editorial notes, and other useful research aids.

The revisor is assigned the duty and given the necessary editorial powers by statute to publish and update the rules as an ongoing process, similar to the process used for *Minnesota Statutes*.⁴⁹ *Minnesota Rules* is also accessible via the Internet.⁵⁰ The office does continuous revision to keep the text online accurate and up-to-date.

The original publication of *Minnesota Rules* contained only rules adopted under the APA. However, many agencies have sought and been given statutory exemption of their rules from the APA. As a consequence, the original publication contained a large percentage, but not all, of the rules then in force. A legislative change in 1984 provided that all exempt rules then in effect had to be filed with the revisor before January 1, 1985. If agencies failed to file the exempt rules, the rules were no longer effective. The revisor was given the power to edit the filed rules to the same extent as rules originally published in *Minnesota Rules*.⁵¹ These exempt rules were then published by the revisor.⁵²

Minnesota Rules uses an organizational method similar to that used in *Minnesota Statutes*. However, it uses different nomenclature.

⁴⁵ Minn. Stat. § 14.37, subd. 2 (2020).

⁴⁶ *Id.* § 3C.13.

⁴⁷ 1980 Minn. Laws ch. 615, § 57, subds. 1(a), 2, at 1565-66.

⁴⁸ Minn. Rules (1983).

⁴⁹ Minn. Stat. §§ 3C.10, subds. 1, 2, 14.47, subds. 5, 6 (2020).

⁵⁰ Available at <https://www.revisor.mn.gov/rules/>.

⁵¹ Minn. Stat. § 14.385 (2020).

⁵² Minn. Rules (1985).

The rules are arranged in a decimal numbering system. In a part number, the four digits before the decimal point represent the chapter number. The four digits after the decimal point assign a unique number to each rule in the chapter. Together, the chapter and part numbers identify each basic unit of *Minnesota Rules*.

The basic numbered unit in *Minnesota Rules* is the “part.” The divisions of rules are the part, subpart, item, subitem, unit, and subunit. The part is designated by an eight-digit number, such as 1001.0100. The subpart is designated by an Arabic number, such as Subpart 1. The item is designated by an uppercase letter, such as A. The subitem is designated by an Arabic number enclosed in parentheses, such as (1). The unit is designated by a lowercase letter in parentheses, such as (a), and the subunit by a lowercase roman numeral. Novel methods of coding and dividing the rules are not permitted.

Under Minnesota Statutes, sections 3E.01 to 3E.10, the Uniform Electronic Legal Material Act,⁵³ the revisor is directed to electronically preserve and authenticate certain legal materials, including *Minnesota Rules*.⁵⁴ Each time a change to a rule is published online, that version of the rule is preserved and made available to the public. Directions to authenticate and print a PDF version of the rule are also available online.

The revisor’s office also has developed and made available on its web site a public rules status system that allows a user to follow many of the actions taken by state departments and agencies when they adopt administrative rules. It also provides access to historical rule information, documents and notices for rules adopted since 1980. This system provides access to the entire *State Register* in searchable electronic form, agency SONARs (statement of need and reasonableness), final drafts of proposed and adopted rules approved by the revisor, and orders on review of rules and ALJ reports from the Office of Administrative Hearings.

⁵³ Minn. Stat. § 3E.01 (2020); 2013 Minn. Laws ch. 7, at 1-3.

⁵⁴ Minn. Stat. § 3E.02, subd. 3(4) (2020).