DORSEY™
always ahead

Introduction to Rulemaking and How to Deal with Unpromulgated Rules and Guidance

Brian B. Bell
Partner
Dorsey & Whitney LLP
(612) 492-6178
bell.brian@dorsey.com

© Dorsey & Whitney LLP. All rights reserved.

Legal Notice

This presentation is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created through this presentation.

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Speaker Bio



Brian B. Bell
Partner
Dorsey & Whitney LLP
Minneapolis
(612) 492-6178
bell.brian@dorsey.com

Brian assists clients in obtaining governmental approvals for controversial energy, natural resources, and urban development projects. As part of this work, Brian advocates for companies before local, state, and federal regulatory bodies and on judicial review. Brian also assists clients in transactions involving complex environmental issues.

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Agenda

- Background
- Rulemaking requirements
- Unpromulgated rule challenges
- Questions



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Background

© Dorsey & Whitney LLP. All rights reserved.

Definition of Rule

"Rule" means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.

Minn. Stat. § 14.02, subd. 4.



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Types of Rules

- **Legislative**
- **Procedural**
- **Interpretive**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Legislative Rules

- **Rules that make substantive law under power delegated by the legislature**
- **Require specific statutory authorization**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Procedural Rules

- **Set forth the nature and requirements of formal and informal procedures relative to the administration of agency duties.**
- **Minnesota Administrative Procedures Act requires all agencies to adopt procedural rules.**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Interpretative Rules

- **Make specific the law enforced or administered by the agency**
- **Interpretative-rule concept now mostly relevant to unadopted rules**
  - **Notice-and-comment rulemaking applies**
  - **Have force and effect of law**
  - **Arguably, need not be a delegation of statutory authority**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Rulemaking

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Types of Rulemaking

- With hearing
- Without hearing
- Exempt
- Expedited

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Pre-Requisites to Rulemaking

- **Rules may be adopted only if authority delegated by law.**
- **An agency must publish a notice of intent to adopt rules or notice of hearing within 18 months of the effective date of the law authorizing or requiring rulemaking.**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Pre-Rulemaking Requirements

- **60-days before publication of a notice of intent to adopt or a notice of hearing, the agency must solicit comments from the public on the subject matter of a possible rulemaking proposal.**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Rulemaking With a Hearing

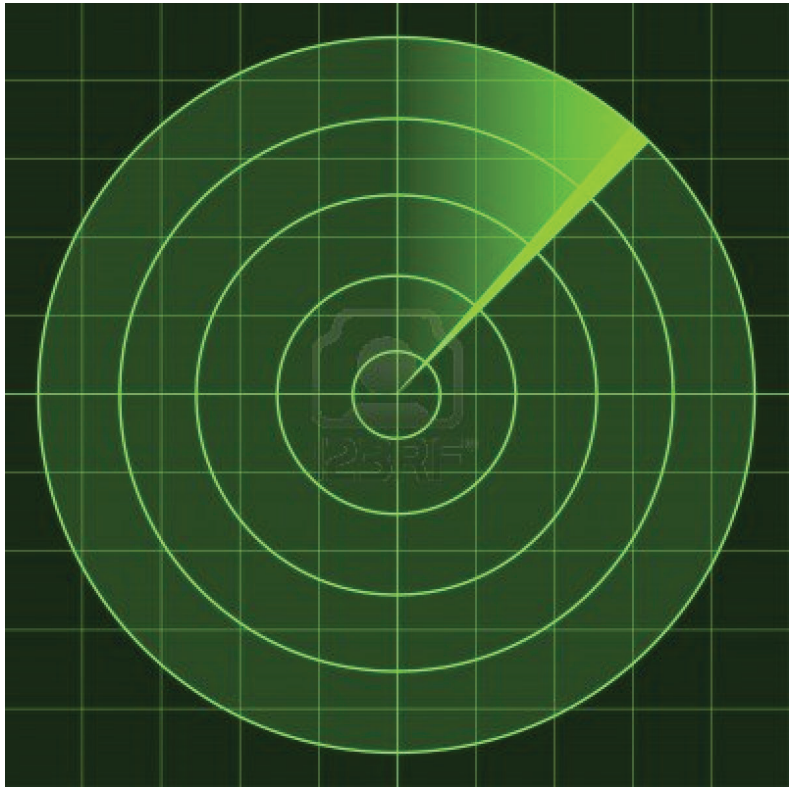
- **30 days before the hearing date, agency must give notice of its intent to adopt rules.**
  - **Copy of proposed rule or description of proposed rule**
  - **Statutory authority for the rule**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Statement of Need and Reasonableness (SONAR)

- **Rules must be accompanied by a Statement of Need and Reasonableness (SONAR)**
- **The SONAR must include:**
  - **Description of those affected**
  - **Cost of implementation, enforcement, and compliance**
  - **Determination of whether less costly or intrusive methods could achieve the agency's purpose**
  - **Alternative methods of achieving goals**
  - **Description of the reasonableness of each section of the rule**



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Hearing Process

- An administrative law judge (ALJ) conducts the hearing.
- The agency must make an affirmative presentation of facts establishing the reasonableness of the proposed rule.
- The agency and interested parties may present written or oral evidence.
- Attendees may question agency representatives.



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Post-Hearing

- **5 working days to 20 calendar day comment period after hearing**
- **Five working day rebuttal period**
- **Agency may make revisions to the rule during comment and rebuttal period provided the changes are insubstantial**



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Rulemaking Without a Hearing

- **Notice of Proposed Adoption of Rules Without Public Hearing**
- **The public has 30 days to comment on the rule.**
- **A public hearing will be held if 25 or more persons submit a written request for a public hearing.**



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

No Request for Hearing

- **Agency must submit the rule to the ALJ assigned to the matter**
- **May modify the rule if supported by the data and views submitted to the agency provided the rule is not substantially different**
- **Must be submitted within 180 days of the comment period closing**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Order Adopting Rule

- **Description of changes made to the rule and explanation of why the changes are not substantial**
- **Confirmation that the agency has complied with all procedural requirements**
- **Statement that the rule is needed and reasonable**
- **Signature of the person authorized to adopt the rule**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

ALJ Review

- ALJ has 14 days from submission of rule to approve or disapprove of the rule if there was no hearing.
- ALJ has 30 days from the close of the record if a hearing is held.
- ALJ may disapprove of the rule on two different grounds
  - Illegal—decision binding on the agency
  - Need and reasonableness not established
    - Decision not binding on the agency
    - Agency must submit the rule to the Legislative Coordinating Commission and committees of the house and senate responsible for



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Publication

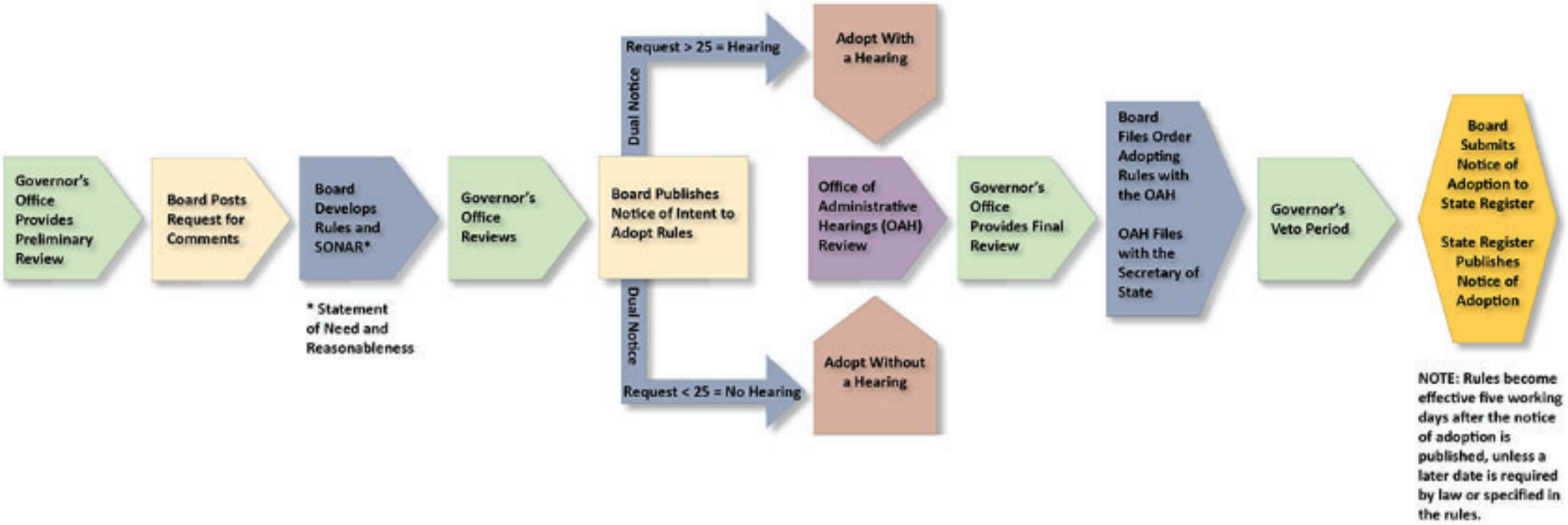
- **Approved rules are forwarded to the Secretary of State.**
- **The revisor of statutes must also approve rules as to form.**



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Minnesota Rulemaking Chart



Source: State of Minnesota

DORSEY™ always ahead

© Dorsey & Whitney LLP. All rights reserved.

Exempt Rules

- **Must be:**
  - **A statutory exemption or**
  - **“Good cause” exception (rarely used)**
- **To be enforceable the rule must:**
  - **Be approved by the revisor as to form**
  - **ALJ approves rule as to legality, including whether it meets the “good cause” exception, if applicable**
  - **Copy is published in State register**
- **Rule is valid for only two years**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Expedited Rule

- A statute may reference the expedited rule section (Minn. Stat. §14.389) to permit an expedited process
- 30-day comment period on proposed rule after notice
- ALJ has 14-days to review legality of rule after submission by agency
- Depending on the language of the authorizing statute, a hearing may be requested by at least 50 people



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Judicial Review of Rules

- **Two avenues:**
  - **In a case applying the rule**
  - **Through a declaratory judgment action in the court of appeals**
- **Rule may be invalid if it:**
  - **Violates constitutional provisions,**
  - **Exceeds statutory authority, or**
  - **Was adopted upon unlawful procedures.**



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Challenges to Unpromulgated Rules

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

The Problem

- Agencies often issue guidance and other pronouncements.
- Generally, these statements are not problematic because they don't implement or make specific the laws.
- Sometimes agencies cross the line by attempting to enforce guidance as though it is a duly adopted rule.



DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Unpromulgated Rule Challenges

"Rule" means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.

Minn. Stat. § 14.02, subd. 4.

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Rule v. Case-by-Case Adjudication

- **Agencies can apply the law to specific facts without promulgating a rule.**
  - **Must apply only to the specific parties**
  - **Cannot be a blanket statement of future effect**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Ways to Challenge Unpromulgated Rule

- **In an enforcement action**
- **Via a petition to the Office of Administrative Hearings (OAH)**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Unpromulgated Rule Challenges (OAH)

- **Unpromulgated rules can be challenged in OAH by a petition**
- **An ALJ can direct the agency to cease enforcement of the unpromulgated rule.**
- **No statute of limitations**
- **Binding on the agency**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Appeal Unpromulgated Rule

- **Appeal unpromulgated rule decision in same manner as facial challenge to a promulgated rule (declaratory judgment petition in the court of appeals)**
- **Must first seek ALJ decision**
- **No deadline for appeal to the court of appeals**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Unpromulgated Interpretative Rules

- **Unpromulgated interpretative rules may be valid if:**
  - **Consistent with the plain meaning of an unambiguous rule or**
  - **Long-standing interpretation of an ambiguous rule**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Sources of Law and Guidance

- **Minn. Stat. ch. 14 (Minnesota Administrative Procedures Act)**
- **Minn. R. ch. 1400 (Office of Administrative Hearings APA Proceeding Rules)**
- **Minnesota Rulemaking Manual**

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.

Questions



Brian B. Bell
Partner
Dorsey & Whitney LLP
Minneapolis
(612) 492-6178
bell.brian@dorsey.com

DORSEY™
always ahead

© Dorsey & Whitney LLP. All rights reserved.