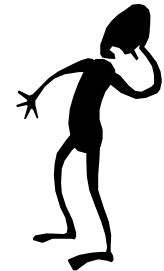




# Procedural Defects in Rulemaking:

*[from past few years of OAH Reports]*

**16<sup>TH</sup> ANNUAL RULEMAKING SEMINAR  
OCTOBER 5, 2011**



*Presenter: Susan Barry  
Minnesota Department of Revenue*

# Defects = disapproval of rule

- **Defects may result in disapproval of the rule by ALJ or Chief ALJ**
  - For example, the rule:
    - grants undue discretion to the agency
    - falls outside of the statutory definition of a “rule.”
- **Some of the defects are procedural**
  - For example, the agency
    - didn't allow 60 days between date publish RFC and date publish NOIA.
    - didn't consult with MMB to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government

# Harmless error

- OAH will disapprove rule if there are procedural defects unless the procedural defect is considered a “harmless error.”
- **Harmless error =**
  - (1) No person or entity was deprived of an opportunity to participate meaningfully in the rulemaking process; or
  - (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.”



# Procedural Requirement:

Send SONAR to Legislative Reference Library when mailing the Notice of Intent to Adopt to agency rulemaking list

**Defect: No SONAR to LRL**



# Recommendation:

Make SONAR available (on agency website, mail it on request...) so all persons & entities have the opportunity to participate meaningfully in rulemaking



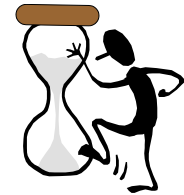
# Procedural Requirement:

Deadline for rule comments must be at least 30 days after the date of publication of the Notice of Intent to Adopt rules

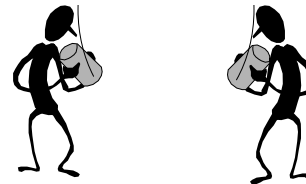
**Defect:** Comment period < 30 days



# Recommendation:



- Double-check time required.
  - If in doubt, err on the side of a generous comment period
- Opportunities for public participation
  - Reach out to parties impacted
  - Extend and publicize extension of comment period



# Procedural Requirement:

## Additional Notice --

Make reasonable efforts to notify persons or classes of persons who may be significantly impacted by the rule

**Defect: Inadequate additional notice**



# Recommendation:



- Identify those significantly impacted & an outreach strategy
- Prior approval of Additional Notice Plan before Request for Comments
- Explain in SONAR why outreach efforts not made (*required*).

# Procedural Requirement:



Include in SONAR everything required in Minn. Stat. § 14.131

For example, the SONAR “... must include ... to the extent ..., through reasonable effort, can ascertain this information:

- description of the classes of persons who probably will be affected by the proposed rule... \* \* \*
- probable costs of complying with the proposed rule ...” \*  
\* \*

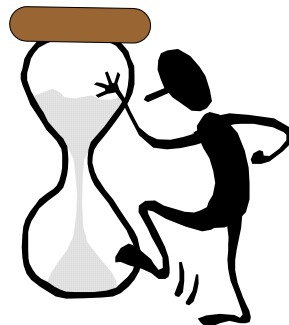
.... **must consult with ...[MMB]..** to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government....

**Defect: Failure to include any or all of SONAR requirements**



## Recommendation:

- Begin research of requirements while developing rule
- Consult previous SONARs for language
- In overall rulemaking timeline, account for time needed to provide for each SONAR requirement
- Use § 14.131 as checklist; allow time to complete





# Procedural Requirement:

SONAR must explain the **need** for the rulemaking and why the proposed rule is a **reasonable** way to meet that need

**Defect:** Lack of explicit rationale for new rule or deletion of obsolete rule



# Recommendation:

- Review Minn. R.1400.2070 re. general content of SONAR
- While drafting the rule, make notes on
  - the need for each portion, why the proposed rulemaking is reasonable, and evidence justifying need & reasonableness



# Procedural Requirement:

Must wait at least 60 days to publish NOIA after publish Request for Comment

**Defect: Published NOIA  
< 60 days after published RFC**



# Recommendation:

- Count the days; be generous
  - Count twice; allow  $> 60$  days to be sure
- For good cause, consider seeking a reduction in time to 30 days





# Procedural Requirement:

Provide NOIA to legislators when mail the NOIA to agency rulemaking list

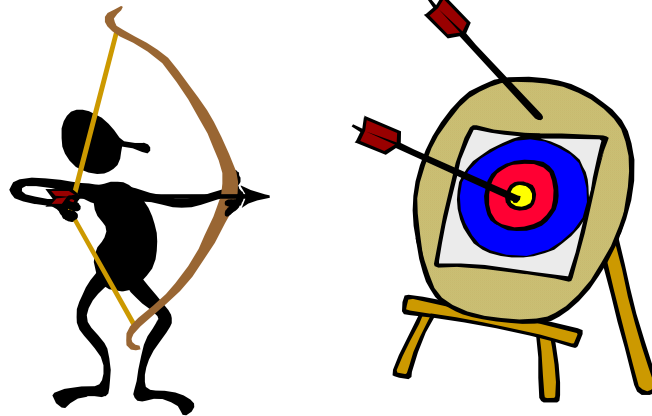
- chairs & ranking minority party members of policy & budget committees in house & senate
- may include authors of bill to grant rulemaking

**Defect:** Failed to provide required notice to legislators



# Recommendation:

Identify relevant legislators/ committee chairs  
when begin rulemaking



# Overall Recommendation:



- Review the most current Minnesota Rulemaking Manual <http://www.health.state.mn.us/rules/manual/>
- Use checklists in manual and allow enough time for each step.
- Double-check when counting days and be generous if can.
- Check Revisor's website to see if either Minn. Stat., chapter 14, or Minn. Rule chapter 1400 has been revised since the last posting of the rulemaking manual.