ADMINISTRATIVE RULES -- MAPA REQUIREMENTS

Outline for a Miniseminar

(June 1999)

Prefatory remarks: The administrative rule review committees, their staff, and their functions. Rules are **not** reviewed by the Legislative Council or by the Legislative Services Division. They are reviewed by the Legislative Services Division attorneys assigned as staff attorneys to the interim committees and EQC and reviewed by the interim committees and EQC (the EQC, like each interim committee, has the responsibility to review the rules of the executive branch agencies under its jurisdiction).

Information and background reading

-- Read and study, and periodically reread, Title 2, ch. 4, parts 1 through 4, MCA, and the annotations to those parts. The annotations are contained in a publication entitled "Montana Code Annotated (Annotations)". This is not the same publication as the "Montana Code Annotated".

-- Chapters 2 and 3 of the Legislative Council's Bill Drafting Manual can be consulted on grammar, punctuation, capitalization, and other matters of style and English usage.

--- Review the Montana Attorney General's Model Rules, including the Appendix of Sample Forms. These are contained in Title 1 of the Administrative Rules of Montana (ARM). They contain various helpful aids and formats for rules work.

-- The staff of the Administrative Rules Bureau of the Secretary of State's office is a good source of information as to rules formats and the process of filing rule proposal and adoption notices.

-- The Legislative Services Division staff attorneys will help you with your questions and problems regarding procedure, process, format, substantive matters, or other matters.

Definition of administrative rule

-- See the definitions of "Rule" and "Substantive rules" in 2-4-102, MCA.

Agencies and rules subject to the Montana Administrative Procedure Act (MAPA)

-- See the definitions of "Agency" and "Rule" in 2-4-102, MCA. Taken together, they will tell you which agencies and which rules are subject to MAPA. Some agencies are exempt from MAPA as to all their rules, and some agencies are exempt as to some of their rules.

Legislative delegation of rulemaking authority

-- The Legislature has the power to delegate to the Executive Branch agencies the authority to adopt, as law, administrative rules. Without such a delegation, an agency has no authority to adopt rules.

-- Some reasons why a delegation of rulemaking authority may be necessary or desirable:

- The Legislature lacks sufficient expertise in the subjects covered by the statutes that the rules will implement.
- The field of law involved is too complex, too broad, or too narrow and obscure for the Legislature to be able to enact as statutes what an agency can adopt as rules.
- The agency that will administer the statutes and implement them by rules has an abundance of expertise or much more expertise than the Legislature, and it is better that the agency adopt rules than that the Legislature attempt to completely cover the area by statute.
- There is a necessity for ongoing compliance with federal law that the state must follow, or has to follow to get federal funds, which necessitates periodic rulemaking more often than the Legislature meets.
- The field of law involved does not easily lend itself to regulation completely by statute.
- The field of law involved is a fast-moving one, and the law must be

constantly updated. The Legislature does not meet often enough to itself do the updating, which must therefore be done by rulemaking.

- The legislative process results in a bill granting rulemaking authority because the Legislature does not have the time, or the inclination, to completely flesh out a concept or program, or a legislative compromise between competing interests results in a vague or incomplete law that must be fleshed out by rule.

MAPA does not grant authority for substantive rules

-- See 2-4-301, MCA. Section 2-4-201, MCA, grants authority to adopt rules, but only for the limited specific types of procedural rules mentioned in that section. It does not grant authority to adopt substantive rules. Authority to adopt substantive rules must come from a statute enacted by the Legislature giving a specific agency authority to adopt rules in a specific area of law to implement that law.

Key sections for rulemakers

-- Persons formulating, writing, and filing rule proposal and adoption notices should pay particular attention to 2-4-302, 2-4-303, and 2-4-305 through 2-4-307, MCA, and the annotations to those sections. A proposal notice is a written document, filed with the Secretary of State, containing a proposal to amend, adopt, or repeal rules. An adoption notice is a written document filed with the Secretary of State that adopts (with or without changes in what was proposed) that which is contained in a proposal notice. Examples of proposal and adoption notices are contained in the Appendix to the Attorney General's Model Rules.

Statutory authority for rules

-- Rules are laws. The adoption of rules is the exercise of a power that is primarily granted by the Montana Constitution to the Legislature, that is, the power to pass laws. A rule cannot be adopted unless the Legislature has, by statute, granted the agency authority to adopt rules in an area of statutory law that the rule pertains to and implements. Such a grant by the Legislature of authority to legislate laws (adopt rules) is typically contained in an MCA section

that provides that “The department may (or shall) adopt rules to implement this chapter (or this part or sections___ through___)”. Under 2-4-305, MCA, each new rule or amendment of a rule must cite the MCA section that is authority for the rule. An agency may not adopt a rule unless an MCA section clearly grants authority to adopt the rule and the rule implements a particular MCA section or sections.

Implementation of MCA sections

-- Each new rule or amendment of a rule must implement one or more sections of the MCA and must cite the implemented section or sections.

-- "Implement" a section means to flesh it out, explain it, further or fulfill its purpose, make it work or work better, interpret it, or carry it into effect. A rule that is not in some such way related to at least one MCA section is invalid.

-- Under 2-4-305, MCA, a substantive rule or rule amendment may not be proposed or adopted unless: (1) **a statute granting authority to adopt rules clearly and specifically lists the subject matter**

of the rule as a subject upon which the agency has authority to adopt rules; or (2) the rule implements and relates to **a subject matter or an agency function that is clearly and specifically included in a statute to which**

the grant of rulemaking authority extends.

Consistency (and conflicts) with MCA

-- Each rule or rule amendment must be consistent with, and not in conflict with, the MCA section or sections that it implements and all other statutory and constitutional law, including applicable federal law. A rule can never override a provision of a statute or constitution.

-- A rule cannot add to a statute a provision or additional requirement not envisioned by the Legislature. See the 2-4-305, MCA, annotations case notes from the following cases: McPhail v. Mont. Bd. of Psychologists, Bd. of Barbers v. Big Sky College of Barber-Styling, Michels v. Dept. of Social and Rehabilitation Services, and Bell v. St.

Statements of reasonable necessity for rules

-- Section 2-4-302, MCA, requires a rule proposal notice to include a rationale for each proposed rule amendment or new rule. It also requires that the rationale be written in plain, easily understood language (do not use bureaucratic or technical jargon that the average member of the public may not be able to understand).

-- Under 2-4-305, MCA, a proposed rule amendment or new rule must be reasonably necessary to effectuate the purpose of the statute that is to be implemented by the proposal. The fact that a statute mandates the adoption of rules establishes the necessity for a proposed rule amendment or new rule but does not, standing alone, constitute **reasonable** necessity for the proposal. The agency must clearly and thoroughly demonstrate the reasonable necessity for

each rule amendment, each new rule, and each repeal of a rule. The demonstration must be contained in the proposal notice and in the written and oral data, views, comments, or testimony submitted by the public or by the agency and considered by the agency. In demonstrating the reasonableness component of the showing of reasonable necessity, the agency must state the principal reasons and the rationale for the proposed rule amendment or new rule and for the particular approach that the agency proposes to take in exercising its rulemaking authority and in implementing the statute.

-- Reasonable necessity and rationale are similar, but the former includes the latter and is a stiffer test to meet. If you adequately show reasonable necessity, you have an adequate rationale.

-- The rule amendment or new rule must be necessary to implement the statute, and the necessity must be reasonable. State as explicitly and clearly as you can why the rule is needed. Do not be afraid to be lengthy. Do not merely state what the rule provides or does or covers. An explanation of **what** the rule amendment or new rule does is not an explanation of **why** the rule amendment or new rule is needed. If you start by asking yourself who wants the rule amendment or new rule and exactly why it is wanted, you will usually be able to formulate the reasonable necessity for the rule amendment or new rule. However, remember that the reason must be a reasonable one and a good one and must constitute necessity for the rule.

-- You can: (1) separately state the reasonable necessity for each rule amendment or new rule; (2) have a number of separate reasonable necessity statements, each of which covers two or more rule amendments or new rules; or (3) have a reasonable necessity statement that covers all the rules in the proposal notice. However, if you proceed under (2) or (3) above, make sure that each reasonable necessity statement is adequate and complete enough to cover the multiple rule amendments and/or new rules.

-- You can either insert a reasonable necessity statement at the end of each rule amendment or new rule or place the statements for all the rule amendments and/or new rules after the last rule amendment or new rule.

-- Some examples of reasonable necessity are:

- The rule amendment or new rule is needed to conform Montana law to federal law or to receive federal funds.
- The rule amendment or new rule is needed to make Montana law uniform with that of other states.
- Rules regulating mirrors on school buses are necessary because an investigation has shown that three recent school bus accidents were caused by faulty mirrors, improperly placed mirrors, not enough mirrors, or other problems with mirrors.
- Rules are necessary to provide a procedure by which the public can apply for or receive something from, or otherwise interact with, the agency and to ensure due process.
- A rule is being amended to delete a conflict with a statute.
- Fees are changed to make them commensurate with costs.
- The rule amendments and/or new rules are needed to conform them to recent legislative enactments.
- A majority of those affected by the rule amendment or new rule agree that experience and studies by experts show that the rule amendment or new rule is necessary to protect the public health, safety, or welfare.
- Standards contained in a rule and generally accepted nationwide are being updated because the current standards are obsolete or are no longer state-of-the art.
- The rule amendment or new rule is needed to ensure fair competition and reduce unfair trade practices that have frequently occurred.
- Documented instances of incompetent or substandard work by persons regulated by the rules show that rules are necessary to reduce such occurrences.

Subsections (1) and (2) of 2-4-305, MCA

-- The requirements of these two subsections are often overlooked. Be sure that you are familiar with and comply with these subsections.

-- It is not just written and oral submissions at a hearing that must be considered (and answered, in the adoption notice, if the submission opposes the rule proposal). Submissions that are mailed, phoned, faxed, or submitted to

the agency in any other manner must be dealt with.

-- A comment by an interim committee or EQC staff attorney who reviews a proposal notice for the committee or EQC must be answered in the adoption notice.

Hearings on rule proposal notices

-- Section 2-4-302, MCA, states the instances in which a hearing must be held. Familiarize yourself with them. One of these instances is when the proposal involves matters of "significant interest to the public". That term is defined in 2-4-102, MCA, as "agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals." This is a very broad definition. If a proposal notice fits within this definition, a hearing must be held. An agency should consider the benefits of erring on the side of holding hearings on proposals that perhaps do not fit within this definition rather than not holding hearings on proposals that do not appear to the agency to involve matters of significant interest to the public. If hearings are held when they perhaps are not required by the "significant interest to the public" requirement, money and time are spent by the agency when they did not have to be (although this is at least partially offset by allowing the public to have its say at a hearing and the public relations benefit of doing that). However, if a hearing is not held on a matter that is in fact of significant interest to the public, the adopted rule amendments and/or new rules are subject to invalidation by a court upon the court's finding that the proposal was indeed of significant interest to the public.

Persons who must be given notice of a proposal

-- See 2-4-302(2) and (3), MCA, for persons who must be given notice of the proposal notice.

-- Section 2-4-302(2), MCA, requires notice at another, earlier, point in time. It requires that the **first time** that an agency proposes to implement a statute with one or more rule amendments or new rules, the agency must, **at the time that**

its personnel begin to work on the substantive content and the wording of the initial rule proposal, notify the sponsor of the legislative bill or bills that enacted the MCA section to be implemented. In other words, with respect to a statute that has not yet been implemented by rules, when agency staff decides that rule amendments or new rules are necessary to implement the statute and starts to work on the wording of the rules, it is at that time that the agency must notify the sponsor of the bill that enacted the section to be implemented.

-- Section 2-4-302, MCA, states who must receive a proposal notice, in addition to filing it with the Secretary of State. It also requires the proposal notice to be posted on the state electronic bulletin board or other electronic communications system available to the public. Since state government has an Internet website home page for state government, that's where you must post it--under your agency's page under the Montana government home page.

Adoptions and incorporations by reference

-- See 2-4-307, MCA. Review that section and the Model Rules when you intend to adopt rules or standards by referring to them in the adopting rule and stating that they are adopted and incorporated by reference.

-- You must adopt and incorporate by reference a particular version of the adopted material, which is clearly specified in the rule. Refer to, for example, the 1998 edition of the Code of Federal Regulations; the 1998 edition of the Uniform Fire Code, including the Fall, 1998 amendments; or the U.S. Stockgrowers Association publication F-98, published in 1998, on proper fencing. A rule cannot say, for example, that it adopts all future amendments to or new editions of the rules or standards that are incorporated by reference. If you wish to adopt future amendments, you must do so specifically in a new rule amendment proposal notice that refers to the amendments adopted or to the amended version or new edition of the rules or standards that are incorporated by a reference to them.

Time periods

-- See 2-4-302, MCA, for various time period requirements.

-- You must give a least 20 days' notice of a hearing, and the notice period begins on the date of publication of the rule proposal notice in the Montana Administrative Register (MAR).

-- You must allow at least 28 days from the date of publication of a proposal notice in the MAR for interested persons to submit data, views, or arguments, orally or in writing. Note that oral submissions are permitted and that they are not limited to rules for which there is a hearing. Consequently, if someone calls an agency staffer involved with a rule proposal and makes comments over the phone, the comments should be noted and should be considered by the staffers ultimately in charge of deciding what will and will not be in the adopted rules. If the comments are against something in the rule proposal notice, they must be responded to in the adoption notice (see 2-4-305, MCA).

-- An adoption notice must be published in the MAR no less than 30 days or more than 6 months after the publication date of the proposal notice. See 2-4-302 and 2-4-305, MCA.

Effective date of rules

-- This is governed by 2-4-306, MCA. A rule amendment, new rule, or repeal of a rule is effective on the date that the adoption notice is published in the MAR. However, if you wish, you may, in the adoption notice and in the history that appears at the end of the rule, specify a later effective date.

-- A temporary rule or emergency rule is effective at the time that its adoption notice is filed with the Secretary of State or at a later date stated in the rule's history and in the adoption notice.

Emergency rules and temporary rules

-- These are not normally needed. They are governed by 2-4-303 and 2-4-306(4)(b), MCA. Contact the appropriate interim committee or EQC staff attorney if you have any doubts or questions.

Retroactive rules

-- A retroactive rule or rule amendment is one that applies backward in time, as if the retroactive rule had already been in effect at that past time. Such a rule is not usually necessary. It will be carefully reviewed by the interim committee or EQC staff attorney. You should not be adopting a rule and making it retroactive simply because you, for whatever reason, did not get around to proposing and adopting it at the point in time in the past when you should have proposed and adopted it (though that will not necessarily invalidate the retroactivity of the rule). MAPA does not address retroactive rules, nor does Montana case law, but the following case law in other states establishes principles you can use for guidance:

Guerrero v. Adult and Family Services Div., 67 Or. App. 119, 676 P.2d 928 (1984), an Oregon case, held that administrative rules may be applied retroactively **if it is reasonable under the circumstances**, but that retroactive application of a rule is not favored by the court if the rule does not specifically state that it is retroactive.

In Shapiro v. Regional Bd. of School Trustees of Cook County, 71 Ill. 915, 116 Ill. App. 3d 397, 451 N.E.2d 1282 (1983), an Illinois court held that in determining whether a rule may be made retroactive, the test is whether the question or problem or issue is one that never arose before, whether the rule is an abrupt departure from well-established practice, the extent to which a party adversely affected by the rule relied on the former rule, the degree of burden on that party, and whether there are significant statutory interests involved that counterbalance any hardship to that party.

The U. S. Supreme Court has used various tests over the years in regard to federal administrative rules and has not settled on one litmus test. The tests used include the balancing of interests test, the test of whether the retroactivity will work a manifest injustice to a person the rule applies to, the test of whether the retroactive application benefits the party its applied to, the test of whether the rule is procedural or substantive, and the test of whether the affected rights of a party the retroactivity is applied to are mature or perfected.

In Georgetown University Hospital v. Bowen, No. 86-5381, 6/26/87, a federal agency rule was invalidated by the U.S. Court of Appeals for the District of Columbia because the rule was not proposed and adopted in compliance with the federal Administrative Procedure Act. The court held that when the same rule was later validly proposed and adopted in compliance with the Act, the rule

could not be made retroactive to the time that the invalid rule would have taken effect had it not been invalidated. The court held that to do so would make a mockery of the Administrative Procedure Act by allowing an agency to ignore the Act with impunity and cure the agency's invalid actions by later validly proposing and adopting the rule, and making it retroactive, if the agency is caught.

Section 1-2-109, MCA, provides that "No law contained in any of the statutes of Montana is retroactive unless expressly so declared" in the statute. In view of this MCA section, it is reasonable to argue that the same requirement should apply (and may be applied by the Montana Supreme Court if the question is ever put to the court) to rules. Thus, an agency that plans to apply a rule amendment or a new rule retroactively should state in the rule or amendment that it is retroactive and what, or when, its retroactive to.

In addition, the agency should include in the reasonable necessity statement in the proposal notice a clear and detailed statement of why the rule is being made retroactive.

If you have doubts or questions, contact the staff attorney of the interim committee (or EQC) that has jurisdiction over the proposed rule.