

Rules Reform Task Force (RRTF) November 10, 2000, Meeting Minutes

Members Present:

Kathryn Eileen DeBoer, Citizen Member	Senator Don Betzold
John Knapp, Esq., Winthrop & Weinstine, P.A.	Representative Gene Pelowski
Laura Offerdahl, Governor's Office	Representative Marty Seifert
Dave Orren, Minnesota Department of Health (MDH)	Senator Dan Stevens

Also Present:

Adrienne Buske, Legislative Assistant to Rep. Seifert	Norma Coleman PCA
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Call to Order. Representative Pelowski, RRTF Chair, called the meeting to order promptly at 10:30 a.m. Representative Pelowski noted that all RRTF members were present. No roll call was taken.

Approval of 10/20/00 Minutes. Motion to approve minutes as written made by Senator Betzold, seconded by Mr. Knapp. Motion passed unanimously.

Presentation of Legislative Oversight in Other States. George McCormick from Senate Counsel & Research distributed a handout and made a presentation on legislative oversight in other states. The handout was available on the RRTF web site for a week before this meeting. See Mr. McCormick's handout for details of his presentation. Highlights of the presentation include:

- Before its abolition in 1996, the Legislative Commission to Review Administrative Rules (LCRAR) played the main role in Minnesota's system of legislative oversight of rulemaking. Since 1996, most of the LCRAR's powers have been exercised by the Legislative Coordinating Commission (LCC). These powers are summarized in the handout.
- 27 states use legislative committees to review proposed rules and 17 states use legislative committees to review existing rules. There are a variety of means that legislatures use to accomplish this.
 - One specific example is Colorado, where the state Administrative Procedure Act (APA) provides that any agency rule adopted during the previous year expires, unless it is extended by law. Each year, a ten-member joint Committee reviews all adopted rules from the past year and uses three criteria to determine that a rule should expire: (1) the rule is in conflict with a state or federal law or constitutional provision; (2) the agency lacked statutory authority to adopt the rule; or (3) the agency exceeded its statutory authority in adopting the rule.
- An agency is only authorized to adopt rules when the Legislature passes a law to let the agency do so. The Legislature clearly has the authority to pass a law to suspend or repeal state agency rules.

- Under federal case law, the separation of powers doctrine does not allow Congress to veto or repeal agency rules or decisions made under authority delegated by law, unless Congress passes another law to do so. In other words, Congress may only veto or suspend a federal agency rule by passing a law.
- The MN LCRAR had the authority to suspend rules, but this authority was repealed in 1997. In large part, this was because the Minnesota Constitution has separation of powers provisions that are similar to the U.S. Constitution. This varies from state to state depending on the language of their constitutions. Wisconsin, whose Legislature has authority to suspend rules, has an implied doctrine of separation of powers. Minnesota has explicit separation of powers.

Discussion following Legislative Oversight Presentation.

- Representative Seifert asked, if Minnesota goes back to LCRAR's authority to suspend rules, would it draw legal challenge? Mr. McCormick didn't feel comfortable giving an opinion on this and how the courts would rule. He provided example in Iowa where a challenge was addressed.
- Legislative review by a standing committee doesn't present a constitutional problem.
- Senator Stevens asked about the Colorado constitution; is it similar to ours? He asked for more detail on how long they've had this process and if it's working. Mr. McCormick answered - keep in mind that in Colorado, 1) grant of rule authority says this is the way it works, and 2) the grant of rulemaking is still legislatively done. We did that on occasion in Minnesota quite a few years ago. A bill would give an agency direction to adopt energy codes, but because agency folks and industry representatives were nervous, they would compromise. The agency would adopt rules but need to go through prescribed steps with a timetable to meet each of the steps. This process was beyond the usual requirements to the APA. No problems with that process then.
- Senator Stevens referred to the Colorado system. He would have some uneasiness with rule language that is vague or unconstitutional. Would a joint and standing committee that has oversight be able to modify a rule before them? Example: part of rule was not what Legislature intended and the committee didn't want to throw out entire rule. How broad is the oversight? Mr. McCormick answered that he didn't know what the Colorado procedure is but could get additional information for him. Senator Stevens would like to pursue additional information on the Colorado process.
- Mr. Knapp asked: How often does Colorado committee exercise this power and does it apply to existing rules? Mr. McCormick - Review Commission acts every year in Colorado. The Commission acts on rules that were adopted in that given year. They don't go back to another year. Mr. Knapp - How frequent do they use their authority to veto rules? Mr. McCormick - Don't know but can research the information and get back to committee.
- Mr. Orren commented that in Minnesota, the three criteria used by Colorado are addressed during the Administrative Law Judge's (ALJ's) review of Minnesota rules before the rules become effective. Mr. Orren recommended that each legislative policy committee review rules adopted in the previous year that relate to the committee's jurisdiction. Mr. Orren also suggested the RRTF move on to discussion of regulatory reform.
- Ms. DeBoer was interested in knowing Colorado procedures for passing rules. Ms. DeBoer also asked if an agency could adopt rules after an ALJ rules against the rules. Mr. Orren replied that the rules would be stopped if the ALJ determined the agency didn't have statutory

authority, exceeded its statutory authority, or the rules were unconstitutional. However, if the ALJ finds that the rules were not needed or reasonable, the agency can go ahead and adopt the rules, but must first wait up to 60 days to receive and consider advice and comments from the Legislature.

Presentation of 50 State Survey of Regulatory Reforms. John Knapp and Julie Fishel of the Winthrop & Weinstine law firm distributed a handout and made a presentation on state initiatives in rulemaking reform (1995-2000). The handout is available on the RRTF web site. See the handout for details of the presentation. Highlights of the presentation and discussion include:

- Ms. Fishel discussed several key trends in the review and oversight of rules and the removal of regulatory burdens.
 - Economic impact analysis.
 - Waivers or variances for small businesses.
 - Streamlining regulations and procedures, especially regarding permits.
 - State permit reform initiative (New York).
 - A movement in public participation at the beginning and the end of rulemaking.
 - Increased noticing at the beginning of a rulemaking.
 - Rulemaking documents now required to be on the web (Iowa).
 - Ten states in the nation have directives by their Governors to reform rules and rulemaking. In 1999, the Iowa Governor began an initiative for quality and efficiency that includes a review of all agency rules, agency web sites, uniform waiver procedures and training for agency rule writers.
- Mr. Knapp added that in 1999, Minnesota gave the Governor authority to veto rules. Representative Seifert asked when this expires. Ms. Offerdahl said it expires sometime after the 2001 Session. (MS14.05,s6, expires 6/30/01.) Ms. Offerdahl said the veto was enacted with a sunset because the Legislature did not want to enact this new authority permanently without knowing how it would work.
- Mr. Knapp also noted that Michigan has 15 staff in Governor's Office to review proposed rules and newly adopted rules. Ms. Offerdahl stated that the six members of the Policy Management staff in the Minnesota Governor's Office review proposed and newly adopted rules along with their policy review responsibilities related to proposed legislation. Representative Pelowski asked if State Planning could help do rule review for the Governor's Office. Ms. Offerdahl said this would be a possibility. Ms. DeBoer asked if State Planning had its own rulemaking authority and, if so, would that present a conflict. Representative Seifert recalled that Planning did have rule authority, but there was no conclusion whether this would present a conflict.
- Representative Pelowski asked if Minnesota agencies use web sites to distribute rulemaking information and documents. Mr. Orren replied that many Minnesota agencies distribute rulemaking info via the web and that it is steadily getting better as technology improves and small agencies develop the capacity to have web pages. Mr. Orren cited the Minnesota Pollution Control Agency web site as an example of an excellent rules web page. Norma Coleman, PCA rules coordinator, described the PCA rules web page and how it is used.

Discuss and Approve the Rules Review Process Identified in 1-4 of the Task Force Charge.

Mr. Orren distributed a copy of his 5/1/00 memo to the Conference Committee Co-Chairs regarding reporting requirements for agencies under SF3234 (Laws 2000, ch469). Mr. Orren directed task force members' attention to section 4 of chapter 469, which requires cabinet-level

agencies to report on the status of all their rules. The reports are scheduled over the next four years and must include: “(1) list any rules that the entity recommends for repeal; (2) list and briefly describe the rationale for rules that the entity believes should remain in effect; and (3) suggest any changes in rules that would improve the agency's ability to meet the regulatory objectives prescribed by the legislature, while reducing any unnecessary burdens on regulated parties.”

- The 5/1/00 memo documented the authors’ intent that “briefly describe” for most rule chapters would be only a paragraph or two on the continuing viability of the rule chapter. The report would be more in-depth only for those few rule chapters that had taken a recent controversial or problematic turn. The committee co-chairs agreed this was their intent.
- Mr. Orren recommended that the task force include the 5/1/00 memo’s points in the task force report. Mr. Orren also suggested that the task force recommend that each legislative committee select only one rule chapter or issue area to review each Session. There is not enough time for a committee to discuss all rules, there are too many agencies grouped together, and it is better to focus on problem rules. Mr. Orren used as an example Senator Stevens’ subcommittee which did an in-depth look at the issues around nursing home bed rails. Senator Stevens’ subcommittee held three hearings around the state during the interim to learn more about this issue.
- Senator Stevens told about some history of the bed rail issue. He also recommended we consider alternatives to hard and fast rules. We should not be timid in looking at alternatives.
- Representative Pelowski recommended that we post all rule information on the web. This would increase accessibility to material.
- Senator Stevens noted that not all folks have computers. We should also have information available in a more public facility such as a town hall, etc. and on the web.
- Mr. Knapp expressed the concern that repealing rules through legislation is not the best way to approach rule repeal, especially where the repeal is added by a conference committee. Adopting rules is much more complicated, so repealing shouldn’t be too easy. Maybe have an expedited rule repeal process in place to expedite but also provide some public notification and discussion.
- Mr. Orren suggested that rule repeal should still be allowed by statutes, but not first put in the bill in conference committees.
- Representative Pelowski said the Legislature should be cautious when repealing rules by statute. He used as an example the rule on teacher licensure that was repealed by statute.

Determine Format of Agency Reports. This was discussed under the previous agenda item. Mr. Orren asked if he should come with some language at next committee for discussion? Representative Pelowski suggested to do this as quickly as possible and have it posted on web.

Review Stakeholder Input - Written Submissions. Ms. Offerdahl reported that we have received nothing to date. Representative Pelowski asked the audience - no one came forward with any submissions. Senator Stevens encouraged stakeholders to come forward soon, given the schedule. He asked what direction folks would like to see in regulatory reform for the future. Representative Pelowski asked stakeholders at the meeting to notify their constituents of needed input. Ms. Offerdahl noted that notice about the RRTF was published in the State Register on November 6, 2000.

Public Testimony by Kathryn Ludwig. Kathryn Ludwig of Flaherty & Hood, P.A., testified on behalf of the Coalition of Greater Minnesota Cities (CGMC). Her remarks were based on the CGMC's long-standing experience with the Minnesota Pollution Control Agency and its rules, especially water quality standards in Minnesota Rules, chapter 7050.

- Ms. Ludwig was asked about the PCA's web site and whether individual cities used this to get information about PCA rules and whether CGMC encouraged cities to use it for information. Ms. Ludwig said that cities are aware of the PCA web site, but their clients trust them to interact with the agency directly. CGMC makes folks aware information exists, but at the same time cities know that coalition is their representative and will respond formally to the agency. Representative Pelowski said he hopes CGMC's message is to encourage direct input by cities and not just wait for the coalition to respond. Ms. Ludwig responded that that is the way things have been proceeding currently.
- Ms. Ludwig reviewed the first bullet point of her handout. She believes it is appropriate for some new rules to undergo a cost benefit analysis and be reviewed by the Legislature for cost effectiveness. She acknowledged the cost involved to prepare a cost benefit analysis, but feels it is important to consider the costs involved in some rules.
- Representative Seifert asked, does Minnesota require a cost impact for all rules?
- Mr. Orren noted that Minnesota Statutes, section 14.131, requires a regulatory analysis for all new rules. Ms. Offerdahl also noted the requirements of Minnesota Statutes, section 3.987 for all new rules. Ms. Offerdahl also noted the requirements of Minnesota Statutes, section 3.987.
- Mr. Knapp said that the 1995 overhaul of the APA added some key requirements in the regulatory analysis that agencies must address in the SONAR. Mr. Knapp summarized the six regulatory analysis requirements: (1) a description of persons affected by the rules; (2) the probable costs to the state and effects on state revenues to implement or enforce the rules; (3) whether there are less costly or less intrusive methods for achieving the purpose of the rules; (4) any alternative methods for achieving the purpose of the proposed rules that were seriously considered; (5) the probable costs of complying with the proposed rule; and (6) an assessment of any differences between the proposed rule and existing federal regulations. Mr. Knapp added there were two problems with the regulatory analysis – it doesn't apply to existing rules, and it doesn't apply to permits and other regulatory actions that have the effect of rules.
- Senator Stevens said we need to also consider comparative risk assessment because monetary analysis not always easy or comparable, especially when valuing lives. An example - mandatory seat belt law to save lives because of the large number of deaths due to accidents (approximately 700 per year in Minnesota) compared to the likelihood of being struck by lightning (approximately 4 per year in Minnesota – one in a million).
- Ms. Ludwig reviewed the second bullet point of her handout. She proposed that the SONAR contain the total costs to implement the rule. There should be a trigger amount where a higher level of legislative oversight would be required. For example, Legislature would have to review if cumulative costs projected to exceed \$1,000,000 or if individual costs projected to exceed \$100,000.
- Ms. Ludwig's third bullet point recommended legislative review and approval for any rules with stricter requirements than federal requirements.
- Representative Seifert asked what Ms. Ludwig recommended – should these rules be passed as statutes or should the rules be suspended? Ms. Ludwig said the rules should be delayed until legislative review.

- Ms. Ludwig's fourth bullet point noted non-rulemaking efforts instead of going through the formal rulemaking process. Example: PCA phosphorous limits strategy. Approved by the PCA board and currently being used by PCA. Another example is the Mercury Reduction Plan.
- Ms. DeBoer asked what enforcement authority do agencies have with regard to strategies, etc? Mr. McCormick quoted Minnesota Statutes, chapter 14, that says if an agency policy has general impact, it is a rule. Such a policy can be struck down by a judge if it hasn't gone through the rulemaking process. Mr. Knapp noted that even though these deal with permits, they are regulatory policy.
- Mr. Orren recommended the RRTF consider the expedited rulemaking process. Because the regular rulemaking process is so complex and burdensome, agencies sometimes look for ways other than the rulemaking process to implement policy. Policies that are not controversial should be allowed to go through an expedited process or agencies should be allowed to use alternatives to rulemaking such as best practices, etc.
- Senator Stevens said it is the Legislature's authority to set policy and the agency's authority to implement policy. There have been instances of agencies setting policies beyond legislative authority.
- Ms. DeBoer asked, are you saying agencies should only implement policy? Do agencies have rulemaking authority outside of legislative authority?
- Senator Betzold said agencies have jurisdictional authority. Does every rule have to be tied to some statute? Mr. McCormick said every rule has to be tied to statutory authority. There are some very broad grants of rulemaking authority. For example, Commerce has statutory authority to do rules related to its statutory duties. Policy committees reviewed this several years ago and must have thought the broad authority was justified.
- Senator Stevens said the task force should address that issue. When you get into areas where agencies say we need to have a limit on a specific item (example PCA policy) and no legislative mandate exists, that is considered rulemaking and perhaps the agency has gone beyond its authority.
- Ms. Ludwig made a closing comment. She has worked on PCA rulemaking and very much appreciates Norma Coleman's work.

Assignments for Next Meeting. Next RRTF meeting Friday, December 1, 2000, at 9:30 a.m. in Room 300 South of the State Office Building.

- Mr. Orren will prepare his recommendations and post them to the RRTF web site before the meeting.
- Mr. McCormick will be in Ireland doing a cost / benefit study on Guinness Stout, but will post material on web before departing.
- The RRTF will discuss alternatives to rules. Senator Stevens said we already have some very good programs that can serve as examples of alternatives to rules. We have administrative penalty orders by PCA, best management practices at Agriculture, descriptive guidelines with DHS child care, and revenue notices by the Department of Revenue. Staff can bring forward these examples. Possibly discuss other alternatives from other states.
- Representative Pelowski encouraged stakeholders to bring forward suggestions also.

January meeting date. RRTF recommendations are due January 15, 2001. RRTF members looked at their calendars and tentatively set a meeting for Tuesday, January 9, 2001, from 4:00 to 6:00 p.m.

Meeting Adjourned. The meeting adjourned at 12:30 p.m.

Handouts:

- 1) Meeting agenda.
- 2) Draft minutes from the 10/20/00 Rules Task Force meeting.
- 3) “Legislative Oversight of Agency Rules” 11/3/00 memo by George McCormick, Senate Counsel.
- 4) “State Initiatives in Rulemaking Reform (1995-2000)” by John Knapp and Julie Ann Fishel.
- 5) “Table of State Rulemaking Reforms (1995-2000)” by Winthrop & Weinstine.
- 6) Kathryn Ludwig’s written testimony on behalf of the Coalition of Greater Minnesota Cities.
- 7) “Rules Reform Task Force Notice of Meetings” as published in the 11/6/00 State Register.
- 8) 5/1/00 Memo regarding the Reporting Requirements of SF3234 (Ch469) to Senator Hottinger and Representative M. Seifert, Conference Committee Co-Chairs, from Dave Orren.
- 9) Revised Workplan for the Rules Reform Task Force.
- 10) Materials prepared by Deputy Revisor of Statutes Paul Marinac in response to information requests by the Rules Task Force at its 10/20/00 meeting:
 - ◆ Memo dated 11/6/00 by Paul Marinac summarizing the Task Force’s requests and the information provided by the Revisor’s Office. The information included: obsolete rules report compliance; rules repeal legislation; and status of rulemaking authority of MnSCU.
 - ◆ An excerpt from the Revisor’s *Review of 2000 legislation affecting Rulemaking by Agencies* listing legislative repeals of agency rules during the 2000 Session.
 - ◆ An example of a bill that repealed administrative rules - Minnesota Laws 2000, chapter 313, section 10, which repealed obsolete emergency medical services rules of the Board of Emergency Medical Services.
 - ◆ Memo dated 11/7/00 by Senior Assistant Revisor Karen Lenertz outlining the statutory authority of MnSCU to adopt rules and policies.

Thank you to Norma Coleman for her assistance in taking notes and preparing the minutes.

Dave Orren note regarding Audio Tape of Meeting. Due to technical problems, no audio tape of the meeting was made. A GREAT deal of discussion took place. These notes capture a lot of the comments and, hopefully, captured the flavor of the discussion. Every effort was made to accurately capture the comments: my apologies if any comments were misquoted or mischaracterized or missed.