



Everyone's a Critic: Best Practices for Submitting (and Reviewing) Comments on New Administrative Rules

February 25, 2010

Rulemaking Comments and Testimony: An Introduction

Honorable
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February 25, 2010



The Minnesota Legislature Wants You ... to Participate in State Rulemaking

Minn. Stat. § 14.001: The purposes of the APA are to:

- (1) provide oversight of powers and duties delegated to administrative agencies;
- (2) increase public accountability of administrative agencies;
- (3) ensure a uniform minimum procedure;
- (4) increase public access to governmental information;
- (5) increase public participation in the formulation of administrative rules

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The Legislature's Conclusion: Broad Participation Improves the Results

Minn. Stat. § 14.001:

[Chapter 14] is limited to procedural rights with the expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained.

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Transparency Starts with the SONAR

Minn. Stat. § 14.131:

[T]he agency shall prepare a statement of need and reasonableness, which must be available to the public. The statement ... must include the analysis required in section 14.131.... For at least 30 days following the notice, the agency shall afford the public an opportunity to request a public hearing and to submit data and views on the proposed rule in writing.

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Some Key Elements of the SONAR

Minn. Stat. § 14.131:

- (1) a description of who probably will be affected by the proposed rule
- (2) the probable costs to government agencies of implementing and enforcing the rule;
- (3) a determination of whether there are less costly, or less intrusive methods for achieving the purpose of the proposed rule;

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Some Key Elements of the SONAR

- (4) a description of any alternative methods for achieving the purpose of the proposed rule;
- (5) the probable costs of complying with the proposed rule;
- (6) the probable costs or consequences of not adopting the proposed rule; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations.

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Rulemaking Hearings: An Opportunity to Focus and Persuade

Minn. Stat. § 14.14:

When a hearing is held on a proposed rule ... [t]he agency shall submit into the record the jurisdictional documents, including the statement of need and reasonableness, and any written exhibits in support of the proposed rule. The agency may also present additional oral evidence. Interested persons may present written and oral evidence. The administrative law judge shall allow questioning of agency representatives or witnesses, or of interested persons making oral statements, in order to explain the purpose or intended operation of a proposed rule

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Short Summary

Public Accountability, Access and Participation are improved by:

- Close review of the assumptions, claims and evidence found in the SONAR
- Submission of detailed written comments
- Focused testimony at public hearings

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Making Persuasive Comments and Testimony

Viewpoint of the Private Practitioner

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Meaningful Public Input Starts Early

- Regulated Groups and Trade Associations should participate at the Legislature because legislative bills may:
 - Clarify or underscore need for rule-making
 - Require Advisory Groups before rule-making
 - Narrowly define exemptions to rule-making
 - Enact self-implementing laws loaded with detail to eliminate rules (e.g., 256B.431)

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Focus the Client on What Matters

- SONARS and proposed Rules may be daunting to clients
 - The impending change brings uncertainty
 - Legalese is confusing
 - Length is frustrating

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Steps to Orient and Focus the Client

- **Step One:** Explain the parameters of the enabling legislation, e.g.

Congress “does not ... hide elephants in mouse holes.”

- *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)
- *Leisure Hills of Grand Rapids v. Levine*, 366 N.W.2d 302 (Minn. App. 1985) *rev. denied* (Minn. July 11, 1985) (invalidated rule's 30 day deadline on grounds enabling legislation did not give agency control of jurisdiction).

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Step Two: Dissecting the SONAR and the Proposed Rule

- Focus the client: Ask client to analyze the SONAR and proposed rule using three color highlighters:
 - **Green:** Acceptable/non-controversial
 - **Red:** Dispute
 - **Yellow:** Don't know
 - need more input from other affected stakeholders
 - Meaning ambiguous or uncertain

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Step Three: Suggested Five Part Checklist for Client's Analysis

- Consider distributing a five-part checklist to clients and stakeholders who are reviewing proposed rule and SONAR
- Checklist seeks their feedback on following five key analytical points

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A. Does Reality Support the Rule?

- Does another rule or provision of law already address this need?
- Has the asserted harm or conduct actually happened?
- Do knowledgeable stakeholders agree or dispute the agency's concerns?
- Is the asserted need consistent with the enabling legislation?

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B. Is the Proposed Rule Reasonable?

- Do other approaches or alternatives exist?
- Does rule treat similar regulated parties differently?
- Are the factual assumptions known to be uncertain or debatable?
- Does client perceive any “ulterior” or “stray” motivations that do not advance end sought to be achieved by statute?

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C. Is the Language Ambiguous?

- Are key provisions vague?
- Are provisions overly broad such that professional practices may be swept up with prohibited conduct?
- Are terms inconsistent with other provisions of same proposed rule?
- Are terms inconsistent with other governing laws?

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D. Check the Rule Against the Enabling Legislation

- Are any provisions not contemplated by enabling statute?
- Does rule propose deadlines for actions that are not in enabling legislation?
- Are key terms inconsistent with statutory terms?
- Does proposed rule broaden scope of statutory restrictions?
- Any conflict with governing federal laws or criteria?

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E. Are the Standards Stated and Do They Make Sense?

- Are any professional standards and community practices different from the agency's proposed standards?
- Is the basis in fact for the asserted standard lacking?
- Is the new standard arbitrary or well-founded?

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Homework for Counsel

- Consider reviewing legislative hearing tapes to document intent
- If agency is amending an existing rule, examine
 - Any contested case decisions arising under current rule
 - The ALJ rule-making decision on the **current** rule for insight as to why current provisions were adopted and upheld

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Preparing Written Submissions

- Consider whether it should be on client letterhead or attorney's
- Avoid generalities and instead focus on precise criticisms
- Use information gleaned from client review
- Argue impact on any related caselaw or contested case decisions

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Preparing Written Submissions

- If language is vague, **propose actual language** to remedy ambiguity
- If standard is troublesome for client, **propose actual language** for modified standard that is workable
- Identify pitfalls of enforcement: e.g., rule, if adopted, arguably exceeds enabling legislation and will lead to controversies

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Witness Testimony

- Orient witnesses on what to expect in hearing room
- Anticipate questions
- Favor knowledgeable real-life witnesses over surrogates when available
- Use experts in person when warranted
- Lawyer or trade association CEO may be good summarizing witness to close
- Keep it as short as possible

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Talk and Negotiate with the Agency Throughout the Process

- If you and your client are able to convince the agency drafters of the merits of your concerns, that may result in negotiating key segments of the proposed rule.

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Review ALL Agency Responses

- Watch out for Substantially Different New Provisions offered at the 11th hour
- Review ALJ order carefully. File it, and all rule-making submissions, away in retrievable format to define intent in subsequent enforcement proceedings

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Comments and Testimony in Rulemaking

Effective Strategies for Making Your Agency's Record

Bert Black, Esq.

February 25, 2010



Rulemaking Methods

- Comments can be made in several different types of rulemakings:
 - Rulemaking with a Hearing
 - Rulemaking without a Hearing
 - Expedited Rulemaking
 - Good Cause Exemption Rulemaking
- NOTE: This presentation does not address submissions made in response to a Request for Comments

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Comments in Rulemaking with a Hearing

- Comments in Rulemaking can be made in up to three separate time periods.
 - 30 day comment period
 - prior to hearing
 - in rulemaking without a hearing
 - Post-hearing comment period*
 - Rebuttal period*
 - Only when a hearing occurs
 - 5 day comment period for Good Cause Rulemaking
- Testimony occurs at the hearing

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Comments in Rulemaking Without a Hearing

- Only occur in the thirty day comment period
- No other opportunity for commentary
- In a Dual Notice situation, make sure your partners make all their comments in this period, because there may not be another chance to comment if fewer than 25 persons ask for a hearing.

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Comments in Expedited Rulemaking

- Matters subject to expedited rulemaking are generally less controversial; otherwise they would not be authorized by the Legislature for expedited rulemaking. So, comments here are likely to be less adversarial and more technical. Still, get your constituencies to comment favorably.
- Again, the comment period is thirty days after publication in the *State Register*.

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Comments in Good Cause Rulemaking

- Good Cause rulemaking is used for more technical and conforming changes, when controversy is likely to be absent, but there is still a comment component.
- The comments must be submitted within 5 days of the issuance of the notice of intent to amend rules using good cause rulemaking.
- Given the more limited scope of review in Good Cause rulemaking, comments have a lesser role.

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Pre-Hearing Comments

- These comments are the 'first round' of comments. While all comments we discuss today are part of the record and are considered by the ALJ, the earlier a comment is submitted, the more time it will be in the marketplace of ideas and the more responses a trenchant comment will provoke.

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Laying the Groundwork

- While an agency should respond to all substantive comments, if a rulemaking has been proceeding, as many do, as a negotiated process, it is a positive act for the non-agency partners to submit meaningful comments in support of the rule. Nothing says that comments have to be negative, or that partners cannot be encouraged to express their support.

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Comments as Grounded Observation

- When drafting rules, consulting a cross-section of those affected does not prevent blind spots.
- Comments offer a different perspective to which rulemakers should listen.
- Comments are also an occasion for the expression of legitimate alternative policy views.

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Responding to Comments

- Every substantive comment should be responded to on the merits.
- Non-substantive comments are submitted, and need not be individually addressed, but should be noted. Responding specifically to non-substantive comments simply creates background noise that interferes with resolution of the principal issues at hand.

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Tracking

- In order to assure that each substantive comment is responded to properly, it is a good idea to log in comments.
- In practice, comments can be submitted to either the agency or the OAH. Be sure you have seen them all. OAH is very good about forwarding comments to agencies, and it is recommended that agencies promptly do the same in forwarding comments to OAH.

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Testimony

- At the hearing, both the agency and the public will have the opportunity to testify about the proposed rules. The comments submitted during the pre-hearing period will also be available and may be responded to at the hearing.
- Testimony, like comments, tends to be naturally negative – those who agree don't feel the need to express their opinion as strongly as those who object.

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Positive Testimony

- Encouraging positive testimony from partners in the rulemaking process is important.
- Written statements, if available from your partners, are very helpful in the testimonial process. It is somewhat less cumbersome to respond to a written statement.
- Written statements are also posted on the OAH web site, while the transcript is not.

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Critical Testimony

- Critical testimony can be faced in several ways.
 - It can be responded to at the hearing. Not recommended unless you have a fairly clear response ready to go and approval from policy makers (or perhaps even a policymaker testifying for the agency)
 - It can be responded to in writing. This has a bit less of an impact but allows for a more careful response. Also, if you decide you like some of what was suggested, you can incorporate that into a written response, while parsing an alternative proposal on the fly is a bit tough.

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Debriefing

- After the hearing, make sure you debrief to determine what you heard at the hearing.
- If your agency is large enough that those guiding the rulemaking process day to day are removed from policymakers, summarize the hearing for the policymakers.
- This is a good time to also mention that comments should also be summarized, and provided to the policymakers along with proposed responses, to make sure everyone is on the same page.

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Post-Hearing Comments

- After the hearing, there may be more pointed or refined comments, both positive and negative, amplifying and elucidating the points made in testimony at the hearing or submitted into the record.
- It is preferred that the agency respond to comments by the end of the initial post-hearing period.

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Opportunities Created by Comments

- Not all good ideas are created in agencies
- Adopting reasonable ideas proposed by others can reduce conflict, create allies, and lead to better policy decisions
- Comments that suggest alternative policies may open the door to third-way rule language that is related to, but not a substantial change from, the originally proposed rule.
- The ultimate purpose of comments from the public (and the response of the agency) is to build a result that more nearly reaches a consensus that the rules are needed and reasonable. This doesn't always happen, but it is the goal.

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Responses

- Comments are easier to respond to when they are more specific. Whether you prevail is another matter, but a specific comment can be refuted or agreed with.
- How do you best respond to a vague comment verging on opinion? Politely point out the lack of specifics.
- Specific responses to specific comments are more likely to be seen as helpful in the rulemaking process.

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Responses

- As a general principle, the more specific the response, the better the record should you wish to appeal to the Chief ALJ the disapproval of certain proposed rules.
- Be careful in crafting your responses, and give yourself sufficient time and resources to respond.
- If you provide responses at several points in the process, and if there are any questions about inconsistency, make sure you clarify those points in your last response.

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Conclusion

- Comments and testimony require a great deal of attention, and properly responding to them is an art requiring care and skill.
- Comments and testimony can improve your final product.
- Sometimes, comments and testimony are intended to frustrate the rulemaking process, or introduce extraneous issues. Respond in a way that furthers both your goals as an agency and the public good.

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Rulemaking Comments and Testimony: The Best Practice

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The Big Three

Minn. Stat. § 14.128:

[I]t shall also be the duty of the judge to make a report on ... the degree to which the agency has

(i) documented its statutory authority to take the proposed action,

(ii) fulfilled all relevant procedural requirements of law or rule, and

(iii) in rulemaking proceedings, demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.

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Comments and the Affirmative Presentation of Facts

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The Testimony ALJs Like Best

- Has a Theme or Objective in Mind
- Highlights Key Points
- Is Accompanied By More Detailed Written Comments
- Addresses “The Big Three”
- Has Specific Citations to Problem Areas in the Proposed Rules

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Questions?

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