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Michigan Rulemaking

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Michigan Rulemaking, Digested

By Virginia C. Thomas

“Now, explain it to me like I’m a four-year-old.”

—Plaintiff’s attorney Joe Miller, in *Philadelphia*¹

“**A**ll regulations provide insight into what the law is.”² Perhaps that is because administrative rules, as delegated legislation, at once derive their authority from statutes and serve to provide the detailed infrastructure for implementing them. Regulations likely provide the majority of the law that most people encounter daily. Attorneys who have only occasional need to locate pertinent regulations may find the research or engaging the regulatory process a challenge. Even those who work in highly regulated areas of law may find an inside look at the dynamics of rulemaking helpful to their practice.

Although a lot of documentation outlines steps in the Michigan rulemaking process, what happens in between is not intuitive to the occasional or inexperienced stakeholder. What follows is a mix of both: basic mechanics for jump-starting the rulemaking process, plus practical tips from individuals in the know about how to succeed in making the system work for you as a stakeholder or legal advocate.

First, it is important to know who has a hand in rulemaking and how those individuals assist stakeholders in getting administrative rules on the books. The Michigan Administrative Procedures Act (APA)³ mandates the formal rulemaking process in our state. In addition to outlining the process, the APA designates the rulemaking roles of agencies and departments.

The State Office of Administrative Hearings and Rules (SOAHR), which coordinates the rulemaking process from beginning to end, is charged with improving public ac-

cess to Michigan rulemaking.⁴ In support of its mission, SOAHR maintains a public website⁵ from which the *Michigan Administrative Code*, its *Annual Administrative Code Supplements* (1998 to date), and the *Michigan Register* (2000 to date) are available in HTML and PDF formats. The SOAHR website provides guidance for participants in the rulemaking process from request for rule-making (RFR) forms⁶ that initiate the process to a “latest rule activity” link on its home page through which stakeholders can gather information on the status of rule-making requests and withdrawals, proposals, hearings, certifications, and filings. It also contains a single-page outline of Michigan rulemaking⁷ that provides an at-a-glance overview of the process.

The Michigan Legislative Service Bureau (LSB), an agency within the Michigan Legislative Council, participates in informal review of proposed rules once they have been approved by SOAHR for a public hearing. The LSB provides guidance with the rule-drafting process through a detailed procedural manual⁸ that even contains the style protocols applied by the agency in its own editorial review of proposed rules. The manual, available through a link on the SOAHR website, provides numerous examples illustrating the proper language and formatting of proposed rules.

As part of the Michigan General Assembly, the Joint Committee on Administrative Rules (JCAR) has legislative oversight of administrative rules proposed by state agencies. JCAR’s primary role is to ensure that proposed rules are necessary and that they meet Michigan statutory requirements. JCAR reviews each final rule package⁹ prepared by SOAHR and vets proposed rules through members of legislative committees and others whose interests may be impacted by the rules. JCAR also publishes a monthly

newsletter¹⁰ so agencies and other stakeholders can keep current with its rulemaking activities.

In addition to these print and web resources, SOAHR, LSB, and JCAR collaborate behind the scenes to help stakeholders navigate the process. Without knowing more, however, what’s a stakeholder to do? Here are some suggestions from the agencies:

- **Follow the rules.** Yes, there are *rules* to follow, and there are rules to *follow*. It simply is not enough to watch an RFR advance from the sidelines. There are numerous opportunities for stakeholders to comment on the regulatory or fiscal impact of a rule (pro and con) before it is drafted (e.g., open meetings of professional boards, commissions, advisory groups) and after the RFR has been submitted (e.g., public hearing on the rule). The provisions of a proposed rule may change at several stages during the process, and it is essential to be accurate in referencing a rule provision. Providing qualitative and quantitative commentary is important, too, as it demonstrates a balanced understanding of the proposed rule.
- **Check your sources.** Many Michigan agencies maintain websites that include information regarding existing and proposed regulations that come within their areas of responsibility. However, the frequency with which agencies update information on their websites may vary. The “official” and up-to-date versions of the *Michigan Register*, the *Michigan Administrative Code*, and the *Michigan Administrative Code Supplement* reside on the SOAHR website.
- **Stay in touch.** In addition to formal channels of communicating during the rulemaking process, SOAHR, LSB, and JCAR

staff welcome stakeholder comments and questions throughout the process. Stakeholders are encouraged to become involved early in the process by expressing interests or concerns—and by remaining tuned in for the duration. More can be accomplished and better results achieved when stakeholders and agencies are on the same page. Simply put, better communication makes for better rulemaking. There is no ban on ex parte communication during the rulemaking process as there is in litigation proceedings. Lobbying, within ethical guidelines, is not a bad word. In fact, lobbyists serve an important role in articulating the need for regulation or its potential impact. Anyone with an interest can participate in the process.

- **Be persistent.** Don't be shy. If the pertinent administrative agency does not share your position on rulemaking, all is not lost. There are other ways to communicate your views. Members of legislative standing committees who deal with similar topics may have an interest. Remember, JCAR distributes a final rule set package, including its own analysis of proposed rules to legislative committees and staff.
- **Be prepared to negotiate.** Michigan rulemaking involves change and compromise that begin well before an RFR is filed. Successful rule proposers know their bottom line from the get-go and present realistic proposals rather than a wish list. They remain open to alternative proposals and compromise. They also understand how to make productive use of a seemingly negative response. For example, a notice of objection from JCAR may present an invitation to go back to the table and make adjustments that are keeping a proposed regulation from moving forward. See you next time around, as they say.
- **Let the experts do their job.** SOAHR, the LSB, and JCAR staff understand Michigan rulemaking, and they know where the “give” is. Their suggestions for changes or clarifications to a draft rule are based on deep experience with successful rule-

making. A well-crafted rule is less likely to be challenged later in the process.

The Michigan rulemaking process, with its timing requirements and other complexities, may appear a bit intimidating to inexperienced stakeholders. However, the process has built-in flexibility, ongoing help is available for the asking, and there is a lot more room for negotiation than meets the eye. ■



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FOOTNOTES

1. *Philadelphia* (TriStar Pictures, 1993).
2. Kunz, *The Process of Legal Research* (7th ed) p 322.
3. 1969 PA 306, MCL 24.201 *et seq.*
4. Executive Order No. 1995-6.
5. Michigan Department of Labor & Economic Growth, State Office of Administrative Hearings and Rules, DELEG Home <http://www.michigan.gov/dleg/0,1607,7-154-10576_35738---,00.html>. All websites cited in this article were accessed November 18, 2010.
6. Michigan Department of Labor & Economic Growth, State Office of Administrative Hearings and Rules, *Request for Rulemaking (RFR)* <http://www.michigan.gov/documents/dleg/Request_for_RulemakingRFR_March_08_297483_7.doc>.
7. Michigan Department of Labor & Economic Growth, State Office of Administrative Hearings and Rules, *Administrative Rules Process in a Nutshell* <http://www.michigan.gov/documents/dleg/Administrative_Rules_Process_singlepagesummary_302623_7.pdf>.
8. Legislative Service Bureau, Legal Editing and Law Publications Division, *Administrative Rules in Michigan: A Manual of Style and Procedures* (June 2003) <http://www.michigan.gov/documents/dleg/LSB_Style_Guide_June_2003AdminRules_278892_7.pdf>.
9. The final rule package includes a transmittal letter, public hearing report, the proposed rule, LSB and SOAHR certifications, and regulatory impact statement.
10. Joint Committee on Administrative Rules, Newsletter <<http://council.legislature.mi.gov/jcar.html>>.