

**THE NEED FOR THE MONTANA ADMINISTRATIVE PROCEDURE ACT AND
LEGISLATIVE OVERSIGHT, UNDER MAPA, OF ADMINISTRATIVE
RULEMAKING**

In Montana, as in most states, the state constitution provides that lawmaking is a function of the Legislature and declares that certain procedures must be used in order to enact laws. Historically, it is also a recognized principle of state law that the Legislature may delegate the power to enact law (in the form of administrative rules) to the Executive Branch. This delegation of legislative authority to adopt administrative rules that are binding as law has its support not only in law but also in reason; the Legislature, being a part-time body and lacking expertise in the many varied purposes of state government, often does not have the time, knowledge, and resources to adopt as statutory law the many detailed provisions needed to implement the statutes that the Legislature enacts. To facilitate the administration of legislation, the Legislature authorizes the adoption of administrative rules that must be adopted pursuant to the requirements of the Montana Administrative Procedure Act (MAPA).

Because of the MAPA definition of "agency", MAPA applies to most state Executive Branch agencies. MAPA has standardized many functions of administrative agencies, the most important of which may be the rulemaking function delegated by the Legislature. As a result, persons dealing with state agencies need not obtain rulemaking information and copies of agency rules solely from the agencies themselves, nor must they distinguish between many different forms and styles of, and

procedures for adopting, agency rules. Furthermore, there is no longer a risk that an agency may have adopted rules in a manner unknown and undiscoverable by the general public. Under MAPA: (1) all proposed and adopted rules of every agency covered by MAPA must be printed in the Montana Administrative Register, which is published twice monthly by the Secretary of State; (2) interested persons must be given an opportunity to comment on proposed rules; and (3) adopted rules must be published in the Administrative Rules of Montana (ARM). Much good has resulted from these and other provisions of MAPA. The purpose and effect of MAPA, however, have sometimes been misconstrued. MAPA has sometimes been claimed to be the cause of an alleged undesirable proliferation of agency rules, and its repeal has sometimes been advocated as the cure. However, MAPA does not grant rulemaking authority to state agencies, as the language of MAPA plainly states at 2-4-301, MCA. Rulemaking authority has been granted by the Legislature in numerous individual sections of the law scattered throughout the Montana Code Annotated.

The number of statutory grants of rulemaking authority may surprise some people. There are hundreds of statutory sections delegating authority for agencies to adopt administrative rules. The statutory grants of rulemaking authority are often worded in a manner that provides little detail and guidance to an Executive Branch agency as to what the rules are to contain and the approach that the agency is to take in regard to the substance of the rules. To address the problem of loosely worded and hastily considered delegations of rulemaking authority, the Legislature enacted Chapter 11, Laws of 1997, codified as 5-4-103, MCA, providing: "A statute delegating rulemaking authority to an agency must

contain specific guidelines describing for the agency and the public what the rules may and may not contain."

Over the past 25 to 30 years, the Legislature has enacted numerous MAPA amendments to help strengthen the Legislature's influence over the rulemaking process. These enactments, while certainly helpful, cannot be relied upon in all instances to ensure a proper implementation, under MAPA, of legislative intent by an agency, much less the "best", most practical, or least expensive implementation. Whether because of oversight, inaccurate use of language, limited time allowed for legislative action, inability to foresee possible legal or economic consequences, or other reasons, grants of rulemaking authority and the statutes to be implemented by rules are rarely written in a manner acceptable to all interests. Therefore, legislative oversight becomes a practical necessity.

MAPA REVIEW OF AGENCY ADMINISTRATIVE RULES

The interim committees and Environmental Quality Council are required by 2-4-402, MCA, to "review all proposed rules filed with the secretary of state". The review of proposed rules is conducted primarily to determine compliance with statutory requisites in MAPA for the valid proposal and adoption of rules. Under 2-4-305, MCA, a rule is not effective unless all of the following conditions are met:

- (1) Each substantive rule adopted must be within the scope of authority conferred by the Legislature, must implement a statute,

and must be in accordance with other statutory standards.

- (2) The rule must be consistent with the implemented statute and must be reasonably necessary to carry out the purpose of the statute.
- (3) The rule must substantially comply with the requirements of MAPA relating to the procedure for adoption (e.g., notice, hearing, and submission of comments on the rule).

To determine whether a proposed rule complies with these statutory standards, an interim committee staff attorney reviews the statute authorizing rulemaking, the substantive law implemented by the proposed rule, and the procedure used by the agency to propose or adopt the rule. The staff attorney reviews the proposed rule for such additional considerations as clarity and style.

The review begins with a committee staff attorney analysis of the rule proposal for compliance with MAPA. If an error or problem in a proposed (or adopted) rule is discovered, the reviewing attorney notifies the agency concerned and recommends a solution. The staff attorney conducts a followup as necessary to determine subsequent agency compliance. If the agency disagrees with the staff attorney comments and recommendation and the staff attorney comments and recommendation are of a substantive nature and relate to an important problem, it is up to the committee how the matter

will be handled.

Committee staff attorney comments and recommendations usually fall into the following major categories:

- (1) The agency lacks statutory authority for the proposed rule, the proposed rule improperly implements the language of the statute being implemented, or the proposed rule is unnecessary to give effect to the statute implemented.
- (2) The proposed rule cites a statute as a grant of rulemaking authority or as implemented when, in fact, the statute cited does not grant rulemaking authority or is not implemented, or the proposed rule improperly repeats statutory language or contains ambiguous language.
- (3) The proposed rule conflicts with a statute or adds to a statute something not envisioned by the Legislature.
- (4) The proposed rule contains grammatical, spelling, or typing errors, which are usually brought to the attention of the agency by the committee staff attorney. They are rarely brought to the attention of the committee.

In the great majority of cases in which committee staff attorney comments and recommendations are made, the agencies

will respond positively and remedy the situation by: (1) canceling the rulemaking proceeding altogether; (2) canceling the rulemaking proceeding and the proposed rule objected to and renoticing the proposed rule in a different form; (3) amending the proposed rule in the subsequent notice of adoption; or (4) correcting minor errors in the ARM replacement pages.