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Definition of "Rule" Under the Minnesota Administrative Procedure Act

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DEFINITION OF "RULE" UNDER THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT

Administrative agencies possess both adjudicatory and rulemaking powers. This Note focuses on agency rulemaking power. In particular this Note analyzes the definition of "rule" under the Minnesota Administrative Procedure Act and discusses the three types of rules: interpretive, legislative, and procedural. In addition, relevant Minnesota Supreme Court decisions are examined. Finally, statutory changes are suggested.

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I. INTRODUCTION

   A. Background

   The area of administrative law has expanded greatly in recent years primarily as a result of increased governmental involvement in the economy and increased governmental entitlements. The tremendous growth in administrative law also has been attributed to the reforms of the New

Deal. Increased government regulation was imperative in light of New Deal reforms such as a retirement program for the elderly, the National Labor Relations Board, a program to oversee trading in the securities markets, and a system of subsidies and quotas for controlling agricultural production. With the increased complexity of our social, economic, and industrial systems has come the need for flexibility in the administration of these systems. The resulting demands made on legislatures and courts have led to the creation of numerous state and federal administrative agencies.

Administrative agencies are better equipped than legislatures or courts to implement and supervise the new governmental programs because agencies possess the ability to perform both legislative and adjudicative functions. Unlike legislators and some judges, agency personnel do not serve at the pleasure of an electorate; the functioning of agency staff is not being constantly interrupted by the electoral process. Agencies, unlike legislatures or courts, can devote more attention to details because agencies deal with a comparatively narrow scope of issues. Perhaps one of the biggest advantages of an agency is its ability to specialize and to develop expertise in highly technical areas. While legislatures continue to set the major policy framework, agencies, because they have the time and the personnel, often are better able to set up and enforce specific programs. Some commentators have recognized adjudication by administrative agencies is easier and faster than adjudication by the


3. See Rabin, supra note 2, at 121.

4. At the state level, administrative agencies regulate activities such as air pollution, agriculture, banking, civil rights, civil service, conservation, corporations, some aspects of divorce law, fair employment practices, fisheries, highways, horse racing, insurance, labor, licensing, liquor control, mediation, occupational permits, prisoner parole, professional licensing, public health, public utilities, public welfare, railroads, revenue, securities, taxation, trucking, unemployment, unfair competition, veterans' affairs, water resources, workmen's compensation, zoning, and literally dozens of other fields of activity. See 1 F. Cooper, State Administrative Law 2 (1965).


6. While the statement is true with respect to agency staff members, most high-level agency officials are political appointees who can be removed at will. See R. Lorch, Democratic Process and Administrative Law 55-56 (1969). Federal independent regulatory agencies such as the FTC, FCC, ICC, and NLRB, however, have been established with agency heads who cannot be fired except for cause. See id.

7. See Wesland v. Railroad & Warehouse Comm'n, 251 Minn. 504, 509, 88 N.W.2d 834, 838 (1958).

8. See W. Gellhorn, Federal Administrative Proceedings 27 (1941) ("Because the subject matters involved are often technical in nature—superintendence of transportation, or communications, or finance, or health—it is felt that only 'experts' or 'specialists' can effectively cope with them, and hence they have been segregated from other subject matters and entrusted to administrative agencies.").
courts. Administrative agencies are not subject to the rigid procedural framework imposed on courts. Finally, administrative agencies, unlike courts, can initiate a wide range of investigations.

Agency policy making generally takes one of two forms—adjudication or rulemaking. The traditional distinction between rulemaking and adjudication is that rulemaking is legislative in nature and adjudication is judicial in nature. When an agency possesses both “adjudicatory and rule-making powers covering the same subject matter, the agency generally may choose whether to proceed by means of adjudication or rulemaking in resolving particular policy problems confronting them.”

The choice of agencies generally has been to proceed by rulemaking.

The purpose of this Note is to examine the Minnesota statutory definition of the term “rule” and to examine the Minnesota cases that have attempted further to define the term. Agency rulemaking has been divided into three categories: informal, formal, and precedents derived from agency adjudications after compliance with formal rulemaking procedures. The increased use of agency rulemaking has led to a greater

9. See K. Davis, supra note 5, § 1.05, at 15-16.
10. See id. at 16-17.
11. See id. at 17; W. Gellhorn, supra note 8, at 27 (“Unlike the courts, some of the agencies do not wait for cases to be brought to them for decision. Instead they assume the burden of preparing and presenting cases which have relationship to the desired public ends.”). See generally K. Davis, supra note 5, §§ 3.01-.14.
12. See Fuchs, Development and Diversification in Administrative Rule Making, 72 Nw. U.L. Rev. 83, 87 (1977). Professor Davis correctly acknowledges that some agency activity does not fall within either the adjudication or rulemaking category. See 1 K. Davis, supra note 2, § 1:4, at 13. Professor Davis states:

Even though the Administrative Procedure Act defines “adjudication” in §§ 551(6) and (7) as process for a final disposition in a matter other than rulemaking, and even though that definition, if taken literally, means that all administrative action is either adjudication or rulemaking, Congress lacks the practical power to change the customary thinking of judges and practitioners, who continue to assume that a good deal of administrative action is neither adjudication nor rulemaking. Agencies do not necessarily either adjudicate or make rules when they initiate, investigate, threaten, publicize, conceal, plan, recommend, and supervise. Some informal action of agencies is in the nature of informal adjudication, and some is in the nature of informal rulemaking, but the general understanding continues that some informal action is neither adjudication nor rulemaking.

Id.

14. Fuchs, supra note 12, at 89.
15. See id.
16. See United States v. MacDaniel, 32 U.S. (7 Pet.) 1, 15 (1833) (“Usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.”); Davis, Administrative Rules—Interpretative, Legislative, and Retroactive, 57 Yale L.J. 919, 921 (1948) (“Something that either is akin to rule-making or is rule-making takes place when
awareness by those dealing with agencies that much of an agency's activity is the making of policy. Because of the wide range of agency activity that falls within the scope of rulemaking, it is often difficult to determine what is a rule and what is not. In addition to the difficulty in classifying agency activity as rulemaking, a problem arises when attempting to determine the appropriate weight to be given to agency rules. For example, in *Minnesota-Dakotas Retail Hardware Association v. State*, 17 the Minnesota Supreme Court stated that interpretive rules do not have the force of law; yet they are required to be promulgated pursuant to chapter 15 of Minnesota Statutes.18 The statute provides, however, that all rules made pursuant to chapter 15 have the force and effect of law.19 This Note also will attempt to identify and distinguish the various types of rules, and to describe the functions that they perform.

B. Administrative Power

Administrative action is based on the delegation of power to agencies by either state or federal legislatures.20 Typically, such delegations involve a combination of powers. For example, a single agency may legislate rules implementing a statute, search for violations of the rules, and if the agency discovers a suspected violation, prosecute the violator at a hearing with the agency acting as judge.21 The Minnesota Supreme Court has stated that administrative agencies have only such powers as are given them by the statutes creating them and that they must exercise their powers in conformity with those statutes.22 Similarly, other state courts have allowed a combination of legislative, adjudicative, and prosecutorial functions in a single agency when there is a practical necessity for such a combination and a system of checks and balances to guard against abuses of administrative discretion.23

The traditional view of rulemaking has been that rules adopted pursu-

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17. 279 N.W.2d 360 (Minn. 1979).
18. *See id.* at 364 n.6.
20. *For a general discussion of delegation of power in the administrative law context, see 1 F. Cooper, supra note 4, at 31-94; 1 K. Davis, supra note 2, §§ 3:1-18; K. Davis, supra note 5, §§ 2.01-16; M. Forkosch, A Treatise on Administrative Law §§ 80-100 (1956).*
21. *See 1 F. Cooper, supra note 4, at 25. In discussing the delegation of combined powers to administrative agencies, Professor Cooper states that "[e]xcept in the comparatively rare cases . . . where a combination of powers in a single agency was deemed to threaten, in some measure, the respective primacies of the legislature or of the courts, the states have sustained the delegation of combined legislative, prosecutory, and judicial powers to agencies." Id.*
22. *See Yoselowitz v. Peoples Bakery, Inc., 201 Minn. 600, 606-07, 277 N.W. 221, 225 (1938).*
23. *1 F. Cooper, supra note 4, at 17 ("In the absence of such safeguards, the state
ant to a specific grant of power were considered to have the force of law, and that rules adopted pursuant to a general delegation of power were considered to interpret the law.\textsuperscript{24} Many jurisdictions, however, no longer require a specific statutory delegation of power to adopt legislative rules. Rather, these jurisdictions allow rules to be adopted under a general delegation of power when such rules are deemed to be necessary in light of a construction or interpretation of a statute.\textsuperscript{25}

II. DEFINITION OF \textit{“Rule”}

\textbf{A. In General}

Legal scholars generally have recognized that \textit{“rule”} is incapable of precise definition.\textsuperscript{26} Professor Davis states that a \textit{“precise definition [of rule] in the abstract is not necessarily desirable, for the same function may well be regarded as rulemaking for one purpose or in one context and as something else for some other purpose or in another context.”}\textsuperscript{27} It is important, however, to define \textit{“rule”} because the application and interpretation of law inevitably depends in part on the meaning of words.\textsuperscript{28}

courts are still prepared to strike down statutes which grant an agency powers so unlimited as to enable the agency in practical effect to displace the legislature and the courts.

\textsuperscript{24.} See notes 98-99 infra and accompanying text.

\textsuperscript{25.} See Asimow, \textit{Public Participation in the Adoption of Interpretive Rules and Policy Statements}, 75 Mich. L. Rev. 520, 561 (1977) ("Today, however, it is universally accepted that agencies can adopt legislative rules pursuant to general rule-making powers.").

In discussing the power to make rules, Professor Fuchs states that the potential for agency resort to rule making results from the range of rulemaking authority which agencies possess. This authority has come to depend increasingly on explicit statutory provisions, yet it still depends in part on authorization which inheres in the requirements of good administration. These inherent requirements which regulations can help to fulfill include the effective announcement of an agency's prescriptions for doing business with it, such as are set forth in procedural rules; the issuance of internal directives to staff members; and the announcement for the information and guidance of persons concerned of policies and legal interpretations that are expected to determine future agency action. Unlike these kinds of pronouncements which may be authorized impliedly from the agency's very existence and need to administer, rules which legally dispose of outside interests, such as regulations which proscribe conduct or define enforceable rights, should rest on more specific statutory or constitutional authority to issue them, since otherwise the agency would be the architect of its own powers.

Fuchs, supra note 12, at 89-90 (footnote omitted).


\textsuperscript{27.} See K. Davis, \textit{supra} note 26, § 5.01, at 123.

\textsuperscript{28.} Professor Davis stated: [Definitions] often control the results when practical problems come to court. Both legislative bodies and courts have to define the terms they use, and then problems have to be worked out by applying logic to the definitions; every system of law has to rest in part on the meaning of words.

\textsuperscript{2 K. Davis, \textit{supra} note 2, § 7:6, at 32-33 (2d ed. 1979).}
Although commentators agree that defining "rule" and "rulemaking" is difficult, many authors nonetheless have attempted to do so. Professor Davis states that "[a] rule is the product of rule-making, and rule-making is the part of the administrative process that resembles a legislature's enactment of a statute." Professor Fuchs defines rulemaking as "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations." Other attempts to define the term "rule" similarly have equated rulemaking with legislative conduct on the administrative level.

The spectrum of activity denoted as rulemaking ranges from the everyday decisions of agency personnel to detailed regulations. To illustrate further the broad range of activity that could be labeled rulemaking, take the example of someone requesting that an agency pursue a certain course of conduct. Should the agency decide not to pursue that conduct, that decision in itself arguably would constitute rulemaking. Professor Davis acknowledges that "[i]f emphasis is given to the multiplicity of meanings of the word 'rule,' one might guess that only about one percent of all 'rules' that agencies make are governed by procedures that allow


Justice Holmes offered the following definition of rulemaking:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial . . . .

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). The theory of Justice Holmes' definition was later embodied in FAPA. Professor Davis is of the opinion that the definition offered by Justice Holmes "has produced many unsatisfactory practical results." Davis, supra note 16, at 920. As an example, Professor Davis cites Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1940), a case he says is "permeated with conceptualism and unrealism." Davis, supra note 16, at 920 n.4.


32. Professor Davis has stated:

All "rules" could be lined up on a scale from unthinking habits of a single public employee at a low level to the most formal "rules" published in the Code of Federal Regulations, such as, for instance, the Federal Reserve Board's Regulation Z, which is formal, elaborate, detailed, . . . and has acquired almost the status of a statute. Neither the statutory law nor the judicial case law has crystallized a line between the two ends of the scale, separating a statement by the lowly employee that "my rule is to do thus and so" from the formal regulation.

2 K. Davis, supra note 2, § 7:1, at 3 (2d ed. 1979).
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B. Difficulty in Defining the Term

1. Statutory Definitions

At least two obvious reasons exist for the difficulty in defining "rule." The first reason is found in the various statutory definitions, which vary greatly from state to state. Contrasting the different definitions of "rule," Professor Cooper finds some definitions so narrow in scope that they deny rights to persons intended to benefit by rulemaking procedures while other definitions are so broad that compliance with all of the procedural requirements would overly burden administrative agencies.

Under the Minnesota and federal statutes "rule" is defined through certain inclusions and exclusions. These statutes, however, remain significantly ambiguous in terms of what acts constitute rulemaking. The Federal Administrative Procedure Act (FAPA) defines "rule" as

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, applications, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing...

FAPA goes on to define "rule making" as the "agency process for formulating, amending, or repealing a rule."

"Rule" is defined in the Minnesota Administrative Procedure Act (MAPA) as

every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by it or to govern its organization or procedure. It does not include (a) rules concerning only the internal management of the agency or other agencies,

33. Id.

34. Professor Cooper stated:

Some [definitions] are so narrow as to deprive the intended beneficiaries of the full enjoyment of the rights which are meant to be made available to members of the public through the substantive provisions concerning rule-making procedures and the requirements concerning publicity for rules. Conversely, some definitions are so broad that if the agencies were compelled to follow literally the procedural and publicity requirements, with respect to every statement falling within the definition of rule, then the agencies could properly complain that the result was to impose onerous and unnecessary burdens on agency staffs.

1 F. COOPER, supra note 4, at 109-10.


36. Id. § 551(4).

37. See id. § 551(5).

and which do not directly affect the rights of or procedure available to
the public; (b) rules of the commissioner of corrections relating to the
internal management of institutions under the commissioner's control
and those rules governing the inmates thereof prescribed pursuant to
section 609.105; (c) rules of the division of game and fish published in
accordance with section 97.53; (d) rules relating to weight limitations
on the use of highways when the substance of the rules is indicated to
the public by means of signs; (e) opinions of the attorney general;

Similar to the Minnesota and federal definitions above, state statutes
typically define "rule" through a number of fairly common inclusions
and exclusions.40

a. Inclusions

Most state statutes that define "rule" contain five basic elements. First, a "rule" usually is described in broadly inclusive terms such as by
the word "statement." This element is in response to the tendency of
agencies to try to avoid complying with the procedural requirements of
rulemaking by labeling certain agency activity as "bulletins," "guides,
" or "announcements."42

Second, the definition usually is confined to statements of general applicability.43 Many states also include the requirement that the rules be
of future effect. Iowa, for example, has eliminated the requirement
that rules be of future effect because "every statement of general applicability must, almost by definition, have future effect at the time it is first
issued."45 Professor Auerbach also recognizes that deletion of the "future

40. See 1 F. COOPER, supra note 4, at 107; Auerbach, Administrative Rulemaking in Minne-
sota, 63 MINN. L. REV. 151, 156-61 (1979).
41. See 1 F. COOPER, supra note 4, at 108 ("[T]he concept should be described in
broadly inclusive terms (the word ‘statement’ has been most popular.").
42. See id.; Davis, supra note 16, at 921-22 ("An agency may announce policies in
connection with deciding cases, or informally through press releases or reports or speeches,
or formally through regulations. The practical effect of each of these three courses is often
almost the same, and yet a good deal may hinge on the form.").
43. See 1 F. COOPER, supra note 4, at 108.
44. See id. at 108, 113. Professor Cooper states:

Many state statutes provide that the definition of rule applies only to state-
ments which, in addition to having general applicability, have "future effect." A
approximately an equal number of state statutes do not include this require-
ment of future effect. Its inclusion would seem to be unimportant except as a
rhetorical nicety, and its omission of little significance, because if statements of
general applicability prescribing law or policy do not have future effect they
would seem to have little effect at all.

Id. at 113 (footnote omitted).
45. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability,
Public Access to Agency Law, the Rulemaking Process, 60 IOWA L. REV. 731, 830 (1975). Simi-
larly, Professor Cooper states that "[i]t is doubtful whether [the] addition [of the require-
ment that the rules must be of future effect] has any great significance, for there would be

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"effect" requirement "eliminates a difficulty that can occur when parties rely on a rule that is subsequently declared invalid." For example, in Addison v. Holly Hill Fruit Products, the United States Supreme Court invalidated a rule that had been relied upon by various employers. By deleting the "future effect" requirement, a subsequent rule could be made retroactive to accommodate the employers who had relied on the invalid rule.

Third, most "rule" definitions encompass every statement that implements, interprets, or prescribes law or policy. This language has been viewed as necessary to the definition to "ensure that every agency statement will be treated as a rule if it declares, recognizes, makes, promulgates, prescribes, implements, interprets, indicates, creates, or authorizes law or policy of general applicability."

Fourth, typically there is a description of the agency's organization, procedure, and practice requirements. The rationale for these inclusions is that "those doing business with an agency find that an initial difficulty is to learn how the agency staff may properly be approached, and this can be known only if the organization of the agency is a matter of public knowledge."

Finally, most definitions of "rule" have a provision for the amendment or repeal of a rule. Minnesota also provides for the "suspension" of a rule in its statutory definition. This inclusion is important because the amendment, repeal, or suspension of a rule can be as important as the adoption of a new rule.

b. Exclusions

A number of subjects commonly are excluded from the statutory def...
nition of "rule," but there is no uniform set of exclusions. Some of the exclusions are intended to clarify the definition of "rule." For example, statements that concern only the internal management of an agency and intraagency memoranda that do not directly affect private rights may be excluded. Examples of agency statements that fit within this exclusion are "statements specifying employee vacation policies, work schedules, work standards, promotion policies, grievance procedures, and staff benefits." Agency statements that would not come within the exclusion include "statements of general applicability defining agency law or policy in relation to job applicants." The exclusion of intraagency memoranda is of practical necessity so that staff members can write internal memoranda on policy questions without complying with the statutory rulemaking requirements.

Several possible reasons exist for a state legislature's decision to define "rule" narrowly or broadly. One author suggests that some exclusions are "designed merely as reassuring clarifications of the definition" while others "apparently reflect successful lobbying tactics on the part of the agencies which normally seek a narrow definition of the term rule, and others reflect particular local needs." Many of the exclusions from rulemaking procedures have been criticized because an exclusion eliminates the requirement of notice and public participation.

A second reason for the difficulty in defining "rule" is that only a few

57. See 1 F. Cooper, supra note 4, at 109; Auerbach, supra note 40, at 241.
58. Bonfield, supra note 45, at 834.
59. Id.
60. Examples of other common exclusions from the definition of "rule" are forms, instructions to forms, rules addressed to specific persons, rules pertaining to military or naval functions, educational regulations concerning admission and graduation, regulations relating to commitment to and release from state institutions, emergency health rules, rate or tariff determinations, street and highway signs or markers, activities relating to the management and development of state property, licensing activities, and informational pamphlets. See 1 F. Cooper, supra note 4, at 117-18. The definition of "rule" in MAPA excludes five categories of rules. See note 39 supra and accompanying text. For an in-depth discussion of the exclusions in MAPA, the Revised Model Act, and the Iowa APA, see Auerbach, supra note 40, at 241-51.
61. See 1 F. Cooper, supra note 4, at 109.
62. Id. at 117.
63. See R. Lorch, supra note 6, at 102-05. Because of the potentially sweeping effect of many of the excluded rules, Professor Lorch argues that it is unreasonable to exclude such rules from the rulemaking requirements. Professor Lorch further argues that "[t]he cause of democracy in rule-making is served by opening the doors of public participation as widely as possible. Where law allows an agency to omit notice of proposed rule-making, it makes more difficult the democratic process in administration." Id. at 103. See generally Auerbach, supra note 40, at 163 (suggesting that "there is greater reason to require Attorney General approval of rules that may be adopted without satisfying the rulemaking procedures prescribed by MAPA than of rules that must satisfy these procedures").
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court decisions have interpreted the statutory definitions. 64 Administrative law is still a relatively new field that has not yet developed an extensive body of judicial law. In addition, because many states allow petitioners the opportunity to present their grievances to hearing examiners and state district courts, many cases raising significant administrative law issues are never heard by the state's appellate courts.

In the few cases that have interpreted the statutory definition, one author has noted "a pervasive tendency on the part of the agencies to seek to construe the statutory definition in a way which will exempt some agency statements from the application of the definition." 65 Many agencies apparently have attempted to skirt the statutory rulemaking procedures 66 by issuing rules under the guise of "bulletins," "guides," "policy statements," or "announcements." 67

Consistent with the trend in other states, 68 the Minnesota Supreme Court has not been confronted with many cases requiring a determination of what agency statements or conduct constitute rulemaking. In Wacha v. Kandiyohi County Welfare Board, 69 the Minnesota court considered whether a public welfare bulletin, reminding county welfare agents to notify recipients that they should use their tax refunds to meet current needs, was a rule that the Commissioner of the Minnesota Department of Welfare had issued without complying with statutory rulemaking procedures. 70 The Wacha court determined that the welfare bulletin constituted "merely a restatement of existing welfare policy and a directive concerning internal management." 71 The court further held that the welfare bulletin was not intended to have the force and effect of law but rather was intended to implement the existing law. 72 The Wacha court concluded that because MAPA only required compliance with the formal rulemaking procedure if the rule was intended to have the force and effect of law, the welfare bulletin was not invalid. 73

The same issue arose in McKee v. Likins, 74 in which a county resident challenged the authority of state and county welfare officials to provide medical assistance to welfare recipients for abortions. 75 The medical

64. See 1 F. COOPER, supra note 4, at 118.
65. Id.
67. See note 42 supra and accompanying text.
68. See note 64 supra and accompanying text.
69. 308 Minn. 418, 242 N.W.2d 837 (1976) (per curiam).
70. See id. at 419, 242 N.W.2d at 838.
71. Id. at 421, 242 N.W.2d at 839.
72. See id.
73. See id.
74. 261 N.W.2d 566 (Minn. 1977) (per curiam).
75. See id. at 568.
assistance was provided pursuant to a policy bulletin that the Commissioner of Welfare had issued,\textsuperscript{76} according to which medical coverage was allowed for elective, nontherapeutic abortions.\textsuperscript{77} The \textit{McKee} court held that the policy bulletin constituted a rule\textsuperscript{78} by construing the statutory definition to include agency activities and to exclude "specific activity as it deemed beneficial to the concerns of efficient government and public participation."\textsuperscript{79} The \textit{McKee} court then considered whether the policy bulletin fit within any of the exceptions to the definition of "rule." Finding that the statutory language in MAPA did not exclude statements of general applicability such as the policy bulletin, the Minnesota court concluded that the policy bulletin was invalid because it had not been issued in compliance with the statutory rulemaking process.\textsuperscript{80}

These Minnesota cases illustrate the types of agency conduct that have been challenged as rulemaking and the analysis that the Minnesota court may apply. While both the \textit{Wacha} and \textit{McKee} cases involved welfare policy bulletins, the approach that the Minnesota court took was not the same in both cases. In \textit{Wacha}, the court focused on the legal effect of the bulletin, while in \textit{McKee}, the emphasis was on the statutory definition of "rule."

### III. Functions of Administrative Rules

#### A. Types of Rules

In attempting to achieve a workable definition of "rule," commentators have categorized rules into three basic types. These categories are procedural rules,\textsuperscript{81} legislative rules,\textsuperscript{82} and interpretative rules.\textsuperscript{83} The distinctions among these categories is not always precise.\textsuperscript{84} In some cases, a rule may be described by two or more of the basic types.\textsuperscript{85} Despite the occasional difficulty in categorizing rules, the distinction among the three types becomes important in judicial decisions regarding the procedural requirements followed in promulgating the rules\textsuperscript{86} and in deter-

\textsuperscript{76} See id.
\textsuperscript{77} See id. at 576.
\textsuperscript{78} See id. at 577.
\textsuperscript{79} Id.
\textsuperscript{80} See id. at 578.
\textsuperscript{81} See notes 88-91 infra and accompanying text.
\textsuperscript{82} See notes 92-94 infra and accompanying text.
\textsuperscript{83} See notes 95-105 infra and accompanying text.
\textsuperscript{84} See 1 F. COOPER, supra note 4, at 173 ("While the categories are neither precise nor clearcut, and while some rules serve two or more of these three purposes simultaneously, nevertheless the distinction is important.").
\textsuperscript{85} Id. at 173 n.1.
\textsuperscript{86} For example, FAPA excludes interpretative rules from its procedural requirements. See 5 U.S.C. § 553(b)(A) (1976); Davis, supra note 16, at 928; notes 106-11 infra and accompanying text.
mining the validity and legal effect to be given a rule.87

1. Procedural Rules

Examples of rules falling within this category are guidelines for the filing of applications, the institution of complaints, the serving of papers, and the conduct of hearings.88 Such rules force agencies to describe their procedural practices and are considered particularly helpful to persons unfamiliar with the practices of an agency.89 Procedural rules are recognized as having the force and effect of law unless they are found to conflict with the statutory requirements.90 One author states that "the adoption of procedural rules involves principally the development of a working compromise between the agency's interest in unregulated fluidity of procedure, and the public's interest in being able to ascertain in advance the mechanics which will govern the disposition of cases."91 Because procedural rules are readily identifiable as such, their adoption is not controversial.

2. Legislative Rules

Professor Davis defines legislative rules as "the product of an exercise of delegated legislative power to make law through rules."92 The term "legislative rule" is not defined in FAPA, MAPA, or the Revised Model Act and, as Professor Davis has noted, "the term 'legislative rule' or 'legislative regulation' apparently does not appear in any Supreme Court opinion."93 Legislative rules are important because of the authoritative weight of the policy they announce. Legislative rules typically have the following characteristics: (1) the rule provides sanctions for its violation; (2) the rule carries the force and effect of law; (3) the rule creates a new area of law; and (4) the rule is issued pursuant to a valid delegation of rulemaking power.94

87. See notes 99-100 infra and accompanying text.
88. See 1 F. Cooper, supra note 4, at 266-67.
89. See id. at 173. According to Professor Cooper, "the term procedural rules refers to those describing the methods by which the agency will carry out its appointed functions—rules which make provisions for the filing of applications, the institution of complaints, the serving of papers, the conduct of hearings, and the like." Id. (emphasis in original).
90. See id. at 266-67.
91. Id. at 174.
92. 2 K. Davis, supra note 2, § 7:8, at 36 (2d ed. 1979).
94. One author lists the following as characteristic of a legislative rule: (1) it is issued by an agency pursuant to a valid delegation of rulemaking authority from Congress; (2) the delegating legislation contains sanctions either in the form of imposition of penalties or withholding benefits that are applied when there is nonconformance to the regulation; (3) the delegating statute usually contains provisions which become fully operative only after an exercise of the agency's delegated authority to issue legislative rules; (4) it receives statutory force upon going into effect; (5) often the delegation is phrased in terms like, "the agency may make such rules and regulations as are necessary to effectuate
3. Interpretative Rules

An interpretative rule has been defined as "any rule an agency issues without exercising delegated legislative power to make law through rules" and as any rule that clarifies "the meaning of language in statutes or other rules without creating legally binding rights or obligations." According to Professor Davis, the meaning of the term "interpretative rules" is not made clear by either FAPA or the immediate legislative history of the act. Interpretative rules have a number of characteristics. While valid legislative rules clearly have the effect of law, interpretative rules only sometimes have the force of law. Professor Davis notes, however, that while courts are free to deny recognition to interpretative rules, they often defer to them. Another author has

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the provisions of this section"; (6) it is, in effect, an administrative statute and actually creates law where none theretofore existed; and (7) it is limited only by the doctrine of ultra vires—it must fall within the bounds of the delegated authority, must be issued in accord with procedural due process, and must not be unreasonable, arbitrary or capricious.


95. 2 K. Davis, supra note 2, § 7:8, at 36 (2d ed. 1979).
96. Asimow, supra note 25, at 523.
97. K. Davis, supra note 26, § 5.03, at 126.
98. The characteristics of an interpretative rule are described as follows:
(1) it is a rule issued by an agency not pursuant to a valid delegation of law-making power; (2) there is generally an implied power to issue such rules since it is logically impossible for an agency to effectuate the policies and purposes of the statute without limiting or expanding the coverage of the statute by interpretation of the statutory terms; (3) it is ordinarily of an advisory nature merely indicating the agency's present belief concerning the meaning of applicable statutory language; (4) it merely construes the terms of the statute and does not add anything to the statute by making new law; (5) it merely guides subordinate administrative officers in the administration of the statute and informs the public of the way the agency intends to administer the statute; (6) it does not have the force and effect of law; and (7) if there is disagreement with it, it is subject to full plenary review by a court and theoretically may be refused judicial recognition.

Warren, supra note 94, at 373.

99. For a general discussion of the legal effect of legislative rules, see 1 F. Cooper, supra note 4, at 264-65.
100. In the case of Skidmore v. Swift & Co., 323 U.S. 134 (1944), the Court determined whether an interpretation was made in the course of an administrator's official duties. In discussing the effect of interpretative rules, the Skidmore Court stated:
We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140. For a general discussion of the legal effect of interpretative rules, see 1 F. Cooper, supra note 4, at 265-66.
COURTS always have power to substitute their judgment for administrative judg-
observed that "[n]o sanction attaches to the violation of an interpretative rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets." 102

Interpretative rules are important in several respects. First, interpretative rules give the public an indication of the agency's position on various policy matters. 103 In addition to giving notice to the public, interpretative rules provide guidance to agency staff when attempting to administer the duties delegated to the agency by law. 104 Without the framework of administrative policy provided by interpretative rules, persons dealing both with and within agencies would be forced to act without clear guidance, thus creating the problem of different agency personnel interpreting the enabling legislation in different ways. 105

B. Distinctions Between Legislative and Interpretative Rules

It has been suggested that while the theoretical differences between legislative and interpretative rules are rather clear, in practice the two types of rules do not differ significantly. 106 Under FAPA, however, the distinction becomes important in terms of the procedure followed in promulgating the rules: FAPA specifically excludes interpretative rules from its rulemaking procedural requirements. 107 The exclusion of interpretative rules from the FAPA rulemaking requirements apparently is based on the desirability of encouraging agencies to make rules that are readily subject to review. 108 Despite the procedural difference in

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102. 1 F. COOPER, supra note 4, at 175.
103. See Asimow, supra note 25, at 529 ("interpretive rules and policy statements are of great importance to the public in alerting them to the agency's position on substantive matters").
104. See id.
105. See id. (interpretive rules and policy statements "are needed to guide the staff in administering the statute and in assisting regulated persons to comply with the law").
106. See Davis, supra note 16, at 932.
108. As to the exclusion of interpretative rules from formal rulemaking procedures: First, it is desired to encourage the making of such rules. Secondly, [these] types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that "interpretative" rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas "substantive" rules involve a maximum of administrative discretion.

Auerbach, supra note 40, at 158 (quoting SENATE COMMITTEE ON JUDICIARY, ADMINIS-
promulgating interpretative and legislative rules under FAPA, the argument has been made that the distinction between legislative and interpretative rules is becoming increasingly irrelevant.\textsuperscript{109} Such an argument is consistent with cases requiring agencies to provide notice and comment procedures before adopting interpretative rules having a substantial impact. Indeed, from the public viewpoint, the disadvantage of an interpretative rule is that it has, in effect, the force of law, without the requirement of public notice and an opportunity to be heard.\textsuperscript{110} Unlike FAPA, however, MAPA requires compliance with the statutory rulemaking procedures for all types of rules.\textsuperscript{111}

To illustrate the merging of legislative and interpretive rules the sections that follow will identify four basic areas in which these rules traditionally have differed and contrast that with the current approach.

\section{Authority to Make Rules}

In contrast to the traditional view that legislative rules must be adopted pursuant to a specific statutory delegation and that interpretative rules must be adopted pursuant to a general statutory grant of authority,\textsuperscript{112} the present view is that both legislative and interpretative rules can be adopted pursuant to either a specific or general statutory delegation of authority.\textsuperscript{113} The rationale for allowing rules to be adopted pursuant to a general delegation of power is based on judicial recognition that an agency's expertise must be given great deference.\textsuperscript{114}
Consequently, agencies acting pursuant to a general delegation of rulemaking authority probably can adopt legislative rules after complying with the procedural requirements.\textsuperscript{115}

2. Authoritative Weight of Rules

The traditional view of the authoritative weight of legislative rules and interpretative rules is that legislative rules have the force of law upon going into effect and that interpretative rules merely interpret existing law and do not have the force and effect of law.\textsuperscript{116} Professor Davis rejects the view that interpretative rules merely interpret existing law.\textsuperscript{117} Because interpretative rules are based on agency experience, policy considerations, and court decisions as well as conventional methods of interpretation, Professor Davis states that such rules go far beyond mere interpretations.\textsuperscript{118} Professor Asimow points out that as a matter of practice, courts defer to interpretative rules,\textsuperscript{119} thereby adding to their authoritative weight.

Three situations have been identified in which the weight given to interpretative rules is said to approximate the force of law.\textsuperscript{120} The first situation arises when the interpretative rule is made, contemporaneous with the enactment of the enabling statute, by agency personnel familiar with the legislative intent.\textsuperscript{121} The second situation arises when the administrative interpretation has been adhered to for a long time.\textsuperscript{122} Finally, interpretative rules are given the force of law when the underlying agency possesses expertise not shared by the courts. Where once it might have demanded proof of specific delegation of legislative rule-making authority, the court stated that it had learned from experience to accept a general delegation of power as sufficient in certain areas of expertise.

\textit{Id.}

115. See id. at 563.


117. See Davis, \textit{supra} note 16, at 933.

118. See id. "So long as the rules represent an interpretation of the statute which is acceptable to the court, they possess (in one sense) the force of law. But they lose all force and effect if held to be an incorrect interpretation." 1 F. COOPER, \textit{supra} note 4, at 265.

119. See Asimow, \textit{supra} note 25, at 565.

120. See Davis, \textit{supra} note 16, at 936.

121. See id. at 936-37.

122. See id. at 938-39. In Helvering \textit{v. Winmill}, 305 U.S. 79 (1938), the Court stated: "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." \textit{Id.} at 83 (footnote omitted).

The Minnesota court went further in \textit{Ingebritson v. Tjernlund Mfg. Co.}, 289 Minn. 232, 183 N.W.2d 552 (1971). The \textit{Ingebritson} court stated: "A reasonable departmental practice in the administration of the statute is normally accorded substantial consideration, . . . but even a longstanding administrative practice is not binding if it is erroneous or contrary to the plain meaning of a statute." \textit{Id.} at 237, 183 N.W.2d at 554-55 (citation omitted) (footnote omitted).
enabling statute has been reenacted by the legislature.\textsuperscript{123} Consideration of this third situation has not been limited to interpretative rules but also has been applied in determining the validity of a legislative rule.\textsuperscript{124}

3. Judicial Review

A third area in which an obvious distinction traditionally existed between legislative and interpretative rules is the scope of review of such rules. The traditional approach viewed interpretative rules merely as agency opinion with the courts left free to substitute their own judgment.\textsuperscript{125} Legislative rules, however, were overruled only when they were arbitrary or capricious or not rationally related to the underlying statute.\textsuperscript{126} The current approach of the courts has been to scrutinize the entire record supporting legislative rules more carefully, while requiring a less intense examination of the record supporting interpretative rules.\textsuperscript{127} Professor Asimow states that a distinction in the scope of review for legislative and interpretative rules should be maintained.\textsuperscript{128} Since not all interpretative rules are thoughtfully drafted, Professor Asimow would allow courts to "retain their power to substitute judgment on issues of law, giving deference to the administrative interpretation when appropriate, but substituting judgment when the court's superior ability in statutory construction or its broader policy perspective is called for."\textsuperscript{129}

4. Retroactivity

The actual distinction between legislative and interpretative rules is greater in theory than in practice in the area of retroactivity. Traditionally, legislative rules were applied prospectively and interpretative rules were applied retroactively.\textsuperscript{130} Retroactive legislative rules, however, should be valid only in the same exceptional situations in which statutes are retroactive.\textsuperscript{131} In addition, another obstacle to applying a legislative rule retroactively is that agencies have no power except those conferred by the legislature, and the power to issue retroactive rules is not easily implied.\textsuperscript{132} On the other hand, the argument for making interpretative rules prospective is based on the many definitions of "rule" that include language requiring that "rules" be of "future effect" and on the fact that

\begin{itemize}
  \item \textsuperscript{123} See Davis, supra note 16, at 939-43.
  \item \textsuperscript{124} See id. at 943.
  \item \textsuperscript{125} See Asimow, supra note 25, at 563.
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} See id. at 564-65.
  \item \textsuperscript{128} See id. at 567 ("[I]t would be undesirable if the differences [between the scope of review for legislative and interpretive rules] were wholly to disappear.").
  \item \textsuperscript{129} Id. (footnote omitted).
  \item \textsuperscript{130} See id. at 569.
  \item \textsuperscript{131} See id. at 569-70; Davis, supra note 16, at 944-45.
  \item \textsuperscript{132} See Davis, supra note 16, at 945.
\end{itemize}
people rely on interpretative rules in determining what course of conduct to follow.133

C. The Minnesota Approach

In McKee v. Likins,134 the Minnesota Supreme Court for the first time expressly recognized three types of rules—procedural, legislative, and interpretative.135 While avoiding the issue of whether the Minnesota Department of Public Welfare had attempted to publish a procedural, legislative, or interpretative rule in adopting the policy bulletin,136 the McKee court found that the bulletin “involved a question of social and political policy so important to the public as a whole as to require that the rulemaking process of the Minnesota Administrative Procedure Act be followed.”137 In addition, the court interpreted MAPA as requiring the notice and public hearing requirements to be followed when issuing either legislative or interpretative rules.138

The McKee decision is important in Minnesota administrative law in two respects. First, the Minnesota court attempted to clarify what kind of agency activity will be considered rulemaking. In addition, the court chose to go beyond MAPA and expressly recognized three types of rules: procedural, legislative, and interpretative.139

After the McKee decision, the Minnesota Supreme Court, in a limited discussion, attempted further to define the three types of rules. In Minnesota-Dakotas Retail Hardware Association v. State,140 the court examined rules promulgated by the Consumer Services Section of the Minnesota Department of Commerce. The rules at issue in Minnesota-Dakotas were promulgated according to the notice and comment mandate of MAPA.141 The rules were challenged on the ground that the agency had no statutory authority to make substantive rules.142 The court found that the enabling legislation did not authorize the promulgation of legislative regulations having the force of law, and refused to construe the statute as conferring upon the agency the implicit authority to adopt legislative rules.143 The court further held that “[w]hile it is true that Consumer Services does not have legislative rule-making power, we conclude that these rules come within the statutory power conferred upon Consumer Services to promulgate interpretative rules and are a valid ex-

133. See Asimow, supra note 25, at 570-71.
134. 261 N.W.2d 566 (Minn. 1977) (per curiam).
135. See id. at 577.
136. See id. at 577-78.
137. Id.
138. See id. at 578.
139. See id. at 577.
140. 279 N.W.2d 360 (Minn. 1979).
141. See id. at 362.
142. See id.
143. See id. at 364.
exercise of that power."  

In reaching its decision, the Minnesota-Dakotas court first examined the enabling legislation of the Consumer Services Section. The legislation authorized the Section to adopt rules to implement the statutory language. The court then acknowledged the existence of the three types of administrative rules set forth in McKee. The Minnesota-Dakotas decision, however, went beyond the McKee decision in that the court attempted to define interpretative and legislative rules. Interpretative rules were defined by the court as "those rules coming within the definition of 'rule' . . . which are promulgated to make specific the law enforced or administered by the agency" and legislative rules were defined as those rules "enacted pursuant to delegated powers to make substantive law, and, in contrast to interpretative rules, have the force and effect of law."

In a footnote, the court attempted to distinguish between the procedural requirements of FAPA and MAPA:

Unlike the federal administrative procedures act, Minn. St. ch. 15 does not except interpretative rules from the procedural requirements for adoption of regulations. Minn. St. 1974, § 15.0413, subd. 1, which provided that agency standards, statements of policy or interpretations of general application and future effect did not have the effect of law unless adopted as a rule in accordance with ch. 15, was repealed by L.1975, c. 380, § 3. Under the current statute, all "rules," as defined by § 15.0411, subd. 3, whether or not they have the effect of law, are subject to the statutory rule-making procedure. . . . Only agency rules concerning internal management which do not directly affect the rights of or procedure available to the public or certain rules of specified agencies are excluded from the procedures set forth in ch. 15.

Although the court was correct in its statement that MAPA, unlike FAPA, does not exclude interpretative rules from its procedural requirements, its statement that all rules are subject to the procedural requirements of MAPA, whether or not they have the force of law, indicates that the court was not familiar with all of the provisions of MAPA. The footnote language contradicts section 15.0413 of MAPA, which provided in relevant part that "[e]very rule approved by the attorney general and filed in the office of the secretary of state . . . shall have the force and effect of law 20 days after its publication in the state register unless a

144. Id.
145. See id.
146. See id. The court found that section 45.16 of Minnesota Statutes authorized Consumer Services to "[a]dopt, pursuant to the administrative procedures act, rules and regulations to implement the provisions of this section." Id.
147. See id.
148. See id. at 364-65.
149. Id. at 364 (footnote omitted).
150. Id. at 365.
151. See id. at 364 n.6 (emphasis added).
later date is required by statute or specified in the rule. 152 This lan-
guage clearly gives the force and effect of law to all rules adopted in
compliance with statutory rulemaking procedures.

In recognizing and defining legislative and interpretative rules, the
Minnesota-Dakotas court adhered to the traditional view of such rules
rather than to the more practical view which recognizes that the distinc-
tions between the two types of rules are often blurred. 153 For example,
the court distinguished between the legal effect of the two types of rules,
and refused to imply a grant of statutory power to adopt legislative
rules. 154

The approach taken by both the Minnesota Legislature and the Min-
nesota Supreme Court in declining to exclude interpretative rules from
the rulemaking procedures of MAPA is consistent with the growing idea
that the public should be allowed to participate in the adoption of rules
that have a substantial impact on private rights and obligations, regard-
less of whether the statute requires participation. 155 Some commentators
have suggested that perhaps interpretative rules should be expressly ex-
cluded from the procedural requirements of administrative procedure
acts because the procedural requirements may discourage agencies from
issuing clarifying statements. 156 On the other hand, because of the
practical difficulty in always distinguishing between legislative and inter-
pretative rules, the comment has been made that an exclusion for inter-
pretative rules makes it possible for agencies to circumvent rulemaking

that every rule, regardless of whether it may be substantive, procedural, or interpretive,
has force and effect of law)).

153. See notes 106-33 supra and accompanying text.

154. See 279 N.W.2d at 365. The Minnesota-Dakotas court stated:

In the instant case, however, authorization for the promulgation of legisla-
tive regulations with the force and effect of law . . . is absent from the statute,
and, as we recently stated in State, by Spannamus v. Lloyd A. Fry Roofing Co., 310
Minn. 528, 534, 246 N.W.2d 696, 700, n.6 (1976):

". . . Courts cannot properly aid the agency by construing the stat-
ute to confer upon it implicit authority, when to do so would contra-
vene the legislature's apparently deliberate failure to explicitly grant it
such authority."

Id.

155. See Auerbach, supra note 40, at 159. The author states:
Professor Kenneth Culp Davis points out that, even on the federal level, the idea
is growing that fairness requires that the public be afforded the opportunity to
participate in the making of those rules that have substantial impact on private
rights and obligations whether or not FAPA mandates such an opportunity.

Id. (footnote omitted).

156. See id. at 158; accord, Asimow, supra note 25, at 575. Professor Asimow has ob-
served that "[t]he APA draftsmen wished to encourage the adoption of interpretive rules
and policy statements by not requiring burdensome procedures. They were also con-
cerned by the inappropriateness of mandating a single, rigid procedure for the many
forms that nonlegislative rulemaking may take." Id. (footnote omitted).
procedures. One author, who favors an exemption for interpretative rules, suggests that agencies voluntarily subject themselves to rulemaking procedures when it is feasible and useful. While there are no clear answers as to which route would best encourage both public participation and clarifying statements from agencies, it does not appear to make much difference what agencies call the rules they adopt since all rules adopted in compliance with MAPA have the force and effect of law.

**IV. CONCLUSION**

The Minnesota Legislature is the proper source to look to for clarification of the status of administrative rules in Minnesota. This Note has identified several areas in need of change or clarification.

First, the legislature should define the three rule types—procedural, legislative, and interpretative—identified by the Minnesota court. While the Minnesota court has yet to undertake any more than an abbreviated analysis of these rule types, the court has defined them according to traditional distinctions. Although theoretically the distinctions are sound under a FAPA-type statute, the practical reality of agency activity under the various rule categories indicates that the distinctions are more blurred than real if all rules must satisfy the formal rulemaking requirements.

Because of this, the Minnesota Legislature should clarify the status of interpretative rules by determining whether Minnesota, like the federal government, also wishes to exempt interpretative rules from the procedural requirements of MAPA. Unless MAPA is amended to distinguish between the legal effect of procedural, legislative, and interpretative rules, or to exempt interpretative rules from its procedural requirements, it is questionable whether the different categories of rules have any real significance. Requiring compliance with notice and comment rulemaking procedures is consistent with the trend of encouraging greater public participation in the adoption of all types of rules.

Undoubtedly, it is questionable whether a definition of "rule" will ever be precise enough to encompass all types of agency rulemaking activity. As Professor Davis has stated:

> If the legislators were omniscient and had at their disposal linguistic precision tools, the interpreter's function would involve no more than finding and applying the meaning of words. But since legislators can neither anticipate all problems nor define terms with minute exactness, judges must necessarily cooperate with legislators in trying to build a sound and workable system. Judges who rest interpretations solely

157. See Auerbach, supra note 40, at 158.

upon abstract meanings of words fail to do their part as working partners with legislators. The meaning of such a term as “rule” must frequently depend not only upon word contexts but also upon practical contexts.159

159. Davis, supra note 16, at 924.