# Chapter 3 - Rule Development

## Introduction

### General

An agency adopts rules to implement or make specific the law enforced or administered by the agency or to govern its organization or procedure.[[1]](#footnote-1) Rule development is a huge topic, one that could fill an entire manual of its own. Given the focus of this Manual, however, this chapter will hit the high points of rule development. These points include the foundation or basis for the rules, input on rule development, and rule drafting. You should review this chapter before proceeding with your rule.

Consider simultaneously working on sections of the SONAR as rules are being developed. It is especially useful to capture the rationale for new rules or changes to include in the rule-by-rule analysis section of the SONAR. This will save you work later. Remember, though, that if rule language changes, you must update the SONAR.

### Expectations management and staff assignments

Before you start developing and writing the rules, you need to define responsibilities in your agency for the rulemaking project. Clearly establishing who is doing what is imperative.Who will write the various parts of the rules and the SONAR, who will edit and proofread, who will be responsible for compliance with the rulemaking process, who will send and sign notices to the Governor’s Office, and who will oversee that each of these things are completed?

Also, consider consulting with in-house counsel or the agency’s rules coordinator.In a small agency or program, this planning is easy—you just do everything. Where you have a group of people involved in the rulemaking process, this planning will turn the group into a team.

## 3.1 The Foundation or Basis for the Rules

These are the things that you should verify before you begin work on your rules.

### 3.1.1 Statutory authority

The basis for every set of rules or rule amendments is statutory authority. Statutory authority can come in the form of a statute or session law that authorizes or directs the adoption of a specific set of rules, or a statute might give an agency general authority to adopt rules to carry out its assigned duties. Without statutory authority, an agency cannot adopt rules.

### 3.1.2 Limits of statutory authority

When you start a rule project, carefully review your statutory authority. If you have specific statutory authority for your set of rules, follow the direction established by your grant of rulemaking authority and stay within any stated limitations contained in the grant. If you are relying on a general grant of rulemaking authority to adopt rules to carry out duties assigned to the agency, you will find your direction and limitations in the statutes that set out the duties assigned to the agency. In general:

* A rule must not exceed statutory authority conferred to the agency.
* A rule must not conflict with the governing statute or applicable law.
* A rule must have a reasonable relationship to the statutory purpose.
* A rule must not be unconstitutional, arbitrary, or unreasonable.

**Note**: Your statutory authority might derive from more than one source and thus could be complicated. You might need to seek legal advice for building your case or properly describing your authority.

### 3.1.3 Statutory authority expiration

For certain rules, statutory authority expires 18 months after the effective date of the law authorizing the rules.[[2]](#footnote-2) An agency must publish a Notice of Intent to Adopt Rules or a Notice of Hearing within 18 months of the effective date of the law authorizing or requiring the rules. If the agency does not meet this deadline, the rulemaking authority expires.

This provision applies to first-time rule adoptions under the statutory authority and not to amendments or repeals of the rules if the statutory authority was originally used within the time limit. Be aware, however, that if the Legislature amends your long-standing statutory authority, it might trigger this 18-month requirement.

### 3.1.4 Time frame for developing and adopting rules

It takes between six months and two years to develop most sets of rules, and then another four to eight months to complete the rules adoption. If a newly authorized set of rules is complex or controversial enough that you will take more than 18 months to develop the rules, you should work with the legislature to obtain an exception from Minnesota Statutes, section 14.125, if the section applies.

### 3.1.5 Clearly understand the need for your rules

After you determine that you have statutory authority for rulemaking, the most important thing to do is clearly set out why you are writing rules. This will give direction to the entire rulemaking project. A statutory mandate to adopt rules will, by itself, establish the legal basis for need in your SONAR, but it will not guide you in developing the rules. In this case, you need to find out the underlying issue that compelled the legislature to mandate the adoption of rules and what the legislature wants the rules to accomplish. If your rules are to implement statutory duties or to address a problem under a statutory duty, then these duties or the issue should be your focus throughout the entire rule project.

As noted in section 2.4, it is highly recommended that you put forth the effort to craft a high-quality Governor’s Preliminary Proposal Form before publishing the Request for Comments. Committing your thoughts to writing at the beginning will help you throughout the project to clearly understand the need for your rules and to focus on your goals.

### 3.1.6 Keep your options in mind from the beginning

As you develop your rules, it is a good idea to keep in mind your future procedural choices for adopting the rule.

You have three choices:

1. Notice of Hearing
2. Notice of Intent to Adopt Rules Without a Public Hearing
3. Dual Notice, where you give notice of a hearing date, but you state that you will cancel the hearing and adopt the rules without a hearing if fewer than 25 people request a hearing.

While this step might feel remote, knowing how to put your rule development into the context of proposing them for adoption will help you. You can better gauge how your development is progressing so you can guide or determine your path. See Chapters 5, 6, and 7 for additional information about these three options.

## 3.2 Input on Rule Development

Getting public input is very important. There are many ways to do this. The following list has many good ideas about getting input on rule development, but it is by no means exhaustive. Rule development is an art, not a science. Be creative in finding ways to get input when developing rules.

### 3.2.1 Agency leadership

Agency leadership needs to be involved throughout rule development. At the outset of the rule project, the agency leadership should set or approve the direction of the project. To help the agency leadership, prepare an initial proposal directed to them to ensure that they understand and approve the reason for the rule project and any fiscal implications.

Throughout the process, there needs to be communication between the agency leadership and any advisory committee so that each knows the other’s positions and so that there are no surprises at the end of the process. It would be a major problem to develop a set of rules and then have your leadership see the proposed rules for the first time and disapprove an important advisory committee recommendation. Additionally, a major decision by your leadership needs to happen early enough in the rule development process so that the advisory committee has a meaningful chance to respond to the leadership’s decision.

Make sure that your leadership knows the rulemaking requirements. Even though they make the final decisions about rules, they must do so within their statutory authority and ensure rules are needed and reasonable.

**Note:** At each important approval point in the process, make sure to leave enough time for formal approval by the agency leadership.

**For multimember boards:** When an agency is governed by a multimember board, the opportunities are limited for getting direction and approval on the rules. In most cases, you can discuss the rules with the board or get direction or approvals only at board meetings. It will likely take more time to adopt rules for an agency governed by a multimember board than for an agency headed by a commissioner.

### 3.2.2 The agency’s Assistant AG

The role of the agency’s Assistant AG varies from agency to agency and for each set of rules. The role is determined by the agency and depends on such things as the availability and experience of the rule writer and the legal issues involved. For agencies without in-house counsel (generally boards), the agency may ask its AG to review for legal issues such as constitutionality, enforceability, and impermissible discretion. In some cases, the agency will ask its AG to be actively involved in drafting the rules, participating in advisory committee activities, and participating in a hearing, if one is required.

### 3.2.3 Request for Comments

The starting point for getting input on rule development is the Request for Comments. The agency must publish the Request for Comments in the *State Register*. In addition, the agency should seek information by other methods designed to reach affected persons.[[3]](#footnote-3)

### 3.2.4 Interested legislators

Interested legislators include any who have expressed an interest in the rule project or in the legislation that authorizes or requires the rulemaking. Interested legislators could also include those listed in Minnesota Statutes, section 14.116. Put interested legislators on your rule project mailing list to keep them informed of the progress of the rule project.

Even though individual legislators do not have authority to adopt or dictate the content of rules, their comments should be carefully considered and given great weight, especially if they give insight into the background and development of the underlying legislation.

### 3.2.5 Advisory committee

An agency may decide to appoint an advisory committee to help develop the rules.[[4]](#footnote-4) For controversial or complex rules or for rules that require in-depth knowledge of an industry, advisory committees are highly recommended.

#### 3.2.5.1 Forming an advisory committee:

* In some cases, advisory committees are mandated by statute and the agency must submit rules to the committee for review and comment before the rules can be proposed for adoption. When you have such an advisory committee, it is usually a good idea to get them involved early.
* Generally, you should keep the advisory committee to a workable size of no more than 15 people. However, your agency may decide that a larger advisory committee is necessary.
* Find out which people or groups are interested in the rulemaking and invite them to be on the advisory committee. Include friends and supporters of the rules and get their advice on record. Include likely opponents of the rules. Put them in the position to hear all sides and keep yourself neutral. Discussion by people with opposing views tends to moderate the views, and all advisory committee members might gain pride of ownership in the rules and become “defenders” of the rules. By including both supporters and opponents, you will ideally be able to resolve the controversial issues, avoid unintended consequences of a proposed rule, and possibly avoid a hearing. At the very least, you will identify controversial issues before the hearing, which allows you to prepare.
* To find out who the interested parties are, ask yourself several questions, including: Who participated in the legislative process when the rulemaking was first authorized? Who will benefit from these rules? Who is going to be upset by these rules? Who would want to know about these rules?
* If there is a potential policy impact on other state agencies, include them on the advisory committee and, as a courtesy, get a response from the other agency before making proposals related to any important issues.
* Have someone from the agency act as the chair for advisory committee meetings. The chair must ensure that issues are raised and discussed in a timely manner and that reluctant or shy parties are encouraged to participate.
* Open your advisory committee meetings to all. Allow interested parties to attend. If someone who is not on the committee wants to speak, let them.
* Use the advisory committee until your agency adopts the rule.
* Some agencies keep meeting agendas and minutes, post both online, and include them in their SONARs.

**Note**: Choosing members of your advisory committee is an informal process that does not require an application or formal appointment through the Secretary of State.

#### 3.2.5.2 Role of advisory committee

The advisory committee’s role is to advise. The committee has the power to inform and persuade the agency, but ultimately, the commissioner or board makes final decisions. Be sure to inform the advisory committee members of their role so they understand their advisory status and do not presume they have the authority to write, adopt, and administer the rules. It’s a good idea to remind them of this, maybe as often as every meeting. Tell the advisory committee members that each of them likely represents an interest group and encourage them to maintain communication with the interest group. The appendix has an information sheet, **ADV-COMM**, that you can customize and give to advisory committee members to summarize the rulemaking process and the advisory committee’s role.

#### 3.2.5.3 Working with an advisory committee

* It can be difficult to draft rules by committee. You should give the committee a draft of the rules early in the process so they have something to react to, but you might want to wait for one or two meetings before providing the draft. This allows the committee to discuss and identify issues without the structure and limitations imposed by a draft.
* For new rules, it may be helpful to provide an outline of the topic areas.
* For controversial issues, it may be helpful to develop a policy draft (or one-pager) explaining your rationale for the rule. Route these issues and policy drafts through the agency chain of command and discuss them with the advisory committee early in the process.
* Advisory committee members can help to get the word out about the rulemaking. Emphasize their responsibility to the committee as representatives and ask them to spread the word. Repeat this reminder, maybe as often as every meeting.
* In cases where there are opposing views on the rules within the advisory committee, you may want to use a mediator. Contact the Docket Coordinator at Office of Administrative Hearings to find out the availability of mediators. It is important to achieve consensus within the advisory committee as much as is practical, but it is not required to move forward.
* For especially controversial or complex rules, you might want to augment the advisory committee schedule from time to time with town hall meetings or listening sessions on special topics with the public.
* Do not make promises about the content of rules. There can be problems when you promise to include certain language in the rules before the formal adoption process and before all interested parties have had a chance to comment. It is certainly okay to promise that you will carefully consider all comments and suggestions and that you will be straightforward with the advisory committee.

#### 3.2.5.4 Using advisory committee discussions to help you write your SONAR

Advisory committee discussions are an invaluable source of information for you when writing your SONAR. Tell the advisory committee members that it is important for them to give reasons for their recommendations. Keep notes of advisory committee discussions with the SONAR in mind.

1. **Regulatory analysis**

A broadly representative advisory committee is probably your best source of information for doing the regulatory analysis. Ask the advisory committee members to give their opinions on the eight factors that the agency must analyze and on ways that the rules can emphasize superior achievement and maximum flexibility. Run these opinions through your own filter to make sure they make sense and are balanced.

1. **Cost analysis**

A broadly representative advisory committee will also probably be your best source of information for doing the cost analysis under Minnesota Statutes, section 14.127. Ask the advisory committee members to give their opinions on the cost of compliance for small businesses and small cities, along with how they made their estimates. Also ask them to verify if there are no costs so that you can report this later in your SONAR (*see* chapter 4). Again, run these opinions through your own filter to make sure they make sense and are balanced.

#### 3.2.5.5 Thank the advisory committee.

Be sure to thank the advisory committee members at the end of the committee process for their participation and suggestions and let them know that their work and participation as committee members makes the final rules better and more workable for everyone. Acknowledging their service with certificates of appreciation reinforces your gratitude. Mailing the certificates or having a party to give them out are very gracious ways to bestow them.

### 3.2.6 Written comments

It is important to keep careful track of all comments received so that the agency can consider and respond to any policy issues raised. Another important reason to keep track of the comments is to keep all commenters informed throughout the remainder of the rulemaking process. Log the name, address, summary of the comment, and agency response for all written comments. Put each person who commented on a mailing list for the Notice of Intent to Adopt Rules. Some agencies will send a standard response letter to all persons who comment, thanking them for the comment and telling them that they will be put on the mailing list for the Notice.

**Note:** You don’t have to respond to comments received before you formally propose the rule in the *State Register*; these comments aren’t part of the formal rulemaking record. But depending on the rule and how many comments you receive; you could include them in the rulemaking record to demonstrate the agency’s good-faith effort in engaging stakeholders while developing the rules.

### 3.2.7 Expert opinions

Get expert opinions (for example, economist, mathematician, medical experts, scientists, other subject matter experts, etc.) when it is appropriate to support your rule and the rationale for adopting it.[[5]](#footnote-5)

**Note:** Even if you don’t have an advisory committee, you can get expert opinions.

### 3.2.8 Review other similar rules and laws

Review other rules and laws on related or similar topics for drafting examples. Look within your own agency and other agencies that do similar types of rules. Also, you might find rules on your subject matter that have already been drafted and adopted by other states.

### 3.2.9 Review past rulemaking records for policy reasons behind rules

Amending existing rules is often easier than first adopting rules because of the availability of the rulemaking record compiled during the original adoption. The rulemaking record reflects an agency’s formulated policy. A rule writer should review all prior rulemaking records to understand the circumstances that created the need for the rules and any amendments and why the rules and amendments were needed and reasonable.

### 3.2.10 Governor

As previously mentioned, the agency must submit the rules to the Governor’s Office three times throughout the rulemaking process, including during the draft stage. (See **GOV\_PLCY** in the appendix.)

### 3.2.11 The Minnesota Department of Management and Budget (MMB) consultation about local government impact

The APA requires agencies to consult with MMB to help evaluate the fiscal impact and benefits of the proposed rules on local governments. A form for a letter to your Executive Budget Officer (EBO) is in the appendix as **MMB-LTR**. Send this at the same time as you send the Governor’s Office the Proposed Rule and SONAR form. Include the same materials that you send the Governor’s Office. If you need assistance, contact your EBO to initiate the consultation with MMB.

MMB will confirm the agencies’ determinations with its own letter. OAH prefers that agencies include a copy of its letter and any response when it submits its record for OAH review.

You do not need to wait for MMB’s response before moving forward with your rulemaking, but you must include it in your submission to OAH.

## 3.3 Rule Drafting

The following are comments and suggestions about rule drafting.

### 3.3.1 The Revisor’s role in rule drafting

* The Office of Revisor of Statutes plays an essential role in rule drafting. Refer to the [Revisor’s website (http://www.revisor.leg.state.mn.us/rules/)](http://www.revisor.leg.state.mn.us/rules/) for staff and policy assignment areas.
* Before the proposed rules and Notice of Intent to Adopt Rules may be published, the proposed rules must be in the Revisor’s format, and there must be a Revisor’s certificate saying the rules are approved as to form.
* When amending rules, get an electronic copy of existing rule text by either calling the Revisor’s Office or going to the [Revisor’s website (http://www.revisor.leg.state.mn.us/rules/)](http://www.revisor.leg.state.mn.us/rules/). Do this early in the project.
* When should you first ask the Revisor for a Revisor’s draft? In the early stages of developing your rules, you may want your drafts on your own computer so that you can easily work on them and make changes. You should ask the Revisor for a Revisor’s draft when the rules are in almost final form. The Revisor’s draft is a PDF document, which is more difficult to edit than a Word document on your own computer.
* If you have not worked on rules for a while (or ever), you may contact the Revisor’s Office early in the process to get advice on drafting rules; however, you might still want to wait until the rules are in almost-final form to get a Revisor’s draft.
* It is not necessary to have approval from the Governor’s Office before beginning work with the Revisor’s Office.
* To get draft rules in the Revisor’s format, you must provide the Revisor the draft language and ask the Revisor to produce a Revisor’s draft. Emailing an electronic copy is the most expedient and common way to provide draft language. The Revisor will input your rules and, as necessary, assign rule part numbers and titles; edit to make sure the rules are in the correct style and format for *Minnesota Rules*; edit for grammar, spelling, and clarity; and point out potential rule-related legal problems, including impermissible discretion. Make sure to compare the Revisor’s draft with the draft you provided so you are aware of any changes the Revisor made and can ensure the Revisor’s editorial changes do not make substantive changes.
* As you work through the rule development process, you may request updated Revisor’s drafts. There is no limit to how many drafts that the Revisor can produce for you—it could be 5, or it could be 50. When your rules are ready to propose, give the Revisor any last changes and ask for a draft approved for publication—this draft will include a certification page with the Revisor attorney’s signature.
* The time it takes to get an initial Revisor’s draft may be anywhere from several days to several weeks, depending on how busy the Revisor is with the legislative session or other projects. A Revisor’s draft approved for publication can generally be produced quickly if there are few changes from the preliminary draft. It is helpful to communicate your anticipated timeline to the Revisor’s Office.
* Use the following Resources from the Revisor when drafting your rules:
  + [Minnesota Rules Drafting Manual with Styles and Forms (https://www.revisor.mn.gov/static/office/1997\_RuleDraftManual.a285c37112da.pdf)](https://www.revisor.mn.gov/static/office/1997_RuleDraftManual.a285c37112da.pdf)
  + [Rulemaking in Minnesota: A Guide (https://www.revisor.mn.gov/static/office/pubs/2018\_all\_rulemaking\_guide.491681155472.pdf)](https://www.revisor.mn.gov/static/office/pubs/2018_all_rulemaking_guide.491681155472.pdf)

### 3.3.2 Draft clearly

When writing a requirement, clearly state who the requirement applies to and what must be done.

* Use active voice: “The licensee must keep the purchase agreement on file.” (This statement clearly identifies the actor responsible for carrying out the duty.).
* Try not to use passive voice: “The purchase agreement must be kept on file by the licensee.” Passive voice is fine if you want to emphasize what is being acted upon. But generally, in legal drafting, active voice should be used because it is clearer, more direct, and more concise.
* Do not use truncated passive: “The purchase agreement must be kept on file.” (Who must do this?). An exception is when the reader doesn’t need to know who is acting or the actor is clear from the context or previous sentences.
* It is acceptable to fix errors or clarify existing text outside of the scope of your rules (such as grammatical changes, formatting, etc.).
* Be consistent in using terms and phrasing similar requirements. Use identical language and construction wherever possible in similar requirements. For example, do not use “machine shop,” “machining business,” and “machining company” in successive paragraphs to describe the same entity. Instead, use one of these terms throughout.
* Write rules clearly so that the public knows what is required and what is prohibited. Start with a noun, add a verb, and see what else you need.
* Avoid using vague terms, known as weasel words, that are commonly flagged by OAH as unduly vague. The following are examples of words that have been cited by an ALJ as vague:

Acceptabl\*

Adequate\*

Applicable

Appropriate

At least

Complete

Determine\*

Discretion

Good faith

Including but not limited to

Material

Materially

May

Might

Pertinent

Reasonabl\*

Require\*

Responsibly

Satisfact\*

Should

Substantial

Sufficient

Such as

Will

Willful

* + When practical
* Eliminate jargon and legalese and replace with commonly used and understood terms.
* Break up unnecessarily long sentences. Sentences should average 25 words or less. Use items but avoid going below the subitem level.
* Break up long paragraphs. Paragraphs should average 60 words or less.

### 3.3.3 Draft with enforcement in mind

Write clearly with specific, measurable requirements that your agency can enforce consistently. Obviously, the agency must be able to enforce the rules it adopts. Break requirements into separate subparts or items so that agency staff can easily cite individual infractions for enforcement purposes.

### 3.3.4 Definitions

Define all words used in the rules that do not have common meanings. Compare the definition in similar rules and statutes from your agency and other agencies so that terms are defined consistently as much as possible. Be consistent in how you use defined words throughout the rules. **And remember**, definitions should not be used to convey policy—that is, don’t include substantive requirements in a definition.

Rules are often organized so that definitions are the first section of the rules. You should use a definition, however, only as the need arises; namely, when you are going to use the term in a substantive rule provision. Therefore, write policy first and see what definitions you need to give the policy effect.

### 3.3.5 Layout

When structuring a new set of rules, try to use the Revisor’s format of part, subpart, item, and subitem from the very beginning of the project.

For example:

**1400.2400 Title**

Subpart 1. **Headnote.** Paragraph

1. Item A
2. Item B
3. Item C
   1. Subitem (1)
      1. Unit a
      2. Unit b
   2. Subitem (2)
4. Item D

Subp. 2. **Headnote.** Paragraph

The basic structure for the final set of rules is definition, scope, substantive requirements. While drafting the rules, it is often helpful to work backward. First, focus on what must be done (substantive requirements), then determine by whom (scope), and finally, fill in the details (for example, definitions). For more detailed guidance on structuring new rules, see the [Revisor’s Rule Drafting Manual (https://www.revisor.mn.gov/static/office/1997\_RuleDraftManual.a285c37112da.pdf)](https://www.revisor.mn.gov/static/office/1997_RuleDraftManual.a285c37112da.pdf).

### 3.3.6 Incorporation by reference

An agency may incorporate by reference text from other sources into its rules, such as publications, documents, industry standards, and text from the *Federal Register* or *State Register*. However, text from Minnesota Statutes, Minnesota Rules, United States Statutes at Large, United States Code, Laws of Minnesota, Code of Federal Regulations, and other laws should not be incorporated by reference. Instead, cross-reference the language in your rule. For example, use “As provided under Code of Federal Regulations, title X…” not “Code of Federal Regulations, title X, is incorporated by reference.”

To incorporate other sources,the Revisor’s Office must determine that the text is conveniently available to the public, and the rule must contain a statement of incorporation. “Conveniently available to the public” means “available for loan or inspection and copying to a person living anywhere in Minnesota through a statewide interlibrary loan system or in a public library without charge, except for reasonable copying fees and mailing costs.” The statement of incorporation must “include the words ‘incorporated by reference’; must identify by title, author, publisher, and date of publication the standard or material to be incorporated; must state whether the material is subject to frequent change; and must contain a statement of availability.”[[6]](#footnote-6)

The Revisor’s Office considers material to be conveniently available to the public if it is available free online or is available through the Minitex interlibrary loan system. If the material you seek to incorporate is not conveniently available, the Revisor will require that you submit two copies of the material to be catalogued at the State Law Library to make it available through Minitex (one for reference and one for circulation).

While statute requires that you state whether the material is “subject to frequent change,” what constitutes “frequent change” is undefined, and there is no significance attached either way. For practical purposes, material that is updated at least annually should be described as “subject to frequent change.”

**Note**: To avoid future problems of interpretation, make sure your rules clearly reflect whether the incorporated-by-reference text is incorporated “as amended” or is subject to the agency’s changes. For example, Minnesota Rules, part 4720.0350 states:

**4720.0350 RULES AND STANDARDS ADOPTED BY REFERENCE.**

The National Primary Drinking Water Regulations in Code of Federal Regulations, title 40, part 141, and sections 142.40 to 142.64, *are incorporated by reference* in parts 4720.0200 to 4720.3970 *and are subject to the alterations and amendments contained in parts 4720.0200 to 4720.3970*. [emphasis supplied]

Also note that incorporating text by reference is *not* an unconditional right. An agency may always cross-reference state and federal law, including future amendments (except where there is clear legislative intent to the contrary, and perhaps whenever the federal Internal Revenue Code is involved). You will have to make your case, however, to the Revisor’s Office for using other sources and incorporating future amendments to them. While further discussion is beyond this Manual’s scope, you should know that there are limits to incorporations of future amendments. Seek legal advice if this issue becomes a sticking point.

### 3.3.7 Miscellaneous

* At the bottom of each page of a rules draft, print a footer with the date of the draft. This is a good idea because somewhere between the 3rd and 13th draft, you will lose track of what you did when. The footer should be in the general form: “[Topic] Rules Draft Dated [MM/DD/YR] - Page #.” When you are ready to submit your draft rules to the Revisor for a Revisor’s draft, include in the footer that it is the draft submitted to the Revisor.
* Outcome-based rules or performance standards are favored by the legislature over design or operational standards. Outcome-based rules or performance standards are, however, harder to write and enforce. One way to draft outcome-based rules is to start with operational standards, but to allow a variance if the regulated party can ensure the same or better level of safety or emissions or whatever is the purpose of the operational standards.
* *Shall* versus *must*. Disputes over *shall* have rendered it a very unfavorable word for drafting,[[7]](#footnote-7) making “must” the favored word of most plain-language experts. Under statute, *shall* and *must* are defined as “mandatory.”[[8]](#footnote-8)
* The use of “*may”* is restricted to circumstances that require its use, such as when the affected party may choose to comply with one provision or another or where there are criteria relating to a choice. Don’t use “*may”* when the commissioner or agency actor is enforcing a requirement. For example, “The commissioner may certify an applicant if …” Here, the commissioner has unfettered discretion to choose whether to certify an applicant. Use “*must”* instead.
* Do not restate the statute. This doesn’t meet the definition of a *rule* and could result in conflict between statute and rule if the statute gets amended.
* Unbridled discretion by an agency is prohibited. Phrases such as “other information the commissioner may require” or “at the discretion of the commissioner” are vague and, therefore, give unbridled discretion. The Revisor’s Office will likely flag this for you, and the ALJ will very likely disapprove the rule.
* Variances must be limited to case-by-case situations. If alternatives of general applicability and future effect will be considered; these criteria must be in the rules.
* Check similar rules to standardize the language for similar requirements. Examples of common rule provisions are licensing procedures, variance procedures and criteria, and documentation and record-keeping requirements.
* If a document is to be incorporated by reference, it must be readily available in the public domain.[[9]](#footnote-9)
* Use singular rather than plural. For example, “an applicant must…” vs. “applicants must…”
* Avoid gender-specific language. Use they/them.
* Rules are regulatory tools, not educational documents. In the language below, the agency is putting an example into rule; this explanatory information is beneficial but should be placed on the agency’s website or in another document.

Subp. 2. **Exclusion of household members is prohibited.** The commissioner must not exclude a household member and the household member’s income and assets from the applicant’s household for the sole purpose of establishing eligibility for the remaining household members except as provided in subpart 1.

**Example:** A household consists of a veteran, spouse, a biological child of the veteran and spouse, and a biological child of the spouse (stepchild of the veteran).

The spouse receives $500 per month in child support which puts the household over the income limit for income based programs or reduces the amount of assistance the household is eligible for under other programs.

The household cannot exclude the stepchild and the $500 in child support for the purpose of attaining eligibility or maximizing benefits for the remaining household members.

* Use existing professional accreditation or licensure where possible rather than creating new qualification requirements.
* When drafting, ask:
  + What will it cost?
  + Is the data generated actually used?
  + Is statewide uniformity needed?
  + What is the sanction for not doing this?
  + Can we enforce this?
* Do we need to specify an effective date?
  + Does the statute or other law require it?
  + Does Minnesota Statutes, section 14.128, apply? (*See* section 4.2.5)

1. Minn. Stat. § 14.02, subd. 4. [↑](#footnote-ref-1)
2. Minn. Stat. § 14.125. [↑](#footnote-ref-2)
3. See chapter 2 for detailed information about the Request for Comments. [↑](#footnote-ref-3)
4. Minn. Stat. § 14.101, subd. 2. [↑](#footnote-ref-4)
5. Minn. R. 1400.2070, subp. 1(A). [↑](#footnote-ref-5)
6. Minn. Stat. § 14.07, subd. 4. [↑](#footnote-ref-6)
7. *See* the entries in *Black’s Law Dictionary* and *Garner’s Modern English Usage*; Joseph Kimble, *Seeing through Legalese*; Ian Lewenstein, “The Uses and Misuses of *Shall*,” *Bench and Bar of Minnesota*; and Richard Wydick, *Plain English for Lawyers*. [↑](#footnote-ref-7)
8. Minn. Stat. § 645.44, subds. 15a, 16. [↑](#footnote-ref-8)
9. Minn. Stat. § 14.07, subd. 4. [↑](#footnote-ref-9)