
WISCONSIN LEGISLATIVE COUNCIL STAFF

**1994 ANNUAL REPORT ON THE
LEGISLATIVE COUNCIL RULES CLEARINGHOUSE***

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* This Report was prepared by Ronald Sklansky, Director, and Richard Sweet, Assistant Director, Rules Clearinghouse, Legislative Council Staff.

PART I
FUNCTION OF THE LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

A. REVIEW OF RULES

Legislative review of proposed administrative rules begins with the submission of a rule to the Legislative Council Rules Clearinghouse. Section 227.15, Stats., requires that, prior to any public hearing on a proposed rule or prior to notification of the presiding officer of each house of the Legislature if no hearing is held, an agency must submit the proposed rule to the Legislative Council Rules Clearinghouse for review by the Council Staff. [See the Administrative Rules Procedures Manual, October 1994, prepared by the Legislative Council Staff and the Revisor of Statutes Bureau, for more information on drafting, promulgating and reviewing administrative rules.]

The Legislative Council Staff is provided 20 working days, following receipt of a proposed rule, within which to prepare a report on its review of the rule. However, with the consent of the Director of the Legislative Council Staff, the review period may be extended for an additional 20 working days.

Upon receipt of a proposed administrative rule, the Legislative Council Staff assigns the rule a Clearinghouse rule number, records the submission of the rule in the Bulletin of Proceedings of the Wisconsin Legislature and prepares two numbered rule jackets, one for the Assembly and one for the Senate.

The Director of the Rules Clearinghouse assigns the rule to a Legislative Council attorney or analyst for review and preparation of the statutorily required report. The staff member generally prepares the report within 10 working days and transmits the report to the Director or Assistant Director for final review. When the report on the proposed rule is completed, the staff returns to the agency the rule, the rule jackets and the Clearinghouse report containing the results of the review. [See Appendix 1 for a sample Clearinghouse report.]

In accordance with s. 227.15, Stats., the Clearinghouse report is structured to:

1. Review the statutory authority under which the agency intends to adopt the rule.
2. Review the proposed rule for form, style and placement in the Administrative Code.
3. Review the proposed rule to avoid conflict with, or duplication of, existing rules.
4. Review the proposed rule to ensure that it provides adequate references to related statutes, rules and forms.

5. Review the language of the proposed rule for clarity, grammar and punctuation and to ensure the use of plain language.

6. Review the proposed rule to determine potential conflicts and to make comparisons with related federal regulations.

7. Review the proposed rule to determine whether the agency has specified the number of business days within which the agency will review and make a determination on an application for a business permit.

As part of this review process, the Legislative Council Staff is directed to ensure that procedures for the promulgation of the rule are followed, as required by ch. 227, Stats., and to streamline and simplify the rule-making process.

B. OTHER RELATED RESPONSIBILITIES

Other primary rule review responsibilities of the Legislative Council Staff include the following:

1. Working with and assisting the appropriate legislative committees throughout the rule-making process.

2. Notifying the Joint Committee for Review of Administrative Rules (JCRAR) and appropriate committees of the Legislature whenever the rule-making authority of an agency is eliminated or significantly changed by the repeal, amendment or creation of a statute, by the interpretive decision of a court of competent jurisdiction or for any other reason.

3. Assisting the public in resolving problems related to administrative rules. This function includes providing information, identifying agency personnel who may be contacted in relation to rule-making functions, describing locations where copies of rules, proposed rules and forms are available and encouraging and assisting participation in the rule-making process.

The final responsibility of the Legislative Council Staff is the submission of an annual report to the chief clerk of each house of the Legislature and to the Governor summarizing any action taken by the Staff and making recommendations to streamline the rule-making process and eliminate obsolete, duplicative and conflicting rules. This document is the 15th Annual Report submitted by the Legislative Council Staff and covers the Staff's activities during calendar year 1994. This Report has been preceded by an initial report to the 1979 Legislature, which covered the Staff's activities from November 2, 1979 to April 1, 1980 (i.e., from the effective date of Ch. 34, Laws of 1979, which initiated the omnibus rule review process, to the end of Floorperiod IV of the 1979 Session) and Annual Reports for calendar years 1980 to 1993.

C. RECORDKEEPING SYSTEM

The Legislature's Bulletin of Proceedings is used for recording actions relating to the review of administrative rules. The Legislative Council Staff, the Senate and Assembly Chief Clerks and the Legislative Reference Bureau cooperate in a computerized recordkeeping system. Commencing with the 1981 Session, action on administrative rules has been shown in a separate part of the Bulletin of Proceedings.

Under this system, each proposed rule is assigned a number and entered in the computer by the Legislative Council Staff. A copy of the Clearinghouse report is placed in a Senate and Assembly rule jacket (similar to bill jackets), and the rule is then transmitted to the agency promulgating the rule for its review. After that, all actions taken on the rule are entered on the face of the jacket and are reported to the Chief Clerks of each house. The Clerks enter the actions in the computerized system, thereby compiling a history of all actions taken on a rule.

At the beginning of each biennial session, the administrative rule portion of the Bulletin of Proceedings is updated by deletion of all records relating to rules which, in the preceding session, have become effective, have been withdrawn or have been permanently objected to by law. Also removed from the Bulletin and withdrawn from the rule-making process is any proposed rule that, in accordance with s. 227.14 (6) (c), Stats., has been pending for at least four years, but no more than five years, after the date of its receipt by Legislative Council Staff under s. 227.15 (1), Stats. The final Bulletin printed for the preceding session then serves as the permanent record of the disposition of those rules. The remaining rules, which are still in the promulgation process, are carried over into the new Bulletin of Proceedings for the following biennial session.

The Council Staff cooperates with a private reporting service that reports on recent actions taken on all proposed administrative rules moving through the legislative review process.

PART II

1994 ACTIVITIES OF THE RULES CLEARINGHOUSE

A. LEGISLATIVE COUNCIL STAFF REVIEW OF PROPOSED ADMINISTRATIVE RULES

During 1994, 225 proposed administrative rules were submitted to the Legislative Council Staff by 26 state agencies.

As of December 31, 1994, Legislative Council Staff reports had been completed on 215 of the 225 proposed rules and 10 rules were in the process of review. In addition to the 215 rule reports completed on 1994 rules, reports were prepared in 1994 on 19 rules received in late 1993. Of the 234 reports completed in 1994, no rule required an extension of the review process by the Director of the Legislative Council Staff. Clearinghouse activities in 1994 are summarized below:

Rules Received in 1994		225
Withdrawn	0	
No report required	0	
Pending	10	
		-10
1994 Reports Completed		215
1993 Reports Completed in January 1994		+19
Total Reports in 1994		234

The table below shows that, from November 2, 1979 (the beginning of the omnibus rule review process) through December 31, 1994, the Clearinghouse has received 3,533 rule submissions and completed reviews on 3,448 proposed rules. Of the total rule submissions, 75 were exempt from the reporting process for various reasons and 10 were under review at the end of 1994.

<i>Year</i>	<i>Received</i>	<i>Completed</i>	<i>Exempt</i>
1979	70	45	12
1980	252	227	24
1981	252	234	9
1982	251	254	3
1983	222	220	4
1984	255	247	2
1985	213	206	4
1986	251	252	4
1987	182	186	1
1988	219	216	5
1989	212	208	1
1990	264	254	3
1991	199	205	2
1992	225	228	0
1993	241	232	1
1994	225	234	0
Total	3,533	3,448	75

In 1994, rules were received from the following 26 state agencies:

Number of Proposed Rules, by Submitting Agency

Administration	2	Parole Commission	1
Agriculture, Trade and Consumer Protection	8	Public Defender Board	1
Banking, Office of the Commissioner	2	Public Instruction	11
Controlled Substances Board	1	Public Service Commission	4
Corrections	2	Regulation and Licensing	30
Development	9	Revenue	5
Educational Communications Board	1	Savings and Loan, Office of the Commissioner	1
Employe Trust Funds	2	Securities, Office of the Commissioner	3
Gaming Commission	6	State Fair Park Board	1
Health and Social Services	32	Transportation	17
Industry, Labor and Human Relations	21	Veterans Affairs	2
Insurance, Office of the Commissioner	9	Vocational, Technical and Adult Education Board	1
Justice	2		
Natural Resources	51	TOTAL	225

Although the statistics presented in this Report give some indication of the work load of the Legislative Council Staff in reviewing proposed administrative rules, it should be noted that some proposed rules are only a few sentences long while others exceed 50 pages in length. Similarly, Legislative Council Staff reports vary from completion of a simple checklist to reports of multiple pages. In summary, for all rule reports completed in 1994:

1. The Legislative Council Staff commented on the *statutory authority* of a proposed administrative rule on 60 occasions.
2. The Legislative Council Staff commented on the *form, style and placement* of proposed administrative rules in the Administrative Code on 176 occasions.
3. The Legislative Council Staff commented on a *conflict* with, or *duplication* of, existing rules on six occasions.
4. The Legislative Council Staff commented on the *adequacy of references* of proposed administrative rules to related statutes, rules and forms on 97 occasions.
5. The Legislative Council Staff commented on *clarity, grammar, punctuation and use of plain language* in proposed administrative rules on 159 occasions.
6. The Legislative Council Staff commented on the *potential conflicts* of proposed administrative rules with, and their comparability to, related federal regulations on 13 occasions. In addition, the Council Staff has adopted a policy of noting when proposed rules are based on federal "*guidelines*," which do not have the force of law, as opposed to rules based on federal "*regulations*," which do have the force of law and with which the state may have a legal obligation to comply.
7. The Legislative Council Staff commented on two *permit action deadline requirements*.

B. WORKING WITH AND ASSISTING COMMITTEES

Each standing committee of the Legislature, other than the Joint Committee on Finance, has a Legislative Council Staff attorney or analyst regularly assigned to it. At the time that a committee has a proposed rule referred to it by the presiding officer of the house, the assigned attorney or analyst will participate in whatever level of oversight is chosen to be exercised by the committee.

During 1994, legislative committees held hearings or requested meetings on 65 proposed rules. Modifications to rules were either requested or received in the legislative review of 29 proposed rules. Also, committees exercised their power to disapprove proposed rules in whole or in part with respect to three proposed rules.

As a result of committee activities, a total of four rule objections were subject to JCRAR jurisdiction in 1994. [One rule objection occurred in 1993, but was retained by JCRAR for

action in 1994.] Of the rules subject to objection, the JCRAR objected to no proposed rules; and JCRAR nonconcurred in the objection to two proposed rules. The remaining two rule objections were retained by JCRAR for action in 1995.

The table below reviews legislative committee activity in the review of proposed administrative rules beginning on November 2, 1979 and ending on December 31, 1994.

LEGISLATIVE REVIEW OF PROPOSED ADMINISTRATIVE RULES <i>(November 2, 1979 Through December 31, 1994)*</i>						
Year	Rules Submitted	Rules Subject to Modification	Committee Review Objections	JCRAR Rule Objections	Enacted Laws Following Rule Objections	Enactments by Session Law and Other Description of Bills Introduced Following Rule Objections
11/2/79-80	322	18	5	1	0	No bill introduced, rule withdrawn
1981	252	29	10	4	4	Chapters 20 (SEC. 1561), 26, 31 and 180, Laws of 1981
1982	251	31	4	1	1	1983 Wisconsin Act 94
1983	222	30	5	0	0	--
1984	255	26	2	2	2	1983 Wisconsin Act 310 and 1985 Wisconsin Act 29 (SEC. 826)
1985	213	37	8	3	2	◆ 1985 Wisconsin Act 29 (SECS. 1059r and 2238ng to 2238or) ◆ 1985 Assembly Bill 460, passed and vetoed; override failed
1986	251	30	1	0	0	--
1987	182	30	5	0	0	--
1988	219	38	4	0	0	--
1989	212	22	6	2	0	◆ 1989 Senate Bill 89 and 1989 Assembly Bill 171 (failed to pass) ◆ 1989 Senate Bill 248 and 1989 Assembly Bill 457 (failed to pass)
1990	264	29	2	1	0	◆ 1991 Senate Bill 24 and 1991 Assembly Bill 71 (failed to pass)
1991	199	19	5	1	0	◆ 1991 Senate Bill 442 and 1991 Assembly Bill 840 (failed to pass after rule objected to withdrawn by agency)
1992	225	33	3	2	1	◆ 1993 Wisconsin Act 9 ◆ 1993 Senate Bill 3 and 1993 Assembly Bill 17 (pending)
1993	241	24	1	0	0	--
1994	225	29	3	0	0	--
TOTAL	3,533	425	64	17	10 (PLUS ONE BILL PASSED AND VETOED; VETO NOT OVERRIDDEN)	

* The general system of legislative review of proposed administrative rules, primarily embodied in ss. 227.15 and 227.19, Stats., took effect on November 2, 1979, as part of Ch. 34, Laws of 1979.

C. NOTICE OF CHANGE IN RULE-MAKING AUTHORITY

To date, no court decisions or changes in legislation have been brought to the attention of the Legislative Council Staff which would require notification of the JCRAR or appropriate standing committees of a change in, or the elimination of, agency rule-making authority.

D. ASSISTING ADMINISTRATIVE AGENCIES

The Legislative Council Staff has responded to numerous questions from agency personnel, relating to both the process and the law governing legislative review of proposed rules.

The Director of the Rules Clearinghouse described the process of rule drafting and legislative review of administrative rules to:

1. The Government and Law Section of the State Bar of Wisconsin, Annual Convention, on June 23, 1994.
2. A delegation of Kenyan Legislators on March 7, 1994.
3. A delegation of Legislators from Ghana, Kenya, Namibia, Zambia and Zimbabwe on April 12, 1994.

E. REVISION OF STATUTES DEALING WITH ADMINISTRATIVE RULE-MAKING

During 1994, there were no significant amendments to the statutes relating to administrative rule-making.

F. PUBLIC LIAISON

To date, the Legislative Council Staff has received minimal requests from the public. These infrequent questions have either concerned aspects of the rule review procedure or have related to the status of specific rules.

RS:RNS:kjf;kja

APPENDIX 1
SAMPLE CLEARINGHOUSE REPORT

WISCONSIN LEGISLATIVE COUNCIL STAFF

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 94-188

AN ORDER to create HSS 108.02 (10), (11) and (12), relating to filing a claim against the estate of a medical assistance recipient or against the estate of the surviving spouse of a medical assistance recipient for certain services for the recipient that were paid for by the medical assistance program.

Submitted by **DEPARTMENT OF HEALTH AND SOCIAL SERVICES**

10-17-94 RECEIVED BY LEGISLATIVE COUNCIL.
11-14-94 REPORT SENT TO AGENCY.

RNS:JLK:kjf;jt

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REG-
ULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO

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CLEARINGHOUSE RULE 94-188

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. Section HSS 108.02 (10) (a) provides that one of the occasions when the amount of Medical Assistance (MA) paid is to be recovered is “while the recipient was an inpatient in a *hospital* and was required to contribute to the cost of care” (emphasis added). However, s. 49.496 (3) (a) 1, Stats. (as amended by 1993 Wisconsin Act 437), requires recovery “while the recipient was an inpatient in a *medical institution* and was required to contribute to the cost of care” (emphasis added). What is the basis for limiting recovery to those situations in which the MA recipient was in a hospital as opposed to in a medical institution?

b. The last section of the proposed order indicates that the rule will take effect on the first day of the month following publication in the Administrative Register. The proposed order implements 1993 Wisconsin Act 437, which increases the number of services funded under the MA program for which recovery from a decedent’s estate must be sought and which creates the hardship waiver provision. However, 1993 Wisconsin Act 437 specifies that these provisions become effective April 1, 1995 and apply to recoveries from estates of MA recipients who die on or after that date for MA services provided on or after that date. [See SECTIONS 9326 (2g) and 9426 (9) of 1993 Wisconsin Act 437.] The effective date provision of the proposed order does not take into account these statutory limitations and must be revised to do so.

Moreover, because of the complexity of these statutory provisions and their applicability to most, but not all, of the proposed order [for example, they do not apply to the nursing home provision in s. HSS 108.02 (10) (a)], these effective date and initial applicability provisions also should be explained in the text of s. HSS 108.02 (10) and (12) or in notes following these subsections.

c. Section 49.496 (6m), Stats. (as created by 1993 Wisconsin Act 437), provides that the Department of Health and Social Services (DHSS) is to establish standards for determining whether pursuing a lien or estate recovery would “work an undue hardship in individual cases.” Section HSS 108.02 (12) (b) 1 allows only a “relative” or “heir” of a decedent to apply for a hardship waiver. If a decedent had a valid will, the persons nominated in the will to receive an interest in property in other than a fiduciary capacity are “beneficiaries.” A beneficiary may or may not be a relative. Even if a beneficiary is not a relative, he or she may be subjected to undue hardship if DHSS attempts to recover from the decedent’s estate. What is the statutory basis for excluding a beneficiary of a decedent’s estate from the hardship waiver provisions unless he or she is a “relative” as defined in s. HSS 108.02 (12) (a) 4? [See the definitions of “beneficiary” in s. 851.03, Stats., and “heir” in s. 851.09, Stats.]

2. Form, Style and Placement in Administrative Code

a. The analysis omits a description of the provision of 1993 Wisconsin Act 437 related to expanding the estate recovery provisions to the amount of MA paid while a recipient was an inpatient in a medical institution and required to contribute to the cost of care. This provision is included in the rule. As other provisions of 1993 Wisconsin Act 437 that are included in the rule are explained in the analysis, an explanation of this provision also should be included in the analysis.

b. Statutory subunits that follow introductory material should end with periods rather than semicolons. This facilitates insertion or deletion of subunits in the future. [See s. 1.03 (intro.), Manual.] Thus, s. HSS 108.02 (10) (b) 1. a. to c. and 2 to 6 should end with periods.

c. In s. HSS 108.02 (12) (b) 1, “2. a.” should replace “2 a” in two locations.

4. Adequacy of References to Related Statutes, Rules and Forms

In s. HSS 108.02 (12) (d) 1. b., the reference to “par. (b)” should be to “par. (b) 2. a. or b.”

5. Clarity, Grammar, Punctuation and use of Plain Language

a. In the treatment clause of SECTION 1 of the rule, a comma should be inserted between “(10)” and “(11).”

b. In s. HSS 108.02 (11), the phrase “ss. 49.496 and 867.035, Stats,” should be changed to “s. 49.496 or 867.035, Stats.,”.

c. Section HSS 108.02 (12) (a) 4 provides that:

“Relative” means a son, daughter, grandson, granddaughter, stepson, stepdaughter, in-law, mother, father, stepmother, stepfather, grandmother, grandfather, aunt, uncle, sister, brother, stepbrother, stepsister, half sister, half brother, niece, nephew or cousin.

It would be preferable to use more generic terms such as parent, grandparent, child, grandchild, etc. Also, the meaning of “in-law” is unclear. It would be preferable to specify who is included under this term, for example, parents-in-law, grandparents-in-law, brother-in-law, sister-in-law, etc. Does the term include the spouse of a niece or the spouse of a cousin?

Also, it is unclear whether all degrees of cousins are included. If they are, there appears to be no rational basis for not including other persons who are more closely related than a distant cousin, for example, great grandchildren or grand nephews or nieces.

d. In s. HSS 108.02 (12) (b) 1, it would be preferable to replace the phrase “the person handling the decedent’s estate” with a phrase that more clearly reflects the person’s legal status, such as “the personal representative or special administrator of the decedent’s estate.”

e. The department should clarify that a waiver under s. HSS 108.02 (12) (b) 2. b. extends only to the real property that is used in the waiver applicant’s business and not to other property in the decedent’s estate, if this is the department’s intent.

f. Section HSS 108.02 (12) (c) 1 provides that DHSS must include the hardship waiver notice with the claim that DHSS files with the probate court if DHSS cannot ascertain who is handling the decedent’s estate. Section HSS 108.02 (12) (c) 2 indicates that the individual receiving the notice under s. HSS 108.02 (12) (c) 1 is responsible for notifying the decedent’s relatives and heirs of the hardship waiver provisions. As it is unlikely that the probate court will undertake this duty, it is suggested s. HSS 108.02 (12) (c) 1 specify that when the notice is sent to the probate court, it shall be accompanied by a request that the court provide the notice to the personal representative or special administrator of the decedent’s estate.

g. Section HSS 108.02 (12) (c) 2 indicates that the individual receiving the hardship waiver notice under s. HSS 108.02 (12) (b) 1 is responsible for notifying ***all of the decedent’s relatives and heirs*** of the hardship waiver provisions.

The definition of “relative” in s. HSS 102.08 (12) (a) 4 is very expansive and includes many more people than are defined as “heirs” under the statutes of intestate succession, ch. 852, Stats. For example, the definition of “relative” includes in-laws, step-parents and step-siblings. Unless these people are nominated as beneficiaries in the decedent’s will, they have no claim on the decedent’s estate, and there appears to be no purpose served in requiring the person handling

the decedent's estate to send the hardship waiver notice to *all of these people*. Has DHSS considered requiring that this notice be sent as follows: (1) if the decedent had a will, to beneficiaries who are "relatives" [or to all beneficiaries (see comment 1, c)]; or (2) if the decedent did not have a will, to the decedent's heirs?

h. It is unclear in s. HSS 108.02 (12) (d) 1. a. what documents a waiver applicant may submit to establish a relationship. A parent, child or spouse could submit a birth certificate or marriage license. What documents would be submitted by a cousin?

i. In s. HSS 108.02 (12) (d) 1. b., the reference to "the applicant's" should be changed to "the waiver applicant's" in order to use the defined term consistently.

j. In the Note following s. HSS 108.02 (12) (e) 1, the word "address" is misspelled.

k. In s. HSS 108.02 (12) (f), "a" should precede the first occurrence of "hearing."

APPENDIX 2
PROCESSING INSTRUCTIONS TO AGENCY HEADS

