1989 Wis. Act 107 transferred responsibility for corrections related hearings from the department of health and social services to the division of hearings and appeals on January 1, 1990. These rules fulfill the legislative mandate of 1989 Wis. Act 107 and recreate procedural rules to govern corrections hearings. They replace ss. HSS 31.05, 31.13 (4) and 31.14 (4), Wis. Adm. Code. Although these rules are largely taken from the HSS rules, some revisions are made and some new provisions are created to address subjects not covered by the previous rules. Unless otherwise noted, the changes are intended to simplify and clarify the rules and are not meant to change the original intent. The remaining portions of ch. HSS 31 dealing with substantive probation and parole issues have been separately promulgated by the department of corrections in ch. DOC 331.

Note: **HA 2.01 APPLICATION OF RULES.**Section 227.03 (4), Stats., provides that the contested case provisions of ch. 227 do not apply to proceedings involving the revocation of parole or probation. Accordingly, it is intended that the provisions of ch. HA 1 not apply in corrections proceedings.

Note: **HA 2.02 DEFINITIONS.**The definitions come from ch. DOC 328. The definition of "day" has been clarified to mean actual working days in conformity with practice and its usage in s. HSS 31.05. The term "administrative law judge" is new.

Note: **HA 2.03 SERVICE OF DOCUMENTS.**This section is new and will permit the parties to file documents by regular first class mail, inter-departmental mail and by facsimile transmission in addition to the more formal methods of personal service, registered or certified mail. The changes are intended to reduce administrative costs associated with the hearing process and to give the parties the convenience of filing documents by facsimile transmission. The mailing address of the division is: 5005 University Ave., Suite 201, Madison, WI 53705-5400. The facsimile transmission number of the division is: (608) 267-2744.

Note: **HA 2.04 WITNESSES AND SUBPOENAS.**These rules will allow attorneys to issue subpoenas under the same procedure as provided by s. 805.07 (1), Stats. Although the division reserves the right to issue subpoenas directly, the attorneys are in a better position to issue the necessary subpoenas and the division's responsibility should be limited to cases where a party is not represented by an attorney or where the division is asked to modify or cancel a subpoena.

Note: **HA 2.05 REVOCATION HEARINGS.**This section replaces s. HSS 31.05 which was developed in 1981 from the broad outlines of the revocation process drawn by the U.S. Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Like the prior rules, these rules reflect an attempt to provide a fair hearing procedure that is also efficient and speedy.

Subsection (1) is patterned after s. HSS 31.05 (1) and requires the notice of hearing to be issued within 5 working days of receipt of the hearing request. Subsection (1) (b) has been revised to clarify that the notice must contain a statement of the alleged violation in addition to the rule or condition violated. Subsection (1) (d) reflects actual practice and clarifies that only a listing of evidence and witnesses is required. It also allows the department to withhold disclosure of such information if it is confidential or if disclosure would threaten the safety of a witness or another. Subsection (1) (e) clarifies that prehearing disclosure of evidence should come from the department rather than from the division. The former provision which required identification of unavailable witnesses in the notice has been eliminated because: such information is rarely, if ever, known to the department at the time the notice is issued; these issues can be better addressed at the hearing, and; witnesses are otherwise identified under sub. (1) (d).

Subsection (2) is new and conforms to the holding in *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376 (1978).

Subsection (3) is taken from s. HSS 31.05 (1) (h).

Subsection (4) replaces s. HSS 31.05 (3) and recognizes the requirement that hearings for persons confined in a county facility must begin within 50 calendar days of detention as mandated by s. 302.335, Stats. Subsection (4) (b) replaces the former "five-day" rule of s. HSS 31.05 (3) (b), incorporates factors necessary to determine compliance with s. 302.335, Stats., and incorporates postponement criteria used by courts as summarized in *State v. Wedgeworth*, 100 Wis. 2d 514 (1981). The former "five-day" rule is unworkable because many valid reasons for postponements arise more than 5 days after the notice is issued. The division does not interpret s. 302.335, Stats., or s. HA 2.05 (4) as a jurisdictional time limit.

Subsection (5) replaces s. HSS 31.05 (4) and creates new special protective procedures for witnesses in light of the decision in *State v. Thomas*, 150 Wis. 2d 374 (1989). Although the confrontation rights applicable in a revocation hearing are not the same as those in a criminal proceeding, the standards and criteria for special protective procedures described in *Thomas* are informative and have provided the basis for these revised procedures. This section is broader than *Thomas*, however, in that it applies to all witnesses whenever the requisite need is established. This subsection is intended to permit use of protective procedures such as a screen, one-way mirror, televised or video taped testimony and, if necessary, exclusion of a client from the hearing room when such action is necessary to protect a witness from the substantial likelihood of significant psychological or emotional trauma or to enable a witness to give effective, truthful testimony at the hearing.

Subsection (6) presents a description of what is to occur at the hearing. The provision that the hearings are not open to the public reflects the historical fact that the hearings most often occur in a jail or other secure detention facility and the belief that such hearings are not a "meeting" of a "governmental body" as those terms are used in s. 19.82, Stats. The rule on the inapplicability of the rules of evidence comes from s. 911.01 (4) (c), Stats. The rule that a judgement of conviction conclusively proves a violation comes from *State ex rel. Flowers v. H&SS Department*, 81 Wis. 2d 376,389 (1977), citing *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) and reflects a belief that a parolee or probationer should not be allowed to relitigate issues determined in other forums, as in the situation presented when the revocation is based on conviction of another crime. No distinction is made between judgements resulting from trial and those resulting from a plea.

Subsection (7) replaces s. HSS 31.05 (6). The revocation criteria of sub. (7) (b) 3 come from the holding in *State ex rel. Plotkin v. H&SS Department*, 63 Wis. 2d 535 (1974) and replace the former language found at s. HSS 31.05 (6) (b) 4. The changes are appropriate to clarify the criteria and to clarify that revocation may occur if the administrative law judge finds that any one of the *Plotkin* criteria is met and that there are no appropriate alternatives to revocation. The former provision of s. HSS 31.05 (6) (c), citing the goals and objectives of supervision under ch. DOC 328, has been eliminated because it was not in complete harmony with the *Plotkin* criteria and generated confusion over the revocation standard. Tolled time is permitted by s. 304.072, Stats. Sentence credit is required under s. 973.155, Stats.

Subsection (8) replaces s. HSS 31.05 (9) and (10). Prior to January 1, 1990, revocation appeals were reviewed by the secretary of the department of health and social services. These rules direct that such appeals be reviewed by the division administrator as provided in s. 301.035 (4), Stats. The administrator's decision is the final decision and is not subject to further administrative review. The appeal, including all supporting materials and arguments, must be filed by the appellant within 10 working days of the decision. The opposing party then has 7 working days to respond. The parties are not responsible for assembling the record or reviewing the synopsis of testimony as these functions are performed by the division.

Subsection (9) replaces s. HSS 31.05 (11). In the past, the secretary of the department of health and social services had 7 working days to decide the appeal from the date the secretary received the record and synopsis from the department's office of administrative hearings. Since assembly of the record and preparation of the synopsis often took several weeks, the secretary's final decision was similarly delayed. These rules recognize the time required for assembly of the record and preparation of the synopsis and provide that the division has only 21 working days from the date the appeal is received to issue the final decision.

Judicial review of a revocation decision is by certiorari in the county in which the client was last convicted of an offense for which the client was on parole or probation. See: State ex rel. Johnson v. Cady, 50 Wis. 2d 540 (1971) and s. 801.50 (5), Stats.

Note: **HA 2.06 GOOD TIME FORFEITURE AND REINCARCERATION HEARINGS.** This section combines the former provisions of ss. HSS 31.13 and 31.14 in one combined hearing section. These procedures are used only when the client waives a revocation hearing but does not waive a good time forfeiture or reincarceration hearing. The appeal procedures are clarified in conformity with the appeal procedures created in s. HA 2.05 (7).

Note: **HSS 2.07 TRANSCRIPTS.** Under this section, production of a transcript requires a writ of certiorari or prepayment of the transcription costs. A transcript is not prepared until the writ or prepayment is received and will require several weeks to complete. A party may also tape record the hearing at their own expense.

Note: **HSS 2.08 HARMLESS ERROR.** This section broadens the harmless error provisions of the former rules to include variance from procedural requirements as well as variance from time limits. As in the past, an error can be found harmless only if it does not affect the client's substantive rights.