NASS ACR 2022
Colborn Presentation: Rules Analysis

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Background

Iowa rulemaking process: Iowa Code chapter 17A

Administrative Rules Review Committee (ARRC)
- 10 legislators
- Fairly strong legislative oversight of rulemaking
- Reviews new noticed and adopted rules on a monthly basis, as well as misc. rulemaking matters
- Can delay adopted rules, sponsor legislation, among other powers
- Some members are particularly suspicious of agencies as a general matter

Legislative Services Agency (LSA): publishes rules, staffs ARRC, other functions
- Nonpartisan arm of the legislative branch
- I oversee publication of rules, am legal counsel to the ARRC, also draft bills
Issue: Untimely rulemaking

- ARRC began to see more rule filings implementing bills years after enactment
  - Rule filings implementing legislation generally identify the bill and year
- Sometimes just nonsubstantive updates, sometimes substantive
- Had been somewhat of a long-term issue, but began to really catch the ARRC’s eye around 2015
- General complaints and criticism at ARRC meetings didn’t seem to bring about improvement
- Finally, ARRC members wanted something to be done about this
Solution 1: Legislation

- Enacted a bill in 2016 providing that rulemaking required by newly enacted bills going forward be commenced within 6 months of each bill’s effective date (generally July 1)
  - Filing of a notice of intended action is sufficient; rules need not be effective yet
- If not commenced within 6 months, an agency must provide a written notification to ARRC explaining the delay and providing a timeline
- Generally interpreted to include both substantive policymaking rules as well as nonsubstantive updates, but interpretations vary somewhat
  - Tricky to determine when rulemaking is required in some instances
- A subsequent attempt to enact a financial penalty on agencies for late rulemaking was not enacted, but did serve to indicate to agencies that ARRC considers this a serious matter
Solution 2: LSA rules analysis

- In Nov. 2015, ARRC directed me to establish an annual process to track all required rulemaking from new bills in order to ensure it is getting done, starting with 2016 session
- No guidance given on how I should accomplish that, no additional resources
- A big task! (~150-180 bills per session, annual sessions)
- I did successfully reject a request to apply this retroactively
Establishing a process

- Turnaround time for a process for 2016 session was short
- ARRC directive came Nov. 2015, session usually runs mid Jan. to late April or early May
- 6-month expectation typically means most rulemaking must begin by Dec. 28 each year; a tracking mechanism ideally should be ready before then
- Projects with major development requirements for our Computer Services Division (CSD) typically take months to get to initial version
  - Major development largely goes on hold during session
- LSA didn’t have much of a project management structure at that time
- So...
I’m also a bill drafter and committee staffer during session, so my time then is more limited.

Human resources: during the interim, bill drafters have more time for various projects.

Our division director signed off on me conscripting bill drafters to analyze their enacted bills after session to find possibly required rulemaking.

So I’ve got people, but what should this thing look like?

- Needed to put something together on my own; my IT knowledge is so-so at best.
- Probably going to need some charts. Maybe Excel?
NOPE!
Haven’t really used Excel since 8th grade
Microsoft Word it is!

- Best tool for the job? Maybe not.
- Do I know how to use it? Sure!
- I designed a chart template in Word for drafters to use, got ARRC sign off
- CSD did put together a simple Macro for drafters to access the chart and auto save the charts to the same folder on an internal drive, so they are easy for us to locate
# Chart

**Rules Analyses Report for 2017 Iowa Acts**

**SF 2001**

<table>
<thead>
<tr>
<th>Act Section Relating to Rulemaking</th>
<th>Rules Analyses</th>
<th>Rulemaking Agency</th>
<th>Code Section Relating to Rulemaking in Act</th>
<th>Code Section Relating to Rulemaking Not in Act, if any</th>
<th>Current Agency Rules in IAC, if any</th>
<th>ARC# or other status</th>
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Column 1: Act section relating to rulemaking

- Charts go through bills section by section horizontally; bills sections with common theme can be combined to simplify the chart
Column 2: Rules analysis

- This is where the drafter determines whether a bill section may require rules
- 3 options:
  - Rules required
  - Rules authorized or implicated
  - No rules involved
- Entails reading a bill section in its broader statutory context; not limited to the 4 corners of the bill
- Drafters consult the bill, Iowa Code, Iowa Administrative Code, and other research tools to carry out this analysis
  - Sophisticated electronic search capabilities: website search and Folio
  - Also an autogenerated table of references in rules: https://www.legis.iowa.gov/law/administrativeRules/additionalInfo/rulesImplementingStatutes
Rules required

- Bill section, read in its broader statutory context, explicitly requires rulemaking
- Or the bill section renders an existing rule out of date
  - Some might not consider this a rulemaking requirement, but this is a parameter the ARRC set
- So rulemaking requirements can be implicit, for purposes of this project
Rules authorized or implicated

- If a bill section authorizes, but doesn’t require rulemaking (usually “may”)
- Or if a drafter cannot determine whether a bill section requires rules
  - Sometimes relationships between statute and rule are complex
  - Drafters may lack sufficient expertise
  - Judgment calls and gray areas are inevitable
  - This category facilitates giving agencies the benefit of the doubt
No rules involved

- Bill section doesn’t involve rules
- Common reasons:
  - Relates only entities not subject to APA: private entities, courts, governor, legislative branch, local governments, etc.
  - Relates to a subject on which no agency has ever had rules
  - Some minor nonsubstantive changes
<table>
<thead>
<tr>
<th>Rulemaking agency: who has to make the rules?</th>
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</thead>
<tbody>
<tr>
<td>Can have multiple rows per bill section if multiple agencies involved</td>
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<tr>
<td>Iowa has about 100-150 agencies, depending on how you count</td>
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<tr>
<td>Code section relating to rulemaking in Act: what Code provision is being enacted or amended?</td>
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<tr>
<td>Code section relating to rulemaking not in Act, if any: Where the rulemaking authority is if not contained in the bill section itself</td>
</tr>
<tr>
<td>Current Agency Rules in IAC, if any: What rules need to be amended</td>
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<tr>
<td>Can be left blank if only new rules need to be made</td>
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</tbody>
</table>
Column 7

- ARC # or other status
- This is where I indicate whether rulemaking or any other relevant activity has occurred
- An ARC number is the tracking number assigned to each rulemaking document once it is accepted for publication
- This column can also be used to note that a rulemaking document has been filed and is under review by the Governor’s Office, that the ARRC has been notified of the delay, that the agency disagrees with the LSA’s determination, or other miscellaneous responses
Example

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</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Rules authorized or implicated</td>
<td>Alcoholic Beverages Division</td>
<td>123.3.11</td>
<td>123.10</td>
<td>185.4.10(6)(b)</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>No rules involved</td>
<td></td>
<td>123.30.3.c</td>
<td>123.35.6, 123.49.2.b, 123.134.4, 123.150</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3, 5, 9, 10</td>
<td>No rules involved</td>
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<td></td>
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<td>4</td>
<td>Rules required</td>
<td>Alcoholic Beverages Division</td>
<td>123.46A.1, 2</td>
<td>123.10</td>
<td>185.4.5(2)</td>
<td>6138C</td>
</tr>
<tr>
<td>5</td>
<td>Rules authorized or implicated</td>
<td>Alcoholic Beverages Division</td>
<td>123.46A.1A</td>
<td>123.46A.1A</td>
<td>185.4.10</td>
<td></td>
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<tr>
<td>7</td>
<td>Rules required</td>
<td>Alcoholic Beverages Division</td>
<td>123.49.2.d,(2), (3)</td>
<td>123.49.2.d,(2), (3)</td>
<td>185.4.5(2)</td>
<td>6138C</td>
</tr>
<tr>
<td>8</td>
<td>Rules required</td>
<td>Alcoholic Beverages Division</td>
<td>123.49.2.d,(4)</td>
<td>123.10</td>
<td>185.4.10(1), (3)</td>
<td>6138C</td>
</tr>
</tbody>
</table>
Completion of charts

- I prepared a memo for drafters describing the process of filing out the chart and the analytical framework
- Also an in-person training session, which was also recorded
- Drafters are free to ask me questions as needed, tricky scenarios are inevitable
- Drafters get about 2 months to finish their charts, extensions given as needed
  - In year 1, I tried not giving a deadline, with mixed results...
- I slotted this in between other key interim projects bill drafters do
- There was no technological mechanism for me to know when a drafter is done with a chart at this point, so they gave me a paper copy as well as saving in an internal drive
Review of charts

- I review the bill drafters’ charts when they are done
- Review both for substance and consistency of style
  - Style issues: consistency of agency names, rule citations, etc.
  - Most of the fields in the chart were freeform at this point, so there’s variation
    - I focused my expectations for drafters more on substance than style
- I mark up paper copies and save updated versions of the charts or start over as needed
- Drafters are pretty good at this, so I usually don’t have to reinvent the wheel
  - But plenty of results are overbroad or underinclusive
  - I give feedback as needed
  - Expecting perfection here is not realistic, but getting their input on the front end is useful
- Often, the rulemaking process begins between drafters’ work and completion of my review, so I need to update the last column a lot
- Secondary ARRC staffer did a supplemental review
I then compile the charts into a report to the ARRC.

Intro describes LSA’s process, the non-binding nature of the findings, LSA’s lack of substantive expertise compared to agency, and a summary of the results.

Key stats and findings:
- How many bills from previous session required rules
- How many of those bills still have outstanding rules
- Which agencies are responsible

Many charts

Report is provided and orally summarized at monthly ARRC meetings, updated each month until all outstanding rulemaking is accounted for.

Format of the report is pretty standardized.

Report doesn’t speak to discretionary rulemaking or ongoing rulemaking after initial implementation of a bill.
Section-by-section breakdown is only included for bills found to require some amount of rulemaking that have one or more instances of outstanding rulemaking. This declutters the report somewhat. Sections not involving rules are also omitted from this breakdown. Members wanting more detail can ask, but that is rare.

I repeatedly caution ARRC members, orally and in writing, that LSA’s analysis is not binding on agencies, and LSA doesn’t have the expertise that agencies do. Separation of powers is a concern. Therefore, agencies are free to disagree with the LSA’s determinations. Members have generally accepted this.

7 appendices is... a lot. I don’t print the whole thing out for ARRC each month, just brief summaries; whole report is emailed. Engagement with the content varies by member.
Report example

(Note: This is the first of several slides with embedded content. Reach out to me if you want copies.)
Common trends over the years

- Each year around 35% of bills don’t require or implement rulemaking, 30% authorize or possibly implicate rulemaking, 35% require rulemaking
  - Less variation then I’d have expected
- Around 40ish bills a year have outstanding rulemaking
- Around 20 agencies typically have one or more instances of outstanding required rulemaking
  - Bills sometimes affect multiple agencies
  - Some outliers when a bill affects all or many agencies; APA changes, prof. licensing changes, etc.
- A mix of agencies constantly subject to statutory changes and more stable agencies
- On the whole, agencies have been getting better at updating their rules over the years
Agency outreach

- After initial report is presented to ARRC, I contact each agency found to have outstanding required rulemaking by email; format is mostly standardized

- Would it make sense to check with agencies first before reporting to the ARRC?
  - Sure!
  - But agencies often need time to digest and respond the findings, and it already takes quite a while to get the report together; agencies get more time to respond in detail this way if ARRC already has something to mull over

- Email explains the process, notes nonbinding nature of LSA’s findings, offers a variety of possible responses
  - After a few years of this, some agencies are used to these exchanges, some need education
Example email

To: [Recipient Name]

Subject: Review Committee (ARC) Analysis - 2020 Bills

Hi [Recipient Name],

I am writing to inform you that the ARC has received a request for review of the 2020 bills. The ARC has determined that the bill [Bill Number] has been filed correctly and that the agency has received notification of the file. The analysis report can be provided for your review.

Please let me know if you have any questions.

Best regards,

[Your Name]

Administrative Rule Editor

Legislative Services Agency

915-251-8600
Example agency memo

| Act Section | Rule Adopted | Rulemaking Agency | Code Section Notified | Code Section Repealed | Rulemaking Date in Stat. | Current Agency Date o/a Stat | Other than AOC |
|-------------|--------------|-------------------|-----------------------|-----------------------|--------------------------|-----------------------------|----------------
| HF 2389     | Rule reported | Aging Department Co. | 13A:08                | 13A:08                | 37:5.5-16                | 37:5.5-11                   |                |

LSA Rule Analysis Report to AFRG on 2020 Iowa Acts: Outstanding Required Rulemaking
Dialogue with agencies

- The nature of agency responses varies quite a bit
- Some agencies know the routine here, some need education
  - When necessary, I try to help agencies determine responses appropriate to their situations
- Agencies will sometimes assert that rulemaking is not required, but acknowledge it is advisable and do it anyway
- Agencies sometimes convince me our determination is substantively incorrect, and I update the chart accordingly
- Sometimes we do make mistakes due to lack of expertise with the subject matter, but also simple human error
- I largely give agencies deference and the benefit of the doubt, don’t try to sow conflict between the branches
Dialogue, continued

- ARRC typically doesn’t push back on agency justifications for delays
  - Higher profile agencies that “phone in” their responses are sometimes criticized, smaller agencies given more slack
  - A follow up response or some brief dialogue at an ARRC meeting is usually enough to resolve the matter
- Unequivocal disagreements are very rare
- Agency disagreements of any kind seem to be largely made in good faith
  - Because ARRC and I don’t question responses much, this could incentivize bad faith responses
  - But most agencies seem to take this seriously
- Agency responses vary in length and substance depending on the circumstance
  - Inexperienced agencies occasionally give brief unserious responses; I try to smooth it over
Dialogue, continued

- Agencies may take days or weeks to respond
- Sometimes I have to hunt for the right agency contact; agency turnover is an issue
- Responses are typically forwarded to the ARRC and also condensed and incorporated into an updated report to the ARRC
Typical agency reasons for delay of rulemaking

- Agency turnover
- Need for approval from federal agency (e.g., Medicaid changes)
- Additional relevant legislation expected the following session
- Lack of funding
- Litigation (voting rights, abortion, etc.)
- Controversy/complexity of subject matter, need for protracted negotiation with interested parties
- Agency just missed a relevant bill
  - Bandwidth during session varies by agency
  - DHS trailer example
- Some concern in ARRC about nonfeasance or malfeasance: not an issue in my experience
Transitioning the project

- The logistics of the project felt unsatisfactory from the start
- My lack of time and technological savvy
- LSA’s project management process was not robust at that point, so somewhat challenging to get help efficiently
- So much paper!
- Sorting, updating, checking, rechecking, moving the paper: it all took forever
  - Sometimes papers get lost
  - Sometimes typos cause trouble
- I and other ARRC staffer would mark our edits on paper copies then create new Word versions; track changes felt cumbersome
- Guess what happens next?

(This is only a small sample)
OH NO!
Once it was unlocked, we ultimately determined they were only outdated copies
LSA's document disposal contractor was so unhelpful, we ended up getting a new one
This incident helped get the ball rolling on upgrading the process
LSA had recently established a Process Improvement Office (project management unit); I’d worked with their staff before on other matters
  Perfect for this kind of work
Establishing a new, more efficient, higher tech process was made a priority
  I had solid support from management to get something done; we made the time for development
I was largely given discretion to work with our PM and CSD teams to come up with a new process
Project development

► Basic workflow would be retained: bill drafters to me to ARRC to agencies
  ► Dropped secondary ARRC staffer review; nonessential step
► Kept the chart structure for each bill and the overall analytical framework
► Just needed better tools/logistics
► Key objectives:
  ► Significantly less paper
  ► Uniformity of charts
  ► Have all the charts sync up with one another, so everything wouldn’t need to be manually updated and checked
  ► Simplicity! (sometimes lacking in other LSA endeavors)
Development, continued

- Development took about 6 months, a lot of iterative discussion
  - COVID struck in the middle, main PM left the LSA, later the main developer did too; slowed things down a bit
- LSA had an existing program we use for various endeavors relating to bills and the Iowa Code, but it is quite complicated and somewhat old
- Decision was made to create a new tool for this process
  - Again, avoiding too much complexity was a key goal of mine
  - I lacked the technical knowledge to get into the weeds on coding and whatnot, had to defer to CSD and see what they come up with each time
Project design

- Bear in mind I don’t really know what I’m talking about here
- If you’re interested, I can put you in touch with our CSD staff
Tool is housed in LSA’s existing online “portal” system, but the tool itself is new.

The tool was designed using a “Bootstrap” framework.

Framework is supported by JQuery and SQL.

After discussing with our CSD staff and googling it, I still can’t explain that very well.

Overall design approach was new for LSA in terms of IT.
Design features and demo

- New tool is easy to use, efficient, has a clean visual look
- New tracking tools for me so I can see how things are progressing
- Reports and charts are autogenerated based on what drafters and I input
- Bills automatically assigned to drafters shortly after enactment
- Electronic routing of charts
- Dropdowns for agencies, statutes, rules: no more free form
- Paperless!
- Past years (that were completed using the tool) are archived
- Let’s take a look and see examples: https://www.legis.iowa.gov/portal
  - Using the tool requires an LSA log-in
Outcomes from new tool

- No more paper
- Uniformity in charts
- Time savings: no more manually updating every field in every document, no more moving paper around, less checking for errors
- Drafters find it easy to use, even more tech-skeptical ones
- After initial training, I’ve gotten relatively few questions about the functionality
  - Training has video, paper, and in-person options
- It’s been fairly easy to get minor technical changes to the tool implemented; no major changes needed since launch
Challenges with new tool

- PM and main developer left the LSA during the development phase
- COVID hit during development
- I went on paternity leave during first full year of use
- The tool can run slow for bills with 100+ sections (maybe 5-10 a year)
- Tool can be cumbersome for bill sections affecting many agencies
  - There is an “all agencies” option, but different subsets have to be dealt with individually
  - This is somewhat of an issue with the rules analysis process generally though
Positive outcomes of the overall project

- New tool is awesome! Drafters and I are very satisfied
  - Shows value of good project management and IT staff
- A more accurate, up-to-date Iowa Administrative Code
  - Helpful to the public, agencies, our rule editing staff, me...
- Agencies getting more attuned to the entirety of their rules, to more fully monitoring legislation, and to determining relationships between statute and rule
  - Particularly helpful for smaller agencies that don’t have the bandwidth to monitor everything on their own
- Fewer outstanding rules getting flagged in report as years go by
- ARRC has been seeing rules being made on more timely basis, more thorough rulemaking
Positive outcomes, continued

- ARRC has gotten a better understanding of issues agencies face when implementing rules
- Rulemaking issues proactively addressed somewhat more often in bills
  - Apprentice bill example
- Governor’s office started flagging bills with possible rules issues upon Governor’s signature
  - Governor’s office has generally backed the ARRC’s emphasis on timely rulemaking
- Bill drafters getting to know relevant rules better
- No other process in Iowa to systemically address these issues
- I’ve been plugging the tool as an option for other LSA endeavors; we’ll see if the framework gets used for other purposes
Ongoing challenges with the project

- Large, complex bills still take a lot of time to get through
- Agency turnover/agencies inexperienced with rules
- Difficult agencies
  - Not really their fault!
  - Dept. of Revenue: lately, every year is a tax reform year
  - Licensing entities: dozens of these, Iowa Code doesn't treat them consistently
  - Dept. of Human Services: size, reorganization
- Even with the new tool, this project still takes up a lot of my time; finishing before Dec. 28 is difficult
  - I’m somewhat of a choke point in the process
- Interplay between the branches can be tricky at times; LSA and ARRC can’t really order agencies around
- No matter how efficient the project gets, it will always be hard for agencies and LSA to catch every possible rulemaking implication from every section of every bill
What’s next?

- An “undo” button in the tool
- Possibly interweave this project with other processes for rules
  - 5-year review of rules, rule annotation, editorial revision process
- As agencies have gotten better at getting their rules done, ARRC concerns have cooled down
  - Could/should the project be scaled down?
  - Perhaps decouple tracking of substantive vs nonsubstantive rulemaking
- I’ve thus far decided automating communications with agencies through the new tool doesn’t add enough value, but may consider in the future
Questions?
Feel free to reach out to me.