

II. (§2.8) Checklist for Challenging an Administrative Rule or Policy

The following is an outline-type “checklist” for counsel who is faced with an existing or proposed agency rule or a situation in which the agency is citing a “policy” as the basis for its action or inaction. This checklist is an attempt, through a series of questions, to acquaint counsel with the broad avenues of inquiry and argument that can be made concerning administrative rules. In keeping with the outline approach, citations are given to sections in this chapter in which further explanation can be found.

1. Is the statement by the agency a proposed rule or a formal rule that is already in effect, or is the agency interpreting or implementing law or policy in a fashion that is not a formal rule?
 - a. If it is a proposed rule, you have certain rights to participate in the rulemaking process by making your comments known. *See* §§2.13 and 2.14, *infra*.
 - b. If the rule is already in effect, there may be ways to influence the agency outside of court action by asking the agency to change the rule or by seeking the assistance of a standing committee of the General Assembly. *See* §§2.27 and 2.28, *infra*.
 - c. If the agency position or policy meets the statutory definition of rule but has not been published according to Chapter 536, RSMo, it is void. *See* §2.39, *infra*.
2. What is the statutory authority for the agency to make this rule? Is it sufficient to support this action?
 - a. Does the rule clearly come within the legislative or constitutional grant of authority or the subject matter jurisdiction of the agency? *See* §§2.30 and 2.40, *infra*.
 - b. Does the rule conflict with a statute? *See* §2.40, *infra*.
 - c. Is there a constitutional problem with the rule or its application to the client? *See* §2.40, *infra*.

- d. The constitutional issue may have to be raised with the agency. *See* §2.40, *infra*.
 - e. Rules can be applied “retrospectively” in some instances. *See* §2.33, *infra*.
3. Was the rule promulgated properly by the agency?
- a. Did the agency follow the statutory requirements to make or amend it? *See* §2.39, *infra*.
 - b. What sort of “record” did the agency make in enacting the rule? *See* §2.44, *infra*.
 - c. Does the rule incorporate other material by reference? *See* §2.19, *infra*.
 - d. Was the fiscal note estimating its cost accurate? *See* §2.16, *infra*.
 - e. Does the rule limit or affect the use of real property, and did the agency do a “takings analysis” in accordance with § 536.017, RSMo 2000?
4. Can the rule properly be characterized as arbitrary, unreasonable, or an abuse of the agency’s discretion? *See* §2.43, *infra*.
5. What is the proper forum for challenging the rule?
- a. Do you have to exhaust your administrative remedies before going to court? *See* §2.36, *infra*.
 - b. Are there special review provisions that apply to the agency? *See* §2.46, *infra*.
 - c. What is the venue for a challenge to a rule? *See* §2.37, *infra*.

The Missouri Secretary of State’s Office publishes a rulemaking handbook titled *Rulemaking 1-2-3, Drafting and Style Manual*. The manual is available in print and online at the Secretary of State’s website.