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What is a "Rule"?

Navigating a Notoriously Muddled Corner(stone) of Texas Administrative Law

Steven Baron

Steven Baron
Steven Baron Consulting & Legal Services
Post Office Box 5573
Austin, Texas 78763
(512) 535-3104
(512) 479-8070 (fax)
sbaron@baroncounsel.com

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I. Introduction

The Texas Administrative Procedure Act[2] (APA) has been with us now for over 40 years. Enacted in 1975,[3] the Act sets out two basic procedures for decision-making by Texas administrative agencies: public notice-and-comment procedures to adopt rules, and contested-case adjudication to adopt final orders. The APA correspondingly authorizes two judicial review procedures: declaratory judgment actions to determine the validity or applicability of rules, and administrative appeals of final orders.

One might suppose that after 40 years it would be reasonably clear when an agency should proceed by rulemaking, and also when a rule may be challenged by declaratory judgment action. One would be wrong. A commentator once described this area of the law as a "miry bog."[4] The Austin Court of Appeals recently labeled it a "notoriously muddled corner of the law."[5] It would be more accurate to say "notoriously muddled corner*stone* of administrative law," considering how basic these questions are.

Why is the law in this area so unsettled? Much of the problem is attributable to the APA's exceedingly general definition of a "rule." The Texas Supreme Court raised hope for clarification earlier this year when it granted review in *Texas State Board of Pharmacy v. Witcher*, No. 14-1022. Shortly after hearing oral argument, however, the Court decided that review had been improvidently granted. The Court might yet have addressed these issues in another appeal, *Texas Medical Board v. Teladoc, Inc.*, No. 15-0092, but after receiving briefs the Court denied the petition for review. And so the "muddle" will persist for the foreseeable future if not for the next 40 years. This paper describes the muddle, discerns from the case law three attributes of an APA "rule" that provide some guidance, and closes with a few practical suggestions for navigating the uncertainties.

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[1] The views expressed in this paper are those of the author and do not necessarily represent the views of any client of Steven Baron Consulting & Legal Services.

[2] TEX. GOV'T CODE §§ 2001.001-.902

[3] The original enactment was titled the Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. art. 5252–13a. It became the APA when codified in the Texas Government Code in 1993.

[4] Ron Beal, *A Miry Bog Part II: UDJA and APA Declaratory Judgment Actions and Agency Statements Made Outside a Contested Case Hearing Regarding the Meaning of the Law*, 59 Baylor L. Rev. 267 (Spring 2007).

[5] *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 616 (Tex. App.—Austin 2014, pet denied).

II. The Muddle

Texas courts consistently remind us that the judiciary's role is not to make law or policy but "simply" to interpret the law as enacted by the Texas Legislature. Under this view, the court's limited function is to ascertain and give effect to the Legislature's intent, which is reflected first and foremost in the "plain language" of the statute. *Greater Houston Partnership v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015). This textual approach to statutory construction has an inherent shortcoming: statutory language often is not plain. When the dictionary and rules of grammar fail to provide ready answers, judges often struggle to divine the Legislature's "intent" and end up disagreeing among themselves. *See, e.g., Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556 (Tex. 2014).

The rulemaking/contested case dichotomy in the APA vividly illustrates this difficulty. One part of the statute sets out procedural steps that an agency must take to adopt a rule. *See* APA §§ 2001.023–.034. Another part sets out procedural requirements for contested-case adjudications. *See id.* §§ 2001.051–.147. But save for the general directive to agencies in APA § 2001.004(1) to "adopt rules of practice," nowhere does the APA specify when an agency must or should use one set of procedures in lieu of the other. Instead, the choice between rulemaking and contested case is addressed only implicitly, embedded in the statute's definitions of a "rule" and "contested case." As a result, unless an agency's enabling statute provides specific direction, whether the agency must promulgate a "rule" using the APA's notice-and-comment procedures will ordinarily depend on what the APA says a "rule" is.

A plaintiff's ability to challenge a rule in a declaratory judgment action also frequently turns on the APA's definition of "rule." APA § 2001.038 confers jurisdiction on the Travis County district courts to determine "the validity or applicability a rule" that that allegedly "interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." *See A. I. Divestitures, Inc. v. Tex. Comm. Env't'l Quality*, 2016 WL 3136850 at *7 (Tex. App.—Austin June 2, 2016, no pet.) ("Section 2001.038 is a grant of original jurisdiction and waives sovereign immunity.") *Accord, Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 700 (Tex. App.—Austin 2011, no pet.).

The definition of "rule" in APA § 2001.003(6) is therefore key. Far from being plain, the definition is abstract and ambiguous:

> "Rule":
>
> (A) means a state agency statement of general applicability that:
>
> (i) implements, interprets, or prescribes law or policy; or
>
> (ii) describes the procedures or practice requirements of a state agency;
>
> (B) includes the amendment or repeal of a prior rule; and
>
> (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

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