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Comment

Participatory Rulemaking in State Government: A Managed Care Success Story

I. INTRODUCTION

In June 1997, the Missouri Department of Insurance (“DOI”) was presented with a massive undertaking: implementation of Senate Substitute for Senate Committee Substitute for House Substitute for House Committee Substitute for House Bill 335 (“HB 335”).¹ The bill enacted sweeping reforms of the managed health care system, incorporating “some of the strongest consumer protections in the country.”² Prior to 1997, the DOI’s authority over managed care, and hence its expertise, was limited.³ Furthermore, the bill contained a variety of controversial and complex issues, so implementation of the legislation was certain to be difficult both politically and technically.⁴

The promulgation of rules was to be the primary tool for the implementation of HB 335.⁵ In order to promulgate rules that were meaningful, effective, fair, and in keeping with legislative intent, the DOI established an extensive participatory process to involve as many interested individuals in the rulemaking process as possible.⁶ Although such a process was authorized by statute in 1997,⁷ no similar process had previously been used by the DOI.⁸

This Comment examines the rulemaking process as established by the Missouri Administrative Procedure Act⁹ and the costs and benefits that an

1. Judith Vandewater, *Consumer Groups Praise Health Bill But Insurers Predict That Costs Will Rise*, ST. LOUIS POST-DISPATCH, June 1, 1997, at 1E.

2. *Id.* For a partial list of reforms, see *infra* note 137.

3. See Vandewater, *supra* note 1, at 1E.

4. See Dan Balaban, *Health Bill Stirs Conflict in Missouri*, KAN. CITY BUS. J., Nov. 3, 1997, at 55.

5. See *infra* notes 85-88 and accompanying text.

6. Memorandum from Tom Bixby, Director, Division of Consumer Affairs, Missouri Department of Insurance, to Interested Parties (June 27, 1997) (on file with author). As the Director of the Division of Consumer Affairs for the Missouri Department of Insurance, the Author was in charge of the implementation of HB 335 for the DOI. In that position, he chaired the task force meetings, as well as the meetings with interest groups, and oversaw responses to all correspondence in regard to HB 335. He was responsible for the content of the regulations promulgated pursuant to HB 335 and designed the participatory process that is the subject of this Comment.

7. MO. REV. STAT. § 536.026 (Supp. 1999).

8. Nor, to the Author’s knowledge, has this process been used by other state agencies.

9. See MO. REV. STAT. ch. 536 (1994 & Supp. 1999).

extensive, participatory process for rulemaking may have for state agencies, the public, and the regulated industry. Specifically, this Comment will focus on the participatory process leading up to the promulgation of three rules generated as a result of the passage of HB 335.¹⁰ The participatory process for the three rules—concerning a standardized credentialing form, the delivery of prescription drugs, and the adequacy of a Health Maintenance Organization’s (“HMO’s”) network of health care providers—yielded very different experiences. In general, the process was invaluable to the DOI in the development of implementing rules and is highly recommended to agencies considering rules to put into effect legislative enactments.

II. LEGAL BACKGROUND

A. Rulemaking Generally

Whereas the federal and state Constitutions divide government into three branches with distinct governance functions,¹¹ administrative agencies often perform all three of these functions.¹² Administrative agencies are generally charged with implementing and enforcing laws under their jurisdiction, and so perform an executive function.¹³ Administrative agencies are also often required to adjudicate the rights of individuals in specific cases, and thus perform a quasi-judicial function.¹⁴ Furthermore, administrative agencies are at times granted discretionary power from the legislative branch, and consequently also take on a quasi-legislative function.¹⁵ The ability to use each of the three types of governmental functions has allowed administrative agencies to “more expeditiously develop and enforce policies.”¹⁶ However, this concentration of powers has generated concerns about anti-democratic governance in which “unelected bureaucrats accumulate enormous policy and law-making discretion.”¹⁷ These concerns have led administrative law to focus on agency

10. Sixteen different rules have been generated as a result of the passage of HB 335. See *supra* note 148 and accompanying text.

11. See U.S. CONST. art. I (federal legislative powers); U.S. CONST. art. II (federal executive power); U.S. CONST. art. III. (federal judicial power); see also MO. CONST. art. II, § 1 (state separation of powers provisions).

12. See CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 4 (1994).

13. See SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY 62 (1993).

14. *Id.*

15. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 4 (1993).

16. *Id.*

17. CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 5 (1990).

structures and processes designed to ensure that agencies do not use their power inappropriately.¹⁸

Administrative agencies generally make policy by using one (or both) of two models of law-making processes.¹⁹ “Incremental” lawmaking is based on the adjudicatory resolution of individual cases.²⁰ Under this process, “policymaking is piecemeal and tightly restricted in scope.”²¹ The second process by which agencies create policy is “comprehensive rationality,”²² more commonly known as rulemaking.²³ Pure comprehensive rationality requires (1) that an agency “identify all possible methods of reaching” its specific objective, (2) that it evaluate each possible method, and (3) that it choose the method best suited to achieving its objective.²⁴ Practically speaking, pure comprehensive rationality is extremely difficult to achieve.²⁵ In addition to the objective of thorough consideration of all options, “[w]e want government administration to be workable, effective, efficient, and economical . . . [as well as] acceptable to the community at large.”²⁶ Consequently, the agency rulemaking process requires trade-offs between different objectives in order to produce the “optimum administrative law-making process.”²⁷

To promulgate a rule, an agency must have some degree of discretionary power granted to it from the legislature.²⁸ The legislature grants such power in order to meet a particular need of the legislature.²⁹ First, rulemaking may “provide the essential details of our law.”³⁰ Rules may fill the gaps where the legislature “is unwilling or unable to write laws specific enough to be implemented by government agencies and complied with by private citizens.”³¹ Second, rulemaking allows the legislature “to remain vague, leaving the specific, painful, and politically dangerous decisions to the agencies.”³² Finally, the

18. *Id.* at 3.

19. See ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* 6 (1986).

20. *Id.* at 5.

21. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 399 (1981).

22. *Id.* at 396.

23. See BONFIELD, *supra* note 19, at 12.

24. Diver, *supra* note 21, at 396.

25. See BONFIELD, *supra* note 19, at 7-8. Although comprehensive rationality “do[es] not often exist in [its] pure and uncompromising form[],” the bulk of the benefits of comprehensive rationality may be attained through rulemaking without incurring too great a cost. BONFIELD, *supra* note 19, at 6-7.

26. BONFIELD, *supra* note 19, at 8.

27. BONFIELD, *supra* note 19, at 8.

28. See BONFIELD, *supra* note 19, at 20-21.

29. See AMAN & MAYTON, *supra* note 15, at 10-11.

30. KERWIN, *supra* note 12, at 2.

31. KERWIN, *supra* note 12, at 2.

32. KERWIN, *supra* note 12, at 32.

rulemaking process allows the legislature to “gain the advantage of policy development by professionals,” where the legislature develops “the rudiments of a solution” to a problem, and then “turn[s] the program . . . over to an agency . . . for implementation.”³³

Agency rulemaking authority parallels these legislative needs. Under state administrative procedure acts, an administrative agency must *implement, interpret, or prescribe the details* of a law established by the legislature.³⁴ When a rule *implements* a law, the policy behind the law has been fully developed by the legislature, and the rule merely instructs the public on how to comply.³⁵ This meets the need of the legislature to “provide the essential details of the law.”³⁶ When a rule *interprets* the law, it clarifies, explains, or describes a standard of conduct required by the legislation.³⁷ Agency interpretation allows the legislature to “remain vague,” leaving the agency with the difficult decisions.³⁸ When a rule *prescribes the details* of a law, it does so because the legislature “establishes the goals of . . . statutes but provides few details as to how [the goals] are to be put into operation or how they are actually to be achieved.”³⁹ Allowing an agency to prescribe the details of the law enables the legislature to set broad policy goals without filling in all of the details.⁴⁰

The process for rulemaking in administrative agencies serves two broad purposes. First, *decisional processes* of rulemaking are designed to be “participatory (open to persons likely to be affected by the proposed rule) and comprehensive ([addressing] the range of interests at stake in a proposed rule).”⁴¹ Second, the process is designed to ensure agency compliance with the *rule of law* concept.⁴² The rule of law requires clearly established rules so that the public may more readily understand and comply with the law.⁴³

The decisional processes of rulemaking are designed to be participatory and comprehensive for a variety of reasons. First, “[p]ublic participation in rule making . . . helps to ensure that non-representative bodies of rule makers make responsive and responsible rules.”⁴⁴ Second, participation in rulemaking serves an important informational function.⁴⁵ Information from and critical analysis by affected parties can prove invaluable to an agency attempting to develop

33. KERWIN, *supra* note 12, at 11-12.

34. See BONFIELD, *supra* note 19, at 89.

35. See KERWIN, *supra* note 12, at 5.

36. KERWIN, *supra* note 12, at 2.

37. See AMAN & MAYTON, *supra* note 15, at 88.

38. KERWIN, *supra* note 12, at 34.

39. KERWIN, *supra* note 12, at 6.

40. See KERWIN, *supra* note 12, at 11-12.

41. AMAN & MAYTON, *supra* note 15, at 41.

42. See AMAN & MAYTON, *supra* note 15, at 41.

43. See BONFIELD, *supra* note 19, at 107.

44. BONFIELD, *supra* note 19, at 184.

45. KERWIN, *supra* note 12, at 34.

policy.⁴⁶ Administrative agencies frequently have insufficient information and background necessary to write effective rules.⁴⁷ Furthermore, “broad citizen participation provides agencies with a basis of comparison to check the accuracy of information proffered by regulated groups.”⁴⁸ Such participation gives opponents of the agency proposal a fair and complete opportunity to voice their concerns.⁴⁹

In addition to enhanced accountability and increased information flow, public participation “help[s] rulemaking agencies plan for the circumstances they will confront when . . . implementation . . . begins.”⁵⁰ Generally, “[i]nput during the initial stages of the rulemaking process from sources outside the agency may prevent the development of subsequent legal, technical, or political problems for the agency.”⁵¹ Circumstances for which an agency must plan include a negative reaction to an unpopular rule⁵² and the likelihood and nature of a lawsuit challenging the rule.⁵³ Furthermore, effective enforcement plans and monitoring systems must be designed.⁵⁴ Participation in rulemaking helps the agency address each of these problems.⁵⁵

An additional benefit of public participation in the rulemaking process is the prevention or perception of “agency capture.”⁵⁶ Agency capture occurs when agency personnel, for any of a variety of reasons, adopt the regulated industry’s point of view rather than maintaining an objective, detached perspective.⁵⁷ The decisional processes of rulemaking are designed to be “a cure for the myopia of the . . . administrator, unable to see beyond the parties before him to the full range of public interests affected by his decisions.”⁵⁸

Finally, the participation of opposing interests in the rulemaking process may “lead to bargaining, [where] the rules produced reflect[] compromises generally acceptable to all.”⁵⁹ This type of outcome enhances the legitimacy of the rulemaking process⁶⁰ and makes the adoption “of unnecessary, unsound, or otherwise undesirable rules” less likely.⁶¹

46. See AMAN & MAYTON, *supra* note 15, at 45.

47. See AMAN & MAYTON, *supra* note 15, at 45.

48. BONFIELD, *supra* note 19, at 182.

49. See BONFIELD, *supra* note 19, at 182.

50. KERWIN, *supra* note 12, at 162.

51. BONFIELD, *supra* note 19, at 157.

52. See BONFIELD, *supra* note 19, at 183.

53. See KERWIN, *supra* note 12, at 163.

54. See KERWIN, *supra* note 12, at 162.

55. See KERWIN, *supra* note 12, at 10.

56. BONFIELD, *supra* note 19, at 184.

57. See SHAPIRO & TOMAIN, *supra* note 13, at 12, 113.

58. Diver, *supra* note 21, at 424.

59. BONFIELD, *supra* note 19, at 185.

60. See KERWIN, *supra* note 12, at 161.

61. BONFIELD, *supra* note 19, at 150.

Public participation in the rulemaking process is not, however, devoid of problems.⁶² First, in order to participate effectively in the rulemaking process, an interest group must be well-organized, able to devote substantial resources to the project, and fairly sophisticated.⁶³ As a result, "industry and trade associations tend to be overrepresented in regulatory politics, and small producers and consumers tend to be underrepresented."⁶⁴ Furthermore, interest groups that do participate in the rulemaking process are often less interested in producing a good rule than they are in taking "extreme positions," providing results of "defensive research," and taking other steps designed solely to protect the narrow interests of their constituents.⁶⁵

Accommodating an extensive public participation process can be cumbersome and costly to the promulgating agency.⁶⁶ The agency must collect, analyze, consider, and respond to comments. Such a process, particularly one involving a complex rule or participation by a large number of individuals (or both), is time-consuming and costly.⁶⁷ In addition, when considering high profile, controversial issues, public participation may "place the agency squarely between powerful contending forces," creating political ramifications for the agency.⁶⁸

Another potential problem with public participation in the rulemaking process is that "[f]ormal mechanisms for participation, such as written comment and public hearings, [may] become stylized rituals from which neither side expects much more than an affirmation of what is already known."⁶⁹ If an agency views participatory mechanisms as a mere formality, then the benefits of public participation in the rulemaking process will be lost. Thus, mechanisms to increase public participation are a means to achieve greater accountability, better information, and a better rulemaking process, not ends unto themselves.⁷⁰

The second major function of the rulemaking process is to ensure compliance with the rule of law.⁷¹ First, the rule of law requires that laws be clearly established to enable one to have "the practical capacity . . . to order her life and business."⁷² Government "owes a duty to define the conditions under which conduct . . . would be [illegal] so that [the public] will have an inkling as to what they can lawfully do rather than be in a state of complete

62. See KERWIN, *supra* note 12, at 89-90.

63. See KERWIN, *supra* note 12, at 114.

64. SHAPIRO & TOMAIN, *supra* note 13, at 111.

65. KERWIN, *supra* note 12, at 115-16.

66. See AMAN & MAYTON, *supra* note 15, at 58.

67. See KERWIN, *supra* note 12, at 115.

68. KERWIN, *supra* note 12, at 163.

69. KERWIN, *supra* note 12, at 116.

70. See BONFIELD, *supra* note 19, at 10-11.

71. See AMAN & MAYTON, *supra* note 15, at 41.

72. AMAN & MAYTON, *supra* note 15, at 69.

unpredictability.”⁷³ Second, the rule of law requires rules to be general in their application: “[a] rule will not say that Jones may not drive faster than sixty-five miles per hour. Rather it will say that no one can.”⁷⁴ At the state level, therefore, the formal promulgation of rules is required whenever an agency makes a policy “statement that is of general applicability.”⁷⁵ A “statement of general applicability” is any statement of policy “*directed at a class by description, that is directed at all persons similarly situated*, rather than at named individuals.”⁷⁶

B. The Missouri Rulemaking Process

The Missouri Constitution provides that “[a]ll rules and regulations of any . . . administrative agency of the executive department . . . shall take effect not less than 10 days after the filing thereof in the office of the secretary of state.”⁷⁷ The Missouri Supreme Court has interpreted this provision to mean that the “[p]romulgation of rules and regulations is an executive function.”⁷⁸ Although, rulemaking is a *function* of the executive branch, legislative authority must be granted to an administrative agency before it can promulgate rules.⁷⁹ Furthermore, rules “must be promulgated within the scope of the legislative authority conferred upon the state agency or [they] . . . are void. They are also void if they attempt to modify or extend the statutes.”⁸⁰ The grant of legislative authority may be express or implied.⁸¹

Missouri, like most states, has adopted an Administrative Procedure Act that establishes (among other things) the process by which administrative

73. AMAN & MAYTON, *supra* note 15, at 69 (quoting E.I. Dupont De Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984)).

74. AMAN & MAYTON, *supra* note 15, at 70.

75. BONFIELD, *supra* note 19, at 77. This is not always the case for rules promulgated by the federal government. See BONFIELD, *supra* note 19, at 77.

76. BONFIELD, *supra* note 19, at 75.

77. MO. CONST. art. IV, § 16.

78. Missouri Coalition for the Env’t v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 133 (Mo. 1997); see also Pharmflex, Inc. v. Division of Employment Sec., 964 S.W.2d 825, 829 (Mo. Ct. App. 1997).

79. See *State ex rel. Royal Ins. v. Director of the Mo. Dep’t of Ins.*, 894 S.W.2d 159, 161 (Mo. 1995).

80. Associated Indus. of Mo. v. Angoff, 937 S.W.2d 277, 282 (Mo. Ct. App. 1996).

81. See Pen-Yan Inv., Inc. v. Boyd Kan. City, Inc., 952 S.W.2d 299, 304 (Mo. Ct. App. 1997). However, an agency “cannot infer a power from a statute simply because that power would facilitate the accomplishment of an end deemed beneficial.” *Id.* “A power may be implied ‘only if it necessarily follows from the language of the statute.’” *Id.* (quoting Brooks v. Pool-Leffler, 636 S.W.2d 113, 119 (Mo. Ct. App. 1982)).

agencies are required to adopt rules.⁸² The Missouri Administrative Procedure Act (“MoAPA”) defines a rule as any “agency statement of general applicability that implements, interprets, or prescribes law or policy.”⁸³ In short, any policy an administrative agency wishes to generally apply, must be promulgated in accordance with MoAPA.⁸⁴

The consequences of applying a “rule” (a policy of general applicability) without adhering to the formalities of MoAPA are clear: the rule is invalid⁸⁵ and, if the agency had been notified in writing prior to the application of the “rule,” the agency “shall” be required to pay reasonable attorney’s fees to the offended party.⁸⁶ Rulemaking under MoAPA requires that “statement[s] of general applicability” be expressed in a rule.⁸⁷ Furthermore, MoAPA provides effective remedies to those who are wronged by an agency’s failure to do so.⁸⁸

82. See MO. REV. STAT. ch. 536 (1994 & Supp. 1999); see also BONFIELD, *supra* note 19, at 19.

83. MO. REV. STAT. § 536.010(4) (1994). The definition explicitly includes an amendment or repeal of an existing rule. The definition also provides for several exceptions not relevant here.

84. See *NME Hosps., Inc. v. Department of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. 1993). Missouri courts also require that a “rule” have the “potential, however slight, of impacting the substantive or procedural rights of some member of the public” before obligating an agency to go through the rulemaking process for a statement of general applicability. *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. 1994) (holding that placing the word “prior” before the word “salvage” on titles of vehicles that had been reconstructed, although a statement of general applicability, and therefore a “rule,” was not void for failure to follow MoAPA procedures because the term did “not substantially affect the legal rights of any party.” *Id.*

85. See MO. REV. STAT. § 536.014 (Supp. 1999); MO. REV. STAT. § 536.021.1 (Supp. 1999) (“No rule shall hereafter be proposed, adopted, amended or rescinded” without following procedures set out in MoAPA.); MO. REV. STAT. § 536.021.5 (Supp. 1999) (“If the state agency fails to file the order of rulemaking as indicated in [MoAPA], the proposed rule shall lapse and shall be null, void and unenforceable.”); MO. REV. STAT. § 536.021.7 (Supp. 1999) (“Except as [otherwise provided], any rule, or amendment or rescission thereof, shall be null, void and unenforceable unless made in accordance with the provisions of [MoAPA].”); MO. REV. STAT. § 536.024.1 (Supp. 1999) (“[T]he granting of . . . rulemaking authority and the validity of . . . rules and regulations is contingent upon the agency complying with the provisions of [MoAPA].”); see also *State v. Peters*, 729 S.W.2d 243, 246 (Mo. Ct. App. 1987) (holding that state’s method for analyzing blood of allegedly drunk driver was invalid for failure to comply with MoAPA).

86. MO. REV. STAT. § 536.021.9 (Supp. 1999). Attorney’s fees in such a case are to be limited to “the amount in controversy in the original action.” MO. REV. STAT. § 536.021.9 (Supp. 1999).

87. MO. REV. STAT. § 536.014 (Supp. 1999).

88. See MO. REV. STAT. § 536.021.9 (Supp. 1999).

To retain some control over the rulemaking process, the Missouri General Assembly established the Joint Committee on Administrative Rules (“JCAR”).⁸⁹ JCAR is a permanent committee made up of five members of the House of Representatives and five members of the Senate.⁹⁰ Prior to 1997, JCAR had statutory authority to initiate a “legislative veto.”⁹¹ However, in February 1997, the Missouri Supreme Court ruled that the “legislative veto” was an invalid usurpation of executive power by the legislative branch, and a violation of the presentment clause of the Missouri Constitution.⁹² As a result of this decision, the General Assembly established a new statutory scheme⁹³ that relied on an

89. See MO. REV. STAT. § 536.024 (Supp. 1999).

90. See MO. REV. STAT. § 536.037.1 (Supp. 1999).

91. MO. REV. STAT. § 536.024.2 (1994); Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 MO. L. REV. 1158 (1992). A “legislative veto” is “a scheme authorizing [the] legislature[] to invalidate or suspend particular agency rules by means other than the enactment of a statute.” BONFIELD, *supra* note 19, at 497-98. Although originally designed to *review* agency rules, JCAR (in some instances) was later given “breathtaking” power to permanently suspend a rule, subject only to the legislature overruling the committee’s decision. Dean, *supra*, at 1161-64, 1215. The Dean article criticizing the legislative veto is “recommended to any serious student of administrative and constitutional law.” *Missouri Coalition for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 133 n.17 (Mo. 1997). The legislative veto as established prior to 1997 “mocks the concept of political accountability” in the rulemaking process. Dean, *supra*, at 1202. “Far more political accountability already exists for most agencies because they must report to the governor, who is accountable to [all] the people” whereas JCAR is made up of ten legislators with comparatively narrow constituencies. Dean, *supra*, at 1202. The legislative veto has been criticized as “unduly aggrandiz[ing] the legislative authority at the expense of the executive branch,” thereby weakening the governor. BONFIELD, *supra* note 19, at 507. Because *unlawful* rules may be attacked judicially (with a provision for attorney’s fees in Missouri, see MO. REV. STAT. § 536.050.3 (Supp. 1999)), the primary effect of a legislative veto will be attacks on *lawful* rules. In Missouri, this would give JCAR power to restrict the scope of legislative acts duly passed with the approval (or over the veto) of the governor. See Dean, *supra*, at 1204. This power would upset the system of checks and balances set out in the state constitution. See BONFIELD, *supra* note 19, at 507-08. Perhaps most importantly, a legislative veto “may be more susceptible to undue influence by special interest groups seeking action inconsistent with the political will of the entire body politic and contrary to public interest” than is the agency rulemaking process. BONFIELD, *supra* note 19, at 508. Finally, the legislative veto may encourage some interests to limit or entirely forego their participation in the agency rulemaking process, seeking to defeat a rule they oppose through the legislative veto. Such a result would defeat the purpose of a participatory rulemaking process, and make the process less effective and valuable. See BONFIELD, *supra* note 19, at 508; see also Dean, *supra*, at 1204.

92. *Missouri Coalition for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 133 (Mo. 1997).

93. See H.B. 850, 89th Leg. (Mo. 1997). The process applies to state agencies. See MO. REV. STAT. § 536.021.1 (Supp. 1999). “State agency” is defined as “each board, commission, department, officer or other administrative office or unit of the state other

Executive Order and statutory provisions contingent upon future events to recreate the legislative veto.⁹⁴ Under this new legislative veto provision, JCAR remains a pivotal actor in the rulemaking process.⁹⁵

The new scheme makes parsing the guidelines for rulemaking somewhat difficult.⁹⁶ The scheme in effect at the time rulemaking for HB 335 took place, allows an administrative agency to seek informal public comment prior to initiating the formal rulemaking process.⁹⁷ This informal input may consist of the solicitation of comments on rules an agency is considering, and the appointment of committees “to comment on the subject matter of a rule that the agency is considering proposing.”⁹⁸ The informal process is entirely at the option of the agency.⁹⁹

The formal rulemaking process begins with the filing of a “notice of proposed rulemaking” with the Secretary of State.¹⁰⁰ The notice must also be filed with JCAR.¹⁰¹ This notice must include:

- (1) an explanation of the rule (or change in the rule);
- (2) reasons for the rule (or change in the rule);
- (3) the agency’s legal authority for promulgating the rule (or change in the rule);
- (4) the text of the entire rule (or changes to the existing rule);
- (5) notice of where and how a person can comment on the proposed rule,¹⁰² and

than the general assembly, the courts, the governor or a political subdivision of the state, existing under the constitution or statute, and authorized . . . to make rules.” MO. REV. STAT. § 536.010(5) (1994). Certain aspects of the process do not apply to the Public Service Commission and the Labor and Industrial Relations Commission. *See* MO. REV. STAT. § 536.024.6 (Supp. 1999). Furthermore, for certain issues, the Director of the Department of Social Services need not promulgate rules, *see* MO. REV. STAT. § 536.043 (Supp. 1999), and the process need not be applied to “letter rulings” of the Department of Revenue. MO. REV. STAT. § 536.021.10 (Supp. 1999).

94. Exec. Order No. 97-97 (1997) (on file with Mo. Secretary of State); *see, e.g.*, MO. REV. STAT. §§ 536.016, .019, .028 (Supp. 1999).

95. *See, e.g.*, MO. REV. STAT. §§ 536.024.2-.3 (Supp. 1999); Exec. Order No. 97-97 ¶ 3 (1997) (on file with Mo. Secretary of State).

96. In addition to having statutes effective based on a future contingency, *see supra* note 94, the scheme, for example, makes Executive Order No. 97-97 pivotal to the rulemaking process in effect when the contingent statutes are not in effect. However, the only explicit mention in the statutes of Executive Order No. 97-97 is in those contingent statutes. *See* MO. REV. STAT. §§ 536.016, .019, .028 (Supp. 1999).

97. *See* MO. REV. STAT. §§ 536.026.1-.2 (Supp. 1999).

98. MO. REV. STAT. §§ 536.026.1-.2 (Supp. 1999).

99. *See* MO. REV. STAT. §§ 536.026.1-.2 (Supp. 1999).

100. MO. REV. STAT. § 536.021.1 (Supp. 1999).

101. *See* MO. REV. STAT. § 536.024.2 (1999); Exec. Order No. 97-97 ¶ 1 (1997) (on file with Mo. Secretary of State).

102. *See* MO. REV. STAT. § 536.021.2 (Supp. 1999).

- (6) a fiscal note, estimating the cost of the rule to government agencies¹⁰³ and to private parties.¹⁰⁴

The notice is to be published by the Secretary of State in the Missouri Register “as soon as practicable after the filing” of the rule by the agency.¹⁰⁵

MoAPA establishes a minimum comment period of thirty days after publication in the Missouri Register of the notice of proposed rulemaking.¹⁰⁶ In addition, the agency may hold a public hearing on the proposed rule “but no such hearing shall be necessary unless otherwise required by law.”¹⁰⁷ A final order of rulemaking must be submitted to JCAR within sixty days of the end of the comment period or the hearing.¹⁰⁸ The final order must also be submitted to the Secretary of State within ninety days¹⁰⁹ unless “the final order of rulemaking has been disapproved by [JCAR].”¹¹⁰ The final order of rulemaking must contain:

- (1) an explanation of any changes made to the final rule from the proposed rule;
- (2) reasons for any such changes;
- (3) “[t]he full text of any section or subsection of the rule as adopted which has been changed from that contained in the notice of proposed rulemaking”;
- (4) a summary of comments and (if applicable) hearing testimony;
- (5) an explanation of the “agency’s findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule”; and
- (6) the agency’s legal authority for promulgating the rule.¹¹¹

103. See MO. REV. STAT. § 536.200.1 (1994). If the cost to government agencies is expected to be less than \$500 an affidavit to that effect from the department director will suffice.

104. See MO. REV. STAT. § 536.205.1 (1994). A private entity fiscal note is not necessary if the anticipated cost to private entities is expected to be less than \$500.

105. MO. REV. STAT. § 536.021.1 (Supp. 1999). The Missouri Register is to be published “no less frequently than monthly by the secretary of state.” MO. REV. STAT. § 536.015 (1994). Copies of the Missouri Register are to “be made available to the public . . . for a reasonable charge . . . not to exceed the actual cost of publishing and delivery.” MO. REV. STAT. § 536.033.1 (1994).

106. See MO. REV. STAT. § 536.021.2(5) (Supp. 1999).

107. MO. REV. STAT. § 536.021.3 (Supp. 1999).

108. Section 536.024.3 requires that a final order of rulemaking cannot be filed with the Secretary of State until 30 days *after* filing with JCAR. MO. REV. STAT. § 536.024.3 (Supp. 1999). Section 536.021.5 requires that a final order of rulemaking be filed with the Secretary of State within 90 days of the end of the comment period or the hearing. Therefore, to comply with both provisions, an agency must file with JCAR within 60 days of the end of the comment period or the hearing. MO. REV. STAT. § 536.021.5 (Supp. 1999).

109. See MO. REV. STAT. § 536.021.5 (Supp. 1999).

110. Exec. Order No. 97-97 ¶ 3 (1997) (on file with Mo. Secretary of State).

111. MO. REV. STAT. § 536.021.5 (Supp. 1999).

After the final order of rulemaking has been filed with and published by the Secretary of State, the entire rule as finally adopted by the agency must be published in the Code of State Regulations.¹¹² The rule then becomes effective on the “thirtieth day after the date of publication of the . . . Missouri code of state regulations.”¹¹³ If it is later determined that a rule is invalid, the party successfully challenging the rule “shall be awarded reasonable fees and expenses.”¹¹⁴

Alternatively, if JCAR disapproves a final order of rulemaking within thirty days of receiving the filing, then the administrative agency “[s]hall hold in abeyance for thirty (30) legislative days [the] final order of rulemaking.”¹¹⁵ Furthermore, the Secretary of State is prohibited from publishing the final order of rulemaking prior to the expiration of the thirty legislative days.¹¹⁶ If, during the thirty legislative days, the legislature passes a concurrent resolution disapproving the rule, and opponents garner a two-thirds vote in each house, then the agency “[s]hall give force and effect” to the resolution, and the rule will fail.¹¹⁷

MoAPA, therefore, addresses the decisional processes goals of rulemaking, namely that a process must be comprehensive and participatory.¹¹⁸ “The very purpose of the notice procedure for a proposed rule [under MoAPA] is to allow

112. MO. REV. STAT. § 536.021.8 (Supp. 1999). The Code of State Regulations is to be published “from time to time . . . as determined by the secretary of state.” MO. REV. STAT. § 536.031 (1994). Copies of the Code of State Regulations are to “be made available to the public . . . for a reasonable charge . . . not to exceed the actual cost of publishing and delivery.” MO. REV. STAT. § 536.033.1 (1994).

113. MO. REV. STAT. § 536.021.8 (Supp. 1999).

114. MO. REV. STAT. § 536.050.3 (Supp. 1999).

115. Exec. Order No. 97-97 ¶ 3 (1997) (on file with Mo. Secretary of State); MO. REV. STAT. § 536.028.1 (Supp. 1999). A “legislative day” is a day on which the legislature is in session.

116. Section 536.021.1 prohibits the publication of any final order of rulemaking that fails to comply with procedures set out in Section 536.024 “or an executive order, whichever appropriately applies.” Presumably, this reference is to Executive Order No. 97-97. Nevertheless, Section 536.021.1 explicitly prohibits the Secretary of State from publishing a final order of rulemaking that has been disapproved by concurrent resolution of the legislature or one that is the subject of a concurrent resolution. See MO. REV. STAT. §§ 536.021.1, .024 (Supp. 1999).

117. Exec. Order No. 97-97 ¶ 4 (1997) (on file with Mo. Secretary of State). Although the concurrent resolution must first be presented to the Governor for his signature (in which case only a majority in each house must vote for the resolution), this outcome is unlikely. Administrative agencies are part of the Executive Branch, and therefore most agency heads work for the Governor. Presumably, if the Governor wanted to prevent a particular rule from becoming effective, he/she could find a more direct method than signing a concurrent resolution of the legislature.

118. See AMAN & MAYTON, *supra* note 15, at 41; see also *supra* text accompanying notes 44-61.

opportunity for comment by supporters or opponents of the measure, and so to induce a modification.”¹¹⁹ The process set out in MoAPA is comprehensive, providing an opportunity for all interested parties to offer input to the rulemaking agency. If the agency views public comment as more than a mere “stylized ritual,”¹²⁰ then MoAPA provides a process that is also participatory.

Similarly, MoAPA addresses rule of law concerns in the rulemaking process.¹²¹ The MoAPA requirement that any “statement of general applicability”¹²² be promulgated and published as a formal rule is a rule of law concept.¹²³ The provision requires that rules be published, thereby helping to ensure that the public can more easily understand and comply with the law.¹²⁴ If an agency attempts to apply a “rule” without first having properly promulgated it, MoAPA provides ample protection for the public by declaring any such rule void,¹²⁵ and providing for legal fees for an aggrieved party.¹²⁶ Furthermore, if an agency first promulgates a rule that is subsequently challenged and found to be invalid (apparently on any grounds), the adverse party is again entitled to expenses and legal fees.¹²⁷

119. *St. Louis Christian Home v. Missouri Comm’n on Human Rights*, 634 S.W.2d 508, 515 (Mo. Ct. App. 1982) (citations omitted); *see also* *NME Hosps., Inc. v. Department of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. 1993).

120. KERWIN, *supra* note 12, at 116.

121. *See* AMAN & MAYTON, *supra* note 15, at 41.

122. MO. REV. STAT. § 536.010(4) (1994).

123. *See* MO. REV. STAT. § 536.021.5 (Supp. 1999).

124. *See* BONFIELD, *supra* note 19, at 107.

125. *See* MO. REV. STAT. § 536.021.5 (Supp. 1999).

126. *See* MO. REV. STAT. § 536.021.9 (Supp. 1999).

127. *See* MO. REV. STAT. § 536.050.3 (Supp. 1999). Under MoAPA an agency can illegally apply a rule of general applicability in two ways. First, it can apply the rule without first properly promulgating the rule under MoAPA. *See* MO. REV. STAT. § 536.021.9 (Supp. 1999). Second, an agency can promulgate a rule, using the proper procedures, for which it has no authority. *See* MO. REV. STAT. § 536.050.3 (Supp. 1999). The former Section 536.021.9 has two limitations not found in Section 536.050.3. First, the former is limited to legal fees, as opposed to “fees and expenses”; second, the former is limited to “the amount in controversy,” whereas no such limitation exists for the latter statute. *See* MO. REV. STAT. §§ 536.021.9, .050.3 (Supp. 1999). In combination, the statutes clearly create the incentive for an agency not to act at all if unsure about its authority. However, where an agency wishes to pursue a policy for which its authority is unclear, the statutes seem to create an odd incentive to *not promulgate* the rule, because the consequences of having a court determine the agency was wrong are less severe.

III. RULEMAKING PROCESS FOR HB 335

In early 1997, the Missouri General Assembly debated¹²⁸ and passed sweeping reform of how managed care was to be delivered in the State of Missouri.¹²⁹ The bill included “some of the strongest consumer protections in the country”¹³⁰ yet passed both Houses of the Legislature by “lopsided,” bipartisan margins: 140-15 in the House, and 33-1 in the Senate.¹³¹ Governor Mel Carnahan called HB 335, “the legislative miracle of the session.”¹³² The bill was the result of work done by an interim committee that held a series of hearings throughout the prior year,¹³³ out of which developed a “diverse coalition . . . [that] produced consensus among urban and rural, Democratic and Republican legislators.”¹³⁴ The overwhelming margins by which the legislation passed occurred despite “fierce[] opposition to the bill” from managed care companies¹³⁵ and “intense opposition” from business groups.¹³⁶

128. See Virginia Young, *Bipartisan Forces Trying to Regulate Managed Care*, ST. LOUIS POST-DISPATCH, Feb. 16, 1997, at 8D.

129. See Vandewater, *supra* note 1, at 1E.

130. Vandewater, *supra* note 1, at 1E (quoting Geri Dallek, Director of Health Policy at Families, U.S.A., a health advisory organization in Washington, D.C.). For a partial list of reforms, see *infra* note 137.

131. Vandewater, *supra* note 1, at 1E.

132. Scott Charton, *Managed Care Law Aimed at 'Abuses'; Carnahan Signs Bill, Praises Cooperation*, ST. LOUIS POST-DISPATCH, June 26, 1997, at 4B.

133. See Nicole Ziegler, *House Cheers Health Care Bill*, ST. LOUIS POST-DISPATCH, May 15, 1997, at 2B.

134. Young, *supra* note 128, at 8D.

135. Ziegler, *supra* note 133, at 2B.

136. Young, *supra* note 128, at 8D.

In addition to a variety of consumer protections,¹³⁷ HB 335 made a significant public policy shift in that it gave “the Department of Insurance tremendous authority to regulate managed care companies” where no such authority had previously existed.¹³⁸ Faced with this new authority, the DOI lacked the type of expertise necessary to properly address some of the issues raised in the legislation. Given the lack of expertise and the controversial nature of many of the provisions of HB 335, the DOI determined that it would be prudent to solicit input from interested parties concerning the implementation of HB 335 through an inclusive participatory rulemaking process.¹³⁹

Two days after Governor Carnahan signed HB 335, the participatory rulemaking process began when the DOI sent a questionnaire to all interested parties requesting feedback on a variety of issues concerning the legislation.¹⁴⁰ The DOI then held a public hearing on HB 335 and, subsequently, established nine task forces focusing on different aspects of the bill.¹⁴¹ Each task force was

137. See Charton, *supra* note 132. Consumer protections provided by the legislation include the following requirements:

- (1) a prohibition on retracting authorization for health services once given, except in a few narrow circumstances, MO. REV. STAT. § 376.1361.13 (Supp. 1999);
- (2) emergency services must be covered if a prudent layperson under the circumstances would have thought it necessary to go to the emergency room, MO. REV. STAT. § 376.1367 (Supp. 1999);
- (3) the DOI’s resolution to grievances filed by consumers against their managed care companies would be binding, MO. REV. STAT. § 376.1387.1 (Supp. 1999);
- (4) HMOs must have adequate networks of health care providers within reasonable distances of consumers’ homes, MO. REV. STAT. § 354.603.1 (Supp. 1999);
- (5) health care providers are prohibited from billing consumers for covered services where an HMO failed to pay, MO. REV. STAT. § 354.606.2 (Supp. 1999); and
- (6) an HMO must continue to cover services from a health care provider for a pregnant patient, a person with a disability, or a life-threatening illness for up to 90 days after the provider is no longer in an HMO’s network if continuity of care is medically necessary and prudent for that patient. MO. REV. STAT. § 354.612 (Supp. 1999).

138. VandeWater, *supra* note 1, at 1E (quoting John O’Rourke, Chief Executive of Blue Cross and Blue Shield of Missouri and its for-profit subsidiary, RightChoice Managed Care). Although the Department of Health (“DOH”) had some responsibility for the implementation of HB 335, the vast majority of the legislation was the responsibility of the Department of Insurance (“DOI”). See H.B. 335, 89th Leg. (Mo. 1997); see also Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

139. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

140. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6, at 2.

141. Memorandum from Tom Bixby, Director, Division of Consumer Affairs, Missouri Department of Insurance, to Interested Parties 1 (July 17, 1997) (on file with author).

composed of interested parties representing various points of view.¹⁴² Moreover, each task force held several public meetings.¹⁴³ The task forces were designed to “give advice to the Department of Insurance (DOI), help [it] to understand how the [health care] system works ‘in the real world’, and to help with the interpretation of the legislation and the writing of the rules.”¹⁴⁴ The vote of each task force was purely advisory.¹⁴⁵ In addition, DOI staff held many private meetings with various interest groups and interested individuals.¹⁴⁶ The DOI also posted memoranda and drafts of proposed rules on its website and maintained a mailing list of 300 interested parties.¹⁴⁷

Eventually, the DOI promulgated sixteen rules pursuant to HB 335.¹⁴⁸ The participatory rulemaking process established for three of these rules is the subject of this Comment. The three rules selected correspond to the three categories of rulemaking that relate to legislative goals for granting rulemaking authority.¹⁴⁹ Specifically, the “Standard Form to Establish Credentials” (“Standardized Credentialing Form”)¹⁵⁰ involved a situation in which the legislature granted the DOI rulemaking authority to *implement* the law; the “Pharmacies and Prescription Drugs” (“Pharmacy Regulation”)¹⁵¹ involved a situation in which the legislature granted the DOI rulemaking authority to *interpret* the law; and the “Provider Network Adequacy Standards” (“Network Adequacy”)¹⁵² involved a situation in which the legislature granted the DOI rulemaking authority to *prescribe the details* of the law.¹⁵³

142. Memorandum from Tom Bixby (July 17, 1997), *supra* note 141, at 1.

143. Memorandum from Tom Bixby, Director, Division of Consumer Affairs, Missouri Department of Insurance, to Interested Parties 1 (July 30, 1997) (on file with author).

144. Memorandum from Tom Bixby (July 30, 1997), *supra* note 143, at 1.

145. Memorandum from Tom Bixby (July 30, 1997), *supra* note 143, at 1.

146. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

147. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

148. MO. CODE REGS. ANN. tit. 20, §§ 100-4.100, 100-5.010, 100-5.020, 400-2.160, 400-7.095, 400-7.170, 400-7.180, 400-7.200, 400-7.300, 400-7.400, 400-8.200, 400-10.010, 400-10.020, 400-10.200, 400-10.250, 700-4.100 (1998).

149. *See supra* text accompanying notes 34-40.

150. MO. CODE REGS. ANN. tit. 20, § 400-7.180 (1998).

151. MO. CODE REGS. ANN. tit. 20, § 400-7.400 (1998).

152. MO. CODE REGS. ANN. tit. 20, § 400-7.095 (1998).

153. These categories are not mutually exclusive and the legislature does not explicitly grant one type of rulemaking authority over another. *See BONFIELD, supra* note 19, at 89-90. Rather, these categories are descriptions that overlap. It is unlikely that the purpose of a rulemaking procedure would be solely to implement a law without, for example, any interpretation. The authority for the rules selected are, however, *primarily* for the purpose indicated, and so appeared to be the best fit for analyzing the participatory process. *See BONFIELD, supra* note 19, at 89-90.

A. *Standardized Credentialing Form*

HB 335 provided that the DOI “shall develop a standard credentialing form which shall be used by all [HMOs] when credentialing health care professionals in a managed care plan.”¹⁵⁴ The provision was designed to alleviate paperwork for health care providers who contracted with several different HMOs. Each HMO had its own credentialing form that asked for similar information in different formats. Because one HMO would not accept the credentialing form of another HMO, doctors spent a great deal of time filling out these different forms. Hence, the goal of the standardized credentialing form was to minimize the amount of paperwork necessary for health care providers to contract with more than one HMO.¹⁵⁵

The DOI viewed the creation of the standardized credentialing form as an issue of *implementation* of the law—the policy of the legislature was fully developed, and the credentialing form, to be promulgated by rule, would merely instruct the public on how to comply.¹⁵⁶ It was not practical for the legislature to set out with specificity the details of the form, which ultimately included eleven pages of fairly small print.¹⁵⁷ Rulemaking for the standardized credentialing form was, therefore, an example of the legislature delegating rulemaking authority to fill in the details of the law so that it would be “specific enough to be implemented by government agencies and complied with by private citizens.”¹⁵⁸

The DOI had no previous experience with credentialing forms nor did it have expertise in the area.¹⁵⁹ Task force members provided the DOI with essential information the agency needed in order to develop the credentialing form.¹⁶⁰ For example, three different credentialing forms from HMO

154. MO. REV. STAT. § 354.442.1(15) (Supp. 1999). Health Maintenance Organizations (“HMOs”) contract with health care professionals to provide health care services to the HMO’s enrollees. Prior to offering a contract, the HMO inspects the health care provider’s “credentials” to ensure the provider is qualified. Although this provision was placed in an odd statutory location—technically, it is one of a long list of items to be “disclosed in writing” to enrollees and prospective enrollees—there was no dispute concerning the legislature’s actual intent regarding the provision. MO. REV. STAT. § 354.442.1 (Supp. 1999). For purposes of the standardized credentialing form, “health carriers” refers to HMOs. See MO. REV. STAT. § 354.600(11) (Supp. 1999). Although this definition is not controlling for Section 354.442, Sections 354.400 to 354.636 relate specifically to HMOs, and to no other type of insurer. There was no dispute as to what the term “health carrier” meant.

155. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6, at 2.

156. See KERWIN, *supra* note 12, at 5.

157. MO. CODE REGS. ANN. tit. 20, § 400-7.180 (1998).

158. KERWIN, *supra* note 12, at 2.

159. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

160. Memorandum from Debra Schuster, Legal Counsel, Group Health Plan, Inc.,

representatives proved to be invaluable for the development of the final form promulgated by the DOI.¹⁶¹

The process also involved considerable negotiation between parties concerning the type and wording of questions to be included on the form.¹⁶² As a result of the bargaining, a better form was created that was a result of agreements among the parties.¹⁶³ For example, there was considerable debate about the extent to which a provider's medical malpractice history should be required in the credentialing form.¹⁶⁴ After much discussion, the participating HMO representatives eventually agreed to the specific information to be collected and the specific terminology to be used to collect it.¹⁶⁵

The participatory rulemaking process leading up to the standardized credentialing form provided the agency with information necessary for the rulemaking process, and gave competing interests the opportunity to amicably resolve their differences. The process was successful in terms of the implementation of the law because it provided the DOI with information, feedback, and agreed-to-compromises. As a result, the final rule accomplished the purpose of the statute in a manner acceptable to the regulated industry much more effectively and efficiently than the traditional MoAPA process alone could have. Moreover, the form adopted by the DOI provided a basis for standardized forms in Kansas, Colorado, and Nebraska.¹⁶⁶

to Standardized Credentialing Task Force Members and Tom Bixby (Aug. 11, 1997) (on file with author).

161. Memorandum from Debra Schuster, *supra* note 160.

162. *See, e.g.*, Memorandum from Debra Schuster, *supra* note 160; Letter from Cheryl Dillard, Vice President, Public Affairs, HealthNet, to Tom Bixby, Director, Division of Consumer Affairs, Missouri Department of Insurance (Sept. 2, 1997) (on file with author).

163. *See* BONFIELD, *supra* note 19, at 185.

164. *See, e.g.*, Memorandum from Debra Schuster, *supra* note 160, at 3; Memorandum from Blue Cross and Blue Shield of Kansas City, Credentials Unit, to Tom Bixby (Sept. 26, 1997) (on file with author). Although doctors' groups objected to the collection of such information, *see, e.g.*, Letter from Jim Kistler, Government Relations Coordinator, Missouri Association of Osteopathic Physicians & Surgeons (Oct. 22, 1997) (on file with author); Memorandum from [Tom] Holloway, Missouri State Medical Association, to Tom Bixby (Oct. 17, 1997) (on file with author), the statute did not give the DOI the authority to limit the nature of information collected, merely to standardize it. *See* MO. REV. STAT. § 354.442.1(15) (Supp. 1999). Therefore, the relevant debate was *how* to collect the information, not *whether* to do so. *See* MO. CODE REGS. ANN. tit. 20, § 400-7.180 (1998).

165. *See* MO. CODE REGS. ANN. tit. 20, § 400-7.180 (1998).

166. *See* Bulletin from Kathleen Sebelius, Commissioner of Insurance, State of Kansas, to All Managed Care Organizations Authorized to Transact Business in Kansas (June 18, 1999) <<http://www.ksinsurance.org/industry/bulletins/1999-2.html>>.

B. Pharmacy Regulations

One of the last controversial issues to be “resolved” in the legislative process leading up to the passage of HB 335 was a provision regarding “mail order pharmacies.”¹⁶⁷ The dispute boiled down to whether the legislation required HMOs to allow local, retail pharmacies to dispense lucrative, ninety day prescriptions, or whether it allowed HMOs to deal only with those pharmacies willing to give the HMOs deep discounts—primarily, mail-order pharmacies.¹⁶⁸ Although the legislation passed with “compromise” language, subsequent discussions made clear that the compromise was really a severe misunderstanding.¹⁶⁹

The legislative language was the subject of a “last minute compromise between business and HMO groups, and doctors and consumer organizations.”¹⁷⁰ The provisions were believed to be among the most expensive in the legislation, and of great concern to the business community.¹⁷¹ Believing that their acceptance of the pharmacy compromise removed the last obstacle to the bill’s passage,¹⁷² business leaders asserted that they “would not have agreed to a compromise that did not accomplish” pharmacy cost containment and flexibility for employers and HMOs.¹⁷³

The pharmacy dispute centered on the interaction of language in two paragraphs of HB 335.¹⁷⁴ The first paragraph (“subsection 3”) provided:

167. Balaban, *supra* note 4, at 55. A “mail order pharmacy” delivers prescriptions by mail. The prescriptions usually are long-term, maintenance prescriptions for 90 days of medication. Such prescriptions are more profitable for a pharmacy than relatively short-term prescriptions. Managed care companies often allowed patients to purchase 90-day prescriptions *only* from a mail order pharmacy. By concentrating all of its long-term prescription business in a single pharmacy, the managed care companies can command price reductions, but local retail pharmacists lose the opportunity to fill the more lucrative, long-term prescriptions. Patients choosing to purchase prescriptions from local pharmacies typically would have to get prescriptions filled three times to get 90 days of medicine and hence pay three copayments. See Balaban, *supra* note 4, at 55.

168. See Balaban, *supra* note 4, at 55.

169. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

170. Balaban, *supra* note 4, at 55. The Missouri Pharmacy Association was also intimately involved. See Letter from James C. Stutz, Executive Director, St. Louis Area Business Health Coalition, to Marcia (sic) English, Tom Bixby, and Kevin Jones, Missouri Department of Insurance 3 (Aug. 27, 1997) (on file with author).

171. Letter from James C. Stutz, *supra* note 170, at 2.

172. Letter from James C. Stutz, *supra* note 170, at 3. Given the overwhelming support for the measure (140-15 in the House and 33-1 in the Senate), the Author is unconvinced that the business community would have been able to prevent the bill from passing absent the compromise. See *supra* notes 128-32 and accompanying text.

173. Letter from James C. Stutz, *supra* note 170, at 2.

174. Memorandum from Tom Bixby (July 17, 1997), *supra* note 141, at 3.

Every health maintenance organization shall apply the same coinsurance, copayment and deductible factors to all drug prescriptions filled by a pharmacy provider who participates in the health maintenance organization's network if the provider meets the contract's explicit product cost determination.¹⁷⁵

The second paragraph ("subsection 4") of the disputed language stated:

Health maintenance organizations shall not set a limit on the quantity of drugs which an enrollee may obtain at any one time with a prescription, unless such limit is applied uniformly to all pharmacy providers in the health maintenance organization's network.¹⁷⁶

Special interest groups involved in the writing of the legislation interpreted these two provisions in different ways.¹⁷⁷ The interpretation of this language was the focus of the DOI's participatory rulemaking process.¹⁷⁸

The business community and HMO industry argued that these two provisions should be "read together"¹⁷⁹ and that an HMO had to "uniformly apply" quantity limits on prescription drugs (subsection 4) *only when* a pharmacy had met the "explicit product cost determination" of an HMO's contract terms (subsection 3).¹⁸⁰ In other words, an HMO was *not* required to allow a pharmacy to sell ninety day prescriptions unless the pharmacy met the HMO's low, mail-order contract price.¹⁸¹

The Missouri Pharmacy Association ("MPA"), however, argued that subsection 4 prohibited an HMO from allowing mail-order pharmacies to sell ninety day prescriptions unless *all pharmacies in the network* were allowed to sell such prescriptions, whether or not they were willing to meet the HMO's low, mail-order contract price.¹⁸² Furthermore, the MPA interpreted subsection 3 to mean that once a pharmacy was in an HMO's network, the HMO could not discriminate against local pharmacies by requiring higher coinsurance,

175. MO. REV. STAT. § 354.535.3 (Supp. 1999).

176. MO. REV. STAT. § 354.535.4 (Supp. 1999).

177. *See, e.g.*, Letter from Richard S. Brownlee III & Sherry L. Doctorian of Hendren and Andrae, L.L.C., on behalf of the Missouri Chamber of Commerce, Associated Industries of Missouri, and the St. Louis Area Business Health Coalition, to Jay Angoff, Director, Missouri Department of Insurance (Jan. 16, 1998) (on file with author); Letter from Lori Levine & Paul Graham, Carson & Coil, P.C., to Thomas Bixby, Department of Insurance (Jan. 16, 1998) (on file with author).

178. *See* Balaban, *supra* note 4, at 55.

179. Letter from James C. Stutz, *supra* note 170, at 3.

180. Letter from Brownlee & Doctorian, *supra* note 177, at 1.

181. Letter from Brownlee & Doctorian, *supra* note 177, at 1.

182. Letter from Levine & Graham, *supra* note 177, at 1.

copayments, or deductibles for one type of pharmacy (i.e., local retail pharmacies) than for another (i.e., mail-order).¹⁸³

The participatory process for the interpretation of the pharmacy provisions became very contentious.¹⁸⁴ For example, one supporter of the HMO/business position charged that “the proposed regulations [had] no semblance to the reality of the discussions leading up to the legislation, the compromises agreed to by the various parties, the common sense construction of the language, and the intent of the legislation as it was passed.”¹⁸⁵ The MPA was equally determined to maintain its position.¹⁸⁶ Furthermore, legislators supported both sides of the issue.¹⁸⁷ However, the sponsors of the legislation made it clear that their intention was for all pharmacies to be able to participate in any ninety day prescription program, and that the business and HMO groups were attempting to “change the law in the rulemaking process since they lost” in the legislative process.¹⁸⁸

As a result of the controversy, the participatory rulemaking process concerning the pharmacy provisions was more extensive and debated than any of the other rules.¹⁸⁹ For instance, the DOI held substantially more meetings with interested parties concerning the pharmacy provisions than other proposed rules, attended a meeting between the opponents of the proposed rule and the governor’s chief-of-staff,¹⁹⁰ and attempted to foster a compromise between the factions.¹⁹¹ In addition, the DOI requested legal opinions from the various factions to support their positions.¹⁹²

The DOI’s role in promulgating rules for the pharmacy provisions was to *interpret* the law;¹⁹³ this was clearly a case in which the legislature was “vague, leaving the specific, painful, and politically dangerous decisions to the

183. Letter from Levine & Graham, *supra* note 177, at 1.

184. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6, at 3.

185. Letter from Pete Edge, CAP Representative, UAW Region 5, to Mark Stahlhuth, General Counsel, Missouri Department of Insurance 1 (Jan. 14, 1998) (on file with author).

186. *See* Balaban, *supra* note 4, at 55.

187. *See* Letter from James C. Stutz, *supra* note 170, at 3; Balaban, *supra* note 4, at 55.

188. Balaban, *supra* note 4, at 55 (quoting Rep. Tim Harlan (D-Columbia)).

189. In one meeting, a lobbyist for business interests heatedly told the Author, who chaired the meetings, that the lobbyist was going to have him fired for proposing the rules that were later promulgated.

190. This was the only one of the sixteen rules promulgated pursuant to HB 335 that merited such attention.

191. *See* Balaban *supra* note 4, at 55.

192. Letter from Debra K. Schuster, Group Health Plan, Inc., to Tom Bixby, Missouri Department of Insurance 1 (Jan. 16, 1998) (on file with author).

193. *See supra* notes 34–40 and accompanying text.

agencies.”¹⁹⁴ Despite the fact that the participatory rulemaking process for the pharmacy provisions was “painful,” it did accomplish some of the basic goals of a decisional process for rulemaking.¹⁹⁵ Although information gathering was not one of the primary goals of the process for the pharmacy task force, developing an understanding of how the industry handled prescription drugs was crucial to writing an intelligible rule.¹⁹⁶ Feedback from HMOs, business groups, and pharmacies was important to this information gathering aspect of the rulemaking process. Furthermore, the participatory process made it clear that the DOI should expect a lawsuit on this issue, and allowed the agency to plan for such an eventuality.¹⁹⁷

However, problems in the rulemaking process were evident in the promulgation of the pharmacy provision rules. The extensive process was time-consuming and costly for the DOI.¹⁹⁸ Although the legislature “place[d] the agency squarely between powerful contending forces,”¹⁹⁹ the participatory process subjected the agency to pressure from those forces for an unnecessarily prolonged period of time. The participatory process boiled down to a “swearing match” as to alternative versions of presumed legislative intent.

C. Network Adequacy

Among the more consumer-oriented provisions of HB 335 was the requirement that HMOs²⁰⁰ “maintain a network that is sufficient in number and types of [health care] providers to assure that all services to enrollees shall be accessible without unreasonable delay.”²⁰¹ The legislature explicitly granted the DOI broad authority to regulate network adequacy:

194. KERWIN, *supra* note 12, at 2.

195. *See supra* notes 41-70 and accompanying text.

196. *See* KERWIN, *supra* note 12, at 34. Among other things, the DOI had to gather information to understand how prescription drugs were sold by pharmacies and covered by HMOs. Similarly, the DOI had to work out the meaning of such terms as “explicit product cost determination.” MO. REV. STAT. § 354.535.3 (Supp. 1999).

197. A concern over an expected lawsuit was one of the primary reasons for requesting legal opinions from the various factions. A lawsuit was ultimately filed against the rules interpreting the pharmacy provisions. The suit is currently pending. *See Express Scripts v. Wenzel*, No. 98-4285-CV-C-5-ECF, 2000 WL 868229 (W.D. Mo. June 12, 2000).

198. *See* KERWIN, *supra* note 12, at 115.

199. KERWIN, *supra* note 12, at 163.

200. For purposes of Sections 354.600 to 354.636, the term “health carrier” is frequently used. “Health carrier” is defined as “a health maintenance organization established pursuant to Sections 354.400 to 354.636, RSMo.” MO. REV. STAT. § 354.600 (11) (Supp. 1999).

201. MO. REV. STAT. § 354.603.1 (Supp. 1999).

Sufficiency shall be determined by the director [of the DOI] in accordance with the requirements of this section and by reference to *any reasonable criteria*, including but not limited to, provider-enrollee ratios by specialty, primary care provider-enrollee ratios, geographic accessibility, reasonable distance accessibility criteria for pharmacy and other services, waiting times for appointments with participating providers, hours of operation, and the volume of technological and specialty services available.²⁰²

The primary enforcement tool was to be an “access plan . . . for each of the managed care plans that the [HMO] offers in this state.”²⁰³ The format for access plans was to be defined by rule of the DOI.²⁰⁴ HMOs would then be required to submit access plans which the DOI has the authority to “approve or disapprove.”²⁰⁵

The legislature established its goal regarding network adequacy, but “provide[d] few details as to how [the goals] [were] to be put into operation or how they [were] actually to be achieved.”²⁰⁶ Therefore, the object of the rulemaking process for network adequacy was to *prescribe the details of the law*.²⁰⁷ In giving the DOI the responsibility for determining network adequacy, the legislature sought to “gain the advantage of policy development by professionals,” where it had developed “the rudiments of a solution” to a problem, so that it could then “turn the program . . . over to an agency . . . for implementation.”²⁰⁸

The requirement of network adequacy in HB 335 is likely to have the most significant impact on the greatest number of health care consumers of any provision in the bill.²⁰⁹ While the number of primary care providers in an HMO’s network is one factor in competition between HMOs,²¹⁰ “the legislature had limited faith that the marketplace could address” the issue of sufficient access to all types of health care providers.²¹¹ It was this lack of faith that led the legislature to grant the DOI “broad authority in regard to network adequacy.”²¹²

202. MO. REV. STAT. § 354.603.1 (Supp. 1999) (emphasis added).

203. MO. REV. STAT. § 354.603.2 (Supp. 1999).

204. MO. REV. STAT. § 354.603.2 (Supp. 1999).

205. An access plan is a description of how an HMO will have an adequate number and variety of health care providers to meet the needs of its enrollees.

206. KERWIN, *supra* note 12, at 6.

207. See BONFIELD, *supra* note 19, at 89.

208. KERWIN, *supra* note 12, at 11-12.

209. See Thomas D. Bixby, *Network Adequacy: The Regulation of HMOs’ Network of Health Care Providers*, 63 MO. L. REV. 397, 398 (1998).

210. *Id.* at 408.

211. *Id.* at 407.

212. *Id.*

The concern about adequate access to health care specialists, as opposed to primary care providers, was particularly significant.²¹³

Among the implementation issues that required resolution by the DOI during the rulemaking process were: (1) the types of health care providers included in a network adequacy plan, (2) a test to determine that HMOs contracted with various types of providers within a reasonable distance of enrollees (geographic access), and (3) a measure designed to ensure that enough of each type of provider exists to meet the needs of the enrollees.²¹⁴ Because the DOI had little expertise in network adequacy, it determined that a participatory process would be the most efficient and effective method to gain the necessary understanding of the relevant issues.²¹⁵

Some interest groups representing specialized health care providers argued that it was critical for their constituents to be among the types of providers listed in the network adequacy scheme.²¹⁶ Their inclusion as a type of provider in the network adequacy rule was believed to have serious economic consequences.²¹⁷ While hospitals and primary care providers would certainly be included in the network adequacy rule, one writer asserted that failure to include one type of provider in the rule would result in “the exclusion of [those providers]” from managed care plans.²¹⁸ Participants in the process raised little opposition to the inclusion of these interest groups in the network adequacy rule.²¹⁹ This may have resulted from the fact that the rules permitted, rather than required, HMOs to use certain types of providers,²²⁰ or from what was perceived as the more

213. *Id.* at 408.

214. *See supra* note 6.

215. *See supra* note 6. An agency can gain expertise in a variety of ways, including hiring staff with appropriate background and experience. However, at the time HB 335 was implemented, few people in the country had expertise in network adequacy issues, and the DOI did not have positions appropriated by the legislature for such employees.

216. *See, e.g.*, Letter from Richard D. Watters, Lashly & Baer, on behalf of the Missouri Nurses Association, to Bill Ackerman, Counsel, Department of Insurance 2 (Dec. 23, 1997) (on file with author) (“We request that [the rule] be amended to expressly recognize . . . advance practice nurses.”); Letter from Terry E. Carlisle, Missouri Academy of Physician Assistants, to Tom Bixby (Oct. 16, 1997) (on file with author) (“It is very important that [physician assistants] be named” in the rule.); Letter from William A. Spencer, Executive Director, Missouri Podiatric Association, to Tom Bixby, Department of Insurance (Sept. 2, 1997) (on file with author) (“It is our firm belief that podiatry . . . should be included in the Managed Care Plan Network Adequacy Model.”).

217. *See supra* note 216.

218. *See supra* note 216.

219. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

220. MO. CODE REGS. ANN. tit. 20, § 400-7.095(2) (1998). Although the rule would require listed specialists to be in an HMO’s network, there was no requirement that services provided by such a specialist be covered by the HMO plan: “Network adequacy standards shall apply only to those services offered under the terms of a health

important “ratio” issue, discussed *infra*.²²¹ In either case, the process failed to provide the DOI with sufficient expertise or an effective counterbalance to these special interests. The participatory process did not provide the DOI with possible disadvantages to the inclusion of these types of providers in the network adequacy rule.²²²

Geographic access—the ability to access health care services within a reasonable distance of one’s home—was a significant concern of the legislature in passing HB 335.²²³ Like the pharmacy provisions of the bill, geographic access not only increased the administrative costs of HMOs,²²⁴ but had implications for the ability of HMOs to negotiate discounts for health care services.²²⁵ This aspect of the rulemaking process for network adequacy, therefore, provided well defined arguments for both sides of the issue from which the DOI could benefit. The industry argued against the “prescriptive approach” because it “would add unnecessary administrative burdens and costs . . . for HMOs.”²²⁶ However, the legislature argued that the ability of patients to be able to receive care in their local community, was paramount.²²⁷ Geographic access proved to be an issue for which the DOI, with input from legislators and consumer groups, was in a good position to assess the advantages and disadvantages to consumers of different policy choices.²²⁸

The industry argued that “the Department’s current procedures for reviewing the adequacy of HMO networks . . . have worked well to promote broad access to the full range of primary care and specialty providers for Missouri residents.”²²⁹ Therefore, it was argued that the geographic distance limits in the proposed rule were “unnecessary.”²³⁰ Furthermore, the industry

benefit plan.” MO. CODE REGS. ANN. tit. 20, § 400-7.095(2) (1998). As a result, it was possible that an HMO would be required to have, for example, chiropractors in a network without requiring that the HMO make chiropractic care a covered benefit.

221. See, e.g., Letter from Joseph R. Cecil, Executive Director/Chief Operating Officer, Family Health Partners, to Tom Bixby, Missouri Department of Insurance (Oct. 30, 1997) (on file with author).

222. The Author does not necessarily mean to suggest that including such providers was a bad policy choice. However, the Author is of the opinion that it was a less-well-informed policy choice than others made in the process.

223. See Bixby, *supra* note 209, at 398.

224. Letter from Richard I. Smith, Vice President, Public Policy & Research, American Association of Health Plans, to Tom Bixby, Director, Division of Consumer Affairs, Missouri Department of Insurance 9 (Dec. 24, 1997) (on file with author).

225. See Bixby, *supra* note 209, at 405.

226. Bixby, *supra* note 209, at 405.

227. See Bixby, *supra* note 209, at 398.

228. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

229. Letter from Richard I. Smith, *supra* note 224, at 9.

230. Letter from Richard I. Smith, *supra* note 224, at 9. The proposed (and final) rule required that an HMO contract with various types of health care providers so as to ensure that most enrollees were within a specified distance from such a provider. For

argued that the geographic requirements failed to “provid[e] any clear benefit to Missouri residents.”²³¹ Ultimately, this position was viewed as untenable.²³² The DOI presumed that the legislature passed the network adequacy provisions in order to change the process in place prior to the effective date of HB 335.²³³ To maintain the status quo in the face of such legislative action would likely have subjected the DOI to criticism of agency capture.²³⁴

The industry also argued that it was necessary for the rule to balance the patient’s need for convenient access to health care providers with the HMO’s ability to negotiate reasonable contracts with health care providers.²³⁵ The industry was concerned that in areas of the state with limited numbers of health care providers, if network adequacy requirements were too stringent, they would be forced to negotiate a contract with one particular health care provider.²³⁶ For example, if only one hospital in an area met the network adequacy requirements, an HMO doing business in that area would be required to contract with that hospital, limiting the HMO’s ability to keep its costs reasonable.²³⁷ The participatory process enabled the DOI to propose, discuss, modify, and ultimately write exceptions to the general network adequacy rule that provided HMOs with flexibility to negotiate reasonable contracts without leaving HMO patients unprotected.²³⁸

example, a primary care physician had to be within 30 miles of most enrollees in “basic” (as distinguished from rural or urban) counties. *See* MO. CODE REGS. ANN. tit. 20, § 400-7.095(2)(A) (1998).

231. Letter from Richard I. Smith, *supra* note 224, at 9. Consumer groups, on the other hand, argued that the rule had not gone far enough. They argued that in addition to distance requirements, the DOI impose time requirements, whereby driving (or public transit) time be a measure of access to various types of health care providers. Letter from Joel D. Ferber & Rachel J. Storch, Legal Services of Eastern Missouri, Inc., to Jay Angoff, Director, Missouri Department of Insurance 1 (Jan. 8, 1998) (on file with author).

232. *See* MO. CODE REGS. ANN. tit. 20, § 400-7.095 (1998).

233. *See* MO. CODE REGS. ANN. tit. 20, § 400-7.095 (1998).

234. *See* SHAPIRO & TOMAIN, *supra* note 13, at 12.

235. *See* MO. CODE REGS. ANN. tit. 20, § 400-7.095 (1998); Letter from Richard I. Smith, *supra* note 224, at 9-10.

236. Letter from Richard I. Smith, *supra* note 224, at 9-10.

237. Letter from Richard I. Smith, *supra* note 224, at 9-10.

238. For Alternative Compliance Mechanisms, see MO. CODE REGS. ANN. tit. 20, § 400-7.095(5) (1998). Examples of exceptions developed to balance competing interests raised in the participatory process include: “Other Network Adequacy Standards,” MO. CODE REGS. ANN. tit. 20, § 400-7.095(5)(B) (1998) (HMOs that comply with network adequacy standards established by Medicaid, Medicare, or the Missouri Consolidated Health Care Plan would be deemed to be in compliance with state regulations, rather than requiring compliance with both standards); “Noncompetitive Market Exception for PCPs [Primary Care Providers] and Pharmacies,” MO. CODE REGS. ANN. tit. 20, § 400-7.095(5)(D) (1998); and “Noncompetitive Market Exception for

Similarly, the industry argued that it should be allowed to require patients to travel longer distances when quality of care was clearly an issue.²³⁹ The industry argued that some hospitals had significantly lower death rates for some procedures than other hospitals, and that requiring a patient to travel to such a hospital was in the patient's best interest.²⁴⁰ This argument also resulted in an exception to the general network adequacy standard. Specifically, if an HMO could establish that a better health outcome would result, it could send a patient to a health care provider farther away than would otherwise be allowed, provided that the patient had no additional expenses.²⁴¹

In addition to determining the type of providers to include in a network adequacy plan, and the enrollees' geographic access to those providers, the DOI was also required to ensure that a sufficient *number* of each type of provider was available in an HMO's network to meet the needs of the enrollees.²⁴² Early in the participatory process, the DOI suggested that the rule establish a provider/enrollee ratio for each type of provider required by the network adequacy plan ("ratio approach").²⁴³ The proposal was based on an academic study undertaken on behalf of government agencies in Missouri involved in the health care delivery system.²⁴⁴ The ratio approach was criticized by the industry and employer groups as being too intrusive²⁴⁵ and too subjective.²⁴⁶ Furthermore, the issue became "fraught with political agenda" when provider groups lobbied to increase their ratios.²⁴⁷ For example, chiropractors argued for 26 chiropractors per 100,000 patients, whereas the ratio for

Hospitals and Specialists," MO. CODE REGS. ANN. tit. 20, § 400-7.095(5)(E) (1998) (providing a mechanism for adequate networks of health care providers for geographic areas in which competition between health care providers is limited).

239. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

240. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

241. *See* MO. CODE REGS. ANN. tit. 20, § 400-7.095(5)(C) (1998).

242. Memorandum from Tom Bixby, Missouri Department of Insurance, to Members of the Network Adequacy Task Force 2 (Aug. 28, 1997) (on file with author).

243. Memorandum from Tom Bixby (Aug. 28, 1997), *supra* note 242, at 2.

244. *See* MANAGED HEALTH CARE PLANS, PROPOSED MISSOURI PROVIDER NETWORK ADEQUACY STANDARDS (Allen Daugird, M.D., M.B.A., Draft No. 3 1996). The state agencies involved were the Departments of Health, Insurance, and Mental Health, as well as the Division of Medical Services (Medicaid), and the Missouri Consolidated Health Care Plan, the health insurance provider for most state employees. *Id.*

245. *See, e.g.*, Letter from Michael G. Winter, Executive Director, Missouri Association of Health Plans, to Tom Bixby, Missouri Department of Insurance 1 (Oct. 1, 1997) (on file with author) ("[T]hese proposed [ratios] are, in our view, micromanagement of a health plan.").

246. *See, e.g.*, Letter from Joseph R. Cecil, *supra* note 221, at 1. (The DOI should not "impose arbitrary and certainly unsubstantiated by objective research staffing ratios as proposed.").

247. Letter from Joseph R. Cecil, *supra* note 221, at 1.

obstetrician/gynecologists was to be 10 per 100,000.²⁴⁸ This struck more than a few observers as being “obviously a political statement [and] not a reflection of what [was] needed to care for [enrollees].”²⁴⁹ Although the participatory process brought the DOI volumes of information on the subject, the information was of a very technical nature for which the DOI lacked expertise.

Furthermore, information gathered by the DOI during the participatory process soon indicated that the plan was unworkable.²⁵⁰ The simplistic basis of the plan required complex modifications to adapt to the variety of payors with which health care providers contracted, and the different manners in which HMOs managed care.²⁵¹ First, when establishing a ratio of providers to enrollees, it became apparent that such a ratio, without more, would not be an accurate measure of whether patients would have prompt access to health care providers.²⁵² A doctor contracting with one HMO might contract with as many as eight or nine other HMOs, have contracts with a variety of Preferred Provider Organizations, take any number of patients from self-insured plans, and/or from Medicare.²⁵³ As a result, having a provider in a network could require that a provider dedicate all of her time to the HMO’s patients, or none of her time.²⁵⁴ The alternative, collecting, or requiring HMOs to collect, data concerning how much time a provider was required to make available to enrollees of a particular HMO, would be costly and unpopular with both providers and HMOs.²⁵⁵

Second, the appropriate ratio was extremely difficult to determine because of wide variation in patient utilization by health plan.²⁵⁶ For example, based on data submitted to the DOI for two HMOs, the cost of cardiology care varied by more than ninety percent, dermatology by less than ten percent, and pediatrics varied by over 2,300%.²⁵⁷ These variances reflect differences in data collection

248. Letter from Joseph R. Cecil, *supra* note 221, at 1.

249. Letter from Joseph R. Cecil, *supra* note 221, at 1.

250. Memorandum from Tom Bixby, Missouri Department of Insurance, to Members of the Network Adequacy Task Force 1 (Oct. 17, 1997) (on file with author).

251. Memorandum from Tom Bixby (Oct. 17, 1997), *supra* note 250, at 1.

252. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6; Letter from Michael G. Winter, *supra* note 245, at 1.

253. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6; Letter from Michael G. Winter, *supra* note 245, at 1.

254. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6; Letter from Michael G. Winter, *supra* note 245, at 1.

255. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6; Letter from Michael G. Winter, *supra* note 245, at 1.

256. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6; Letter from Michael G. Winter, *supra* note 251, at 1.

257. Letter from Julie Bietsch, Vice President, Provider Affairs, Alliance Blue Cross Blue Shield, to Tom Bixby, Department of Insurance 2 (Oct. 10, 1997) (on file with author); Facsimile from Jamie Huether, Group Health Plan, to Tom Bixby 2 (Sept. 23, 1997) (on file with author).

procedures,²⁵⁸ but also differences in “how care is managed.”²⁵⁹ Different health plans, it was argued, would provide health care by utilizing different combinations of providers,²⁶⁰ and a specifically prescribed ratio would inhibit an HMO’s ability to do so in a cost efficient manner.²⁶¹

After considerable work in attempting to resolve the ratio problem, the DOI determined that the ratio had become so watered down as to be meaningless—all HMOs involved in the process had between three and seven times the providers necessary to meet the ratio standard.²⁶² Consequently, the DOI decided to propose a scaled-down network adequacy plan as an interim structure that would be replaced at a later date by a more comprehensive rule.²⁶³ This scaled-down rule eliminated the controversial “ratio” approach altogether.²⁶⁴

Absent the participatory process, the DOI probably would have proposed some ratio component in the network adequacy rule. After learning of the problems detailed above, the ratio component would have been removed from the rule during the MoAPA process. This, in turn, would likely have been a significant enough change in the proposed rule to require the DOI to start the MoAPA notice and comment process over again, delaying the implementation of the rule, and costing all involved considerable time and money.²⁶⁵

IV. COMMENT

The extensive participatory rulemaking process employed by the DOI in the implementation of HB 335 was extremely valuable to the agency for a variety of reasons. The process educated DOI staff on details of the credentialing process, pharmacy operations, and HMO networks. These details were essential to the development of meaningful, effective rules. Criticism of early DOI proposals revealed legitimate flaws and allowed the development of solutions to problems raised. Addressing these problems early in the participatory process allowed the DOI to avoid the need to start the MoAPA notice and comment process over when making significant changes to proposed rules.

The participatory process was instrumental in the development of rules that benefitted the public to a greater extent than a less-involved process would have. For example, the Quality of Care provision of the network adequacy rule allows

258. Letter from Julie Bietsch, *supra* note 257, at 2.

259. Letter from James C. Stutz, Executive Director, St. Louis Area Business Health Coalition, to Tom Bixby and Marcia (sic) English, Missouri Department of Insurance 2 (Oct. 3, 1997) (on file with author).

260. Letter from James C. Stutz, *supra* note 259, at 2.

261. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

262. Memorandum from Tom Bixby (June 27, 1997), *supra* note 6.

263. Memorandum from Tom Bixby (Oct. 17, 1997), *supra* note 250, at 1.

264. MO. CODE REGS. ANN. tit. 20, § 400-7.095 (1998).

265. *See supra* note 6.

a patient to receive care close to home unless the HMO can demonstrate that the quality of care received will be enhanced, and the patient will not bear the cost of being treated farther away from home.²⁶⁶ Similarly, the process helped the DOI to balance the cost of care ultimately borne by the public with a patient's convenient access to health care providers.

Furthermore, the participatory process enabled the DOI to better meet the legitimate needs of the industry raised during the course of the proceedings. For example, the process developed a Standardized Credentialing Form that became a model for use in other states,²⁶⁷ as well as reducing the administrative burden of credentialing on health care providers. However, the process was not without problems: it was time-consuming, expensive, and contentious. Some issues raised during the process were not resolved, and the participatory rulemaking process became the battleground for political conflict that could have been resolved through the formal MoAPA process with less cost to the agency.

A. *Costs and Benefits to the Agency*

Where the DOI was called upon to implement the fully developed policy of the legislature, as with the Standardized Credentialing Form, the participatory process worked best. The agency gathered and evaluated information essential to the development of the form much more efficiently than it could otherwise have done. The task force meetings provided an opportunity for parties in disagreement over specific terms to negotiate resolutions to their problems—indeed, the meetings virtually *required* parties to work out differences in order to prevent an undesirable format from being adopted. Had the agency attempted to develop such a form without an extensive participatory process, the result most likely would have been a form that failed to address the needs of many in the industry. Once promulgated as a rule, the form would have been relatively inflexible because any changes would have to go through the lengthy, MoAPA rulemaking process.

For the *implementation of laws*, the participatory process should generally prove useful to an administrative agency. When the legislature has established a policy, and an agency is required to instruct the public on how to comply, bringing interested parties together helps the agency gather information necessary for effective implementation. Furthermore, the process creates a forum for the resolution of problems that arise during the implementation stage.

Where the legislature sets broad goals and requires the agency to *prescribe the details* of the law, as with the network adequacy requirements, the participatory process is extremely useful to the agency. For instance, when addressing the issue of geographic access to providers, the DOI gathered

266. See CODE REGS. ANN. tit. 20, § 400-7.095(5)(C) (1998).

267. Other states using the Missouri Standardized Credentialing Form as a model include Kansas, Colorado, and Nebraska. See *supra* note 166.

extensive information about HMO networks and health care providers, was presented with competing interests, and was required to balance those interests. Furthermore, the participatory process provided both the industry and the public the opportunity to criticize DOI proposals early enough in the process so that the criticism could be evaluated and taken into account with little cost to the agency. For example, had the criticism arisen concerning the ratio approach in the formal MoAPA rulemaking process, dropping the approach would probably have made the rule significantly different so as to require starting the MoAPA process over again. Beginning the process anew would have cost the agency, consumers, and the industry time and money, as well as delayed the implementation of the legislatively enacted reforms. Nevertheless, the participatory process for geographic access might have been more valuable to the DOI had the industry not adopted an "extreme position" designed to protect the narrow interests of their constituents by arguing that the status quo provided sufficient protection to patients and no changes were necessary.²⁶⁸ Overall, however, the participatory process was extremely valuable in that it gave the DOI the opportunity to fashion reasonable solutions to legitimate problems concerning geographic access issues in the proposed network adequacy model.

The participatory process was not effective, however, in two aspects of the DOI's attempt to prescribe the details of the law for network adequacy. First, where special interest groups representing specialty providers wished to be included in the network adequacy scheme, the DOI was not presented with disadvantages of their inclusion, nor did the DOI have the expertise to evaluate these claims. In this case, the problem may have been overcome by explicitly asking industry and business groups with concerns about the cost of including these providers to directly address this issue. While still lacking the necessary expertise, such an approach would have provided the DOI with a more balanced perspective.

Second, the participatory process was not able to help the DOI determine the appropriate ratio for different types of providers. This, however, was not a failure of the participatory process as much as it was a lack of technical expertise within the DOI required for this complex policy decision. Determining whether the ratio of OB/GYNs to patients should be 10:100,000 or 15:100,000, and whether chiropractors should have a greater (or lesser) ratio is a determination more appropriate for an expert in public health, not insurance. The DOI properly decided to avoid making such determinations, and should not attempt to do so unless it gains the expertise required to evaluate the information presented to the agency in the participatory process.

A second circumstance in which a participatory process should prove useful to an agency is where the legislature establishes broad policy goals, and the agency is required to fill in the details. A participatory process will bring in information necessary for the agency to have a better grasp on the practical

268. KERWIN, *supra* note 12, at 115-16.

application of the statutory scheme, and help the agency to better understand the implications of its proposed policy choices. Early input for the agency, particularly in cases involving complicated issues such as network adequacy, can save a great deal of time by resolving these issues prior to the beginning of the formal process. When confronted with a situation in which the agency hears from only one side, it should solicit input from likely opponents. Furthermore, an agency should be sure to have appropriate expertise to evaluate information before it attempts to solicit feedback on complex, technical issues.

Where the legislature enacted an ambiguous statute and left it to the agency to interpret the law, as with the Pharmacy Provisions, the value of the participatory process is more limited. For the DOI, the participatory process surrounding the Pharmacy Provisions provided the agency with invaluable information that was necessary to understand how HMOs and pharmacies interact. The process also created the opportunity for the interest groups to resolve their differences on their own. Furthermore, the process enabled the DOI to be better prepared for possible subsequent legislative and judicial attacks resulting from the agency's interpretation of the law. However, the time, money, energy, and political capital expended as a result of the extensive input from parties concerning the pharmacy issue was a tremendous burden on the DOI.

A better approach for the DOI would have been to have a participatory process to learn how the HMOs and pharmacies interacted, but to do the statutory interpretation in a less public forum, perhaps doing no more than requesting legal opinions on the appropriate interpretation. Although the DOI was invariably "stuck in the middle" by virtue of its having to determine the outcome of the controversy, it was not necessary to the resolution of the issue for the DOI to repeatedly go over the arguments in public hearings and private meetings. For the interpretation of statutes, the statutory framework of the MoAPA provides sufficient input for the public, and the courts—which will ultimately decide on proper statutory interpretation—to provide adequate protection for interested parties.

A participatory rulemaking process designed to help an agency interpret the law has valuable aspects, as well as aspects with questionable value. To the extent that the process provides information useful to understanding the context of the law, the process is helpful. However, where the process becomes a forum for opposing sides to describe their version of legislative intent, the cost of the process rapidly overcomes the benefits.

B. Costs and Benefits to the General Public

As discussed above, the DOI's implementation of the standardized credentialing policy of the legislature was more effective and efficient than it would have been without the extensive participatory process. In the absence of the process, the DOI may have been required to make several changes through the formal MoAPA rulemaking process, rather than presenting a largely finished product at the beginning of that process. Such changes would have been costly

and frustrating to both health care providers and HMOs. Although the public-at-large had little direct stake in the outcome of the rule, the benefits to those in the credentialing process accrue indirectly to the general public in the form of reduced costs.

When the DOI was charged with prescribing the details of the network adequacy provisions of HB 335, the public again benefitted from the participatory rulemaking process. The process effectively pressured the DOI to balance the cost associated with a detailed access plan with the inclusion of more types of providers and additional standards for an adequate network of health care providers. Similarly, as a result of the participatory process, the DOI factored quality of care issues into its formula for an adequate network of health care providers. Quality of care, cost of care, and access to a variety of types of a sufficient number of health care providers, are all aspects of health insurance coverage that are important to the public. Requiring the DOI to balance these factors in a public, open manner, resulted in a rule that was better balanced than was likely to have occurred in the absence of a participatory process. However, the inclusion of chiropractors and podiatrists, as well as other types of providers, in the definition of an adequate network may not be warranted strictly on a policy basis. The failure to include some measure of a sufficient number of particular types of providers, such as the ratio approach, was due to a lack of expertise on the part of the DOI, rather than a failure of the participatory process.

The participatory rulemaking process was least helpful in regard to the DOI's interpretation of the pharmacy provisions of HB 335. Although the participatory process benefitted the public to the extent that it was useful to the DOI in gathering information necessary to write a comprehensible, effective rule, it provided no benefit to the public in helping the agency interpret the statute. Giving special interest groups prolonged and repeated opportunities to influence an agency's interpretation of a statute—even where, as here, the effort did not affect the outcome—does nothing to improve the rule for the public.

C. Costs and Benefits to the Regulated Industry

Finally, in some respects, the participatory process benefitted the regulated industry. HMOs were required by the legislation to use a standardized credentialing form.²⁶⁹ Consequently, their participation in the drafting of the form made the requirement considerably less burdensome on them, but no less effective in reducing costs for the physicians and other health care providers it was intended to benefit. Absent the participatory process, it is likely that a standardized credentialing form less acceptable to the managed care industry would have been generated in the rulemaking process. This, in turn, would have made the implementation of the law less effective: HMOs would either be denied the ability to collect information they desired, or would have to do so in

269. See MO. REV. STAT. § 354.442.1(15) (Supp. 1999).

violation of the law. Since the purpose of the law was to restrict the manner in which information was collected, not which information was collected, this would have produced an undesirable result. Similarly, the industry's ability to convince the DOI of the necessity of taking into account quality of care and cost issues benefitted the industry by enabling them to keep costs down, while promoting quality health care.

However, the industry's participation was costly in terms of industry staff time, legal analysis, and other expenses.²⁷⁰ This was particularly true for the pharmacy provisions, where the interpretation of the statute was the DOI's objective. In such cases, a participatory process should be used only sparingly, if at all, because the agency's interpretation should not be unduly affected by special interests. Providing the opportunity for such participation, without yielding to the special interests' conclusions, was costly to the regulated industry, and provided no significant benefit in return.

V. CONCLUSION

A broad-based, participatory rulemaking process, entered into prior to the formal MoAPA rulemaking process can be extremely beneficial to a government agency. Furthermore, such a process has the potential to benefit the public and the regulated industry. The advantages of the process include providing information and understanding of the proposal's impact, as well as providing critical analysis to proposed policy choices early in the development process. The participatory process furthers the goals of "comprehensive rationality" by enabling the agency to consider a wide array of options, and helps the agency to evaluate the alternatives and select the best alternative from the options considered.²⁷¹

Related to this is the possibility that in an informal process of bargaining between interested parties, an amicable resolution to some of the problems faced by an agency in the rulemaking process may be reached. Such a process helps give credibility to rules, and prevents the perception of agency capture. Moreover, a participatory process may help prevent an agency from promulgating rules that require revision soon after publication. Such a process can also prevent the need for going through the formal MoAPA rulemaking process to correct significant problems with a proposal. After discovering problems with the agency's initial approach, the participatory process can

270. The majority of the more than three hundred people on the DOI mailing list were industry representatives, as were the majority of people at most meetings, which would range in size from 20 to 80 people. In addition to this participation, the industry provided formal legal analysis for the pharmacy provisions and other aspects of HB 335, and incurred travel, telephone, postage, data processing, and other costs while participating in the process.

271. Diver, *supra* note 21, at 396.

thereby save the agency and the regulated industry time and money, as well as enable legislative reforms to be implemented more quickly and effectively.

A participatory rulemaking process is clearly helpful where an agency is asked to implement a rule for which the legislature has set out a clear policy. Such a process is also useful where the legislature establishes broad policy goals and leaves the task of prescribing the details of the law to the agency. However, where an agency's only function is to interpret what the legislature meant by a particular provision, a participatory process has less value. Although there remains value in collecting information to better understand the context of the statute, for purposes of ascertaining the meaning of the statute, traditional modes of statutory construction may prove to be more valuable than relying on parties with vested interests in the outcome of the interpretation.

There are three important caveats to the recommended use of an extensive, participatory process in the development of proposed rules. First, where an agency is *required* to take certain steps to promulgate a rule, there is always the danger that agency personnel will make those steps nothing more than "stylized rituals."²⁷² If this is the case, the purpose of the participatory process will be defeated. Simply requiring or establishing such a process will not, in itself, ensure that better rules will be the result.

Second, broad-based participation is important to the value of the process. Where special interests dominate the process, it is important to ensure that alternative points of view come to the fore—even if it becomes necessary to solicit them. Without a broad base of participants, an agency will be unable to bring conflicting interests to bear on one another, thereby minimizing the value of the participatory process. Finally, the participatory process is not helpful where the agency lacks the expertise to properly evaluate highly technical information. The agency should either forego such rulemaking, or develop or obtain sufficient expertise before undertaking such a venture.

The DOI's experiment with a broad-based, participatory rulemaking process in the implementation of HB 335 was successful in terms of providing the DOI with better information, critical analysis, and legitimacy. Such a process should be undertaken by agencies considering the promulgation of rules, particularly where the rules are designed to *implement* the law or *prescribe the details* of the law.

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272. KERWIN, *supra* note 12, at 116.

