



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Kevin M. St. John  
Deputy Attorney General

Steven P. Means  
Executive Assistant

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

TO: Co-Chairs Vukmir & Ott and Members of the Joint Committee for the Review of Administrative Rules

FROM: Attorney General J. B. Van Hollen

DATE: November 7, 2011

RE: Testimony on Emergency Rule 1114

Thank you for inviting me to testify regarding Emergency Rule 1114, which was promulgated by the Department of Justice to implement the State's new concealed carry law.

The emergency rules cover a number of topics, including setting a fee, the application process, and defining key statutory terms. As I understand it, two main concerns have been raised with respect to the Emergency Rule. The first relates to the definition of "firearms safety or training course," which incorporates a minimum 4-hour requirement. The second has to do with the form of certification that must be submitted to provide "proof" of training. After discussing these two points, I will address the consequences if the Committee were to suspend the Emergency Rule pursuant to Wis. Stat. § 227.26(2)(L).

#### **Four Hour Training Requirement**

The concealed carry law includes Wis. Stat. § 175.60(4)(a), which lists the categories of training that will satisfy the statutory requirement for obtaining a concealed carry license. Three of these categories require completion of a "firearms safety or training course" that is offered by a "national or state organization that certifies firearms instructors" or by an instructor who has been certified by such an organization. See Wis. Stat. § 175.60(4)(a)1.b., c., and e. The statute does not, however, define "firearms safety or training course" or "national or state organization that certifies firearms instructors."

The legislature's decision to require a "course"—as opposed to a proficiency test or other method of qualification—is significant, because the law requires us to presume that the legislature chooses its words carefully and intends that they be given their plain meaning. *State v. MacArthur*, 2008 WI ¶¶ 30-31, 310 Wis.2d 550, 750 N.W.2d 910. According to Webster's Third New International Dictionary (1986), the term "course," when used in the educational context, means "(1): an educational unit...consisting of a series of instruction periods... dealing with a particular subject...[or]...(2): a series of such courses coordinated to constitute a curriculum...."

Given the common meaning of "course," the language of the statute did not allow me to

conclude that the training requirement can be satisfied by anything and everything that an instructor or organization might want to call a “firearms safety or training course,” without any regard to the contours of that program.

DOJ, and other agencies, have express statutory authority to “promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute,” as long as the rule does not “exceed[] the bounds of correct interpretation” of the statute. Wis. Stat. § 227.11(2)(a) (emphasis added). That authority includes the power to define undefined statutory terms in order to give substance to the powers delegated to the agency by the Legislature. *See State v. Grayson*, 5 Wis. 2d 203, 207-08, 92 N.W.2d 272 (1958); *see also* 68 Op. Att’y Gen. 264, 273-74 (1979); *Harbert v. Healthcare Services Group, Inc.*, 173 F.Supp.2d 1101, 1106 (D. Colo. 2001) (omission of definition of term in statute delegates to administering agency the authority to elucidate the term by regulation). Accordingly, Wis. Stat. § 227.11(2)(a) authorizes DOJ to promulgate a rule that defines “firearms safety or training course,” consistent with the purpose of the statutory training requirement.

In the emergency rulemaking process, DOJ did significant research and found that four hours is the minimum for what is recognized as a safety-training course by those in the firearms community who regularly provide training. By focusing on the minimum amount of training that would satisfy the plain meaning of the statutory language, we have clarified expectations for permit applicants, those who wish to provide training, and those who will be processing applications. While it would have been within DOJ’s authority to promulgate rules defining “firearms safety and training course” to impose detailed curriculum requirements or multi-day course requirements, we chose to define “firearms safety or training course” to be (1) a face to face course that is (2) reasonably calculated to instruct, practice, and test the student’s comprehension and application of firearm safety rules and safe firearm handling, and(3) at least 4 hours in duration.

On this final requirement, the National Rifle Association, which is the largest firearms training organization in the country, prescribes a minimum number of hours for all the courses described in their catalog except one, which is not a general firearms safety and training course.<sup>1</sup> NRA and most reputable firearms organizations use the number of hours to help define or describe their courses. In fact, practically all of the detailed descriptions of NRA firearms courses start with a sentence giving the minimum number of hours the course of instruction will take, with the shortest course taking 4 hours and some courses exceeding 9 hours. (A listing of offered firearms training courses is attached as Appendix A). NRA defines course content for use by their certified instructors and also specify the number of hours of instruction it should take to deliver that content, depending on what skills they are trying to impart to the students. In short, NRA-developed courses set a standard for content and then define the minimum number of hours it takes to meet that standard, effectively utilizing hours as an additional standard.

This practice is similar to universities describing “credit hours” or “student hours” for courses of instruction and professional organizations or boards who oversee groups such as lawyers, doctors, and law enforcement officers requiring a minimum number of hours of instruction to obtain or maintain their licensing or certifications. A defined number of hours of instruction is a common way of setting an objective standard for the educational requirements while allowing

---

<sup>1</sup> NRA has a pistol orientation course that is 3 hours. This course is weapon specific (i.e. Ruger LC9 9mm) and requires live fire, which DOJ is prohibited from requiring by statute.

individual instructors the freedom to develop or modify the curriculum.

The legislature added the training requirement to this bill after the initial introduction of a constitutional carry bill, leading us to believe a meaningful training requirement was intended. Act 35 specifically precluded DOJ from requiring the firing of live ammunition to meet the training requirements, but did not impose other blanket prohibitions. Clearly, the statute requires DOJ to set some definable criteria. The 4-hour rule is a simple, yet objective standard by which we can meet this statutory obligation.

The standards adopted in DOJ's emergency rule fulfill that intent while creating among the most flexible and liberal training requirements in the nation. By comparison, nearby states have the following requirements:

#### Michigan

Requires original certificate with instructor signature affirming course meets Michigan standards- very similar to WI certificate. 8 hours of training required.

#### Minnesota

Requires proof of training via a certificate from a Minnesota DPS approved "certified business organization." Minnesota also defines what should be in the course of instruction and requires live fire at initial application and renewal.

#### Illinois

Concealed carry not authorized.

#### Iowa

Requires Iowa approved curriculum taught by instructors certified by only six approved organizations which are named, such as the NRA.

#### Missouri

Requires certificate with instructor affirmation.  
8-hour course requirement.

In crafting this emergency rule, I believe we struck a proper balance between the express statutory language requiring a "course" and the desire to provide qualified instructors leeway and discretion to tailor training to the needs of particular individuals. The alternatives were to leave the term undefined or to define it in terms of required curriculum or subject matter. As discussed, the first alternative ~~would have created~~ will create a situation where the clear and stated intent of the statutory language would, effectively, be rendered meaningless and unenforceable. The second alternative would have unduly interfered with the professional judgment of qualified firearms instructors and would have led to the type of "one-size-fits-all" requirement, which we believe was not intended.

#### Certification

The Emergency Rule also requires instructors to sign certificates and indicate where training occurred. These requirements allow the instructor to verify that the permit applicant named on

the certificate actually took the course. These rules serve two goals.

First, they provide certainty upfront so that people know what is expected and are able to comply. Second, the concealed carry law requires an applicant to submit “proof of training.” Wis. Stat. § 175.60(7)(e). Therefore, we needed to make sure that the documentation is consistent with the “proof” standard required by the Legislature. The Legislature used the word “proof.” It only makes sense, therefore, to have the instructor sign the document because this is the standard way that questions of proof are handled in any number of contexts.

By standardizing the form in which “proof” of training is submitted, the Emergency Rule streamlines the processing of applications and will make it unnecessary for DOJ staff to individually evaluate, investigate and verify an unlimited number of other forms that such “proof” of training might take. It is not feasible to have an application process that does not clarify the types of information that must accompany the application. Again, the requirements are minimal, they are typical of requirements in other contexts, and are necessary to enable DOJ to carry out its function in a timely, even-handed, and reasonable manner.

We have heard complaints of individuals who took a qualifying course, but did not receive a certificate in the form required. While we understand that concern, it is not one that should arise in the future, now that the legal requirements are established. Qualified trainers providing a course meant to satisfy Wisconsin Law will simply need to provide what their customers require. As for those who have taken a qualifying course in the past, but don’t have a proper certificate, we are providing a simple template that people can use to contact their trainers and obtain the proper form of certification. The trainers we have spoken to are more than willing to assist in this manner. We recognize that this approach will not work in every situation. However, DOJ must be able to implement the law in a fair and reasonable manner that complies with the statute. We simply cannot identify and accommodate every private organization that may have its own way of doing things and we cannot accept documentation that fails to prove that the required training actually took place.

### **Consequences of Suspension**

It is our understanding that one purpose of the scheduled hearing may be to gather information related to a possible decision on suspending portions of the Emergency Rule pursuant to Wis. Stat. § 227.26(2)(L). While we do not believe that any of the specified statutory grounds for suspension can be established, it is also important that you understand the practical consequences of suspending the rule training or certification provisions discussed above.

If the 4 hour requirement is removed, DOJ will still be faced with implementing the undefined language of the concealed carry law, but will have to do so without any structure or guidance. Let me use an example to show what this will mean.

Assume that we receive an application from a person who claims to have taken a “firearms safety or training course,” from an instructor certified by “XYZ Training Academy—an organization we’ve never heard of-- but provides no other information. We would have three options. The first would be to put all applications on hold while we come up with a new set of rules that will allow us to treat applications consistently and fairly. The second option would be to have a DOJ employee follow up with the applicant to gather the necessary information on each of the points and then make a subjective determination as to whether the statutory requirements have been met. Neither of these options is viable. The first would create significant delay both because of

the work that DOJ would be required to perform and because of the rulemaking timeline established by law. The second option is also unsatisfactory because (a) it would force applicants to guess as to what may be required; (2) it would be a time-consuming process and we don't have the staff to carry it out; and (3) there would be no uniformity, which would subject the state to a risk of legal challenges.

That leaves a third option, which is to process applications without any meaningful standards which is what the NRA and some legislators have been advocating. In essence, we will accept every application at face value without determining whether substantive and meaningful training has occurred. With respect to the example referenced earlier, the applicant would receive a concealed carry permit without regard to whether he or she has actually been trained in gun safety to any meaningful degree. If we were to do anything more than this without administrative rules, then we would be inviting legal challenges by creating standards that were not promulgated in an administrative rule.

Put differently, the only objective measurement of a "firearms safety or training course" will have been removed if the 4 hour course is removed.

Additionally, if there is no standard, it will be difficult, if not impossible for prosecutors to charge fraudulent trainers. The legislation states that "an instructor of a training course under sub. (4) (a) who intentionally submits false documentation indicating that an individual has met the training requirements under sub. (4) (a) may be prosecuted for a violation of s. 946.32" WI Stat. § 175.60 (17) (c). In a very real sense, an individual who has been certified by a "national or state organization" could stand on the street corner and after a short conversation on firearm safety could hand out certificates for a fee. If there is no definition given to the training requirement, there can be no prosecution for violating an undefined standard. In fact, we noted the most serious criminal charge in the training section of the legislation relates to this fraudulent representation by a firearms instructor. It is hard to conceive that the legislature did not intend a requirement be set when a felony charge is prescribed for falsely attesting to the an applicant meeting the requirement.

Thus, eliminating the 4 hour requirement largely guts the training requirement (which is specified by law) and makes it extraordinarily difficult, if not impossible, for prosecutors to use the statutory mechanism in place to ensure the integrity of applications. If the 4-hour rule were suspended, I would ask that some definable standard be put in place by the legislature, so it is clear for DOJ, law enforcement, prosecutors, instructors, and our citizens as to what is expected in complying with and administering the law.

Thank you for inviting me to testify this morning.

## APPENDIX A

<b>National or State Organization</b>	<b>Student Course Length</b>
<b>National Rifle Association Courses</b>	
Home Firearm Safety	4 hours
Basic Personal Protection In The Home	8 hours
Basic Pistol Shooting	At least 8 hours
Basics of Personal Protection Outside The Home	At least 9 hours
FIRST Steps Pistol Orientation	At least 3 hours (Requires live fire)
<b>American Assoc. of Certified Firearms Instructors (WI/MN course)</b>	
	6 hours
<b>Private for-profit companies</b>	
Gander Mountain Academy	5 hours
Armed Citizen Training, LLC, "Conceal and Carry Weapons Training Seminar" and Utah, Iowa, and Florida training courses	4 hours
Wisconsin Concealed Carry Training	4 hours
Equip to Conceal Firearms Group ("E2C")	4 hours
Defensive Edge Training and Consulting (MN permit course)	8 hours
<b>Wisconsin Technical Colleges</b>	
Madison College	7 hours
Southwest Wisconsin Tech College (had planned 8 hr; waiting on DOJ)	4 hours
Blackhawk Technical College	4-6 hours
Waukesha County Technical College	6 hours