

## 10.10 ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

The “exclusionary rule,” which provides that illegally obtained evidence or the fruits of that evidence may not be admitted into evidence in trial proceedings,<sup>1</sup> has not received the same broad acceptance in administrative cases that it has in criminal proceedings.<sup>2</sup> Nevertheless, there is considerable authority holding that illegally obtained evidence may be excluded from administrative proceedings in appropriate circumstances.<sup>3</sup> It seems quite likely that the admissibility of illegally obtained evidence in various kinds of administrative trial proceedings will be the source of an expanding number of decisions as the law in this area continues to respond to the growing and parallel body of cases applying the exclusionary rule to criminal proceedings.

Although Minnesota follows the principle that the exclusionary rule does not generally apply to civil cases,<sup>4</sup> most administrative cases parallel criminal proceedings in that they pit the government as a party against private litigants. In many of these cases, the government is seeking the same types of sanctions, in the form of a civil fine or penalty, that are available in criminal matters.<sup>5</sup> In cases of this type, a primary purpose of the exclusionary rule, the

<sup>1</sup> Although the term *exclusionary rule* is frequently limited to the principle that evidence seized in violation of Fourth Amendment rights is not admissible in criminal cases, as used here, it encompasses the general notion that evidence obtained in violation of a person's legal rights, whether constitutional or statutory, should not be received in evidentiary trial-type proceedings. See *United States v. Bonnell*, 483 F. Supp. 1070, 1075 n.8 (D. Minn. 1979) (stating that the exclusionary rule encompasses violations of other than Fourth Amendment rights, such as right to counsel). See generally JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 356 at 525 (4th ed. 1992) (describing the exclusion of evidence taken in violation of the privilege against self-incrimination).

<sup>2</sup> See generally 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 5.52(6) (1997) (“There is some question as to whether the exclusionary rule applies to administrative hearings.”).

<sup>3</sup> E.g., *Taylor Bus Serv. v. Dep’t of Motor Vehicles*, 155 Cal. App. 3d 820, 202 Cal. Rptr. 433, 438-40 (1984) (in denying hearing in this appeal, the California Supreme Court ordered that the opinion of the court of appeals should not be officially published). However, in *Padilla v. Minn. Bd. of Med. Exam’s*, 382 N.W.2d 876, 883 (Minn. Ct. App. 1986), the court of appeals stated, hypothetically, that evidence received in violation of a statute, in this case the Data Practices Act, is admissible in administrative cases.

<sup>4</sup> *United States v. Janis*, 428 U.S. 433, 447 (1976); *Tucker v. Pahkala*, 268 N.W.2d 728, 730 (Minn. 1978) (blood sample taken in violation of implied-consent law admissible in wrongful-death action brought by heirs of deceased); see *Padilla v. Minn. Bd. of Med. Exam’s*, 382 N.W.2d 876, 882-83 (holding that evidence received in violation of the Data Practices Act would be admissible in the administrative license revocation proceeding). See generally, Marjorie A. Shields, Annotation, *Admissibility, in Civil Proceeding, of Evidence Obtained Through Unlawful Search and Seizure*, 105 A.L.R. 5th 1, 3; 1 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE §§ 7.1, 7.2 (Tillers rev. 1983).

<sup>5</sup> See generally Michele L. Hornish, *Excluding the Exclusionary Rule in Driver's License Suspension and Revocation Hearings*, 65 Mo. L. Rev. 533 (2000) (Connecticut, Maine, Maryland and Missouri do not apply the exclusionary rule to driver's license revocation and suspension hearings while Illinois, Ohio and Oregon do apply the exclusionary rule to such hearings); Bernard A. Nigro, Jr., Note, *The Exclusionary Rule in Administrative Proceedings*, 54 Geo. Wash. L. Rev. 564 (1986) (criticizing the U.S. Supreme Court's use of cost-benefit analysis in applying the exclusionary rule in civil and administrative contexts but concluding that under this analysis, courts will continue to deny application of the exclusionary rule in many administrative law contexts).

deterrence of illegal government conduct by preventing the government from profiting by its illegal acts,<sup>6</sup> is served by the application of the rule.<sup>7</sup>

The Minnesota Court of Appeals considered the possible application of the exclusionary rule in separate cases involving appeals from administrative and arbitration proceedings. In *Minnesota State Patrol Troopers Association v. Department of Public Safety*,<sup>8</sup> the court held that the exclusionary rule was applicable to labor arbitration proceedings involving the discharge of a state trooper. The court held that evidence seized from the trooper's home was taken without probable cause due to the inadequacy of the affidavit upon which the search warrant was issued. The court then held that "the exclusionary rule applies to labor arbitration proceedings involving the loss of a job" and ruled that the illegally seized evidence must be suppressed. However, the court upheld the arbitrator's and district court's confirmation of the trooper's discharge on the basis of other admissible evidence that supported the decision.<sup>9</sup> A concurring opinion criticized the court's extension of the exclusionary rule to civil cases at a time when the rule itself was in decline.<sup>10</sup>

In a second case, the court of appeals upheld the admission of the transcript of a taped telephone conversation between a Minnesota Department of Human Rights investigator and a party charged with rental housing discrimination.<sup>11</sup> The court analyzed the taping of the conversation under Minnesota Statutes chapter 626A (1986), the Privacy of Communications Act. The court concluded that the tape recording of the conversation was not in violation of the act on two separate grounds. First, the taping did not constitute an "intercept" of the conversation by electronic device, as a device designed only to record

<sup>6</sup> See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (stating that the exclusionary rule compels respect for Fourth Amendment rights by removing the incentive to ignore them).

<sup>7</sup> A number of cases have considered the application of the exclusionary rule to administrative searches and seizures where the evidence was subsequently offered in a criminal, rather than at an administrative, hearing. In companion cases, *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967) and *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967), the Supreme Court held that unconsented to administrative searches and inspections of commercial property in the ground floor of an apartment building (to determine whether it was being unlawfully used as a personal residence) and of a warehouse (for fire code violations) could not be conducted in the absence of a valid search warrant. The Court limited this general rule in *Colonnade Catering Corp v. United States*, 397 U.S. 72, 77 (1970) to permit statutorily authorized inspections of the premises of highly regulated businesses, in this case a federally licensed liquor dealer. Subsequent cases have focused on whether the business or industry is highly regulated and on society's need to conduct warrantless inspections to accomplish effective regulation of the business. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 603-04 (1981) (holding that mines are subject to warrantless inspections); *Marshall v. Barlow's* 436 U.S. 307, 323 (1978) (holding that a business subject to OSHA regulations was not subject to warrantless inspections for safety violations); *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (holding that firearms dealers are subject to warrantless inspections); see also *Peterman v. Coleman*, 764 F.2d 1416, 1418 (11th Cir. 1985) (affirming the holding that secondhand goods dealers are subject to warrantless searches); *United States v. Jamieson-McKames Pharm.* 651 F.2d 532, 540-41 (8th Cir. 1981), (holding that the drug manufacturing industry are subject to warrantless searches).

<sup>8</sup> 437 N.W.2d 670, 676 (Minn. Ct. App. 1989).

<sup>9</sup> *Id.* at 675-78.

<sup>10</sup> *Id.* at 679 (Forsberg, J., concurring)

<sup>11</sup> *Dep't of Human Rights v. Spiten*, 424 N.W.2d 815, 820 (Minn. Ct. App. 1988) (admitting into evidence the transcript of investigator's conversation with a real estate agent employed to locate a tenant ).

conversation to which the operator is a party is excluded from the scope of the statute.<sup>12</sup> Interception requires an unauthorized third party listener, and here the investigator who did the taping was a party to the conversation. Second, the act specifically provides that it is not unlawful for a person acting under the color of law to intercept a communication where the person is a party to the communication. Here the investigator was clearly a party and was held to be acting under color of law.<sup>13</sup> Given the weight of the other evidence in the record, the court held that it was not error to admit the transcripts.

Finally, in *Ascher v. Commissioner of Public Safety*<sup>14</sup>, the court of appeals held that the exclusionary rule did not preclude an administrative agency from using evidence of alcohol consumption obtained at a sobriety checkpoint subsequently found to be unconstitutional to cancel and deny respondent's license. Although the court had earlier determined that in implied consent proceedings the exclusionary rule applies to evidence obtained from an unconstitutional checkpoint,<sup>15</sup> the court held that a hearing on whether respondent's license should be canceled on the grounds that he is "inimical to public safety" pursuant to Minn. Stat. § 171.04, subd. 1(8), was not an implied consent hearing.<sup>16</sup> Moreover, the court held that reinstating a driver's license where there is good cause to believe the licensee consumed alcohol in violation of the total abstinence condition on the license would not further the exclusionary rule's primary purpose of deterring unlawful police conduct to any significant degree.<sup>17</sup>

The *Minnesota State Patrol*, *Spiten* and *Ascher* decisions are illustrative of the continuing tension between balancing the policies underlying the exclusionary rule against the potential harm to society that may result from the exclusion of otherwise credible evidence.

Both the California<sup>18</sup> and New York<sup>19</sup> courts have held that the exclusionary rule has general application to administrative cases. The rule also has been applied by some federal

<sup>12</sup> *Id.*; see also MINN. STAT. § 626A.01, subds. 5, 6(3) (2014).

<sup>13</sup> *Spiten*, 424 N.W.2d at 820; see also MINN. STAT. § 626A.02, subd. 2(c) (2014).

<sup>14</sup> 527 N.W.2d 122, 125-26 (Minn. Ct. App. 1995).

<sup>15</sup> *Ascher v. Comm'r of Pub. Safety*, 505 N.W.2d 362, 366 (Minn. Ct. App. 1993).

<sup>16</sup> *Ascher*, 527 N.W.2d at 125-26.

<sup>17</sup> *Id.* at 122.

<sup>18</sup> *Taylor Bus Serv. v. Dep't of Motor Vehicles*, 156 Cal. App. 3d 820, 439 (1984) (holding, in an unpublished opinion, that evidence seized pursuant to an invalid search warrant is not admissible in administrative proceeding for unpaid registration fees and penalties); *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 95-96, 396 P.2d 706, 708, 41 Cal. Rptr. 290, 292 (1964) (holding that illegally seized evidence is inadmissible in civil forfeiture proceeding); see also *Emslie v. State Bar*, 11 Cal. 3d 210, 230, 520 P.2d 991, 1002, 113 Cal. Rptr. 175, 186 (1974) (holding that the exclusionary rule is not applicable to attorney disciplinary proceedings). Although the *Emslie* holding is arguably dictum, as the court held the evidence had been legally seized, the court engaged in an extensive discussion of the rationale for applying the criminal exclusionary rules to administrative cases. The court concluded that "a balancing test must be applied in such proceedings and consideration must be given to the social consequences of applying the exclusionary rules and to the effect thereof on the integrity of the judicial process." *Id.* at 229, 520 P.2d at 1002, 113 Cal. Rptr. at 186.; See generally *Wanda Ellen Wakefield, Use, in Attorney or Physician Disciplinary Proceeding, of Evidence Obtained by Wrongful Police Action*, 20 A.L.R.4th 546 (1981 and Supp. 1997) (explaining the use of illegally obtained evidence in attorney and physician disciplinary proceedings).

<sup>19</sup> *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647, 662, 249 N.E.2d 440, 448, 301 N.Y.S.2d 584, 594-95 (1969); see also *In re J.G.P.C. Enters.*, 127 Misc. 2d 95, 96-97, 485 N.Y.S.2d 486, 488-89 (1985).

courts to exclude evidence offered by agencies.<sup>20</sup> The proper procedure for excluding the illegal evidence appears to be a motion to suppress, made before the agency.<sup>21</sup> It has been held that the agency has the power to rule on the motion even if constitutional questions must be resolved.<sup>22</sup>

The difficulty in applying the exclusionary rule to administrative cases is in formulating a test to determine when the policies of the exclusionary rule are served by the refusal to admit evidence in a particular case. Although various types of balancing tests have been proposed,<sup>23</sup> the application of a balancing test to resolve evidentiary problems during a trial proceeding is an open invitation to a stream of appeals, both from the ALJs to the agencies and from the agencies to the courts. Nevertheless, the alternative, which could be to uniformly apply the exclusionary rule to refuse admittance of all illegally obtained evidence, runs contrary to the general notion that all relevant evidence should be received in administrative cases.<sup>24</sup>

One possible resolution of the balancing test problem would be to follow the approach used in Minnesota criminal jury trials by requiring the parties to raise all objections to illegally obtained evidence in pretrial proceedings.<sup>25</sup> This approach is presently available, under the existing OAH rules, through the use of a motion in limine, whereby a party may seek a ruling limiting the evidence to be produced at hearing by an opposing party.<sup>26</sup> However, the implementation of such a procedure would require the use of either mandatory discovery<sup>27</sup> or a notice of evidence by the government<sup>28</sup> in order for the pretrial proceeding to be effective. Such procedures would further complicate and prolong the administrative process and would increase the cost of administrative cases for all parties. In addition, although prehearing resolution of exclusionary rule issues may simplify the actual trial and occasionally avoid trials where critical evidence is held inadmissible, the problem of a succession of appeals and possible retrials remains.

<sup>20</sup> SEC V. EMS Gov't Sec., 645 F.2d 310, 317 (5th Cir. 1981) (denying enforcement of an administrative subpoena); *Knoll Assoc. v. FTC*, 197 F.2d 530 (7th Cir. 1968) (excluding from hearing record illegally obtained corporate); *see also* SEC v. O'Brien, 467 U.S. 735, 748-50, 104 S. Ct. 2720, 2728-30 (1984) (holding that the target of an SEC investigation has no right of notice of subpoenas issued to third parties even though lack of notice prevents objection to subpoenas issued for improper reasons); *cf.* *United States v. Marzano*, 537 F.2d 257, 271 (7th Cir. 1976), (holding that where the government is not a party to the illegal search, the evidence is admissible).

<sup>21</sup> *J.G.P.C. Enters.*, 127 Misc. 2d at 95, 485 N.Y.S.2d at 489.

<sup>22</sup> *Id.*

<sup>23</sup> *See Emslie v. State Bar*, 11 Cal. 3d 210, 229, 520 P.2d 991, 113 Cal. Rptr. 175 (1974).

<sup>24</sup> *See KOCH, supra* note 2, at § 5.52(6) (arguing against application of rule to civil administrative cases).

<sup>25</sup> MINN. R. CRIM. P. 12.04 (stating that in criminal trials to the court, which are more closely related to administrative cases than jury trials, the court has discretion to reserve hearing on evidentiary issues for trial).

<sup>26</sup> MINN. R. 1400.6600 (2013).

<sup>27</sup> *See* MINN. R. CRIM. P. 9.01.

<sup>28</sup> *Id.* 7.01.