10.6 OFFER OF PROOF

The rules of the OAH implicitly recognize the right of a party to make an offer of proof. Specifically, the rules provide that the record in a contested case must include "offers of proof, objections, and rulings thereon."[1] In this respect, administrative contested case proceedings closely follow civil trials in which offers of proof are not only permitted but required[2] if the record is to be preserved for appeal.

The primary purposes for making an offer of proof where an objection to the introduction of evidence has been sustained by the ALJ are the same as in a judicial trial. First, on rare occasions, the offer may cause the ALJ to reconsider the prior ruling and may result in the receipt of the previously excluded evidence. This may be particularly true where the excluded evidence is shown to be a link in a foundational chain to an important piece of substantive evidence. Second and more important, however, the offer of proof serves to protect the hearing record so that the agency or a reviewing court may be made fully aware of the nature of the excluded evidence and its potential impact on the case. In the absence of an offer of proof, which clearly and specifically sets forth the evidence sought to be introduced and its relevancy to the case,[3] it may be impossible to determine whether an erroneous ruling had any potential impact on the outcome of the case.

Because the ALJ's decision is subject to an additional tier of review not present in a court trial, the offer of proof in administrative cases also presents an immediate opportunity to cure an erroneous ruling and avoid a remand for further proceedings. In most contested cases, ALJs do not make the final decision. Their general function is to take the evidence and prepare a proposed decision for the agency,[4] which then issues a final order.[5] Therefore, an offer of proof during the trial of an administrative case will be subject to review by the agency, which may decide to receive the evidence[6] before issuing its decision. In fact, the OAH rules specifically provide that the ALJ has the discretion to certify motions to the agency during the course of the hearing where "necessary to promote the development of the full record and avoid remanding . . . ."[7] A proper offer of proof may persuade the ALJ to exercise this discretion, particularly where there is a question about whether the agency would consider the evidence important in rendering its decision.

In addition, an offer of proof may form the basis for the receipt of new evidence in proceedings before the reviewing court. The APA provides a procedure whereby the

1 MINN. R. 1400.7400, subp. 1 (2013).

2 MINN. R. EVID. 103(a)(2) provides that error may not be predicated on a ruling excluding evidence "unless the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked."

3 Failure to distinguish between admissible and inadmissible evidence in an offer or to make appropriate offers to "tie-up" the admissibility of the evidence may preclude raising the propriety of the exclusionary ruling on appeal. *E.g.,* Jenson v. Touche Ross & Co., 335 N.W.2d 720, 725-26 (Minn. 1983); Busch v. Busch Constr., 262 N.W.2d 377, 389 (Minn. 1977).

4 MINN. STAT. § 14.50 (2014); MINN. R.. 1400.5500(I) (2013).

5 MINN. STAT. §§ 14.61, .62 (2014).

6 The normal procedure would be to remand the case to the ALJ, before whom the evidence would be taken. The ALJ would then be in a position to consider whether the additional evidence requires a modification of his or her decision.

7 MINN. R. 1400.7600(E) (2013) (certification procedure is expressly made unavailable in cases where ALJ's decision is binding on agency).

reviewing court may, on application of a party, direct the receipt of additional evidence before the agency. The applicant must show, to the satisfaction of the court, that the "evidence is material and that there were good reasons for failure to present it in the proceeding before the agency . . . ."[8] This procedure is not limited, at least not by its terms, to motions based on newly discovered evidence.[9] Hence, if a party can both convince a reviewing court that it was denied the opportunity to present material evidence before the agency and show that a specific offer of proof was made, the party may be able to demonstrate "good reasons" and obtain an immediate opportunity to complete the record. Even if the agency fails to modify its decision based on the additional evidence, further review proceedings may be simplified, and the likelihood of prevailing on review may be enhanced.

In summary, the offer of proof is at least as important in administrative hearings as it is in judicial trials. In fact, the failure to make a proper offer of proof may frustrate a party's efforts to obtain review of erroneous evidentiary rulings and may have a significant impact on the outcome of the case.

8 MINN. STAT. § 14.67 (2014).
9 *Cf.* MINN. R. CIV. P. 59.01(d).