11.2 HEARING PROCEDURE

11.2.1 The Order of Proceeding in General

Most contested cases are conducted like an informal trial before a judge without a jury. The basic hearing protocol is set out in an OAH rule.[1] After convening the hearing, the ALJ states the basic procedural rules. Any stipulations or agreements are then entered into the record. The parties may make an opening statement, after which the party with the burden of proof begins the presentation of evidence through witnesses or documents. Cross-examination is conducted by adverse parties.

The Administrative Procedure Act (APA) sets out specific rights of a party in a contested case hearing, including the right to present evidence and argument with respect to the relevant issues.[2] Each party has the right of cross-examination of witnesses and the right to submit rebuttal evidence.[3] Any party may be represented by an attorney or by a non-attorney unless this constitutes the unauthorized practice of law.[4] There is no statutory authority that permits the appointment of an attorney when a party cannot afford one. Federal cases have held that the appointment of counsel for indigent parties in administrative proceedings is not required by the sixth amendment or the due process clause.[5]

Depositions are sometimes admitted into evidence,[6] although there may be due process limitations on this practice where a party was not present at the taking of the deposition.[7] Written evidence is sometimes substituted for direct oral testimony. When this is permitted, the written testimony is prefiled with the ALJ and served on all parties.[8] This practice is most commonly used for opinion testimony where the demeanor of the witness may contribute little to the assessment of the evidence. It is often used in contested case hearings involving utility rate requests.

The agency may play different roles depending on the nature of the hearing. For example, in public utilities commission hearings, where the utility and public interest groups are represented by private practitioners and state agency staff are represented by the attorney general, the agency acts in a neutral capacity. The state agency may also be a party to the contested case proceeding, as in the case of a license revocation. In these circumstances, the agency staff, represented by the attorney general, will "prosecute" the case. Although contested case hearings must, under the APA, be conducted by an ALJ assigned by the OAH,[9] in some cases the agency head may attend all, or a portion, of the

1 MINN. R. 1400.7800 (2013).

2 MINN. STAT. § 14.58 (2014); Thompson v. County of Hennepin, 660 N.W.2d 157, 160-61 (Minn. Ct. App. 2003) (holding right to present evidence includes the right to present a defense through subpoenaed witnesses).

3 MINN. STAT. § 14.60, subd. 3 (2014).

4 MINN. R. 1400.5800 (2013).

5 Goldberg v. Kelly, 397 U.S. 254, 270 (1970); Tyson v. N.Y.C. Hous. Auth., 369 F. Supp. 513, 521 (S.D.N.Y. 1974).

6 MINN. R. 1400.6900 (2013).

7 Cooper v. Chrysler Corp., 125 Mich. App. 811, 818-19, 336 N.W.2d 877, 880 (1983).

8 MINN. R. 1400.5500(L) (2013).

9 MINN. STAT. § 14.50 (2014).

hearing. This is more common in the case of commissions or citizen boards. Where the agency is not a party, the agency head may, in the discretion of the ALJ, engage in the examination of witnesses.[10] In practice, this rarely happens.

After all parties have had an opportunity to present evidence, final oral argument may be made. The ALJ may order the final argument to be in written form. This is often done in lengthy hearings or when a brief is necessary to fully discuss legal issues presented. Special procedural rules have been adopted to govern Revenue Recapture Act or other simple hearings.[11]

11.2.2 Public Hearings

As a general rule, contested case hearings under the Minnesota APA are open to the public. Although the Act does not require public hearings, the contested case rules require open hearings unless they are otherwise permitted or required to be closed.[12] Agency rules and federal or state laws governing particular types of contested cases may also address the issue. Some statutes require public contested case hearings[13] or suggest that they be open to the public.[14] Others require closed hearings or permit them to be closed at the request of a party.[15] As a general rule, quasi-judicial proceedings outside the scope of the contested case rules will also be required to be open to the public. In the absence of a specific statutory provision permitting a closed hearing or one requiring a public hearing, such as the Minnesota Open Meeting Law,[16] public hearings are normally considered to be required in quasi-judicial proceedings.

Although the sixth amendment requires public criminal trials, it does not require that civil trials or quasi-judicial administrative proceedings be open to the public. However, the right to public contested case hearings has a strong constitutional basis and is recognized as a part of our judicial heritage. In *Morgan v. United States*,[17] the United States Supreme Court recognized the historic basis for making contested case proceedings public. In that case, Justice Hughes, speaking for the Court, said:

> The vest [sic] expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by

10 MINN. R. 1400.7900 (2013).

11 *Id.* 1400.8505-.8612.

12 *Id.* 1400.7800.

13 *See, e.g.*, MINN. STAT. § 182.664, subd. 3 (2014) (governing contested cases under Minnesota Occupational Safety and Health Act open to public).

14 Some statutes provide that any person may appear at a hearing, suggesting that hearings are open to the public. *See, e.g., id.* § 47.54 (regarding protests to bank applications for detached facilities); *see also id.* §§ 72A.22, .25 (intervention by any person in contested case hearings regarding unfair competition and unfair or deceptive insurance acts or practices), 116B.09 (intervention in administrative hearings by any person who is residing in state asserting environmental impairment or pollution), 182.661, subd. 3 (employee intervention in occupational safety and health hearings).

15 *See, e.g., id.* §§ 122A.40, subd. 14 (hearings on teacher dismissal public or private at teacher's option), 147.01, subd. 4 (hearings pertaining to doctors confidential); *see also* Michael Spake, *Public Access to Physician and Attorney Disciplinary Proceedings,* 21 J. NAT'L ASS'N. ADMIN. L. JUDGES 289 (Fall 2001); *infra* note 29 (discussing option available to some parties to make hearings open or closed to the public).

16 MINN. STAT. §§ 13D.01-.07 (2014).

17 304 U.S. 1 (1938).

> adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirement of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'[18]

Nine years later, the Supreme Court stated that a trial is a public event and that what transpires in the courtroom is public property.[19] These general statements have been alluded to or applied in a variety of quasi-judicial proceedings and show that the right to public hearings has a strong constitutional basis and is desirable in order to prevent both secret oppression and favoritism.

The Minnesota Supreme Court cited the *Morgan* decision with approval in describing the requirements of a quasi-judicial administrative hearing.[20] In a later decision, the court made it clear that the first amendment rights of the public, as well as the due process rights of the parties, may require public hearings.[21] Other courts have faced the issue more directly. A federal district court held that an ALJ abused his discretion when he banned all members of the public except members of the press from a deportation hearing of an ex-Nazi.[22] The court held that an open, public hearing is a fundamental principle of fair play inherent in our judicial system and that agencies acting in a quasi-judicial capacity must act in accordance with "cherished judicial traditions and principles."[23] The court recognized that the public's presence may be limited to protect the morals of the young, to protect the confidentiality of information or its source, or to protect a witness or a party but held that the least restrictive limitation must be imposed in each case.

Similarly, the circuit court for the District of Columbia held that an open hearing is a fundamental requirement of due process and is required whenever an agency is proposing an action affecting an individual's legal rights.[24] Even though the regulation applicable to discharge hearings in that case required a closed hearing, the court held that a public hearing was required where the employee to be discharged waived his right to a closed hearing. Other courts have reached the same result, holding that secret proceedings are

18 *Id.* at 14-15.

19 Craig v. Harney, 331 U.S. 367, 374 (1947); *accord* Fite v. Retail Credit Co., 386 F. Supp. 1045, 1046 (D. Mont. 1975), *aff'd*, 537 F.2d 384 (9th Cir. 1976) (stating court records are public records open to public inspection).

20 Juster Bros. v. Christgau, 214 Minn. 108, 119-20, 7 N.W.2d 501, 507-08 (1943); *see also* State v. Duluth M. & I. R. Ry., 246 Minn. 383, 75 N.W.2d 398, 409 (1956).

21 Minneapolis Star & Tribune Co. v. Kanmeyer, 341 N.W.2d 550, 555-56 (Minn. 1983) (holding that public has first amendment right to attend pretrial criminal proceedings that can be limited only to preserve fairness); *see also In re* Rahr, 632 N.W.2d 572, 576 (Minn. 2001) (noting that there is a strong presumption in favor of a public trial in denying a writ of prohibition against the tax court after the tax court had denied a motion to close a trial).

22 Pechter v. Lyons, 441 F. Supp. 115, 119-20 (S.D.N.Y. 1977).

23 *Id.* at 119.

24 Fitzgerald v. Hampton, 467 F.2d 755, 769 (D.C. Cir. 1972).

repugnant to our system[25] and that all types of judicial proceedings are presumptively open to the public.[26]

11.2.2(1) Waiver

A party may waive his or her right to a private hearing[27] and may waive his or her right to a public hearing, but the general rule is that a party may not compel a private hearing.[28] However, this general rule may be modified by applicable statutes and rules that give specified parties the option to make hearings open or closed to the public.[29]

11.2.2(2) Exceptions and Limitations

Although there is a constitutional basis for public hearings and a public policy favoring them, public hearings are not always required. Thus, while the courts uphold rules requiring public investigatory proceedings,[30] they do not generally require such proceedings to be open to the public.[31]

In addition to statutes or rules that provide for closed hearings or that give certain parties the right to determine whether or not the hearings will be open, the ALJ has authority to limit and restrict public attendance. It is usually held that courts have inherent power to limit attendance to prevent overcrowding, disorder, witness intimidation, and the corruption of young children's morals.[32] The administrative hearing officer has similar powers and may limit attendance to preserve order and decorum[33] or to exclude persons having no interest in the proceeding if their presence is intimidating or discomforting to a party.[34] Likewise, the judge may always sequester witnesses.[35] However, the limitations imposed must always be the least restrictive necessary.[36]

25 Adams v. Marshall, 212 Kan. 595, 601, 512 P.2d 365, 371 (1963) (civil service hearing).

26 First Corp. v. Clyne, 50 N.Y.2d 707, 715, 409 N.E.2d 876, 878-79, 431 N.Y.S.2d 400, 403 (1980).

27 *Fitzgerald,* 467 F.2d at 767.

28 Singer v. United States, 380 U.S. 24, 35 (1965); Hughes v. FTC, 63 F.2d 362, 388 (D.C. Cir. 1933) (hearing on charge of false advertising).

29 Such an option is accorded to a variety of parties involved in contested cases and other quasi-judicial administrative proceedings. *See, e.g.*, MINN. STAT. §§ 46.30 (option to agency head in certain banking cases), 122A.41, subd. 9 (giving that option to teachers in certain discharge proceedings), 121A.47, subd. 5 (pupil expulsion hearings) (2014); *see also* 34 C.F.R. § 300.508(b)(2) (2012) (hearings regarding disabled child's special education program).

30 FCC v. Schreiber, 381 U.S. 279, 295-96 (1965). Since 2000, ALJs have been subject to the Code of Judicial Conduct that also has provisions regulating video coverage of court proceedings under a modification to Canon 3A(7).

31 Hannah v. Larche, 363 U.S. 420, 443-44 (1960); Woolley v. United States, 97 F.2d 258, 262 (9th Cir. 1938).

32 *See, e.g.*, Cohen v. Everett City Council, 82 Wash. 2d 385, 388, 535 P.2d 801, 803 (1975).

33 Satterfield v. Edenton-Chowan Bd. of Educ., 530 F.2d 567, 571-73 (4th Cir. 1975); Zanders v. La. State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La 1968); Moore v. Student Affairs Comm., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Swars v. Council of Vallejo, 33 Cal. 2d 867, 873, 206 P.2d 355, 359 (1949); Klein v. Bd. of Fire & Police Comm'rs, 23 Ill. App. 3d 201, 208, 318 N.E.2d 726, 731 (1974); Oliver v. Postel, 30 N.Y.2d 171, 179, 282 N.E.2d 306, 309, 331 N.Y.S.2d 407, 412 (1972).

34 Carr v. State Bd. of Pharmacy, 48 Pa. Commw. 330, 334, 409 A.2d 941, 944 (1980).

35 NLRB v. Hale Mfg. Co., 570 F.2d 705, 711 (8th Cir. 1978). The power to sequester witnesses in contested cases is specifically authorized by MINN. R. 1400.7200 (2013).

36 Pechter v. Lyons, 441 F. Supp. 115, 119-20 (S.D.N.Y. 1977).

Under the Minnesota APA, the ALJ may conduct a closed hearing to discuss information that is not public and may issue protective orders and seal all or part of the hearing record.[37] This provision permits compliance with the requirements of the Minnesota Government Data Practices Act[38] and other statutes requiring confidentiality.

Under Minnesota Rules part 1400.5600, subpart 2(M) (2013), the notice of and order for hearing must contain a statement advising parties that if not public data is admitted into evidence, it may become public unless a party objects and asks for relief under Minnesota Statutes, section 14.60, subdivision 2. Since the reports and decisions of ALJs are circulated among state agencies and generally available for public inspection, and since the official records of contested case hearings are also available for public inspection, parties must take steps to protect not public data pertaining to them from being disclosed. If privileged information may be revealed in a contested case proceeding, it has been held that a closed hearing may be required.[39]

11.2.2(3) Cameras and Similar Coverage

Under the contested case rules, cameras, including television and still cameras, as well as mechanical recording devices such as radio microphones and tape recorders, may be operated during a contested case hearing only if prior approval is obtained from the ALJ.[40] Any such coverage is subject to limitations imposed by the judge to preserve decorum and to protect confidential information. The news media, which most frequently attempts to cover contested cases with cameras and recording equipment, does not have a special privilege to observe or report on administrative proceedings. The news media's right of access to public proceedings is no different than the general public's right of access.[41]

11.2.2(4) The Hearing Record

In addition to the generally recognized right to public trials and hearings, there is a common law presumption that court files and records are open to the public and may only be sealed for compelling state interests. Thus, transcripts and settlement agreements pertaining to a case are public documents and may not generally be sealed.[42] In *Minneapolis Star & Tribune Co. v. Schumacher*,[43] the Minnesota Supreme Court held that there is no recognized constitutional right to examine settlement documents or transcripts of settlement

37 MINN. STAT. § 14.60, subd. 2 (2014). These powers are in addition to those specified in MINN. R. 1400.6700, subp. 4 (2013), which authorizes the issuance of protective orders in discovery.

38 MINN. STAT. § 13.01-.99 (2014). Under section 13.03, subdivision 4, of the act, the classification of data as public, private, or confidential may change if the agency is required to produce that data in an administrative proceeding. *See also* ch. 14.

39 Ark. State Med. Bd. v. Leonard, 267 Ark. 61, 63, 590 S.W.2d 849, 851 (1979).

40 MINN. R. 1400.8000 (2013).

41 Saxby v. Wash. Post Co., 417 U.S. 843, 849-50 (1974); Tribune Review Publ'g Co. v. Thomas, 254 F.2d 883, 884 (3d Cir. 1958); Minneapolis Star & Tribune Co. v. State, 282 Minn. 86, 90, 163 N.W.2d 46, 48 (1968).

42 Cohen v. Everett City Council, 82 Wash. 2d 385, 389, 535 P.2d 801, 803-04 (1975) (transcript of municipal hearing to revoke sauna license); *see also* Miami Herald Publ'g Co. v. Collazo, 329 So. 2d 333, 338 (Fla. Dist. Ct. App. 1976) (terms of settlement agreement cannot be sealed even if disclosure could affect other pending litigation); State *ex rel.* Bilder v. Twp. of Delavan, 112 Wis. 2d 539, 553-54, 334 N.W.2d 252, 260 (1983) (holding record of disciplinary proceeding made part of court record cannot be sealed).

43 392 N.W.2d 197 (Minn. 1986).

discussions sealed by the court in a civil case. However, the court stated that there is a common law right to examine settlement documents. Therefore, when an order sealing settlement documents is challenged, the trial court is required to balance a party's privacy interests against the common law presumption in favor of public access.

The use of initials in the place of names merely to protect the parties from embarrassment has been discouraged.[44] But the use of initials or pseudonyms is commonly authorized to protect juveniles, crime victims, or vulnerable adults. For example, in *Resident v. Noot*,[45] the Minnesota Supreme Court used initials to protect the identity of a nursing home resident and her daughter who challenged an agency regulation. Under Minnesota Rules part 1400.5500(O) (2013), the ALJ may grant a request to use initials for proper names in the hearing record and in the findings of fact, conclusions, and recommendation or order. This authorization was added to the contested case rules especially to protect juveniles and crime victims. In addition, other agency rules permit the use of pseudonyms to protect parties' identities. Minnesota Rules part 1205.1600, subpart 3 (2013), authorizes the use of pseudonyms in contested cases challenging the accuracy of government data on individuals under the Minnesota Government Data Practices Act. Of course, initials may be used when a party's identity is unknown as long as that party's rights are not prejudiced.[46]

An employee's right to a public hearing before an agency includes the right to have a court reporter present, at the employee's expense, to make his or her own record of a discharge proceeding.[47] Where such a right is recognized, it may be limited to quasi-judicial, rather than investigatory, proceedings and is always subject to statutory requirements for secrecy or confidentiality.[48]

The APA favors audio-recording of contested case hearings except when the chief ALJ determines that the use of a stenographer or court reporter is more appropriate.[49] A party requesting a court reporter must pay the reporter's appearance fee and the cost of preparation of a transcript. Court reporters are selected from a list of court reporters under contract to the state of Minnesota. The OAH will prepare transcripts from audio-recordings on request and on payment of a transcript fee. Audio-recording of hearings has been held to be a proper means of recording a hearing unless a party can show substantial prejudice.[50] The recordings of contested case hearings are retained by the OAH for a period of several years whether or not a transcript is prepared.

[44] Leaon v. Wash. Cnty., 397 N.W.2d 867, 871 (Minn. 1986) (finding a person whose identity is known is not a proper "John Doe"); Stern v. Stern, 66 N.J. 340, 343 n.1, 331 A.2d 257, 259 n.1 (1975).

[45] 305 N.W.2d 311, 312 (Minn. 1981).

[46] Johnson v. Udall, 292 F.Supp. 738, 751 (C.D. Cal. 1968).

[47] Brown v. United States, 377 F. Supp. 530, 539 (N.D. Tex. 1974); *accord* Matt v. MacMahon, 214 F. Supp. 20, 23 (N.D. Cal. 1963). *Contra In re* Neil, 209 F. Supp. 76, 77-78 (S.D. W. Va. 1962).

[48] *Cf. In re* Lipson, 39 Misc. 2d 778, 781, 241 N.Y.S.2d 929, 933 (1963).

[49] MINN. STAT. § 14.52 (2014).

[50] Whalen v. Minneapolis Special Sch. Dist. No. 1, 309 Minn. 292, 297-98, 245 N.W.2d 440, 443-44 (1976).