

## 11.4 AUTHORITY OF THE ADMINISTRATIVE LAW JUDGE

The APA directs the ALJ to conduct only those hearings for which proper notice has been given. It also authorizes the ALJ to advise an agency on the location and time of the hearing.<sup>1</sup> According to an OAH rule, the ALJ has a number of duties that include considering requests for subpoenas, ruling on motions, administering oaths and affirmations, granting continuances, examining witnesses, and permitting written testimony.<sup>2</sup> ALJs are obligated to enforce the disciplinary rules contained in the Minnesota Rules of Professional Conduct.<sup>3</sup> The rules apply to attorneys appearing before administrative agencies.<sup>4</sup> The rules use the word "tribunal" in discussing an attorney's responsibilities. "*Tribunal*" is defined to include all courts and all other adjudicatory bodies.<sup>5</sup> Should counsel or any person engage in misconduct that disrupts the hearing, the ALJ has authority to exclude the offender in order to maintain an orderly proceeding.<sup>6</sup> In 2001 the office of administrative hearings announced that it would apply the Professional Aspirations, adopted by the Minnesota Supreme Court on January 11, 2001, to contested case hearings conducted by the office.

The ALJ has authority to regulate the manner and form of the testimony of witnesses. The judge has wide discretion in not allowing undisclosed witnesses to testify at the hearing.<sup>7</sup> Where testimony would merely be cumulative or irrelevant, the judge may limit the number of witnesses.<sup>8</sup> Conversely, the judge has discretion to permit a witness to testify even though his name was not on a prehearing list of proposed witnesses.<sup>9</sup> Generally, the ALJ should permit counsel to question witnesses in their own way so that they may develop their case.<sup>10</sup> Cross-examination may be restricted, however, in the sound discretion of the ALJ, and a ruling restricting cross-examination is reversed only for an abuse of discretion.<sup>11</sup> The ALJ may cross-examine witnesses called by any party in order to clarify the testimony.<sup>12</sup>

At the request of a party or on his or her own motion, the ALJ may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.<sup>13</sup> It is generally held that the ALJ should sequester witnesses when requested unless a party can put forth ample justification for the witness to hear other testimony.<sup>14</sup> The ALJ has wide

<sup>1</sup> MINN. STAT. § 14.50(2) (2014).

<sup>2</sup> MINN. R. 1400.5500, .7000, subp. 1 (2013). A 2001 amendment to rule 1400.5500 (at (O)) added authority for the ALJ to set a reasonable limit on the time allowed for testimony after considering the requests of the parties.

<sup>3</sup> MINN. R. PROF. CONDUCT 3.3, 3.5.

<sup>4</sup> Lavin v. Civil Serv. Comm'n, 18 Ill. App. 3d 982, 991, 310 N.E.2d 858, 865 (1974); Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 543, 261 S.E.2d 520, 521 (1980).

<sup>5</sup> MINN. R. PROF. CONDUCT 1.0(n).

<sup>6</sup> MINN. R. 1400.8000, subp. 2 (2013).

<sup>7</sup> First Nat'l Bank v. Dep't of Commerce, 310 Minn. 127, 135, 245 N.W.2d 861, 866 (1976).

<sup>8</sup> Byrd v. Campbell, 591 F.2d 326, 329 (5th Cir. 1979).

<sup>9</sup> S. Colo. Prestress Co. v. Occupational Safety & Health Review Comm'n, 586 F.2d 1342, 1349 (10th Cir. 1978).

<sup>10</sup> NLRB v. Air Flow Sheet Metal, Inc., 396 F.2d 506, 508 (7th Cir. 1968).

<sup>11</sup> Brennen v. Occupational Safety & Health Review Comm'n, 491 F.2d 1340, 1345 (2d Cir. 1974); NLRB v. Bryan Mfg. Co., 196 F.2d 477, 478 (7th Cir. 1952).

<sup>12</sup> NLRB v. Int'l Bhd. of Elec. Workers, 432 F.2d 965, 968 (8th Cir. 1970); MINN. R. 1400.5500(H) (2013).

<sup>13</sup> MINN. R. 1400.7200 (2013).

<sup>14</sup> NLRB v. Hale Mfg. Co., 570 F.2d 705, 711 (8th Cir. 1978).

latitude in all phases of the conduct of the hearing, including rulings on the reception of evidence.<sup>15</sup> However, an ALJ's creation of prejudice to a party by excluding competent and material evidence may be a denial of due process that requires a remand for rehearing.<sup>16</sup> When a party or witness is not fluent in English or has a speech, hearing, or other communication limitation, the ALJ may direct the appointment of an interpreter by the agency for which the hearing is being conducted.<sup>17</sup>

<sup>15</sup> Fairbank v. Hardin, 429 F.2d 264, 267 (9th Cir. 1970) (holding party may seek agency review of unfavorable evidentiary or procedural ruling through filing of post-hearing exception with agency).

<sup>16</sup> NLRB v. Burns, 207 F.2d 434, 436-37 (8th Cir. 1953).

<sup>17</sup> MINN. STAT. §§ 546.42-44 (2014); *see also* Kropiwka v. Dep't of Indus., Labor & Human Relations, 87 Wis. 2d 709, 718, 275 N.W.2d 881, 888 (1979); MINN. R. 1400.5500(N) (authorizing appointment of an interpreter).