23.8 CONSTITUTIONAL ISSUES

There are a number of constitutional concerns that are frequently presented in the review of rules. These include vagueness, due process, overbroad classifications, equal protection concerns, and burdens on interstate commerce.

The doctrine of void for vagueness has been applied to administrative rules. In *Minnesota League of Credit Unions v. Minnesota Department of Commerce*,[1] the Minnesota Supreme Court held in a pre-enforcement action that a Department of Commerce rule prohibiting a credit union from soliciting individuals to join an affiliated group was a permissible regulation of commercial speech and was not vague since it gave fair warning to an individual of the conduct prohibited.[2] The doctrine has also been acknowledged in a case involving disciplinary investigation of lawyers by the Lawyers Professional Responsibility Board. However, attorney disciplinary proceedings have been said to be in sui generis and may not therefore be analogous to agency administrative proceedings. In one lawyer disciplinary case, the Minnesota Supreme Court declared that a rule, like a statute, is void for vagueness—

> if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement. . . . [D]ifficulty in construction is not in itself sufficient to set aside a rule, and the rule "should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent." . . . Due process, however, does not require that a rule contain an explicit definition of every term. All that is necessary is that the rule prescribe general principles so that those subject to the rule are reasonably able to determine what conduct is appropriate.[3]

Federal courts have applied the void for vagueness doctrine to agency rules but have relaxed the standard from that applicable in the criminal cases from which the doctrine emerged. When a statute or rule is not concerned with criminal conduct or first amendment considerations, federal courts have stated that courts must be fairly lenient

1 486 N.W.2d at 399.

2 *Id.* at 404-05; *see also* Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W.2d 100, 107 (Minn. Ct. App. 1991) (citing *In re* Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386, 394 (Minn. 1985)) (finding Minnesota Pollution Control agency water quality rule not vague).

3 *In re* Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386, 394 (Minn. 1985) (citations omitted); *see also In re* Knutson, 405 N.W.2d 234, 238 (Minn. 1987) (addressing challenge to rules as overbroad and void for vagueness; holding that "necessarily broad standards of professional conduct are constitutionally permissible"); Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980) (quoting Colten v. Kentucky, 407 U.S. 104, 110 (1972)) ("A rule is unconstitutionally vague if the words are 'not sufficiently specific to provide fair warning.'"); State v. Enyeart, 676 N.W.2d 311, 320-21 (Minn. Ct. App. 2004) (stating void-for-vagueness doctrine does not preclude the use of broad flexible standards that require the exercise of judgment or common sense); Voettiner v. Comm'r of Educ., 376 N.W.2d 444, 449 (Minn. Ct. App. 1985) (finding contested rule not vague).

in evaluating a claim of vagueness.[4] As the court in *Exxon Corp. v. Busbee* stated, "[T]o constitute a deprivation of due process, [a rule] must be 'so vague and indefinite as really to be no rule or standard at all.' To paraphrase, uncertainty in this statute is not enough for it to be unconstitutionally vague, rather it must be substantially incomprehensible."[5]

An agency must also not violate procedural due process in the adoption of its rules. Procedural due process requirements guarantee notice and an opportunity to be heard.[6] In *Minnesota League of Credit Unions*,[7] the supreme court held that late submissions to the rulemaking record should not have been made part of the record, however, the submission did not raise any new issues and therefore did not prejudice the objectors who had an adequate opportunity to be heard on the matter.

A rule is unconstitutionally overbroad if its terms prohibit conduct or speech that cannot be prohibited under the United States Constitution, even if some conduct that it reaches is in fact punishable.[8]

In a facial preenforcement constitutional challenge to a rule in *City of Morton v. Pollution Control Agency*,[9] the court of appeals held that it will defer to the agency's expertise in determining how best to allocate grant resources to achieve optimum results, and will not substitute its judgment for that of the agency.[10]

In *Norman v. Commissioner of Public Safety*,[11] Norman challenged a rule as unconstitutional on the grounds it was arbitrary and capricious because the rule inhibited or removed the Commissioner's exercise of discretion. The court of appeals held that the rule, in defining a standard for application for a second-time offender, is not an arbitrary or capricious restriction of the commissioner's discretion and, further, that the purpose behind the rule has a reasonable relation to the purpose of the implied consent law.[12]

4 Exxon Corp. v. Busbee, 644 F.2d 1030, 1033 (5th Cir. 1981).

5 *Id.* (quoting A.B. Small Co. v. Am. Sugar Refining Co., 267 U.S. 233, 239 (1925)).

6 Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W.2d 100, 104 (Minn. Ct. App. 1991) (finding agency gave notice and afforded an opportunity to be heard); *see In re* Proposal by Lakedale Telephone Co., 561 N.W.2d 550, 555 (Minn. Ct. App. 1997) (concluding telephone company not deprived of due process by Minnesota Public Utilities Commission's decision to adjudicate decision versus formal rulemaking process); *In re* Alleged Labor Law Violation of Chafoulias Mgmt. Co., 572 N.W.2d 326, 332 (Minn. Ct. App. 1997) (finding commissioner's failure to promulgate rules on procedures for filing exceptions did not violate relator's right to due process).

7 486 N.W.2d 399, 407 (Minn. 1992).

8 Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980); Minn. Racetrack Inc. v. Goldberg, 403 N.W.2d 885, 890 (Minn. Ct. App. 1987) (holding, in First Amendment challenge to agency's election campaign rules, that rules did not violate employer's constitutional right to free speech).

9 437 N.W.2d 741 (Minn. Ct. App. 1989).

10 *Id.* at 748; *accord In re* Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils., 768 N.W.2d 112, 118-19 (Minn. 2009); *In re* Request for Issuance of SDS Gen. Permit, 769 N.W.2d 312, 320-22 (Minn. Ct. App. 2009); Coalition of Greater Minn. Cities v. Minn. Pollution Control Agency, 765 N.W.2d 2d 159, 168 (Minn. Ct. App. 2009); *see also In re* Application of Q Petroleum, 498 N.W.2d 772, 777 (Minn. Ct. App. 1993) (concluding Petroleum Board rule was ambiguous, but Board's construction was a reasonable one: "[W]hen agency's construction of its own regulation is at issue, this court gives considerable deference to agency interpretation."); *Minn. Chamber of Commerce*, 469 N.W.2d at 104 (giving deference to agency expertise in water quality rules which involved technical issues of public health and the environment).

11 404 N.W.2d 315, 318 (Minn. Ct. App. 1987).

12 *Id.*; *see also In re* Appeal of Jongquist, 460 N.W.2d 915, 917 (Minn. Ct. App. 1990) (quoting Monk &

In addition, a rule may not violate the constitutional right of equal protection. If no fundamental right or suspect class is involved, a classification in a rule is impermissible if it is not rationally related to a legitimate government objective.[13] A rule may not also improperly regulate commercial speech. In *Minnesota League of Credit Unions*,[14] the supreme court affirmed a decision by the court of appeals that held that the Department of Commerce rule prohibiting a credit union from soliciting individuals to join an affiliated group was valid. The court determined that the rule was a permissible regulation of commercial speech.[15]

Finally, a rule may not be an unconstitutional burden on interstate commerce. "Where a regulation is evenhanded and promotes a legitimate state interest, reasonable burdens on interstate commerce will be tolerated."[16]

Excelsior, Inc. v. State Bd. of Health, 302 Minn. 502, 509-10, 225 N.W.2d 821, 825 (1975)) ("'Under [the APA], administrative officials are not permitted to act on mere whim, nor their own impulse, . . . but must follow due process in their official acts and in the promulgation of rules defining their operations.'").

13 *See* State v. Hopf, 323 N.W.2d 746 753 (Minn. 1982) ("We will uphold a legislative classification that is rationally related to a legitimate government objective."); Peterson v. Dep't of Labor & Indus., 591 N.W.2d 76, 79 (Minn. Ct. App. 1999) (upholding rules limiting fees of qualified rehabilitation consultants in an equal protection challenge because, although the rules affected QRCs differently, the rate differences were established by QRCs themselves); *In re* Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n, 515 N.W.2d 604, 606 (Minn. Ct. App. 1994) (concluding rule was rationally related to maintaining the integrity of lawful gambling because it ensures that the public can enter an establishment where there is lawful gambling and be confident that no illegal gambling has been conducted on the premises); Rocco Altobelli v. Minn. Dep't of Commerce, 524 N.W.2d 30, 37-38 (Minn. Ct. App. 1994) (rejecting petitioners' equal protection argument because state's exemption of independent contractors from certain tax payments could be rationally justified by administrative convenience and expense); *In re* Application of Crown CoCo, Inc., 458 N.W.2d 132, 138 (Minn. Ct. App. 1990) (finding Petrofund Board's classification on non-reimbursable costs of cleaning up gasoline leak rationally related to a legitimate government objective); REM v. Dep't of Human Servs., 382 N.W.2d 539, 542 (Minn. Ct. App. 1986) (finding rational basis for DHS classification and rejecting equal protection claim).

14 486 N.W.2d 399, 407 (Minn. 1992).

15 *Id.* at 402-04.

16 Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 246 (Minn. 1984).