7.2. THE RIGHT TO COUNSEL OR OTHER REPRESENTATION

The parties to administrative proceedings do not always have a constitutional right to be represented by retained counsel.[1] Therefore, where the right is not of constitutional dimensions, it will depend on applicable statutes and agency rules or regulations. Under the federal APA, parties and witnesses required to appear at contested case hearings have a statutory right to retain counsel.[2] The Minnesota APA does not grant a similar right to parties and witnesses in contested cases. However, under the contested case rules, all parties have a right to retained counsel, but witnesses compelled to appear do not.[3] Some state statutes[4] and agency rules[5] also entitle the parties to particular proceedings to be represented by counsel,

In agency adjudications outside the scope of the contested case rules, the right to counsel, in the absence of an express provision granting that right, will depend on due process considerations, and not on the Sixth Amendment.[6] With some exceptions, the parties to quasi-judicial administrative proceedings have a right to counsel whenever a hearing is required by due process or by an express provision of law. The Minnesota Supreme Court has articulated three indicia of quasi-judicial actions: "(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim."[7] Thus, courts have recognized that the right to counsel exists in adjudicative proceedings to terminate welfare benefits,[8] to prevent air pollution,[9] to remove a civil service employee,[10] to evict a public housing tenant,[11] to revoke a license,[12] to determine public utility rates,[13] to classify

1 *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 583 (1975).

2 5 U.S.C. § 555(b) (2012).

3 *Cf.* MINN. R.1400.5800 (2013).

4 *See, e.g.,* MINN. STAT. §§ 122A.40, subd. 14 (teacher termination hearings), 268.105, subd. 6 (unemployment insurance hearings) (2014). Neither type of hearing is a contested case for purposes of the Minnesota Administrative Procedure Act.

5 *See, e.g.,* MINN. R. 5215.1400 (contested case hearings under Occupational Safety and Health Act), 7829.1700 (2013) (contested cases under jurisdiction of public utilities commission).

6 Courts uniformly hold the Sixth Amendment applicable only to criminal cases. *See, e.g.,* United States v. Capson, 347 F.2d 959, 963 (10th Cir. 1965); Puleo v. Dep't of Revenue, 117 Ill. App. 3d 260, 268, 453 N.E.2d 48, 53 (1983).

7 Minn. Ctr. for Envtl. Advocacy v. Metro. Council, 587 N.W.2d 838, 842 (Minn. 1999).

8 Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

9 Brown v. Air Pollution Control Bd., 37 Ill. 2d 450, 454, 227 N.E.2d 754, 756 (1967).

10 Steen v. Bd. of Civil Serv. Comm'rs, 26 Cal.2d 716, 727, 160 P.2d 816 (1945); Fusco v. Moses, 304 N.Y. 424, 433, 107 N.E.2d 581 (1952); Christy v. Kingfisher, 13 Okla. 585, 76 P.135, 142 (1904); State *ex rel.* Arnold v. Milwaukee, 157 Wis. 505, 147 N.W. 50, 52-53 (1914). *Contra* Downing v. LeBritton, 550 F.2d 689, 692-93 (1st Cir. 1977).

11 Caulder v. Durham Hous. Auth., 433 F.2d 998, 1003-04 (4th Cir. 1970).

12 Ullmen v. Dep't of Registration & Educ., 67 Ill. App. 3d 519, 522, 385 N.E.2d 58, 60 (1978); Bancroft v. Bd. of Governors of Registered Dentists, 202 Okla. 108, 109, 210 P. 666, 668 (1949). *Contra* Woodham v. Williams, 207 So. 2d 320, 322 (Fla. Dist. Ct. App. 1968).

13 Mayfield Gas Co. v. Pub. Serv. Comm'n, 259 S.W.2d 8, 10-11 (Ky. 1953); Wisconsin Tel. Co. v. Public Serv. Comm'n, 232 Wis. 274, 287 N.W. 122, 133 (1939).

civil service employees,[14] to determine workers' compensation entitlement,[15] or to establish unemployment compensation entitlement.[16] Where pupil dismissals are involved, some courts have found a right to counsel,[17] but others have not.[18]

Although the right to counsel usually exists in quasi-judicial administrative proceedings, such as contested cases, the right is seldom recognized in agency investigatory proceedings.[19] The Minnesota Supreme Court has adopted this view.[20] However, if the investigation occurs when criminal charges arising from the same acts are pending, the right to counsel, at least for consultation and advice, has been held to exist.[21]

The right to counsel is the right to retain counsel at the party's expense. Usually, parties have no right to have counsel appointed or paid for by the agency if they are indigent.[22]

7.2.1 Notice, Denial, and Waiver

Under the contested case rules, a party is entitled to notice of his right to counsel in a contested case proceeding.[23] Notice must be included in the notice of and order for hearing and must be explained to parties unrepresented by legal counsel at the

[14] State *ex rel.* Spurck v. Civil Serv. Bd., 226 Minn. 240, 240, 32 N.W.2d 574, 576 (1948) (holding that statutory right to administrative appeal (trial) includes right to counsel).

[15] Am. Tobacco Co. v. Sallee, 419 S.W.2d 160, 161 (Ky. 1967).

[16] Sandlin v. Review Bd., 406 N.E.2d 328, 332 (Ind. Ct. App. 1980).

[17] French v. Bashful, 303 F. Supp. 1333, 1338 (E.D.La. 1969) ; *In re* Goldwyn v. Allen, 54 Misc. 2d 94, 97-99, 281 N.Y.S.2d 899 (1967); Geiger v. Milford Indep. Sch.Dist., 51 Pa. D. & C. 647, 652 (1944).

[18] Goss v. Lopez, 419 U.S. 565, 583 (1975) (short-term suspension); Madera v. Bd. of Educ., 386 F.2d 778, 788-89 (2d Cir. 1967) (suspension); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (neither side had counsel).

[19] *See, e.g.*, Hannah v. Larche, 363 U.S. 420, 433, 442 (1960) (federal investigation); Anonymous v. Baker, 360 U.S. 287, 294-96 (1959) (state investigation); *In re* Groban, 352 U.S. 330, 335 (1957) (witness at an investigatory proceeding); Haines v. Askew, 368 F. Supp. 369, 377 (M.D. Fla. 1973) (investigation of teacher), *aff'd*, 417 U.S. 901 (1974); Martone v. Morgan, 251 La. 993, 1003-04, 207 So. 2d 770, 774 (1968),Labor-Management Commission investigation into possible criminal violations); Finance Comm'n v. Mayor of Boston, 370 Mass. 693, 697, 351 N.E.2d 517, 520 (1976) (political fundraising); Comm. on Legal Ethics of W. Va. State Bar v. Pence, 161 W. Va. 240, 249, 240 S.E.2d 668, 673 (1977) (attorney discipline). *But see* Rivera v. Blum, 98 Misc. 2d 1002, 1009, 420 N.Y.S.2d 304 (1978) (welfare fraud); *In re* Romeo v. Union Free Sch. Dist. No. 3, 82 Misc. 2d 336, 339, 368 N.Y.S.2d 726 (1975) (employment).

[20] Haaland v. Pomush, 263 Minn. 506, 511-13, 117 N.W.2d 194, 198-99 (1962) (minimum wage investigation); *see also*, chapter 3.

[21] Gabrilowitz v. Newman, 582 F.2d 100, 104-07 (1st Cir. 1978); *cf. Rivera*,, 98 Misc. 2d at 1009, 420 N.Y.S.2d at 304 .

[22] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 270 (1970); Jeralds v. Richardson, 445 F.2d 36, 39 (7th Cir. 1971); Borror v. Dep't of Inv., 15 Cal. App. 3d 531, 543, 92 Cal. Rptr. 525 (1971); Aiello v. Comm'r of Pub. Welfare, 358 Mass. 91, 93-94, 260 N.E.2d 662, 663 (1970); Bancroft v. Bd. of Governors of Registered Dentists, 202 Okla. 108, 109, 210 P.2d 666, 668 (1949). *But see* Earnest v. Willingham, 406 F.2d 681, 684 (10th Cir. 1969) (cannot refuse counsel to indigent person if retained counsel is permitted by those able to pay). The right to have counsel provided at the state's expense will exist for certain indigent probationers and parolees. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

[23] MINN. R. 1400.5600, subp. 2E. (2013). Where specifically required by statute or rule, a party must be informed of the right to counsel. *Cf.* Biberstine v. Port Austin Pub. School Dist. No. 9, 51 Mich. App. 274, 277-79, 214 N.W.2d 729, 731-32 (1974) (failure to give notice of procedural rights rendered discharge improper).

commencement of a contested case proceeding.[24] In agency adjudications outside the scope of the APA, the agency may be required to advise parties of their right to counsel, especially in a parole revocation proceeding,[25] but there are cases to the contrary.[26]

A party is denied the right to counsel if consultations with counsel occur in the presence of an informer working for the agency.[27] Moreover, unreasonably short notice of hearing can constitute the denial of counsel,[28] as can the refusal to continue a hearing when counsel's wife suddenly becomes ill.[29] Lack of counsel coupled with other improprieties or unfairness may result in the denial of a fair hearing.[30]

On the other hand, courts have upheld some direct limitations on a party's right to counsel. The denial of counsel at the preliminary stages of an administrative proceeding is not prohibited if assistance is available in subsequent proceedings.[31] At least one court sustained the complete denial where the party suffered no prejudice.[32] Direct limitations also may be permissible when they are imposed because of the improper motives of a party or the improper conduct of counsel. Thus, a party may not invoke the right to counsel merely to delay the hearing,[33] and disruptive counsel may be excluded from an administrative hearing without denying his or her client's right to counsel.[34] Although a party is normally entitled to counsel of his or her choice,[35] counsel retained by a party may be precluded from participation in a contested case proceeding if that participation would violate the Minnesota Rules of Professional Conduct.[36] Motions to exclude counsel retained by parties to

[24] MINN. R. 1400.7800 B(2) (2013).

[25] *See, e.g.,* Hurley v. Reed, 288 F.2d 844, 846-47 (D.C. Cir. 1961). The right to be informed of the right to counsel in agency investigations may arise under the holding in *Miranda v. Arizona,* 384 U.S. 436 (1966). *See* Mathis v. United States, 391 U.S. 1, 4-5 (1968).

[26] *See, e.g.*, Balch Pontiac-Buick, Inc., v. Comm'r of Motor Vehicles, 165 Conn. 559, 569, 345 A.2d 520, 525 (1973) (no prejudice where party had extensive experience with proceedings); Berkshire Fine Spinning Assocs. v. Label, 74 R.I. 6, 11-12, 60 A.2d 871, 874-75 (1948) (workers' compensation hearing).

[27] Fusco v. Moses, 304 N.Y. 424, 433, 107 N.E.2d 581 (1952).

[28] Fisher v. Indep. Sch. Dist. No. 118, 298 Minn. 238, 243, 215 N.W.2d 65, 69 (1974).

[29] Ullmen v. Dep't of Registration & Educ., 67 Ill. App. 3d 519, 521-22, 385 N.E.2d 58, 60-61 (1978); *see also In re* Romeo v. Union Free Sch. Dist. No. 3, 82 Misc. 2d 336, 342, 368 N.Y.S.2d 726 (1975) (arbitrary and capricious to refuse to hold hearing at any time other than Friday night or Saturday where party's counsel is Jewish and observes Sabbath).

[30] *See, e.g.,* United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22, 25-26 (E.D. Pa. 1950) (deportation based on important facts counsel would have presented for non-English speaking client); Roche v. State Bd. of Funeral Directors, 63 Pa. Commw. 128, 132-39, 437 A.2d 797, 800-03 (1981) (lack of counsel coupled with other improprieties by agency and its attorney).

[31] *See, e.g.*,Opp Cotton Mills v. Administrator of Wage & Hour Div., 312 U.S. 126, 152-53 (1941); People *ex rel.* Calloway v. Skinner, 41 A.D.2d 106, 108-09, 341 N.Y.S.2d 775 (1973) (parole revocation), *aff'd* 33 N.Y.2d 23, 300 N.E.2d 716, 347 N.Y.S.2d 178 (1973); *In re* Popper v. Bd. of Regents, 26 A.D.2d 871, 871, 274 N.Y.S.2d 49, 49 (1966) (dentist interview).

[32] Avery v. Studley, 74 Conn. 272, 50 A. 752, 757 (1901).

[33] *Romeo*, 82 Misc. 2d at 340, 368 N.Y.S.2d at 726.

[34] Ubiotica Corp. v. Food & Drug Admin., 427 F.2d 376, 382 (6th Cir. 1970); NLRB v. Weirton Steel Co., 135 F.2d 494, 496-97 (3d Cir. 1943).

[35] SEC v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966); Backer v. Comm'r of Internal Revenue, 275 F.2d 141, 144 (5th Cir. 1960). *But see* United States v. Steel, 238 F. Supp. 575, 577 (S.D.N.Y. 1965) (upholding agency rule prohibiting parties to investigation to be represented by same counsel).

[36] The OAH has asserted inherent authority to regulate the conduct of attorneys appearing in contested case hearings and to ensure compliance with the Minnesota Rules of Professional Conduct. *See* Minn. R. Prof.

contested cases have been decided by ALJs when based on violations of those rules. Trial courts may disqualify counsel to maintain public confidence in the legal profession and the integrity of the judicial process. However, the disqualification decisions must attempt to maintain the "delicate balance" that exists between a party's right to counsel of choice and the need to uphold ethical standards. In order to maintain that balance, the Minnesota Supreme Court has adopted the following three-pronged process for determining if disqualification is appropriate where potentially conflicting representations are involved:

> (a) Considering the facts and the issues involved, is there a substantial, relevant relationship or overlap between the subject matters of the two representations? (b) If so, then certain presumptions apply: First, it is presumed, irrebuttably, that the attorney received confidences from the former client and he or she will not be heard to claim otherwise. Second, it is also presumed but subject to rebuttal that these confidences were conveyed to the attorney's affiliates. (c) Finally, at this stage, if reached, the court weighs the competing equities.[37]

Various indirect limitations on a party's right to counsel have also been upheld. Thus, an agency's refusal to grant a continuance to a party whose counsel has another engagement at the time of the scheduled hearing does not abridge the right to counsel.[38] Also, the right to counsel is not impaired when agency rules limit the amount of attorneys' fees counsel may charge. In one case, an agency rule limiting attorneys' fees to ten dollars was upheld.[39] Moreover, a party is not denied the right to counsel if his or her counsel is incompetent.[40] The adverse effect of that rule is mitigated, to some degree, by the ALJ's obligation to develop a complete record on which the ultimate decision is to be made.[41] A party's right to counsel may be waived.[42] A knowledgeable waiver does not provide grounds

Conduct 8.3; *see also*, Lavin v. Civil Serv. Comm'n, 18 Ill. App. 3d 982, 990, 310 N.E.2d 858, 865 (1974) (stating that "an administrative agency must act within the rules and regulations which it has enacted"). *But see* Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 543, 261 S.E.2d 520, 523 (1980) (stating that "the formal rules of evidence applicable to the General Court of Justice, even if they were controlled by the Code of Professional Responsibility, are not binding on local municipal administrative agencies").

37 Buysse v. Baumann-Furrie & Co., 448 N.W.2d 865, 868-69 (Minn. 1989).

38 *See* Simmons v. United States, 698 F.2d 888, 893 (7th Cir. 1983); Givens v. Dep't of Alcoholic Beverage Control, 176 Cal. App. 2d 529, 532, 1 Cal. Rptr. 446 (1959). *But see* Castro-Nuno v. Immigration & Naturalization Serv., 577 F.2d 577, 579 (9th Cir. 1978) (concluding that where hearing continued twice due to absence of agency witness, it was error for ALJ not to continue third time when petitioner's counsel did not appear).

39 Hoffmaster v. Veterans Admin., 444 F.2d 192, 193 (3d Cir. 1971). Some state agencies have power to limit attorneys' or agents' fees. *See* MINN. STAT. §§ 268.105, subd. 6 (unemployment insurance proceedings), 611A.58 (Crime Victims' Reparations Board) (2014).

40 Sartain v. SEC, 601 F.2d 1366, 1375-76 (9th Cir. 1979); *In re* Dannenberg v. Bd. of Regents, 77 A.D.2d 707, 707, 430 N.Y.S.2d 700, 700 (1980); Goodman v. State Bd. of Osteopathic Exam'rs, 42 Pa. Commw. 380, 382, 400 A.2d 939, 940 (1979). *Contra* Arms v. Gardner, 353 F.2d 197, 199 (6th Cir. 1965); *but cf.* Orosco v. Poarch, 70 Ariz. 432, 438-39, 222 P.2d 805, 809-10 (1950).

41 Coulter v. Weinberger, 527 F.2d 224, 229 (3d Cir. 1975); Bethlehem Steel Co. v. NLRB, 120 F.2d 641, 652 (D.C. Cir. 1941).

42 *See* Martin v. Wolfson, 218 Minn. 557, 569, 16 N.W.2d 884, 890 (1944); Jones v. Sully Buttes Sch., 340 N.W.2d 697, 699 (S.D. 1983); *cf.* Haaland v. Pomush, 263 Minn. 506, 511-13, 117 N.W.2d 194, 198-99 (1962)..

for appeal.[43] Lack of counsel coupled with other factors may result in an unfair hearing,[44] but lack of counsel itself is not necessarily prejudicial.[45]

7.2.2 Personal and Nonlawyer Representation

Parties to contested case proceedings are not required to be represented by attorneys. Under the contested case rule, parties may represent themselves, or they may be represented by a person other than a lawyer if that representation is not prohibited as the unauthorized practice of law.[46] Normally, an individual or a partnership may appear in court pro se, that is, on their own behalf and without counsel. The same rule would apply in contested cases or other agency proceedings. As in court, however, a party who appears with counsel may not be allowed to represent himself by questioning witnesses or making argument.[47] When a corporation is involved, the usual rule is that the corporation may not appear in court pro se and that any appearance on behalf of the corporation by a person other than a lawyer constitutes the unauthorized practice of law, even if the representative owns all of the corporation's stock.[48] Likewise, an individual or partnership that does not appear pro se may not be represented by any person other than a licensed attorney.

The power to regulate the practice of law on the state level is a judicial power vested only in the courts.[49] However, as a matter of comity, the courts may accept legislative declarations of policy pertaining to the practice of law.[50]

Generally, an administrative agency may not, by rule, permit the unauthorized practice of law or grant immunity to one who engages in it.[51] Moreover, many courts have

[43] *See* Giaimo v. Pederson, 193 F. Supp. 527, 528 (N.D. Ohio 1960), *aff'd*, 289 F.2d 483 (6th Cir. 1961). Before a waiver is effective, the ALJ may be required to tell the party of the complexity of his or her dilemma. *See* Partible v. Immigration & Naturalization Serv., 600 F.2d 1094, 1096-97 (5th Cir. 1979); Smith v. Sec'y of Health, Educ. & Welfare, 587 F.2d 857, 860 (7th Cir. 1978).

[44] *See* United States *ex rel*. Castro-Louzan v. Zimmerman, 94 F. Supp. 22, 25-26 (E.D. Pa 1950); Roche v. State Bd. of Funeral Dirs., 63 Pa. Commw. 128, 132-39, 437 A.2d 797, 800-03 (1981).

[45] *See* Madokoro v. Del Guercio, 160 F.2d 164, 167 (9th Cir. 1947).

[46] MINN. R. 1400.5800 (2013).

[47] *See* H.C. Lind, Annotation, *Right of Litigant in Civil Action Either to Assistance of Counsel Where Appearing Pro Se or to Assist Counsel Where Represented*, 67 A.L.R. 2d 1102 (1959) and 67 Later Case Serv. 1102 (2007); *see also* Ernest H. Schopler, Annotation, Comment Note.-*Right to Assistance by Counsel in Administrative Proceedings*, 33 A.L.R. 3d (1970 and Supp. 2012).

[48] *See* Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 857 (8th Cir. 1996); Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753, 754-55 (Minn. 1992); Cary & Co. v. F.E. Satterlee & Co., 166 Minn. 507, 509, 208 N.W. 408, 409 (1926); *see also* Hawkeye Bank & Trust v. Baugh, 463 N.W.2d 22, 25-26 (Iowa 1990); White v. Idaho Forest Indus., 98 Idaho 784, 788, 572 P.2d 887, 891 (1977); *In re* Eisenberg, 96 Wis. 2d 342, 346, 291 N.W.2d 565, 567 (1980); Jay M. Zitter, Annotation, *Propriety and Effect of Corporation's Appearance Pro Se through Agent Who is Not Attorney*, 8 A.L.R. 5th 653 (1992 and Supp. 2012).

[49] Sharood v. Hatfield, 296 Minn. 416, 422-23, 210 N.W.2d 275, 279 (1973); *In re* Greathouse, 189 Minn. 51, 55, 248 N.W. 735, 737 (1933)..

[50] *See* Cowern v. Nelson, 207 Minn. 642, 646-47, 290 N.W. 795, 797 (1940).

[51] *See* Denver Bar Ass'n v. Public Util. Comm'n, 154 Colo. 273, 279, 319 P.2d 467, 471 (1964).

held that practice before a state administrative agency constitutes the practice of law.[52] However, there is authority to the contrary.[53] The Colorado Supreme Court authorized nonlawyers to appear in agency proceedings of a legislative nature but refused to allow such appearances in cases of a quasi-judicial nature unless no legal issues were involved and the amounts in controversy were too small to warrant the employment of an attorney.[54] The only restriction the court imposed on nonlawyer representation in legislative type hearings was that it occur only if no vested liberty or property rights are involved.

In addition to the contested case rule, some other agency rules permit parties to be represented by nonlawyers.[55] In some cases, representation by nonlawyers is authorized by statute.[56] However, a non-lawyer cannot file an appeal of an administrative case with the Minnesota Court of Appeals on behalf of an individual or a corporation, even though the agent was allowed by statute to represent a party at the agency hearing.[57]

The Minnesota Workers Compensation Court of Appeals has directly addressed the issue of whether corporations can be represented by non-attorneys before administrative law judges at OAH. In *Leopold v. Hillandale Farms*, the Minnesota Workers Compensation Court of Appeals concluded that a corporate insurer could not be represented in proceedings at OAH by a non-attorney.[58] Citing *Nicollet* and a Minnesota Attorney General Opinion from 1970,[59] the *Hillandale* court admonished that "[a] corporation is a legal entity, not a natural person; therefore any individual appearing before OAH on behalf of a corporation would be practicing law."[60] Two years later, the Minnesota Workers Compensation Court of Appeals extended its holding in *Hillandale* to find that a non-attorney could not represent an uninsured corporation in an administrative hearing at OAH.[61]

This outcome is consistent with the rule under Minnesota common law that "a corporation must be represented by an attorney in legal proceedings."[62] The leading Minnesota case addressing the issue of corporate representation by counsel is *Nicollet Restoration, Inc. v. Turnham*.[63] In *Nicollet*, a commercial landlord-tenant dispute was

52 *See* People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 354-57, 8 N.E.2d 941, 946-47 (1937); Clark v. Austin, 340 Mo. 467, 478, 101 S.W.2d 977, 982 (1937); State *ex rel*. State Bar v. Keller, 21 Wis. 2d 100, 103, 123 N.W.2d 905, 907 (1963).

53 *See* Magnolias Nursing & Convalescent Ctr. v. Dep't of Health, 428 So.2d 256, 256-57 (Fla. Dist. Ct. App. 1982); Div. of Alcoholic Beverage Control v. Bruce Zane, Inc., 99 N.J. Super. 196, 201-02, 239 A.2d 28, 31 (1968); Carr v. Stringer, 171 S.W.2d 920, 921-23 (Tex. Civ. App. 1943); *cf.* Rivera v. Blum, 98 Misc. 2d 1002, 1011, 420 N.Y.S.2d 304, 310 (1978).

54 Denver Bar Ass'n,, 154 Colo. at 273, 278-82, 319 P.2d at 467, 471-72..

55 *See, e.g.,* MINN. R. 5215.1400 (2013) (Occupational Safety and Health Review Board).

56 *See, e.g.,* MINN. STAT. § 268.105, subd. 6 (2014) (authorizing representation by nonlawyers in unemployment insurance hearings).

57 *In re* Evjen, 653 N.W.2d 212, 213-14 (Minn. Ct. App. 2002).

58 48 W.C.D. 257, 262 (Minn. Workers' Comp. Ct. App. 1993).

59 Op. Att'y Gen. 523-a-29 (Mar. 17, 1970); *see also* Op. Att'y Gen. 270 (1939).

60 *Hillandale*, 48 W.C.D. at 262.

61 *See Christian,* 55 W.C.D. at 395-96.

62 *Save Our Creeks v. City of Brooklyn Park*, 699 N.W.2d 307, 309 (Minn. 2005) (declining to sanction a corporation for failing to be represented by counsel when filing a complaint in district court; instead allowing the defective complaint to be cured by an amendment made by counsel added to the case).

63 486 N.W.2d 753 (Minn. 1992)

removed from conciliation court[64] to district court, and when the commercial real estate company refused to retain counsel for the district court proceeding, the case was dismissed.[65] The Minnesota Court of Appeals affirmed the dismissal and the Minnesota Supreme Court agreed, holding that a corporation must always be represented by an attorney when appearing in district court.[66] The *Nicollet* court explained the rationale for its decision:

> A non-attorney agent of a corporation is not subject to the ethical standards of the bar and is not subject to court supervision or discipline. The agent knows but one master, the corporation, and owes no duty to the courts. In addition, a corporation is an artificial entity which can only act through agents. To permit a lay individual to appear on behalf of a corporation would be to permit that individual to practice law without a license.[67]

The *Nicollet* court determined that Minnesota Statutes, section 481.02, subdivision 2 (2014), prohibits a corporation from appearing "in any court in the state" through a non-attorney agent.[68] "Since corporations are distinct legal entities, any individual attempting to appear on behalf of the corporation would, in effect, be practicing law."[69] The court interpreted the unauthorized practice of law statute to allow a corporation to appear without counsel only when that individual is specifically named as a party to a lawsuit.[70]

Federal agencies routinely permit parties to be represented by nonlawyers, but such persons generally must be licensed by the relevant agency and meet specified criteria.[71] A person authorized to appear before a federal agency may not appear before a state agency in similar matters if prohibited by state law.[72] However, that person's appearance before the federal agency does not constitute the unauthorized practice of law.[73]

64 At the time of *Nicollet*, the conciliation court rules required parties to appear without attorneys in conciliation court except by leave of court. *See Nicollet Restoration, Inc. v. Turnham*, 475 N.W.2d 508, 509-10 (Minn. Ct. App. 1991). The conciliation court rules were amended in 2007 to allow parties the option of being represented by an attorney in conciliation court. *See* Minn. R. Gen. Pract. 512(c).

65 *Nicollet*, 486 N.W.2d at 753-54.

66 *Id.* at 754-55.

67 *Id.* at 754; *see also Contemporary Sys. Design v. Comm'r of Jobs & Training*, 431 N.W.2d 133, 134 (Minn. Ct. App. 1988) (stating that because a corporation is not a natural person, it cannot practice law or act in person).

68 *See Nicollet*, 486 N.W.2d at 755.

69 *Id*.

70 *Id.* (analyzing the language of Minn. Stat. § 481.02, subd. 2 (2014)). In addition to interpreting Minnesota Statutes, section 481.02, subdivision 2, the court expressly held that "legislative enactments which purport to authorize certain classes to practice law in the courts of this state are not controlling upon the judiciary." *Id.* at 756. This holding has been applied to the exceptions carved out in subdivision 3 of Minnesota Statutes, section 481.02, including subdivision 15, which allows the sole shareholder of a corporation to appear on behalf of a corporation in court. *See Christian v. Windwood Homes,* 55 W.C.D. 389, 395 (Minn. Workers' Comp. Ct. App. 1995) (stating that non-attorney's status as sole shareholder and president of uninsured corporation "not determinative of his right" to represent his corporation in workers' compensation case).

71 *See* Sperry v. State ex rel. Fla. Bar, 373 U.S. 379, 385-403 (1963).

72 State *ex rel.* State Bar v. Keller, 21 Wis. 2d 100, 103, 123 N.W.2d 905, 907 (1963).

73 *Sperry*, 373 U.S. at 384-85.

7.2.3 Attorneys' Fees and Costs

Before 1986, few state statutes permitted parties to be awarded their attorneys' fees in contested case proceedings.[74] In the absence of a specific statutory provision or an agreement or stipulation to pay them, the general rule is that attorneys' fees, or a party's costs and disbursements, may not be awarded in an administrative proceeding.[75] This follows the so-called "American rule" applied in civil actions.[76] Under this rule, an agency may not order one litigant to pay the expenses of another, even if public interests are involved, unless the agency has specific statutory authorization to do so.[77] However, one state court has permitted such an award under the common-fund theory in quasi-judicial reparations cases.[78] One of the factors precluding the award of attorneys' fees in administrative proceedings is an agency's frequent participation as a party. Agencies generally are considered to be immune from the payment of attorneys' fees, costs, or disbursements.[79]

The restriction on awards of attorneys' fees in administrative proceedings was lifted somewhat with the enactment of the Equal Access to Justice Act.[80] It authorizes an award of attorneys' fees and costs to a prevailing party in contested cases. However, because the act is a limited waiver of sovereign immunity, courts strictly construe its language.[81] *Party* is defined in the act to include only small businesses, namely those with not more than 500 employees or annual revenues over seven million dollars.[82] Recovery is only available against the state,[83] and only in cases where the state's position is represented by

[74] *See, e.g.,* MINN. STAT. §§ 216B.16, subd. 10 (allowing compensation for intervenors whose intervention in rate-making proceedings is helpful); 363A.33, subd. 7 (discrimination cases) (2014).

[75] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-71 (1975) (adopting American rule in federal APA cases); *see also* ; Dail v. S.D. Real Estate Comm'n, 257 N.W.2d 709, 714 (S.D. 1977); Watkins v. Labor & Indus. Review Comm'n, 117 Wis. 2d 753, 758, 345 N.W.2d 482, 485 (1984).

[76] *See, e.g.,*Kallok v. Medtronic, Inc., 573 N.W.2d 356, 363 (Minn. 1998); Dworsky v. Vermes Credit Jewelry, Inc., 244 Minn. 62, 70, 69 N.W.2d 118, 124 (1955).

[77] Greene Cnty. Planning Bd. v. FPC, 559 F.2d 1227, 1235 (2d Cir. 1976).

[78] Consumers Lobby Against Monopolies v. Pub. Util. Comm'n, 25 Cal. 3d 891, 908, 603 P.2d 41, 51, 160 Cal. Rptr. 124, 134 (1979).

[79] *See, e.g.,* Dep't of Emp't Sec. v. Minn. Drug Prods., Inc., 258 Minn. 133, 139, 104 N.W.2d 640, 645 (1960); State *ex rel*. Simpson v. Village of Dover, 113 Minn. 452, 458, 130 N.W. 539, 539 (1911); 138 L.S. Tellier, Annotation, *Liability of State, or Its Agency or Board, for Costs in Civil Action to Which It is a Party*, 72 A.L.R.2d 1379 (1960 and Later Case Serv. 2007 & Supp. 2013); *see also*, 2014 Minn. Laws ch. 251, art. 2, § 19, at 24-25 (amending Minn. Stat. § 268.105, subd. 6 (2012)).

[80] MINN. STAT. §§ 15.471 - .474 (2014). Under the act, aggrieved fee claimants, but not state agencies have the right to appeal attorney fees awarded by an ALJ under MINN. R. 1400.8401 (2013). MINN. STAT. § 15.474, subd. 2 (2014). The agencies have only a common law right to petition for a writ of certiorari from attorney fee awards under MINN. R. CIV. APP. P. 120 and MINN. STAT. § 606.01 (2014). *In re* Haymes, 444 N.W.2d 257, 259 (Minn. 1989). The state law is similar to federal law. *See* 5 U.S.C. § 504(2) (2012).).

[81] Donovan Contracting of St. Cloud, Inc., v. Minn. Dep't of Transp., 469 N.W.2d 718, 720 (Minn. Ct. App. 1991).

[82] MINN. STAT. § 15.471 subd. 6 (2014).

[83] *See* City of Mankato v. Mahoney, 542 N.W.2d 689, 692-93 (Minn. Ct. App. 1996) (holding that landlord was not entitled to attorney fees and expenses under the Minnesota Equal Access to Justice Act in action challenging municipality's decision to revoke his rental license, since municipality was not

counsel and does not have a reasonable basis in law and fact.[84] Recovery is not available in proceedings to fix rates or in proceedings to grant or renew licenses. The adverse effects of a party's inability to obtain attorneys' fees in other contested cases may be mitigated in those cases where agencies may limit the attorneys' fees chargeable or where a party has a right to counsel provided by a third party.[85] In other cases, a successful party may be permitted to include those costs in its rate requests.[86] Moreover, agencies may be required to limit a party's costs.[87] When attorneys' fees may be awarded, only those services performed in the contested case should be considered.[88] The right to attorneys' fees will depend on the statute in force at the termination of the proceeding[89] and on the proper promulgation of agency rules.[90] In addition, the right to attorneys' fees may be different for different parties.[91]

Some agencies have the power, in disciplinary proceedings, to order a licensee to pay all costs of the proceeding resulting in disciplinary action. For example, under Minn. Stat. § 150A.08, subd. 3a, the Board of Dentistry may recover "the cost of the investigation and proceeding," which specifically includes attorneys' fees and investigation costs incurred by the attorney general in addition to statutory costs and disbursements.[92]

Administrative agencies and tribunals are not courts.[93] Therefore, statutes that authorize courts to award attorneys' fees and costs do not apply to administrative

equivalent of "state" within meaning of the Act, and city council did not have statewide jurisdiction to be considered state agency under Minnesota Administrative Procedure Act.)

84 *See Donovan Contracting*, 469 N.W.2d at 718, 722-23 (concluding that attorney fees and expenses could be awarded against a state agency under the Minnesota Equal Access to Justice Act where the agency attempted to impose an interpretative rule that was not adopted through the Administrative Procedure Act. The Court determined that the illegal rule was not consistent with the plain meaning of the statute and that the Department's position was not "substantially justified."); *cf.* Mbong v. New Horizons Nursing, 608 N.W. 2d 890 (Minn. Ct. App. 2000) (without deciding whether the Equal Access to Justice Act applied to unemployment proceedings, the court found the determination of the Department of Economic Security to have some justification and denied a request for attorneys' fees).

85 Some agencies have the power to limit attorneys' fees in proceedings under their jurisdiction. *See, e.g.,* MINN. STAT. §§ 268.105, subd. 6(c) (unemployment insurance), 611A.58 (Crime Victims Reparations Board) (2014). The former unemployment insurance statute did not preclude attorneys' fees.. Minn. Stat. § 268.105, subd. 6 (2012). In some cases, a party may have a right to be defended by another person, such as an employer. For example, a school district has an absolute duty to defend a teacher charged with malfeasance. Horace Mann Ins. Co. v. Indep. Sch. Dist. No. 656, 355 N.W.2d 413, 420 (Minn. 1984).

86 This is typical in rate-making proceedings. *See, e.g.,* MINN. STAT. § 256B.47, subd. 1 (2014) (disallowing legal and related expenses for only unsuccessful challenges to agency decisions regarding nursing home rates).

87 *See, e.g.,* MINN. STAT. § 268.105, subd. 6 (2014) (unemployment insurance).

88 *See* First Fed. Sav. & Loan Ass'n v. Clark Inv. Co., 322 N.W.2d 258, 262 (S.D. 1982) (stating that attorneys' fees from collateral declaratory judgment action could not be considered).

89 Bankers Trust Co. v. Woltz, 326 N.W.2d 274, 278 (Iowa 1982).

90 Senior Citizens Coal. v. Minn. Pub. Utils. Comm'n, 355 N.W.2d 295, 303 (Minn. 1984).

91 In discrimination cases, for example, a prevailing respondent may not obtain attorneys' fees as easily as a prevailing complainant. *See, e.g.,* Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 417-19 (1978); *see also* 5 L. LARSON, EMPLOYMENT DISCRIMINATION § 97.03, at 97-9 (1996).

92 Minn. Stat § 150A.08, subd. 3a (2014).

93 Entergy, Ark., Inc. v. Nebraska, 210 F.3d 887, 900-01 (8th Cir. 2000); Baker Elec. Co-op., Inc. v. Chaske, 28 F.3d 1466, 1476 n.8 (8th Cir. 1994).

agencies.[94] Likewise, administrative proceedings (like contested cases) are not actions.[95] Consequently, statutes that authorize the award of attorneys' fees, costs, or disbursements in actions do not apply to administrative proceedings. However, on appeal from an agency decision in a contested case the prevailing party may be entitled to an award of attorneys' fees.[96]

[94] Cnty. of Ramsey v. Neujahr, 409 N.W.2d 53, 56 (Minn. Ct. App. 1987); *see also* State by Cooper v. Mower Cnty. Soc. Servs., 434 N.W.2d 494, 500-01 (Minn. Ct. App. 1989); Henry v. Metro. Waste Control Comm'n, 401 N.W.2d 401 (Minn. Ct.App.1987) (disallowing award of prejudment interest under Minn. Stat. § 549.09 as the statute does not apply to administrative proceedings and the APA does not provide for such awards; allowed under Minn. Stat. § 334.01).

[95] *In re* Holly Inn, Inc.,, 386 N.W.2d 305, 308 (Minn. Ct. App. 1986).

[96] *See In re* Hixson, 434 N.W.2d 1, 3 (Minn. Ct. App. 1988) (attorneys' fees awarded to discriminatee in appeal by employer from Civil Rights Commission decision).