8.4 DISCOVERY AVAILABLE AS A MATTER OF RIGHT

Discovery as a matter of right in a contested case extends to the names and addresses of witnesses, relevant written or recorded statements made by a party or a witness, all written exhibits to be introduced at hearing, and requests for admissions.[1] The duty to disclose the names of witnesses is a continuing obligation.[2] Minnesota Rules 1400.6700, subpart 1, relating to the discovery of written or recorded statements made by a party or witness on behalf of a party, is analogous to rule 26.02(d) of the Minnesota Rules of Civil Procedure. That rule includes a detailed definition of a statement previously made.[3] Disclosure as a matter of right applies to all recorded statements of parties and witnesses, unless privileged.[4] Under part 1400.6700, subpart 1(C), exhibits do not need to be produced until one week prior to the hearing.

The OAH rule is consistent with the principle that a defending party in an administrative proceeding instituted by an agency is entitled to examine and receive any prior statement of a government witness who has testified in the proceeding.[5] This rule, known as the *Jencks* rule, originated in *Jencks v. United States.*[6] In *Jencks*, the Supreme Court held that a defendant in a criminal proceeding was entitled to all previous written reports made by the witness in the government's possession and all recorded oral reports having a bearing on the witness's testimony at the trial. Minnesota has adopted the *Jencks* rule.[7] Although the rule originated in a criminal context, it has been applied generally to administrative proceedings.[8]

Several courts have suggested that in contested case proceedings involving the denial or revocation of a government benefit, license, or entitlement, the agency may be required to go beyond *Jencks* and disclose to the party any exculpatory information in its possession.[9] Such statements, however, have been made in the context of a right to

1 MINN. R. 1400.6700, subp. 1, .6800 (2013).

2 *Id.* 1400.6700, subp. 1*; see* VanHercke v. Eastvold, 405 N.W.2d 902, 905 (Minn. Ct. App. 1987) (stating that there is a continuing duty to disclose the names of witnesses in a civil court case).

3 MINN. R. CIV. P. 26.02(d).

4 *See* Wiggin v. Apple Valley Med. Clinic, Ltd., 459 N.W.2d 918, 919-20 (Minn. 1990); Leer v. Chi., Milwaukee, St. Paul & P. Ry. Co., 308 N.W.2d 305, 307 (Minn. 1981); Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672, 681 (Minn. 1977); Larson v. Indep. Sch. Dist. No. 314, 305 Minn. 358, 359, 233 N.W.2d 744, 746 (1975).

5 *See* Communist Party of the U.S. v. Subversive Activities Control Bd., 254 F.2d 314, 328 (D.C. Cir. 1958).

6 353 U.S. 657 (1957).

7 State v. Thompson, 273 Minn. 1, 31-32, 139 N.W.2d 490, 512 (1966).

8 Great Lakes Airlines v. CAB, 291 F.2d 354, 364 (9th Cir. 1961). Administrative rules limiting the application of the *Jencks* rule to the disclosure of a witness's pretrial statement only after that witness has testified and only for the purpose of cross-examination have been upheld. P.S.C. Res., Inc. v. NLRB, 576 F.2d 380, 387 (1st Cir. 1978). Moreover, the rule does not apply to statements by potential witnesses who do not appear at the hearing. Moore v. Admin'r, Veterans Admin., 475 F.2d 1283, 1286 (D.C. Cir. 1973). The rule has general application to prior written statements and recorded oral reports in the government's possession and is not limited to the files of the particular agency involved. Harvey Aluminum (Inc.) v. NLRB, 335 F.2d 749, 753-54 (9th Cir. 1964).

9 *See, e.g.*, Wegmann v. Dep't of Registration & Educ., 61 Ill. App. 3d 352, 356, 377 N.E.2d 1297, 1301 (1978). *See generally* Brady v. Maryland, 373 U.S. 83, 87 (1963).

discovery, and not in a context of voluntary disclosure without an attempt at discovery.[10] In *Brock v. Roadway Express, Inc.*, the Supreme Court addressed what procedures the Department of Labor must provide before it orders reinstatement of an employee it determined was terminated for reporting his employer's violation of safety rules. [11] A five-Justice majority held that in addition to other prereinstatement procedural requirements, the agency must give the employer notice of all individuals interviewed during the investigation and copies of their statements.[12]

Minnesota Rules part 1400.6700, subpart 1(D) (2013), authorizes the ALJ to impose sanctions for a party's failure to provide timely discovery available as a matter of right, including the exclusions of the testimony of undisclosed witnesses. Minnesota courts have consistently held that the sanction of exclusion of evidence is to be used only as a last resort where the failure to provide discovery is willful, and prejudice to the opposing party can be avoided by no other practical means.[13] A continuance of the proceedings to allow the opposing party to prepare to meet the evidence is the preferred course of action.[14] In *Northern Messenger, Inc. v. Airport Couriers*, the court held that the exclusion of the testimony of undisclosed witnesses by the hearing examiner in a contested case proceeding was inappropriate where the failure to make timely disclosure was not willful and a continuance would have avoided any prejudice to the opposing party. *[15]*

Insofar as the rule requires the disclosure of witness lists, it goes beyond the requirements of the Minnesota Rules of Civil Procedure.[16] The corresponding federal rule of civil procedure, however, requires parties to disclose witness lists at least 30 days before trial unless otherwise directed by the court.[17]

The rule requiring the disclosure of all recorded statements made by a party or a witness on behalf of a party appears absolute on its face. However, the ALJ must recognize all privileges available at law.[18] Hence, a privileged recorded statement would not be discoverable as a matter of right. Such recognized privileges as attorney work product, governmental investigatory information, and the public officer exemption may prevent the disclosure of recorded statements even under the broad language of the rule.[19]

A party has a right to serve on another party a written request for admissions.[20] The subject matter of the request may relate to the truth of relevant facts or opinions, or the application of law to relevant facts or opinions, including the authenticity of any document.[21]

10 *See Wegmann*, 61 Ill. App. 3d at 356, 377 N.E.2d at 1301; Shiveley v. Stewart, 65 Cal. 2d 475, 479-83, 421 P.2d 65 (1966).

11 481 U.S. 252, 264-68 (1987).

12 *Id.*; *see* 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 9.5, at 58-61 (3d. ed. 1994).

13 *See, e.g.*, Dennie v. Metro. Med. Ctr., 387 N.W.2d 401, 405 (Minn. 1986); Cornfeldt v. Tongen, 262 N.W.2d 684, 697 (Minn. 1977).

14 *See* Krech v. Erdman, 305 Minn. 215, 217-18, 233 N.W.2d 555, 557 (1975); Prechtel v. Gonse, 396 N.W.2d 837, 840 (Minn. Ct. App. 1986); Kraushaar v. Austin Med. Clinic, P.A., 393 N.W.2d 217, 221-24 (Minn. Ct. App. 1986); Whitney v. Buttrick, 376 N.W.2d 274, 278-79 (Minn. Ct. App. 1985).

15 359 N.W.2d 302, 305 (Minn. Ct. App. 1984).

16 *Cf.* MINN. R. CIV. P. 26.02.

17 FED. R. CIV. P. 26(a)(3); *see* 6 MOORE'S FEDERAL PRACTICE §§ 26.24[3] (Matthew Bender 3d ed. 2015).

18 MINN. R. 1400.6700, subp. 2 (2013).

19 For a discussion of privilege as limiting pretrial discovery, see ch. 9.

20 MINN. R. 1400.6800 (2013).

21 *Id.*

The request must be served at least 15 days before the hearing, and a written response is due within ten days of the receipt of the request.[22] Failure to provide a timely response or objection will result in the subject matter of the request being deemed admitted unless there was a justifiable excuse for failing to respond.[23] Rule 1400.6800 is analogous to rule 36.01 of the Minnesota Rules of Civil Procedure. It does not, however, carry the same potential monetary sanction for a failure to admit as does the court rule.[24]

The availability of discovery as a matter of right may be affected by the type or subject matter of the hearing. Additional discovery available as a matter of right may be provided for by statute in particular contested case proceedings.[25] If the contested case proceeding is governed by the rules of the OAH applicable to the Revenue Recapture Act,[26] only the names and addresses of witnesses are available as a matter of right.[27] A contested case proceeding may be governed by the Revenue Recapture Act rules as required by statute.[28]

The rules of the OAH for hearings on the siting of power lines and electrical generating plants[29] make no specific provision for pretrial discovery or the availability of information as a matter of right before hearing. There is, however, a specific reference in the rule to the authority of the ALJ to rule on discovery motions made before such hearings.[30] Therefore, by necessary implication, the general discovery rule, Minnesota Rules part 1400.6700, applies to hearings for the siting of power lines and electrical generating plants.

A party seeking discovery available as a matter of right may obtain discovery from an opposing party directly, without any prior application to or order from the ALJ.[31] If discovery available as a matter of right is resisted on an appropriate ground, such as privileged work product or the governmental investigatory file privilege, the party asserting the privilege has the burden of establishing the privilege and avoiding discovery.[32]

22 *Id.*

23 *Id.*

24 *See* MINN. R. CIV. P. 37.03.

25 MINN. STAT. § 216B.30 (2014), for example, provides that in an electric or natural gas investigation or rate-making proceeding, any party is entitled to take the deposition of a witness in the same manner prescribed by law for the taking of a deposition in a civil action in the district court.

26 MINN. R. 1400.8505-.8612 (2013).

27 *Id.* 1400.8600.

28 *Id.* 1400.8505 (noting that contested cases brought pursuant to the following authorities are governed by the rules pertinent to the Revenue Recapture Act: Minnesota Statutes, sections 114C.23 (environmental improvement audit), 115.076 (water pollution enforcement), 116.072, subd. 6 (expedited review of pollution control rules or orders), 144.991 (public health actions) (2014)); *see also* Minnesota Statutes, section 245A.08 (2014), noting that any contested case hearings related to human services licensure and brought pursuant to sections 245A.05, .07, subd. 3, and 245C.28, are all subject only to the Revenue Recapture Act rules.

29 MINN. R. 1405.0200-.2700 (2013).

30 *Id.* 1405.0400, subp. 3A.

31 *Id.* 1400.6700, subp. 1.

32 *See, e.g.*, State v. Lender, 266 Minn. 561, 564, 124 N.W.2d 355, 358 (1963). For a discussion of privilege generally as limiting discovery, see ch. 9.