Chapter 10. Evidence

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10.1 Rules of Evidence in Administrative Adjudication

Under the Administrative Procedure Act (APA), contested cases are not governed by the strict rules of evidence that apply to the trial of cases in Minnesota courts.[1] Rather, the APA provides that agencies "may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs."[2] The rules of the Office of Administrative Hearings (OAH) echo this standard and specifically provide that admissible evidence may include "reliable" hearsay.[3] Under this relaxed standard of admissibility, courts will generally not disturb agency decisions that rest on evidence that is not admissible under the formal rules of evidence, including the hearsay rule, unless the evidence is "inherently unreliable" and the agency's use of the evidence constitutes an abuse of discretion.[4] In practice, however, APA contested cases are heard by administrative law judges (ALJs) and tried by attorneys trained in the formal rules of evidence. As a consequence, with the exception of admissible hearsay, most of the formal rules of evidence tend to be argued and applied to help distinguish evidence that does not possess "probative value." In addition, the rules of evidence are frequently a useful basis for arguing that a particular piece of evidence is "unreliable" and should be excluded from the hearing record.

The rules of the OAH provide that all parties to a contested case have the right to present evidence, including rebuttal evidence.[5] In receiving evidence, ALJs and agencies are

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[1] Minn. Stat. § 14.60, subd. 1 (2014). The Minnesota Court of Appeals has observed that "administrative agencies are not strictly bound by the rules of evidence." *Schumann v. State*, 367 N.W.2d 688, 690 (Minn. Ct. App. 1985) (refusing to apply Minn. R. Evid. 609(b) to driver's license revocation proceeding); *see also Padilla v. Minn. Bd. of Med. Exam'rs*, 382 N.W.2d 876, 881-82 (Minn. Ct. App. 1986) (stating that adherence to formal rules of evidence in administrative cases is not required to provide due process).

[2] Minn. Stat. § 14.60, subd. 1 (2014).

[3] Minn. R. 1400.7300, subp. 1 (2013). The OAH has also adopted specific rules of evidence for hearings involving worker's compensation (Minn. R. 1420.2900, subps. 3,6) (2013)); the Revenue Recapture Act (Minn. R. 1400.8607 (2013)); and for certain hearings involving the Environmental Quality Board (Minn. R. 1405.1700 (2013)).

[4] *State ex rel. Indep. Sch. Dist. No. 276 v. Dep't of Educ.*, 256 N.W.2d 619, 627 (Minn. 1977). In the context of a professional licensing disciplinary proceeding the Minnesota Supreme Court reaffirmed its concern that hearsay evidence have "probative quality" and that the use of hearsay not violate notions of fair play. *In re Wang*, 441 N.W.2d 488, 495 n. 8, 9 (Minn. 1989) (citing with approval, *Morey v. Indep. Sch. Dist. No. 492*, 271 Minn. 445, 448-49, 136 N.W.2d 105, 107-08 (1965)). However, some courts hold that hearsay should not be admitted in administrative cases, over objection, where direct evidence is available. *E.g., Outgamie Cnty. v. Town of Brooklyn*, 18 Wis. 2d 303, 309-12, 118 N.W.2d 201, 206 (1962).

[5] Minn. R. 1400.7100, subp. 1 (2013). In addition, the APA expressly recognizes the right to submit rebuttal evidence. Minn. Stat. § 14.60, subd. 3 (2014).

required to "give effect to the rules of privilege recognized by law."[6] Presumably, agencies must recognize the constitutional privileges construed by case law,[7] as well as those established by statute.[8] In addition, evidence that is incompetent, irrelevant, immaterial, or unduly repetitious is to be excluded by the ALJ or by the agency.[9] Here again the formal rules of evidence form the framework for arguing that particular evidence or testimony should be excluded as prejudicial, confusing, or a waste of time.[10] ALJs are no more receptive to unnecessary or repetitive evidence than trial court judges and will generally sustain proper objections that serve to expedite hearings and maintain a clear record.

10.2 Residuum Rule

Although agencies are permitted to receive hearsay and other evidence that would not be admissible in a court of law, may they base their decisions *solely* on evidence that would be inadmissible in a civil or criminal trial? The notion that they may not is what is commonly referred to as the residuum rule.

The residuum rule was developed by courts in jurisdictions outside Minnesota to counterbalance the relaxed rules of admissibility applicable in administrative proceedings.[11] Under the residuum rule, when all the evidence received by an agency has been sifted through by a reviewing court, there must be present at least a residuum or residue of legally competent evidence[12] that supports the agency's findings.[13]

Although the Minnesota cases do not specifically refer to the residuum rule, the Minnesota Supreme Court has observed that administrative agencies may not rest their decisions solely on hearsay or other incompetent evidence.[14] The source of the requirement that there be a minimum of legally sufficient evidence to support an agency's decision appears to be the "substantial evidence" requirement. The APA provides that an agency decision may be reversed or modified by a reviewing court if it is "unsupported by substantial evidence in

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[6] Minn. Stat. § 14.60, subd. 1 (2014); Minn. R. 1400.7300, subp. 1 (2013). *See generally* Minn. Stat. § 8.3 (2014).

[7] For example, agencies must recognize the privilege against self-incrimination.

[8] *See, e.g.,* Minn. Stat. § 595.02 (2014) (testimonial privileges of witnesses).

[9] Minn. Stat. § 14.60, subd. 1 (2014) provides that an agency *may* exclude incompetent, irrelevant, immaterial, and repetitious evidence. However, Minn. R. 1400.7300, subp. 1 (2013), requires the exclusion of such evidence, (stating evidence "shall be excluded"). As a practical matter, however, the determination of whether evidence is, for example, unduly repetitive remains in the sound discretion of the ALJ.

[10] *See* Minn. R. Evid. 403.

[11] *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938) ("Mere uncorroborated hearsay or rumor does not constitute substantial evidence."). A reviewing court may be loath to rely on agency findings that are unsupported by any legally admissible evidence. 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 12.23, at 209-10 (1997).

[12] FRANK E. COOPER, STATE ADMINISTRATIVE LAW 410-12 (1965) (stating that legally competent evidence means the type of evidence that would be admissible in jury trial).

[13] The residuum rule is strictly an administrative law doctrine and has no application to judicial proceedings. *Shepp v. Uehlinger*, 775 F.2d 452, 454-55 (1st Cir. 1985).

[14] *In re Wang*, 441 N.W.2d 488, 495 n. 9 (Minn. 1989) (holding that out-of-court admissions are hearsay at common law and must have probative quality if they serve as basis for agency decision); *Sabes v. City of Minneapolis*, 265 Minn. 166, 173, 120 N.W.2d 871, 876 (1963).

view of the entire record as submitted."[15] The court has apparently concluded that substantial evidence to support an agency decision means that some minimal amount of legally admissible evidence must be present in the hearing record. However, in light of the considerable criticism of the residuum rule leveled by commentators and its rejection by the drafters of the model APA, the vitality of the rule in Minnesota may be in doubt.[16] Reliability may be based on the presence of corroborating evidence or on the circumstances under which the hearsay statement was made.[17] This approach is consistent with the APA's evidentiary standard[18] that evidence of probative value should be admitted in administrative cases regardless of its technical admissibility under the formal rules of evidence.[19]

However, in light of the requirement of the existing Minnesota decisions that a minimum amount of admissible evidence is needed to support an agency decision on appeal, there are circumstances in which a party is obliged to object to evidence that is clearly admissible under the relaxed rules governing administrative hearings. For example, the Minnesota Supreme Court has stated that "in the absence of a special statute, an administrative agency cannot, *at least over objection*, rest its finding of fact solely on hearsay evidence which is inadmissible in a judicial proceeding."[20] This statement by the court suggests that the failure to object to hearsay may have the effect of allowing the agency to base its decision on hearsay evidence.[21] Furthermore, the general rule is that hearsay evidence that is not objected to may not be the basis for a claim of error on appeal.[22] Consequently, by failing to object to hearsay evidence, a party may waive the right to raise the argument that the evidence is not "substantial" on appeal.[23]

Given the partial recognition that the residuum rule has received in Minnesota, it seems prudent for a party to make a timely and specific objection to legally inadmissible evidence, at least when the evidence relates to a critical part of the contested case and it is unlikely that admissible evidence can be produced. This is true even though the evidence is "admissible" under the APA or the OAH rules. The failure to object may have the consequence of converting hearsay or other objectionable evidence into "substantial evidence" that will support the

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[15] Minn. Stat. § 14.69(e) (2014).

[16] 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.4 (3rd ed. 1994); MODEL STATE ADMIN. PROCEDURE ACT. § 4-215(d), cmt. (1981).

[17] *Cf. Springer v. Norton*, 32 Conn. Supp. 560, 564-65, 345 A.2d 590, 592-93 (1975) (holding that discontinuance of public assistance benefits cannot rest on hearsay where more reliable evidence is available).

[18] Minn. Stat. § 14.60, subd. 1 (2014).

[19] Some courts continue to follow the residuum rule, although they often find independent grounds for the admission of the objectionable evidence. *E.g., Caprioti v. Northridge Hosp. Found. Med. Center*, 147 Cal. App. 3d 144, 155 n.2, 196 Cal. Rptr. 367, 373 n.2 (1983); *The Yacht Club v. Utah Liquor Control Comm'n*, 681 P.2d 1224, 1226 (Utah 1984); *Wagstaff v. Dep't of Emp. Sec.*, 826 P.2d 1069, 1072-73 (Utah App. 1992).

[20] *State ex rel. Indep. Sch. Dist. No. 276 v. Dep't of Educ.*, 256 N.W.2d 619, 627 (Minn. 1977) (emphasis added).

[21] Failure to object may have the effect of lulling the agency into believing that its hearsay evidence is proper or sufficient where other nonobjectionable evidence might have been readily available.

[22] Minn. R. Evid. 103(a)(1).; *see Larson v. Foley Bros.*, 277 Minn. 99, 102, 151 N.W.2d 780, 783 (1967); *Nelson v. O'Neil Amusements*, 274 Minn. 555, 556, 142 N.W.2d 647, 648 (1966).

[23] Ernest H. Schopler, Annotation, *Hearsay Evidence in Proceedings Before State Administrative Agencies*, 36 A.L.R.3d 12, § 31 (1971 & Supp. 1997)

agency's decision on appeal.[24] Nonetheless, even if Minnesota would follow the modern trend in rejection of the residuum rule, reliance on uncorroborated hearsay for proof of significant facts invites reversal.[25] For example, the Minnesota Court of Appeals reversed a student expulsion by a school district that was based on the objected-to hearsay testimony of two police officers relating what non-testifying witnesses had told them.[26] The court noted that the allegations of the non-testifying witnesses were contradictory and held that the decision was not supported by substantial evidence.

10.3 Burden of Proof and Standard of Proof

The term *burden of proof* is often used loosely to refer both to the requirement that one party to a proceeding must bear the burden of proving the truth of a particular fact and to the kind of proof that must be offered to meet that party's burden.[27] As used here, *burden of proof* refers solely to the former concept. The term *standard of proof* is used to refer to the quantity and quality of evidence needed to satisfy a party's burden of proof on a particular issue.

10.3.1 Burden of Proof

The rules of the OAH specify that "[t]he party proposing that certain action be taken must prove the facts at issue . . . unless the substantive law provides a different burden."[28] In short, under the OAH rules, it is the proponent of a particular action who must bear the ultimate burden of persuading the finder of fact that the evidence supports that action. But it

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[24] The residuum rule has been abandoned by the federal courts and many state courts. *See, e.g., Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980) (holding that hearsay that is probative may constitute substantial evidence to support agency decision; the residuum rule no longer controls); *Sch. Bd. v. Dep't of HEW*, 525 F.2d 900, 905-6 (5th Cir. 1976) (stating that "underlying reliability and probative value" determine whether evidence constitutes "substantial evidence"); *Eagle v. Paterson*, 57 N.Y.2d 831, 442 N.E.2d 56, 455 N.Y.S.2d 770 (1982) (residuum rule not followed).

[25] *See* KOCH, *supra* note 11, at § 12.23; *see also In re Wang*, 441 N.W.2d 488, 495 (Minn. 1989) (finding that investigator's testimony regarding dentist's out-of-court statement that he authorized prescription refills was hearsay at common law and was "too insubstantial" to justify the ALJ's finding); *Beranek v. Joint Indep. Sch. Dist. No. 287*, 395 N.W.2d 123, 126-27 (Minn. Ct. App. 1986) (reversing teacher discharge determination based in part on hearsay evidence of prior misconduct); *cf. Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340 (Minn. Ct. App. 2006) (stating that a ULJ is authorized to conduct a hearing without conforming to the rules of evidence); *Vang v. A-1 Maint. Serv.*, 376 N.W.2d 479, 482 (Minn. Ct. App. 1985) (concluding that hearsay may be admissible and sufficient to support a decision in an unemployment compensation case).

[26] *In re Expulsion of E.J.W.*, 632 N.W.2d 775, 782 (Minn. Ct. App. 2001).

[27] Burden of proof may also refer to the burden of going forward with evidence on a particular issue. *See infra* notes 38-39 and accompanying text in this chapter.

[28] Minn. R. 1400.7300, subp. 5 (2013); *see In re Minn. Pub. Utils. Comm'n*, 365 N.W.2d 341, 343 (Minn. Ct. App. 1985) (stating that "substantive law" is law that creates underlying rights and duties). Under the OAH rules, the party with the burden of proof makes the opening statement and begins the presentation of evidence (unless the parties have agreed otherwise or the administrative law judge determines that requiring another party to proceed first would be more expeditious and would not jeopardize the rights of any other party). Minn. R. 1400.7800(D)(E) (2013).

is not always easy to determine the proponent of a certain action. Under the OAH rules, it is the action of the agency in issuing a notice of and order for hearing that commences a contested case.[29] This, however, does not mean that the agency will always be considered the proponent of the action sought merely because it initiated the contested case proceeding.[30]

In occupational licensing matters, for example, a distinction can be drawn between contested cases involving parties who presently hold a license and those involving parties seeking initial licensure. Where a party possesses a license and the agency wishes to take it away (by suspension or revocation) or to impose a penalty on the licensee,[31] it is generally recognized that the agency is seeking action and must bear the burden of proof.[32] Where, however, someone seeks a license for the first time, he or she must normally show compliance with certain minimum requirements imposed by law or rule on all license applicants, such as age, education, experience, successful completion of an examination, or payment of required fees. In the latter situation, it is the applicant who seeks action by the agency, in the form of a determination that a license should be granted, and it is generally held that the applicant has the burden of proof.[33]

In a case involving a license application by a hospital seeking to extend the service area for its non-emergency ambulance services, the Minnesota court of appeals rejected an effort by the applicant to shift the burden of proof to the licensing agency. Under the applicable statute, the hospital had the burden of showing a need for the extended services based on five factors. No evidence was submitted with respect to two of the factors. The hospital argued on appeal that the agency's finding of a lack of need for the extended services was unsupported by "any" evidence as to these two factors. The court rejected this ploy, noting that where an agency's decision is based on a license applicant's failure to submit evidence, "it is not proper for the applicant to seek reversal on the ground that the decision is not supported by evidence it had the burden to present."[34]

In one case, the Minnesota Supreme Court held that a city seeking a state permit to encroach on public waters had the burden of proving that the application should be granted.[35] The court first observed that the general rule in administrative cases is that "an applicant for

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[29] Minn. R. 1400.5600, subp. 1 (2013).

[30] Before amendment in 1980, Minn. R. 1400.7300, subp. 5 (2013) provided that the party "initiating the contested case must prove the facts at issue."

[31] Some agency statutes provide for civil monetary penalties against an offending licensee. *E.g.*, Minn. Stat. §§ 60K.43, subd. 1, 45.027, subd. 6 (2014) (providing up to $10,000 for civil penalty against insurance licensees).

[32] *See generally*. 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW ch. 12, § 1 (1965).

[33] *See generally* COOPER, *supra* note 33 at ch. 12, § 1. *Cf. Anton's v. City of Minneapolis*, 375 N.W.2d 504, 506 (Minn. Ct. App. 1985) (holding that the liquor license applicant has the burden of proving the city acted in an arbitrary manner).

[34] *N. Mem'l Med. Ctr. v. Minn. Dep't of Health*, 423 N.W.2d 737, 740 (Minn. Ct. App. 1988); *see also In re Rochester Ambulance Service, Div. of Hiawatha Aviation, Inc.*, 500 N.W.2d 495, 499 (Minn. Ct. App. 1993).

[35] *In re City of White Bear Lake*, 311 Minn. 146, 156 247 N.W.2d 901, 906-07 (1976); *cf. Minn. Ctr. for Envtl. Advocacy v. Comm'r of Pollution Control Agency*, 696 N.W.2d 95 (Minn. Ct. App. 2005) (burden of proof properly placed on challengers to wastewater treatment permit issued to city by PCA because although city had sought the permit, the challengers sought to have a limit added to the permit and were therefore the party proposing that action be taken).

relief, benefits, or a privilege has the burden of proof."[36] As such, the court stated: "In this state the burden of proof generally rests on the one who seeks to show he is entitled to the benefits of a statutory provision."[37]

It should be noted that the ultimate burden of proof that the OAH rules place on the proponent of a particular action is distinct from the so-called "burden of going forward" with evidence,[38] which the rules apparently do not address. The burden of going forward with evidence will generally be governed by the substantive law and may shift back and forth between the parties during the presentation of evidence in a case.[39] For example, proof of discrimination in the trial of cases under the Minnesota Human Rights Act[40] may require a shift in the burden of production from the complainant to the alleged violator and back again to the complainant.[41] The ultimate burden of persuasion, however, always rests with the party seeking to prove discrimination.[42] In addition, in the case of family foster care and day care licenses issued by the department of human services, the concept of shifting burdens of proof has been adopted by statute.[43] It is not unusual in cases with pro se parties that a represented agency will be asked to proceed first even though the pro se party has the burden of proof.

10.3.2 Standard of Proof

Under the OAH rules, the party with the burden of proof "must prove the facts at issue by a *preponderance of the evidence,* unless the substantive law provides a different . . .

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[36] *In re City of White Bear Lake*, 311 Minn. at 150, 247 N.W.2d at 904.

[37] *Id.; see, e.g., Chemlease Worldwide v. Brace*, 338 N.W.2d 428, 437 (Minn. 1983) (holding that the burden of proof is on the party who will benefit from affirmative proof of the essential fact); *Holman v. All Nation Ins. Co.*, 288 N.W.2d 244, 248 (Minn. 1980) (holding that the burden of proving fact is on the party who must allege fact); *see also Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 34-37 (7th Cir. 1975) (stating that the ultimate burden of proof in a federal coal mine shut-down proceedings rests with mine owner who has "best knowledge" of condition of mine's safety).

[38] The burden of going forward with evidence to meet an opponent's case or to nullify a rebuttable presumption is sometimes confusingly characterized as a "shift" in the burden of proof. What shifts, however, is not the ultimate burden of persuading the finder of fact but, rather, the burden of producing sufficient evidence to avoid a directed verdict on the issue. *See Peterson v. Minneapolis Street Ry.*, 226 Minn. 27, 34, 31 N.W.2d 905, 909 (1948).

[39] *Fidelity Bank & Trust Co. v. Fitzsimons*, 261 N.W.2d 586, 590 n.10 (Minn. 1977); *cf. Minnesota Loan & Thrift Co. v. Commerce Comm'n*, 278 N.W.2d 522, 525-26 (Minn. 1979) (stating that the burden of proof on appeal is on the appellant).

[40] Minn. Stat. §§ 363A.03-.41 (2014).

[41] *Hubbard v. United Press Int'l*, 330 N.W.2d 428, 444-45 (Minn. 1983); *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978).

[42] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 557 (Minn. 1996); *Kaster v. Indep. Sch. Dist. No. 625*, 284 N.W.2d 362, 364 (Minn. 1979); *Danz*, 263 N.W.2d at 399; *cf.*, *Old Ben Coal Corp*, 523 F.2d at 39-40 (concluding that the government has the initial burden of going forward in coal mine shut-down proceeding, but the mine owner has the ultimate burden of proof that mine is safe).

[43] Minn. Stat. § 245A.08, subd. 3 (2014) provides that in proceedings against foster care and day care licensees, the local welfare agency first makes a prima facie showing of grounds to take action against the licensee, based on "statements, reports, or affidavits." On a showing of reasonable grounds to take action, the burden of proving compliance by a preponderance of the evidence shifts to the license holder.

standard."[44] This standard of proof applies to all contested cases unless a constitutional provision, statute, or case law requires the application of an alternate standard.[45] In Minnesota, some of the most troublesome cases involving a determination of the proper standard of proof have involved disciplinary matters against persons holding occupational licenses issued by the state. Basically, the argument put forward by licensees is that because licensing proceedings entail a severe penalty, the possible loss of the licensee's livelihood, the licensing body should be required to prove misconduct by a higher standard than a preponderance of the evidence. Because the OAH rules permit a different standard of proof when the "substantive law" so provides,[46] arguments concerning the proper standard may be based on both statutory interpretation and constitutional grounds.

The reported Minnesota licensing cases dealing with standard of proof have focused on the proof required to sustain disciplinary action against attorneys at law.[47] The proper standard has been described as "clear and convincing evidence," "full, clear, and convincing," "cogent and compelling," and "a strong and convincing showing."[48] Similar standards apply to the discipline of a judge.[49] The argument based on these decisions has been that if attorneys can be disciplined only on a clear and convincing showing, it is unfair or even unconstitutional to discipline real estate brokers or insurance agents on a mere preponderance of the proof.

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[44] Minn. R. 1400.7300, subp. 5 (2013) (emphasis added). *See generally* 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 5.51 (1997).

[45] *See generally* 9 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2498 (Chadbourn rev. 1981 & Best, Supp. 1997).

[46] Minn. R. 1400.7300, subp. 5 (2013); *see In re Minn.Pub. Util. Comm'n*, 365 N.W.2d 341, 343 (Minn. Ct. App. 1985) (defining "substantive law"). In Minnesota public utility rate-making cases, where the agency acts in a legislative (as opposed to quasi-judicial) capacity in the allocation of rates, the agency's determinations on rates are reviewed under a "clear and convincing" evidence standard. Its quasi-judicial determinations, such as those relating to the appropriate rate of return on a utility's equity, are reviewed under the familiar substantial evidence standard. *In re Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 274 (Minn. 2001); *City of Moorhead v. Minn. Pub. Util. Comm'n*, 343 N.W.2d 843, 846 (Minn. 1984); *Hibbing Taconite Co. v. Minn. Pub. Util. Comm'n*, 302 N.W.2d 5, 9 (Minn. 1981); *see also Giles Lowery Stockyards v. Dep'tof Agric.*, 565 F.2d 321 (5th Cir. 1977) (party challenging rate set by federal agency must prove rate unreasonable by clear and convincing evidence). However, cases of this type, which relate to judicial review of agency decisions, should not be confused with those cases setting the standard of proof to be met by a party before the agency. *In re Minn. Power & Light Co.*, 435 N.W.2d 550, 554 (Minn. Ct. App. 1989) (utility seeking rate change must prove change is just and reasonable by preponderance of the evidence; legislative decision of agency in approving rates is sustained on appeal absent clear and convincing evidence of error).

[47] There is a lack of uniformity among the jurisdictions concerning the requisite standard of proof in attorney disciplinary cases. Some courts follow the familiar civil standard of "a preponderance of the evidence," while others, including the federal courts, tend to require proof by the highest standard of "clear and convincing evidence." *See generally* 7A C.J.S. *Attorney & Client* § 103 (1980 & Supp. 1997); 7 AM. JUR. 2D *Attorneys at Law* § 112 (1997).

[48] *In re Strid*, 551 N.W.2d 212, 215 (Minn. 1996) (dismissing a petition against an attorney where allegations were not supported by clear and convincing evidence); *In re Schmidt*, 402 N.W.2d 544, 545 (Minn. 1987); *In re Rerat*, 232 Minn. 1, 5-6, 44 N.W.2d 273, 275 (1950); 4 DUNNELL MINN. DIGEST 2d *Attorneys* § 4.03(n) (4th ed. 1989 & Supp. 1997).

[49] *In re Disbarment of Gillard*, 271 N.W.2d 785, 805 n.3 (Minn. 1978).

Unfortunately, this argument ignores the fact that attorney disciplinary proceedings, which are under the supervision and control of the judiciary, have historically been regarded as unique.[50]

There is nothing in the APA to suggest that the legislature intended to import the standards applied in attorney disbarment cases into contested cases involving licenses issued by the executive branch. When given the opportunity to determine the standard applicable in SEC proceedings against persons in the investment business, the United States Supreme Court construed the federal APA to require no more than proof by a preponderance of the evidence, even where the grounds for discipline included allegations of fraud.[51] State courts have expressly followed the preponderance standard in proceedings against a real estate broker's license,[52] in proceedings against a physician's license,[53] and in proceedings to dismiss a teacher.[54] It has also been held that the preponderance standard governs "informal hearings" which are not required under the federal APA.[55]

The Minnesota Court of Appeals addressed this issue in the case of *In re Schultz,* concluding summarily that a preponderance of the evidence standard governs disciplinary proceedings against a licensed dentist.[56] After noting that the general standard of proof in administrative cases is a preponderance of the evidence,[57] the court concluded that because the substantive law provides no different standard, the preponderance standard applies to dental licensing cases.[58] The court disposed of the dentist's claim that a clear and convincing evidence standard should have been applied in summary fashion and, because the parties raised the issue for the first time on appeal, the court did not discuss the constitutionality of applying the preponderance standard in the occupational licensing context.[59]

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[50] *In re Wang*, 441 N.W.2d 488, 492 n. 5 (Minn. 1989) ("Attorney misconduct, striking as it does at the heart of our justice system, gives society a heightened interest in the outcome of attorney discipline. A high standard of proof is indicated."); *In re Rerat*, 232 Minn. at 4, 44 N.W.2d at 274-75 (stating attorney proceedings are "sui generis").

[51] *Steadman v. SEC*, 450 U.S. 91, 103 (1981). For a post-*Steadman* decision, see *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (holding that the preponderance standard applies in private damage actions for fraud under § 10(b) of Exchange Act).

[52] *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 232, 156 A.2d 657, 663(1959).

[53] *In re Polk*, 90 N.J. 550, 569, 449 A.2d 7, 16 (1982); *see, infra*, note 72.

[54] *Bd. of Educ. of St. Charles Cmty. Sch. Unit Sch. Dist. No. 303 v. Adleman*, 97 Ill. App. 3d 530, 531-33, 423 N.E.2d 254, 256-57 (1981).

[55] *Bender v. Clark*, 744 F.2d 1424, 1428-30 (10th Cir. 1984) (holding that the preponderance standard applies unless liberty, citizenship, or parental rights are at stake).

[56] 375 N.W.2d 509, 513-14 (Minn. Ct. App. 1985).

[57] *Id.* at 514 (citing Minn. R. 1400.7300, subp. 5 (1983)).

[58] *Id.; see also In re Casey*, 540 N.W.2d 854, 857 (Minn. Ct. App. 1996) (stating that the preponderance of the evidence standard of proof applies to disciplinary proceeding against insurance agents); 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, § 16:9 (2d ed. 1980).

[59] *In re Schultz*, 375 N.W.2d at 514. The court's summary treatment of this issue may be attributable to the fact that the issue apparently arose as an afterthought on appeal, the dentist having advocated a preponderance standard in agency proceedings. In addition, no constitutional challenge to the use of a preponderance standard was raised in the parties' briefs. Brief of Appellant at 11-12, No. 9-85-761 (Minn. Ct. App.); Brief of Respondent at 7-8. (briefs on file at Minnesota State Law Library); *see Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776, 779 (Minn. Ct. App. 1992) and Manos v. First Bank Minnehaha, 357 N.W.2d 372, 374-75 (Minn. Ct. App. 1984) (holding that the standard of proof in a proceeding to deny

In *In re Wang*, the Minnesota Supreme Court confirmed the application of a preponderance of the evidence standard in professional licensing proceedings involving disciplinary action against a licensed dentist.[60] However, the court admonished that in applying a preponderance standard in a professional licensing matter, the agency's decision must be supported by evidence of considerable weight:

> Even so, these proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft. The reputation of a profession, and the reputation of a professional as well as the public's trust are at stake.[61]

In *Wang*, the supreme court reversed the decision of the ALJ, the agency and the court of appeals, holding that in light of the record as a whole and the seriousness of the charges, the decision was unsupported by substantial evidence.[62] Hence, although the court affirmed the use of a preponderance standard in non-attorney professional disciplinary matters, it is apparent that the court will carefully scrutinize the record in these proceedings to assure that findings upon which disciplinary action is based are "reasonable in the context of the record as a whole, having in mind, as a reasonable person would, the seriousness of the matter under review."[63]

In *In re Insurance. Agents' Licenses of Kane,*[64] the Minnesota Court of Appeals did address the constitutionality of applying the preponderance standard to non-attorney licensing matters. In this case, insurance agents facing disciplinary action argued that application of the preponderance of the evidence standard violated equal protection since their licenses could be revoked pursuant to a lower standard of proof, while attorneys' licenses could only be revoked upon a showing of clear and convincing evidence of misconduct. Citing *Wang*,[65] the court rejected the agents' equal protection arguments based on the unique sui generis nature of attorney disciplinary hearings and society's heightened interest in the outcome of attorney discipline.[66] The court held that these distinctions provide a rational basis for employing the clear and convincing standard in attorney licensing proceedings and the preponderance of the evidence standard in other licensing proceedings.[67]

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unemployment compensation benefits to employee discharged for gross misconduct is preponderance of evidence).

[60] 441 N.W.2d 488, 492, n. 5 (Minn. 1989) (declining to consider whether the application of differing burdens of proof in attorney and dentist disciplinary cases might be a denial of equal protection, as the issue was raised for the first time at oral argument).

[61] *Id*. at 492.

[62] *Id*. at 493-94.

[63] *Id*. at 492.

[64] 473 N.W.2d 869 (Minn. Ct. App. 1991)

[65] 441 N.W.2d at 488.

[66] *In re Kane,* 473 N.W.2d at 874.

[67] *Id*.

Finally, in *In re Medical License of Friedenson*,[68] the Minnesota Court of Appeals held that the preponderance of the evidence standard applies to professional disciplinary proceedings against a licensed medical doctor. As in *Schultz*, the court noted that the general standard of proof in administrative proceedings is preponderance of the evidence unless the substantive law establishes a different burden.[69] As the statute governing the Board of Medical Practice's discipline of medical doctors is silent regarding the standard of proof, the court applied the preponderance standard.[70] In *Uckun v. State Bd. of Med. Practice*,[71] the Minnesota Court of Appeals found that the State Board of Medical Practice properly applied the preponderance of the evidence standard of proof in its temporary suspension of a licensed medical doctor. This is the first time that the court addressed the correct standard to be applied in temporary suspensions of physician licenses pending contested case hearings.

In light of *Schultz, Wang, Kane* and *Friedenson*, the standard of proof to be applied in non-attorney licensee disciplinary cases under the APA is clearly a preponderance of the evidence. The determination of the appropriate standard necessarily involves a delicate balancing of the public's right to be protected against unscrupulous or unreliable licensees and the individual's right to pursue his or her livelihood in the absence of clear proof that the exercise of that right is a threat to the public.[72]

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[68] 574 N.W.2d 463, 466 (Minn. Ct. App. 1998).

[69] *Id*. at 465-66 (citing Minn. R. 1400.7300, subp. 5 (1995)).

[70] *Id*. (citing Minn. Stat. § 147.091 (1996)).

[71] 733 N.W.2d 778, 783 (Minn. Ct. App. 2007).

[72] A number of cases have considered whether a particular standard of proof in a contested case may be mandated by constitutional provision. *Vance v. Terrazas*, 444 U.S. 252, 266-67 (1980) (holding that the Constitution permits the use of the preponderance standard in voluntary relinquishment of citizenship proceedings, despite the court's preference for the clear and convincing standard in earlier deportation and denaturalization decisions); *Addington v. Texas*, 441 U.S. 418, 422-24 (1979) (holding that the Constitution requires a minimum of clear and convincing evidence in state involuntary commitment proceedings). However, the issue was expressly reserved in Steadman v. SEC, as the parties had not addressed it. 450 U.S. 91, 97 n.15 (1981). The New Jersey Supreme Court has expressly concluded, in a well-reasoned opinion, that the use of a preponderance standard in physician's license disciplinary proceedings does not violate due process. *In re Polk*, 90 N.J. 550, 560-69, 449 A.2d 7, 12-17 (1982). Similarly, the court concluded that the application of a higher clear and convincing evidence standard in attorney disciplinary proceedings (presumably making attorneys less likely to be subject to discipline) did not violate a physician's equal protection rights. *Id.* at 569-73, 449 A.2d at 17-19; *see also, Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234, 237 (Iowa 1991) (holding that the preponderance of the evidence standard is sufficient to satisfy due process in medical disciplinary cases); *Gandhi v. Med. Examining Bd.*, 483 N.W.2d 295, 310-11 (Wis. Ct. App. 1992) (holding that the application of the preponderance of the evidence standard did not violate due process or equal protection).

But see Ettinger v. Bd. of Med. Quality Assurance, 135 Cal.App.3d 853, 856-57, 185 Cal.Rptr. 601, 603-04 (Ct. App. 1982) (holding that the vested right in professional employment requires "clear and convincing proof to a reasonable certainty" in physician disciplinary proceeding); *Nair v. Dep't of Bus. & Prof'l Regulation*, 654 So.2d 205, 207 (Fla.Dist. Ct. App. 1995) (holding that evidence must be clear and convincing to revoke or suspend a professional license); *Poor v. State*, 266 Neb. 183, 190, 663 N.W.2d 109, 115 (2003); Davis v. Wright, 243 Neb. 931, 939, 503 N.W.2d 814, 819 (1993) (holding that allegations in disciplinary proceedings involving physicians must be proved by clear and convincing evidence); *Johnson v. Bd. of Gov. of Registered Dentists,* 913 P.2d 1339, 1353 (Okla. 1996) (holding that constitutional due process requires that the standard of proof in disciplinary proceedings against a person holding a professional license be clear

10.4 Official Notice

The APA provides that administrative agencies, in deciding contested cases, may take notice of facts if they are "judicially cognizable facts" or if they are "general, technical or scientific facts" within the specialized knowledge of the agency.[73] This type of notice, commonly referred to as official or administrative notice, is parallel to but broader than the concept of judicial notice utilized by the courts.

Under the APA, agencies are not limited to taking notice of facts that could properly be noticed by a court. Because agencies are considered to be experts in their individual areas of practice, the APA permits agencies to take notice of facts within their specialized knowledge.[74] However, because the vast majority of contested cases are heard and initially decided by ALJs,[75] it is necessary to consider whether administrative judges, who may not possess the same specialized knowledge as the agency, are entitled to take notice of facts within the agency's specialized knowledge in rendering their decisions.

At first blush, the rules of the OAH appear to restrict official notice by ALJs to those facts that could be noticed by a court. The OAH rules setting forth rules of evidence for contested cases provide: "The judge may take notice of judicially cognizable facts but shall do so on the record and with the opportunity for any party to contest the facts so noticed."[76] This rule appears to narrow the scope of official notice by the ALJ to less than what the APA permits when the agency makes its decision. Such an inconsistency could lead to substantial deviation between the ALJ's initial decision and the agency's final decision, as the agency would be permitted to consider additional "facts" when it decides the case. The result would be a weakening of the value of the ALJ's decision and a tendency to make the administrative process appear "stacked" in favor of the agency.

Read properly, however, the above rule is not a limitation on the ALJ's role but is merely a statement that the concept of judicial notice is recognized in administrative cases. This interpretation is made clear by the rule governing the basis for the judge's recommended decision, which provides:

> The judge and agency may take administrative notice of general, technical, or scientific facts within their specialized knowledge in conformance with Minnesota Statutes, section 14.60.[77]

This rule recognizes that both the ALJ and the agency may take administrative notice of facts within "their" specialized knowledge in deciding a contested case. But does the rule provide that the ALJ can take notice of facts within the *agency's* knowledge or only that the ALJ may notice facts within his or her own individual expertise?

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and convincing); *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989) (holding that, in professional license revocation matters, the appropriate standard of proof is clear and convincing).

[73] Minn. Stat. § 14.60, subd. 4 (2014).

[74] *Id.*

[75] *Id.* § 14.50.

[76] Minn. R. 1400.7300, subp. 4 (2013).

[77] *Id.*1400.8100, subp. 2.

Although the rule is not a model of clarity, the better view, as stated above, is that the authority of the ALJ to take notice of facts should be coextensive with that of the agency to avoid needless inconsistency in the decision-making process. First, the APA favors the use of ALJs who do in fact possess "expertise in the subject to be dealt with in the hearing."[78] Second, through its use of divisions, the OAH attempts to assign ALJs to cases that, at least in a general way, are within their individual fields of expertise. Finally, because noticed facts are part of the record and may be rebutted, there is no substantial harm caused by permitting the ALJ to take notice of all the facts the agency intends to take notice of in rendering its decision, even if they are not facts within the individual judge's specialized knowledge.

What are the limitations on the use of official notice under the APA? Assuming that a fact falls within the scope of the APA's official notice provision (judicially noticeable or within agency expertise), it is nonetheless generally recognized that unless a fact is of common or general knowledge, only "legislative" (as opposed to "adjudicative" or "litigation") facts are a proper subject of official notice.[79] For example, although an agency might have sufficient specialized knowledge to take notice that the release of a particular chemical into public waters would be a source of pollution, it could hardly be permitted to take notice, based on its own investigation or "knowledge," that the respondent in a particular contested case had, in fact, released that pollutant into state waters. The latter type of fact, which is peculiar to the conduct of an individual litigant, must obviously be proved by specific admissible evidence.[80]

A further limitation on the use of official notice is the necessity that noticed facts be made a part of the hearing record. The APA requires that parties "be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record" of the facts that the agency intends to officially notice.[81] Similarly, the OAH rules limit the use of official notice by the ALJ to notice that is taken "on the record."[82] Finally, both the ALJ and the agency are limited in their decisions to a consideration of evidence that is "a part of the record."[83]

In addition to simple fairness, the requirement that official notice be taken as a part of the hearing record offers nonagency parties the opportunity to attempt to disprove the officially noticed fact. Both the APA and the OAH rules recognize that use of official notice is limited by the provision that a party may contest or attempt to rebut noticed facts.[84] So, for example, where an agency takes notice that a certain chemical causes water pollution, a party

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[78] Minn. Stat. § 14.50 (2014).

[79] 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 418 (1965).

[80] It is important to distinguish official notice from the use of expertise by an agency in deciding a case, based on the evidence in the record. In the process of deciding, as opposed to proving a case, agencies have great latitude in the application of their expertise to the evidence before them. COOPER, *supra* note 79, at 419. In applying their expertise to the facts in the record, agencies are utilizing the same evaluation or "thought" processes a judge or jury would use, based on their experience and knowledge, in evaluating the evidence in a trial. Therefore, Minn. Stat. § 14.60, subd. 4 (2014), specifically permits agencies to "utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record."

[81] Minn. Stat. § 14.60, subd. 4 (2014).

[82] Minn. R. 1400.7300, subp. 4 (2013).

[83] *Id.* 1400.8100, subp. 1.

[84] Minn. Stat. § 14.60, subd. 4 (2014); Minn. R. 1400.7300, subp. 4, .8100, subp. 2 (2013).

may offer proof that the chemical is not harmful, or that its effects are much less hazardous than those of which the agency intends to take notice.

The result is that official notice operates much like a rebuttable presumption. Agencies may take notice of certain facts that are within their special knowledge and that will have a presumption of truth by making them part of the hearing record. Nonagency parties, however, may attempt to disprove or lessen the impact of officially noticed facts by contesting them with their own evidence. In this way, official notice may shift the burden of producing or going forward with evidence on a particular fact from the agency to nonagency parties.[85] The ultimate burden of proof of a fact, however, whether or not it may be noticed, should properly remain with the party who has the burden of proof on the issue the fact is offered to prove.

10.5 Application of the Exclusionary Rules of Evidence

As noted at the beginning of this chapter, administrative hearings are not governed by the stringent rules that determine the admissibility of evidence in court trials. The Minnesota Supreme Court has recognized that an agency may receive evidence that would not be admitted in a judicial proceeding and that receipt of "incompetent evidence is not fatal to its determination."[86] Rather, when all the evidence received by the agency is considered, it is sufficient that there be some proper quantity of legally competent evidence in the hearing record to support the agency's decision.[87]

Nevertheless, there are necessarily certain limitations on the evidence an agency may receive. The APA provides:

> In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They *shall* give effect to the rules of privilege recognized by law. They *may* exclude incompetent, irrelevant, immaterial and repetitious evidence.[88]

Under the APA, the only requirements for admission of evidence are that it is probative and is the kind of evidence that "reasonable prudent persons" would accept as credible in conducting their own serious matters. Agencies are required to observe the rules of privilege and have the option to exclude evidence that is repetitious or not probative.

The above-quoted APA standard permits admission of all evidence, including hearsay. Evidence may be received and considered by the agency if it reasonably tends to prove a fact at issue. The OAH rules expressly state that "all evidence which possesses probative value,

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[85] Official notice also has the indirect effect of shifting the financial burden of proving facts within the agency's specialized knowledge by permitting the agency to presume the fact is true and requiring parties contesting the noticed fact to disprove it.

[86] *Hagen v. Civil Serv. Bd.*, 282 Minn. 296, 300, 164 N.W.2d 629, 632 (1969) (quoting *Morey v. Sch. Bd. of Indep. Sch. Dist. No. 492*, 271 Minn. 445, 448-49, 136 N.W.2d 105, 107-8 (1965)).

[87] *See supra* notes 20-25 and accompanying text (discussing residuum rule).

[88] Minn. Stat. § 14.60, subd. 1 (2014) (emphasis added). This statute is restated, with modifications, in the rules of the OAH, Minn. R. 1400.7300, subp. 1 (2013). In particular, the rules appear to mandate the exclusion of incompetent, irrelevant, immaterial, or unduly repetitious evidence.

including hearsay," may be admitted by the ALJ.[89] The focus in administrative hearings, then, is not on the formal rules of evidence as they would be applied in a jury trial, but rather on whether the evidence offered reasonably tends to prove a fact, the proof of which would be helpful to a determination of an issue in the case.

Despite the generally relaxed evidentiary rules that apply to contested cases, the actual conduct of hearings, at least where the parties are represented by attorneys, tends to be reasonably formal. Hearings are conducted by ALJs who are themselves attorneys and are familiar with formal courtroom proceedings. Perhaps for this reason, formal evidentiary objections, which focus on formal rules of evidence, are commonplace in administrative hearings and tend to be well received by ALJs. Although the focus on admissibility may be a "reasonable prudent person" standard, the standard is not so easy to apply in practice. Therefore, while ALJs may tend to be somewhat more relaxed in the admission of evidence, being aware that they can always disregard evidence that they later conclude is not probative, formal evidentiary objections may help to persuade them that reasonable persons would not rely on a particular piece of evidence. Even if the objection is not sustained, an objection based on the formal rules will highlight the inherent weakness in the evidence and may result in it being given less weight in the decision-making process.[90]

10.6 Offer of Proof

The rules of the OAH implicitly recognize the right of a party to make an offer of proof. Specifically, the rules provide that the record in a contested case must include "offers of proof, objections, and rulings thereon."[91] In this respect, administrative contested case proceedings closely follow civil trials in which offers of proof are not only permitted but required[92] if the record is to be preserved for appeal.

The primary purposes for making an offer of proof where an objection to the introduction of evidence has been sustained by the ALJ are the same as in a judicial trial. First, on rare occasions, the offer may cause the ALJ to reconsider the prior ruling and may result in the receipt of the previously excluded evidence. This may be particularly true where the excluded evidence is shown to be a link in a foundational chain to an important piece of substantive evidence. Second and more important, however, the offer of proof serves to protect the hearing record so that the agency or a reviewing court may be made fully aware of

[89] Minn. R. 1400.7300, subp. 1 (2013). An interesting discussion of the application of the parole evidence rule to proof in administrative cases appears in *In re Minn. Power & Light Co*., 435 N.W.2d 550 (Minn. Ct. App. 1989). The court observed that the parole evidence rule, although often labeled as a rule of evidence, is really a rule of contract interpretation, based on the doctrine that oral agreements are deemed integrated into final written agreements. *Minn. Power & Light,* 435 N.W.2d at 562-63, n. 3. The court, therefore, rejected an argument that since the agency was not bound by the formal rules of evidence, it was not required to apply the parole evidence rule. *Id.*

[90] In addition, failure to object may give the evidence additional probative value before a reviewing court. *See supra* § 10.2, notes 10-15 and accompanying text in this chapter.

[91] Minn. R. 1400.7400, subp. 1 (2013).

[92] Minn. R. Evid. 103(a)(2) provides that error may not be predicated on a ruling excluding evidence "unless the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked."

the nature of the excluded evidence and its potential impact on the case. In the absence of an offer of proof, which clearly and specifically sets forth the evidence sought to be introduced and its relevancy to the case,[93] it may be impossible to determine whether an erroneous ruling had any potential impact on the outcome of the case.

Because the ALJ's decision is subject to an additional tier of review not present in a court trial, the offer of proof in administrative cases also presents an immediate opportunity to cure an erroneous ruling and avoid a remand for further proceedings. In most contested cases, ALJs do not make the final decision. Their general function is to take the evidence and prepare a proposed decision for the agency,[94] which then issues a final order.[95] Therefore, an offer of proof during the trial of an administrative case will be subject to review by the agency, which may decide to receive the evidence[96] before issuing its decision. In fact, the OAH rules specifically provide that the ALJ has the discretion to certify motions to the agency during the course of the hearing where "necessary to promote the development of the full record and avoid remanding . . . ."[97] A proper offer of proof may persuade the ALJ to exercise this discretion, particularly where there is a question about whether the agency would consider the evidence important in rendering its decision.

In addition, an offer of proof may form the basis for the receipt of new evidence in proceedings before the reviewing court. The APA provides a procedure whereby the reviewing court may, on application of a party, direct the receipt of additional evidence before the agency. The applicant must show, to the satisfaction of the court, that the "evidence is material and that there were good reasons for failure to present it in the proceeding before the agency . . . ."[98] This procedure is not limited, at least not by its terms, to motions based on newly discovered evidence.[99] Hence, if a party can both convince a reviewing court that it was denied the opportunity to present material evidence before the agency and show that a specific offer of proof was made, the party may be able to demonstrate "good reasons" and obtain an immediate opportunity to complete the record. Even if the agency fails to modify its decision based on the additional evidence, further review proceedings may be simplified, and the likelihood of prevailing on review may be enhanced.

In summary, the offer of proof is at least as important in administrative hearings as it is in judicial trials. In fact, the failure to make a proper offer of proof may frustrate a party's efforts to obtain review of erroneous evidentiary rulings and may have a significant impact on the outcome of the case.

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[93] Failure to distinguish between admissible and inadmissible evidence in an offer or to make appropriate offers to "tie-up" the admissibility of the evidence may preclude raising the propriety of the exclusionary ruling on appeal. *E.g., Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 725-26 (Minn. 1983); *Busch v. Busch Constr.*, 262 N.W.2d 377, 389 (Minn. 1977).

[94] Minn. Stat. § 14.50 (2014); Minn. R. 1400.5500(I) (2013).

[95] Minn. Stat. §§ 14.61, .62 (2014).

[96] The normal procedure would be to remand the case to the ALJ, before whom the evidence would be taken. The ALJ would then be in a position to consider whether the additional evidence requires a modification of his or her decision.

[97] Minn. R. 1400.7600(E) (2013) (certification procedure is expressly made unavailable in cases where ALJ's decision is binding on agency).

[98] Minn. Stat. § 14.67 (2014).

[99] *Cf.* Minn. R. Civ. P. 59.01(d).

10.7 Exclusiveness of Record

Numerous provisions of both the APA[100] and the OAH rules[101] reinforce the requirement that contested cases are to be decided solely on the hearing record. This requirement, frequently referred to as "the exclusiveness of the record," has been observed to be fundamental to a fair hearing.[102]

Because the record is the exclusive source of factual information and evidence on which the agency's decision must be based, it is impossible to overemphasize the importance of developing a clear and complete record. Only in rare circumstances will a party seeking judicial review be permitted to present additional evidence that should have been presented and made a part of the hearing record.[103] Under the APA, the record is the exclusive basis for decision, from the standpoint of both nonagency parties and the agency itself. The APA specifically requires that an agency make all evidence in its possession "of which it desires to avail itself," including data that is classified as not public,[104] a part of the exclusive record.[105]

The one limitation on the requirement that the record is exclusive is the APA's recognition that agencies may, in evaluating the evidence contained in the record, "utilize their experience, technical competence, and specialized knowledge."[106] This provision recognizes that agencies tend to be specialists in their individual areas and permits them to use their special knowledge in deciding what weight the evidence is to be given and what inferences may reasonably be drawn.[107] In practical application, however, it may be difficult to determine whether an agency is merely utilizing its expertise to evaluate the evidence in the record or is relying on extra-record facts that should have been proved or officially noticed[108] on the

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[100] Minn. Stat. §§ 14.60, subd. 2 (all evidence relied on by agency or offered by party made part of record); .60, subd. 4 (official notice to be taken on record); .62, subd. 1 (agency decisions shall be based on record); .67 (additional evidence ordered by reviewing court becomes part of record); .68 (judicial review of agency decision confined to record, absent procedural irregularities not shown in record) (2014).

[101] Minn. R. 1400.6400 (stating affidavits of prejudice are determined as part of record); .7300, subp. 2 (stating evidence must be offered and made part of record); .7300, subp. 4 (official notice to be taken on record); .7400, subp. 1 (contents of record); .7800(J) (close of record); .8100, subp. 1 (stating only record evidence is to be considered) (2013).

[102] 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 430-31 (1965).

[103] Minn. Stat. §§ 14.67 (stating that the application to present additional evidence must be based on "good reasons" for failure to present it before agency); .68 (stating that testimony on judicial review confined to procedural irregularities not reflected in record) (2014)).

[104] *See Id*. § 13.02.

[105] *Id*. § 14.60, subd. 2.

[106] *Id.* subd. 4; *see Minneapolis Street Ry. v. City of Minneapolis*, 251 Minn. 43, 62, 86 N.W.2d 657, 670 (1957).

[107] *Crookston Cattle Co. v. Minn. Dep't of Natural Res.*, 300 N.W.2d 769, 777 (Minn. 1980) (explaining that courts defer to agencies in areas involving technical expertise and skill); *N. Mem'l Med. Ctr. v. Minn. Dep't of Health*, 423 N.W.2d 737, 738 (Minn. Ct. App. 1988) (stating that courts give deference to agency's skill, expertise, and technical experience).

[108] *See supra* § 10.3 note 71 - § 10.4, note 83 and accompanying text in those subchapters

record.[109] In addition, it may be unclear whether the agency has relied on expertise in an area where logic and common-sense would have been more appropriate and might have led to alternate conclusions.[110] Because of the potential for unfairness, courts can be expected to more carefully scrutinize findings and conclusions based on agency expertise where it would have been reasonable for the agency to offer evidence or take notice of the basis for its conclusion on the record.

10.8 Written Testimony

The APA makes no express provision for the receipt of written testimony.[111] However, under the OAH rules, the use of written testimony is acknowledged in two instances: (1) the familiar civil context of the deposition to preserve testimony, which may be taken before hearing on a showing of witness unavailability or other good cause,[112] and (2) prefiled testimony, which may be submitted where the ALJ determines, at the request of a party or on his or her own motion, that "the prefiling will expedite the conduct and disposition of the case without imposing an undue burden on any party . . . ."[113] While a deposition to preserve testimony is accompanied by the many procedural safeguards provided by the rules of civil procedure,[114] including the opportunity for the adverse party to be present during the examination, the OAH rules provide no specific procedural safeguards in the use of prefiled testimony.

Under the rules, the only limitation on the use of prefiled testimony, other than that it will help expedite the case, is that it not place an undue burden on any of the parties. In many contested cases, however, counsel may be reluctant to employ prefiled testimony because they do not want to provide opposing counsel a long period of time to study their case in chief.[115] There are, however, certain situations where strategic considerations are outweighed, particularly in the light of the availability of modern prehearing discovery practices, by the necessity for completing the hearing expeditiously.

In Minnesota contested case practice, the use of written, prefiled testimony is most frequently encountered in public utility, environmental, and other complex regulatory cases that are litigated as a "battle of the experts." Typically, the direct testimony of the expert witness (usually required to be in question and answer form) is filed in advance of the hearing

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[109] To the extent this determination requires an inquiry directed to the finder of fact, the information may be difficult or impossible to obtain. *Mampel v. E. Heights State Bank*, 254 N.W.2d 375, 378 (Minn. 1977) ("Discovery of the mental processes by which an administrative decision is made generally is not proper.")

[110] *See Crookston Cattle Co.*, 300 N.W.2d at 780 (Yetka, J., concurring in part and dissenting in part).

[111] *See infra* § 10.8 note 114 - § 10.9 note 136 and accompanying text in those subchapters (explaining that the use of written testimony, as a substitute for oral testimony, raises serious questions concerning the denial of right to cross-examine).

[112] Minn. R. 1400.6900 (2013) (stating that depositions to preserve testimony are to be taken in manner prescribed "by law" for civil actions.); *see* MINN. R. CIV. P. 27.

[113] Minn. R. 1400.5500(L) (2013).

[114] *See* Minn. R. Civ. P. 32.

[115] In addition, preparation of prefiled testimony where there is a possibility of settlement before hearing may be a waste of a party's resources.

along with any supporting exhibits. At the hearing, the witness is sworn, adopts the testimony, and is then cross-examined.

The prefiling of written testimony serves two important objectives. First, it saves actual hearing time that would otherwise be required for the direct examination of the expert. Second, it substantially avoids the need for pretrial depositions or other discovery, since the entire direct testimony of the witness is available to all parties before the hearing. Prefiled testimony may also foster administrative economy principles, both by forcing parties to better organize their evidence and by allowing the parties to more clearly focus on and narrow those issues that are truly in dispute before the commencement of the hearing.

While the use of written testimony may be a valuable tool in cases involving the opinion evidence of experts, can or should its use be extended to other types of contested cases? Should, for example, ALJs be permitted to receive affidavits or other forms of written testimony routinely, whether or not the opportunity to make evidentiary objections is available? If other forms of written testimony are to be received, should that testimony be required to be pre-filed or to take a particular form? The answers to these questions are considered in the following section of this chapter.

10.9 The Right to Cross Examination

The APA guarantees all parties to a contested case the opportunity to cross-examine: "Every party or agency shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence."[116] The OAH rules affirm this right[117] and extend it to include the right to call an adverse party for cross-examination as part of a party's case in chief.[118] In the case of multiple parties, the sequence of cross-examination is determined by the ALJ.[119]

While application of the right to cross-examine is a simple matter in the case of witnesses who testify, does the existence of this right prevent the use of evidence from witnesses who do not give oral testimony? In short, is it ever proper to receive written evidence[120] in contested cases, sworn or unsworn, offered by a party who fails to call the author of the written evidence. In *Richardson v. Perales,* the United States Supreme Court held that where the written evidence consisted of unsworn statements of medical experts, receipt of the evidence was proper.[121]

Perales involved a claim for social security disability benefits based on a back injury. At the hearing, Perales offered the oral testimony of a general practitioner who had examined him. The government countered with written medical reports, containing observations and conclusions of four specialists who had examined Perales in connection with his claim at various

[116] Minn. Stat. § 14.60, subd. 3 (2014).
[117] Minn. R. 1400.7100 subp. 1,.7800(B)(1) (2013).
[118] *Id*. 1400.7300, subp. 6).
[119] *Id*. 1400.7800(F)).
[120] *See supra* § 10.7 note 109 - § 10.8 note 113 and accompanying text in those subchapters.
[121] 402 U.S. 389, 410 (1971).

times.[122] The reports were received over several objections by Perales's counsel, including hearsay and lack of an opportunity to cross-examine. Although the lower courts refused to uphold the denial of Perales's claim on the basis of the written evidence, the Supreme Court reversed six to three, holding that the receipt of written medical evidence, in the context of a social security disability determination hearing, was consistent with procedural due process requirements and could constitute substantial evidence sufficient to support a hearing examiner's findings.[123] The Court therefore remanded to the district court for a consideration of whether the entire record, including the medical reports, contained substantial evidence to support the denial of the claim.[124]

On its face, the *Perales* case would appear to be clear authority for the use of written testimony, at least insofar as it relates to the opinions of experts, without the right to cross-examine.[125] However, that is not the case. The *Perales* Court focused on the fact that Perales had the opportunity to obtain cross-examination of the adverse medical experts had he utilized the subpoena power available to him under the agency's procedural rules.[126] Hence, rather than holding that cross-examination is a nonessential element of procedural due process,[127] *Perales* shifted the burden of producing the witness from the proponent of the written testimony to the party seeking cross-examination. Had Perales attempted to subpoena these witnesses or had one or more of the witnesses been shown to be unavailable, the admissibility or "substantial" character of the written evidence might well have been analyzed differently.[128]

Following *Perales*, the Minnesota Court of Appeals, in an unpublished opinion,[129] affirmed a decision by the Commissioner of Agriculture which was based in part on hearsay evidence (primarily invoices and receipts). The court agreed with the ALJ that the documentary evidence at issue was of the type appropriately relied upon by reasonable, prudent persons (namely, Department of Agriculture personnel) in the due course of their affairs. Citing to *Perales*, the court noted that the respondent could have subpoenaed the claimants in order to

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[122] *Id.* at 395 (explaining that the only oral medical testimony, other than by Perales's medical expert, was given by a physician called by hearing examiner as an "independent medical adviser." This medical adviser did not examine Perales, but offered his opinion based on medical evidence of all examining physicians contained in record).

[123] *Id.* at 402.

[124] *Id.* at 410.

[125] One federal court observed: "Hearsay reports may constitute substantial evidence in administrative proceedings, even when contradicted by direct evidence, if such reports have 'rational probative force.'" *Mobile Consortium of CETA v. United States Dep't of Labor*, 745 F.2d 1416, 1419 n.2 (11th Cir. 1984).

[126] *Richardson v. Perales*, 402 U.S. 389, 404-05 (1971) (noting that Perales had the opportunity to request a supplemental hearing for purpose of conducting cross-examination of medical witnesses and failed to do so).

[127] The Court listed nine factors in support of its conclusion that Perales was afforded procedural due process. *Id.* at 402-06.

[128] In part, the *Perales* decision may be attributable to the Court's reluctance to add costly and burdensome requirements "to the special difficulties presented by the mass administration of the social security system." *Califano v. Boles*, 443 U.S. 282, 285 (1979).

[129] *In re Grain Buyer's Bond No. MTC 182*, No. CX-95-298, 1995 WL 365400, at *3 (Minn. Ct. App. June 20, 1995).

"examine them about these documents," but chose not to.[130] Consequently, the court found that the Commissioner did not err in relying on the documentary evidence.

However, in *Demenech v. Secretary of DHHS*,[131] the Eleventh Circuit held that an ALJ abused his discretion and violated a claimant's right to procedural due process where he denied the claimant's request to depose and cross-examine the author of an adverse medical report and then substantially relied on the report as the basis for finding the claimant was no longer disabled.

In *Perales*, the Supreme Court also noted that the "extent to which procedural due process must be afforded [to a party] is influenced by the extent to which he may be 'condemned to suffer grievous loss.'"[132] Similarly, the extent to which "credibility and veracity are at issue"[133] may have a bearing on the propriety of receiving evidence where there has been no effective opportunity to confront the adverse witnesses.[134] So, for example, in a contested case where a licensee is charged with making fraudulent representations, consideration of the potential for loss of livelihood and witness credibility would appear to swing the scales in favor of an absolute right to confront the adverse witnesses.[135]

Furthermore, it can be argued that under the APA and OAH rules, due process considerations aside, there is a clear and unequivocal right to cross-examine that cannot be taken away in the absence of an express statutory provision. In *Perales*, the procedural rules appeared to balance the right to cross-examine by permitting it where necessary for "a full and true disclosure of the facts"[136] and by placing hearing procedures "in the discretion of the hearing examiner" as long as they afford "a reasonable opportunity for a fair hearing."[137] The Minnesota APA and OAH rules do not balance the right to cross-examine against the overall procedural fairness afforded by the hearing.[138]

In conclusion, although the Constitution may not guarantee the right of cross-examination in all contested cases, Minnesota's APA and rules appear to do so in the absence of a specific statute to the contrary.

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[130] *Id*.

[131] 913 F.2d 882, 885 (11th Cir. 1990).

[132] 402 U.S. at 401-02 (citing *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (termination of AFDC benefits)).

[133] *Richardson v. Perales*, 402 U.S. 389, 408 (1971).

[134] For example, Connecticut has upheld the use of written reports of dentists who were not biased or interested in a license proceeding, *Altholtz v. Conn. Dental Comm'n*, 4 Conn. App. 307, 311-14, 493 A.2d 917, 921-22 (1985), but has rejected the hearsay affidavits of accident witnesses in a driver's license revocation proceeding, *Carlson v. Kozlowski*, 172 Conn. 263, 268, 374 A.2d 207, 209 (1977).

[135] A licensee may also argue that licensing proceedings are quasi-criminal and may attempt to invoke the Sixth Amendment right "to be confronted with the witnesses against him." *See Padilla v. Minn. Bd. of Med. Exam's*, 382 N.W.2d 876, 883 (Minn. Ct. App. 1986) (holding that the admission of medical records prepared by a physician in a physician disciplinary proceeding does not deny rights to cross-examine or confront witnesses).

[136] 402 U.S. at 409.

[137] *Id.* at 400.

[138] For a discussion of the post-*Perales* case law, see 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.8 (3rd ed. 1994).

10.10 Admissibility of Illegally Obtained Evidence

The "exclusionary rule," which provides that illegally obtained evidence or the fruits of that evidence may not be admitted into evidence in trial proceedings,[139] has not received the same broad acceptance in administrative cases that it has in criminal proceedings.[140] Nevertheless, there is considerable authority holding that illegally obtained evidence may be excluded from administrative proceedings in appropriate circumstances.[141] It seems quite likely that the admissibility of illegally obtained evidence in various kinds of administrative trial proceedings will be the source of an expanding number of decisions as the law in this area continues to respond to the growing and parallel body of cases applying the exclusionary rule to criminal proceedings.

Although Minnesota follows the principle that the exclusionary rule does not generally apply to civil cases,[142] most administrative cases parallel criminal proceedings in that they pit the government as a party against private litigants. In many of these cases, the government is seeking the same types of sanctions, in the form of a civil fine or penalty, that are available in criminal matters.[143] In cases of this type, a primary purpose of the exclusionary rule, the

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[139] Although the term *exclusionary rule* is frequently limited to the principle that evidence seized in violation of Fourth Amendment rights is not admissible in criminal cases, as used here, it encompasses the general notion that evidence obtained in violation of a person's legal rights, whether constitutional or statutory, should not be received in evidentiary trial-type proceedings. *See United States v. Bonnell*, 483 F. Supp. 1070, 1075 n.8 (D. Minn. 1979) (stating that the exclusionary rule encompasses violations of other than Fourth Amendment rights, such as right to counsel). *See generally* JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 356 at 525 (4th ed. 1992) (describing the exclusion of evidence taken in violation of the privilege against self-incrimination).

[140] *See generally* 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 5.52(6) (1997) ("There is some question as to whether the exclusionary rule applies to administrative hearings.").

[141] *E.g., Taylor Bus Serv. v. Dep't of Motor Vehicles*, 155 Cal. App. 3d 820, 202 Cal. Rptr. 433, 438-40 (1984) (in denying hearing in this appeal, the California Supreme Court ordered that the opinion of the court of appeals should not be officially published). However, in *Padilla v. Minn. Bd. of Med. Exam's*, 382 N.W.2d 876, 883 (Minn. Ct. App. 1986), the court of appeals stated, hypothetically, that evidence received in violation of a statute, in this case the Data Practices Act, is admissible in administrative cases.

[142] *United States v. Janis*, 428 U.S. 433, 447 (1976); *Tucker v. Pahkala*, 268 N.W.2d 728, 730 (Minn. 1978) (blood sample taken in violation of implied-consent law admissible in wrongful-death action brought by heirs of deceased); *see Padilla v. Minn. Bd. of Med. Exam's*, 382 N.W.2d 876,882-83 (holding that evidence received in violation of the Data Practices Act would be admissible in the administrative license revocation proceeding). *See generally,* Marjorie A. Shields, Annotation, *Admissibility, in Civil Proceeding, of Evidence Obtained Through Unlawful Search and* Seizure, 105 A.L.R. 5th 1, 3; 1 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE §§ 7.1, 7.2 (Tillers rev. 1983).

[143] *See generally* Michele L. Hornish, Excluding the Exclusionary Rule in Driver's License Suspension and Revocation Hearings, 65 Mo. L. Rev. 533 (2000) (Connecticut, Maine, Maryland and Missouri do not apply the exclusionary rule to driver's license revocation and suspension hearings while Illinois, Ohio and Oregon do apply the exclusionary rule to such hearings); Bernard A. Nigro, Jr., Note, The Exclusionary Rule in Administrative Proceedings, 54 Geo. Wash. L. Rev. 564 (1986) (criticizing the U.S. Supreme Court's use of cost-benefit analysis in applying the exclusionary rule in civil and administrative contexts but concluding that under this analysis, courts will continue to deny application of the exclusionary rule in many administrative law contexts).

deterrence of illegal government conduct by preventing the government from profiting by its illegal acts,[144] is served by the application of the rule.[145]

The Minnesota Court of Appeals considered the possible application of the exclusionary rule in separate cases involving appeals from administrative and arbitration proceedings. In *Minnesota State Patrol Troopers Association v. Department of Public Safety*,[146] the court held that the exclusionary rule was applicable to labor arbitration proceedings involving the discharge of a state trooper. The court held that evidence seized from the trooper's home was taken without probable cause due to the inadequacy of the affidavit upon which the search warrant was issued. The court then held that "the exclusionary rule applies to labor arbitration proceedings involving the loss of a job" and ruled that the illegally seized evidence must be suppressed. However, the court upheld the arbitrator's and district court's confirmation of the trooper's discharge on the basis of other admissible evidence that supported the decision.[147] A concurring opinion criticized the court's extension of the exclusionary rule to civil cases at a time when the rule itself was in decline.[148]

In a second case, the court of appeals upheld the admission of the transcript of a taped telephone conversation between a Minnesota Department of Human Rights investigator and a party charged with rental housing discrimination.[149] The court analyzed the taping of the conversation under Minnesota Statutes chapter 626A (1986), the Privacy of Communications Act. The court concluded that the tape recording of the conversation was not in violation of the act on two separate grounds. First, the taping did not constitute an "intercept" of the conversation by electronic device, as a device designed only to record conversation to which

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[144] *See Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (stating that the exclusionary rule compels respect for Fourth Amendment rights by removing the incentive to ignore them).

[145] A number of cases have considered the application of the exclusionary rule to administrative searches and seizures where the evidence was subsequently offered in a criminal, rather than at an administrative, hearing. In companion cases, *Camara v. Municipal Court,* 387 U.S. 523, 540 (1967) and *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967), the Supreme Court held that unconsented to administrative searches and inspections of commercial property in the ground floor of an apartment building (to determine whether it was being unlawfully used as a personal residence) and of a warehouse (for fire code violations) could not be conducted in the absence of a valid search warrant. The Court limited this general rule in *Colonnade Catering Corp v. United States,* 397 U.S. 72, 77 (1970) to permit statutorily authorized inspections of the premises of highly regulated businesses, in this case a federally licensed liquor dealer. Subsequent cases have focused on whether the business or industry is highly regulated and on society's need to conduct warrantless inspections to accomplish effective regulation of the business. *See, e.g., Donovan v. Dewey*, 452 U.S. 594, 603-04 (1981) (holding that mines are subject to warrantless inspections); *Marshall v. Barlow's,* 436 U.S. 307, 323 (1978) (holding that a business subject to OSHA regulations was not subject to warrantless inspections for safety violations); *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (holding that firearms dealers are subject to warrantless inspections); *see also Peterman v. Coleman*, 764 F.2d 1416, 1418 (11th Cir. 1985) (affirming the holding that secondhand goods dealers are subject to warrantless searches); *United States v. Jamieson-McKames Pharm.,* 651 F.2d 532, 540-41 (8th Cir. 1981), (holding that the drug manufacturing industry are subject to warrantless searches).

[146] 437 N.W.2d 670, 676 (Minn. Ct. App. 1989).

[147] *Id*. at 675-78.

[148] *Id*. at 679 (Forsberg, J., concurring)

[149] *Dep't of Human Rights v. Spiten*, 424 N.W.2d 815, 820 (Minn. Ct. App. 1988) (admitting into evidence the transcript of investigator's conversation with a real estate agent employed to locate a tenant).

the operator is a party is excluded from the scope of the statute.[150] Interception requires an unauthorized third party listener, and here the investigator who did the taping was a party to the conversation. Second, the act specifically provides that it is not unlawful for a person acting under the color of law to intercept a communication where the person is a party to the communication. Here the investigator was clearly a party and was held to be acting under color of law.[151] Given the weight of the other evidence in the record, the court held that it was not error to admit the transcripts.

Finally, in *Ascher v. Commissioner of Public Safety*[152], the court of appeals held that the exclusionary rule did not preclude an administrative agency from using evidence of alcohol consumption obtained at a sobriety checkpoint subsequently found to be unconstitutional to cancel and deny respondent's license. Although the court had earlier determined that in implied consent proceedings the exclusionary rule applies to evidence obtained from an unconstitutional checkpoint,[153] the court held that a hearing on whether respondent's license should be canceled on the grounds that he is "inimical to public safety" pursuant to Minn. Stat. § 171.04, subd. 1(8), was not an implied consent hearing.[154] Moreover, the court held that reinstating a driver's license where there is good cause to believe the licensee consumed alcohol in violation of the total abstinence condition on the license would not further the exclusionary rule's primary purpose of deterring unlawful police conduct to any significant degree.[155]

The *Minnesota State Patrol, Spiten and Ascher* decisions are illustrative of the continuing tension between balancing the policies underlying the exclusionary rule against the potential harm to society that may result from the exclusion of otherwise credible evidence.

Both the California[156] and New York[157] courts have held that the exclusionary rule has general application to administrative cases. The rule also has been applied by some federal

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[150] *Id.*; *see also* Minn. Stat. § 626A.01, subds. 5, 6(3) (2014).

[151] *Spiten,* 424 N.W.2d at 820; *see also* Minn. Stat. § 626A.02, subd. 2(c) (2014).

[152] 527 N.W.2d 122, 125-26 (Minn. Ct. App. 1995).

[153] *Ascher v. Comm'r of Pub. Safety*, 505 N.W.2d 362, 366 (Minn. Ct. App. 1993).

[154] *Ascher,* 527 N.W.2d at 125-26.

[155] *Id*. at 122.

[156] *Taylor Bus Serv. v. Dep't of Motor Vehicles*, 156 Cal. App. 3d 820, 439 (1984) (holding, in an unpublished opinion, that evidence seized pursuant to an invalid search warrant is not admissible in administrative proceeding for unpaid registration fees and penalties); *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 95-96, 396 P.2d 706, 708, 41 Cal. Rptr. 290, 292 (1964) (holding that illegally seized evidence is inadmissible in civil forfeiture proceeding); *see also Emslie v. State Bar*, 11 Cal. 3d 210, 230, 520 P.2d 991, 1002, 113 Cal. Rptr. 175, 186 (1974) (holding that the exclusionary rule is not applicable to attorney disciplinary proceedings). Although the *Emslie* holding is arguably dictum, as the court held the evidence had been legally seized, the court engaged in an extensive discussion of the rationale for applying the criminal exclusionary rules to administrative cases. The court concluded that "a balancing test must be applied in such proceedings and consideration must be given to the social consequences of applying the exclusionary rules and to the effect thereof on the integrity of the judicial process." *Id.* at 229, 520 P.2d at 1002, 113 Cal. Rptr. at 186.; *See generally* Wanda Ellen Wakefield, *Use, in Attorney or Physician Disciplinary Proceeding, of Evidence Obtained by Wrongful Police Action*, 20 A.L.R.4th 546 (1981 and Supp. 1997) (explaining the use of illegally obtained evidence in attorney and physician disciplinary proceedings).

[157] *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647, 662, 249 N.E.2d 440, 448, 301 N.Y.S.2d 584, 594-95 (1969); *see also In re J.G.P.C. Enters.*, 127 Misc. 2d 95, 96-97, 485 N.Y.S.2d 486, 488-89 (1985).

courts to exclude evidence offered by agencies.[158] The proper procedure for excluding the illegal evidence appears to be a motion to suppress, made before the agency.[159] It has been held that the agency has the power to rule on the motion even if constitutional questions must be resolved.[160]

The difficulty in applying the exclusionary rule to administrative cases is in formulating a test to determine when the policies of the exclusionary rule are served by the refusal to admit evidence in a particular case. Although various types of balancing tests have been proposed,[161] the application of a balancing test to resolve evidentiary problems during a trial proceeding is an open invitation to a stream of appeals, both from the ALJs to the agencies and from the agencies to the courts. Nevertheless, the alternative, which could be to uniformly apply the exclusionary rule to refuse admittance of all illegally obtained evidence, runs contrary to the general notion that all relevant evidence should be received in administrative cases.[162]

One possible resolution of the balancing test problem would be to follow the approach used in Minnesota criminal jury trials by requiring the parties to raise all objections to illegally obtained evidence in pretrial proceedings.[163] This approach is presently available, under the existing OAH rules, through the use of a motion in limine, whereby a party may seek a ruling limiting the evidence to be produced at hearing by an opposing party.[164] However, the implementation of such a procedure would require the use of either mandatory discovery[165] or a notice of evidence by the government[166] in order for the pretrial proceeding to be effective. Such procedures would further complicate and prolong the administrative process and would increase the cost of administrative cases for all parties. In addition, although prehearing resolution of exclusionary rule issues may simplify the actual trial and occasionally avoid trials where critical evidence is held inadmissible, the problem of a succession of appeals and possible retrials remains.

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[158] *SEC V. EMS Gov't Sec.*, 645 F.2d 310, 317 (5th Cir. 1981) (denying enforcement of an administrative subpoena); *Knoll Assoc. v. FTC*, 197 F.2d 530 (7th Cir. 1968) (excluding from hearing record illegally obtained corporate); *see also SEC v. O'Brien*, 467 U.S. 735, 748-50, 104 S. Ct. 2720, 2728-30 (1984) (holding that the target of an SEC investigation has no right of notice of subpoenas issued to third parties even though lack of notice prevents objection to subpoenas issued for improper reasons); *cf. United States v. Marzano*, 537 F.2d 257, 271 (7th Cir. 1976), (holding that where the government is not a party to the illegal search, the evidence is admissible).

[159] *J.G.P.C. Enters.*, 127 Misc. 2d at 95, 485 N.Y.S.2d at 489.

[160] *Id.*

[161] *See Emslie v. State Bar*, 11 Cal. 3d 210, 229, 520 P.2d 991, 113 Cal. Rptr. 175 (1974).

[162] *See* KOCH, *supra* note 2, at § 5.52(6) (arguing against application of rule to civil administrative cases).

[163] Minn. R. Crim. P. 12.04 (stating that in criminal trials to the court, which are more closely related to administrative cases than jury trials, the court has discretion to reserve hearing on evidentiary issues for trial).

[164] Minn. R. 1400.6600 (2013).

[165] *See* Minn. R. Crim. P. 9.01.

[166] *Id*. 7.01.