# Chapter 7. Prehearing Practice

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## 7.1 Change of Location, Date of Hearing and Continuances

### 7.1.1 Change of Location

Under the APA and the contested case rules, the agency required to initiate a contested case is authorized to designate the time, date, and place of the hearing.[1] Generally speaking, venue in any location in the state is proper, but the agency is required to seek the advice of the ALJ regarding the time and location to be designated.[2] A party desiring to obtain a change in the location of the hearing must file a motion to obtain the requisite order.[3] There are few statutory restrictions on the location of hearings.[4] However, the location selected should encourage participation by all "affected interests."[5] In the absence of statutory restrictions, an agency has discretion in designating the place of hearing,[6] and it may set multiple hearings in different places throughout the state.[7] Multiple-location hearings are common to contested cases involving policy issues of public impact and concern, such as ratemaking proceedings or environmental actions. Agency discretion in setting the place of hearing must be exercised with due regard for fairness[8] and the convenience of the parties.[9] Thus, it is an abuse of discretion to set a workers' compensation hearing over three hundred miles from a claimant's residence in the face of a protest and known destitution.[10]

A reference point for examining change of location questions is Minnesota *forum non conveniens* law, which establishes a strong presumption in favor of the plaintiff's choice of forum.[11] To rebut that presumption, a defendant must show that a series of factors weigh in favor of an alternative forum. Those factors include: (1) the relative ease of access to sources

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[1] Minn. Stat. § 14.58 (2014); Minn. R. 1400.5600 (2013). However, the agency may leave those determinations to the judge. Minn. R. 1400.5600, subp. 2.A (2013).

[2] Minn. Stat. § 14.50 (2014).

[3] Motion practice is governed by Minn. R. 1400.6600 (2013).

[4] *See* Minn. Stat. §§ 363A.29, subd. 1 ()( specifying the location of hearings arising under the Minnesota Human Rights Act), 125A.091, subd. 12 (specifying the location of special education hearings) (2014).

[5] Minn. Stat. § 14.50 (2014).

[6] *Burri v. Campbell*, 102 Ariz. 541, 434 P.2d 627, 629 (1967); *Nichols v. Council on Judicial Complaints*, 615 P.2d 280, 286 (Okla. 1980).

[7] *See State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543-44 (1980).

[8] *See Brotherhood of R.R. Trainmen v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 237 F. Supp. 404, 422-23 (D. D.C. 1964), *rev'd*, 345 F.2d 985 (D.C. Cir. 1965).

[9] *See NLRB v. Sw. Greyhound Lines*, 126 F.2d 883, 888 (8th Cir. 1942); *Burnham Trucking Co. v. United States*, 216 F. Supp. 561, 564 (D. Mass. 1963).

[10] *Seitzinger v. Fort Pitt Brewing Co.*, 294 Pa. 253, 257, 144 A. 79, 80 (1928).

[11] *Paulownia Plantations de Panama Corp. v. Rajamannan*, 793 N.W.2d 128, 137 (Minn. 2009); *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508, 511 (Minn. 1986).


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of proof; (2) the availability of compulsory process for the attendance of witnesses; (3) the cost of obtaining attendance of witnesses; (4) the administrative burdens a lawsuit will impose upon a court; (5) the interest in having localized controversies decided at home; and (6) the court's familiarity with the applicable law.[12]

The parties may waive statutory venue for their convenience,[13] and when the circumstances so require a hearing may be split between two locations.[14] However, the general rule is that an agency is not authorized to hold hearings beyond its borders or to administer oaths there.[15]

## 7.1.2 Date and Time

Contested case hearings are held at the time and on the date specified by the agency in the notice of and order for hearing unless the ALJ orders a change. Under the contested case rules, a formal contested case hearing may not be held sooner than 30 days after the agency's initial pleading is served unless the chief ALJ determines that a shorter time period is in the public interest and will not be prejudicial.[16] Some statutes and rules require or permit hearings on shorter notice.[17] It is generally held that agency hearings cannot be held on Sundays[18] or holidays.[19]

Statutory time limitations for holding contested case hearings are usually held to be directory rather than mandatory or jurisdictional.[20] Occasionally, statutory time limits are considered to be mandatory unless rights superior to those of the party to be benefited are involved.[21] Where an agency is required to hold a hearing on the suspension of rates and issue

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[12] *Indep. Sch. Dist. No. 197 v. Accident and Cas. Ins. of Winterthur*, 525 N.W.2d 600, 604 (Minn. Ct. App. 1995) (*citing Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09(1947)).

[13] See Knight v. Younkin, 61 Idaho 612, 612, 105 P.2d 456, 457-58 (1940).; *cf. Martin v. Wolfson*, 218 Minn. 557, 569, 16 N.W.2d 884, 890 (1944).

[14] *See Bianco v. Indus. Comm'n*, 526 P.2d 323, 324 (Colo. App. 1974).

[15] *Knight*, 61 Idaho at 612, 105 P.2d at 457.

[16] Minn. R. 1400.5600, subp. 3 (2013).

[17] *See, e.g.,* Minn. Stat. § 83.35, subd. 5 (2014) (requiring a hearing within ten days of the issuance of some suspended registration orders under the Minnesota Subdivided Land Sales Practices Act). Hearings on shorter notice frequently are required when cease and desist orders have been issued. *See, e,g., id.* § 80C.12, subd. 2 () (franchises). Hearings on appeals from some citations issued by the department of health must be heard within thirty days of the appeal. *Id.* § 144A.10, subd. 8 (. Revenue Recapture Act contested case hearings require only a twenty-day notice. Minn. R. 1400.8550 (2013).

[18] Under common law, Sundays were "dies non juridicus," or days when no judicial business could take place. This common-law doctrine is codified in Minn. Stat. § 484.07 (2014), which requires the courts to be closed on Sundays except for limited purposes. *See also Kantack v. Kreuer*, 280 Minn. 232, 235, 158 N.W.2d 842, 845 (1968). Most courts have held administrative hearings conducted on Sunday to be void under the common-law doctrine. *See Chester v. Ark. State Bd. of Chiropractic Exam'rs*, 245 Ark. 846, 849-53, 435 S.W.2d 100, 102-04 (1968); *Texas State Bd. of Dental Exam'rs v. Fieldsmith*, 242 S.W.2d 213, 215-16 (Tex. Civ. App. 1951).

[19] Under Minn. Stat. § 645.44, subd. 5 (2014), no public business may be transacted on holidays except in cases of necessity.

[20] *Perry v. Planning Comm'n*, 62 Haw. 666, 676, 619 P.2d 95, 103 (1980); *cf. Benedictine Sisters Benevolent Ass'n v. Pettersen*, 299 N.W.2d 738, 740 (Minn. 1980).

[21] *State ex rel. Hannon v. DeCourcy*, 18 Ohio St. 2d 73, 77-78, 247 N.E.2d 465, 468 (1969).


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its decision within a specified time period, it has been held that the parties cannot effectively waive the statutory requirement.[22] In the absence of statutory time limitations for holding a contested case hearing, it is frequently held that the hearing must be held within a reasonable time.[23] However, long delays in scheduling or final agency determinations are not *per se* due process violations.[24] Additionally, courts generally hold that a general statute of limitations does not apply to administrative disciplinary matters.[25]

Where long delays occur in holding contested case hearings, some courts have suggested that the defense of laches may be available if actual harm or prejudice results.[26] Thus, where there was a nineteen-month delay from the time of an agency's investigation to the time it brought charges, and where memories were diminished by the delay, making effective cross-examination impossible, a California court concluded that the delay was prejudicial and it dismissed the agency's charges.[27]

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[22] *See Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 267 Ark. 550, 559, 593 S.W.2d 434, 440□41 (1980); *New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 362 A.2d 741, 748-50 (Me. 1976). Minn. Stat. § 237.075, subd. 2 (2014), contains a time limitation for final agency action on telephone rate petitions. The statutory time limit within which the Public Utilities Commission must act on a rate request under Minn. Stat. § 237.075, subd. 2 (2014) only sets the period during which rates may be suspended. The Commission does not lose jurisdiction to act on a rate request if the time limit expires without a decision. *Henry v. Minnesota Pub. Utils. Comm'n*, 392 N.W.2d 209, 213-14 (Minn. 1986).

[23] *Steen v. City of Los Angeles*, 31 Cal. 2d 542, 545, 190 P.2d 937 (1948); *In re Milton Hardware Co.*, 19 Ohio App. 2d 157, 166, 250 N.E.2d 262, 268 (1969); *cf. Nix v. O'Keeffe*, 255 F. Supp. 752, 754 (N.D. Fla. 1966). Similarly, hearings may not be held too quickly. *See Fisher v. Indep. Sch. Dist. No. 118*, 298 Minn. 238, 241-43, 215 N.W.2d 65, 68-69 (1974) (one day's notice of teacher termination hearing inadequate).

[24] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546-47 (1985) (nine-month delay before final decision on security guard's discharge); *In re* Schroeder, 415 N.W.2d 436, 441 (Minn. Ct. App. 1987) (two-year delay between violation and disciplinary hearing does not establish due process violation when there is a lack of evidence regarding the date the agency learned of the violation); *Fisher v. Independent School Dist. No. 622*, 357 N.W.2d 152, 155-56 (Minn. Ct. App. 1984) (charges and hearing against teacher for incidents occurring twelve to sixteen years before); *see also Grayline Tours v. Pub. Serv. Comm'n*, 97 Nev. 200, 204, 626 P.2d 263, 266 (1981) (four-year delay for final decision was not a violation of due process); *Jackson v. State Real Estate Comm'n*, 72 Pa. Commw. 539, 542, 456 A.2d 1169, 1170-71 (1983) (concluding that a 2.5 year delay between the filing of a plea and issuance of a notice of hearing was not a due process violation, despite a statute requiring the commission to act "forthwith," because appellant was unable to demonstrate prejudice); *Roche v. State Bd. of Funeral Dirs.*, 63 Pa. Commw. 128, 134-35, 437 A.2d 797, 801 (1981) (holding that a four-year delay between the hearing and the decision did not violate due process because appellant was unable to show prejudice).

[25] *Colorado State Bd. of Med.ical Exam'iners v. Jorgensen*, 198 Colo. 275, 279, 599 P.2d 869, 872 (1979); *Latreille v. Michigan State Bd. of Chiropractic Exam'iners*, 357 Mich. 440, 445-46, 98 N.W.2d 611, 614-15 (1959); *Sinha v. Ambach*, 91 A.D. 2d 703, 703, 457 N.Y.S.2d 603, 604 (1982); *State v. Josefsberg*, 275 Wis. 142, 150, 81 N.W.2d 735, 739 (1957); *see also* § 12.4; *cf. In re Schultz*, 375 N.W.2d 509, 518 (Minn. Ct. App. 1985). *See also* § 12.4.

[26] *Jackson*, 72 Pa. Commw. at 541, 456 A.2d at 1170; *cf. State v. E. Airlines, Inc.*, 346 N.W.2d 184, 187 (Minn. Ct. App. 1984).

[27] *Gates v. Dep't of Motor Vehicles*, 94 Cal. App. 3d 921, 923-26, 156 Cal. Rptr. 791 (1979). However, a claim of memory loss will not be recognized if the claim is not believable or if the memory loss did not result from the agency's delay. *See Gore v. Bd. of Med. Quality Assur.*, 110 Cal. App. 3d 184, 192-93, 167 Cal. Rptr. 881 (1980) (concluding that licensee failed to establish unreasonable or prejudicial delay by agency, which learned of malpractice settlement approximately one year before it commenced its action against doctor; court held


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If an agency refuses to commence a contested case as it is required to do,[28] the aggrieved party may seek judicial relief.[29]

## 7.1.3 Continuances

ALJs are specifically authorized to rule on requests to continue the date and time of contested case hearings.[30] The procedures and standards applicable to such requests are contained in a separate rule that states, in part:

> Requests for a continuance of a hearing shall be granted upon a showing of good cause. Unless time does not permit, a request for continuance of the hearing shall be made in writing to the judge and shall be served upon all parties of record and the agency if it is not a party. [31]

Although a continuance request is, in effect, an application for an order,[32] historically continuance requests have not been strictly treated as motions. One reason for this is that the ten-working-day period allowed for filing objections to motions sometimes would be unworkable if applied to continuance requests. When a continuance is requested, it must be promptly considered so that the parties do not engage in unnecessary preparation for hearing and so that the parties, as well as the ALJ, can efficiently schedule their business.

If time permits, the continuance request must be in writing and contain the facts and information showing entitlement to a continuance. In most cases, time will permit the filing and service of the request before the hearing. When it does not, the rule is silent about the procedure to follow. In practice, such requests have been made by telephone or by email when a written request cannot be filed and served before the hearing or when time is of the essence to a party. When a written request cannot be made, the requesting party should always make the request by telephone or email rather than waiting to make it at the commencement of the hearing. When telephone or email requests are made, the requesting party should notify all other parties before contacting the ALJ. In that way, the requesting party can determine if any other party objects to the request and will be in a position to advise the judge of any objections and of the need for a prehearing conference to consider the request and the objections to it. Although the rule contains no procedures for objecting to continuance requests, the notice provisions in the rule make it clear that the ALJ should not grant continuances *ex parte*. In practice, therefore, the ALJ will ensure that an opportunity to object is made available. Nonetheless, any party with notice of a request should promptly make his or her objections known to the ALJ.

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that laches should be based on date when agency learned or should have learned of acts on which relevant charges are based); *see also* chapter 12.

[28] Under Minn. Stat. § 14.57 (2014), an agency is required to initiate a contested case when one is required by law.

[29] *Commers v. Spartz*, 294 N.W.2d 321 (Minn. 1980).

[30] Minn. R. 1400.5500 G. (2013).

[31] *Id.* 1400.7500.

[32] *Id.* 1400.6600 (requiring that any application for an order be by motion).


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Continuances that would prevent a case from being concluded within a statutory deadline cannot be granted, and if a continuance request is filed within five business days of the hearing, it must be denied if the reason for it could have been ascertained at an earlier time.[33] In all other cases, continuance requests must be granted on a showing of good cause. In determining whether good cause exists, due regard must be given to the requesting party's ability to effectively proceed without a continuance. Under the contested case rule, the following circumstances constitute good cause for a continuance:

1. the death or incapacitating illness of a party, representative, or attorney of a party:
2. a court order requiring a continuance;
3. lack of proper notice of the hearing;
4. a substitution of the representative or attorney of a party if the substitution is shown to be required;
5. a change in the parties or pleadings requiring postponement; and
6. an agreement for a continuance by all parties provided that it is shown that more time is clearly necessary to complete authorized discovery or other mandatory preparation for the case and the parties and judge have agreed to a new hearing date, or the parties are engaged in serious settlement negotiations or have agreed to a settlement of the case that has been or will likely be approved by the final decision maker.[34]

Since the circumstances mentioned in the rule are not intended to be exhaustive, other reasons may entitle a party to a continuance. However, the rule provides that good cause will not include the following:

1. intentional delay;
2. unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received after the notice of the hearing for which the continuance is sought;
3. unavailability of a witness if the witness's testimony can be taken by deposition; and
4. failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.[35]

A unilateral request for a settlement conference does not constitute good cause for a continuance unless both parties and the judge agree to a continuance for purposes of such a conference.[36]

In any contested case where it appears, in the interests of justice, that further testimony should be received but where sufficient time does not remain to conclude the testimony, the ALJ is required to order that the additional testimony be taken by deposition or to continue the

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[33] Under Minn. R. 1400.7100, subp. 2 (2013), continuance requests must be made within a reasonable time after their need becomes evident.

[34] Minn. R. 1400.7500 (2013).

[35] *Id*.

[36] *Id*. 1400.6550, subp. 2.


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hearing to a future date to take that testimony.[37] This provision enables the judge, on his or her own motion, to require additional evidence when the interests of justice so require.

Agencies may compel the presentation of a party's case within reasonable time limits,[38] and the granting of continuances is discretionary[39] and subject only to a clear showing of abuse.[40] As a general rule, however, continuances should be granted when clearly required to meet the ends of justice.[41] Thus, continuances may be required to prevent prejudice,[42] to obtain testimony,[43] or to obtain counsel.[44] If counsel has other engagements at the time of the scheduled hearing, a continuance is usually discretionary.[45] The agreement of counsel to continue the hearing is not controlling on the ALJ in most cases.[46] An ALJ may place conditions on continuances granted.[47]

Where the attorney representing a party is a member of the legislature, she is entitled to a continuance of the hearing while the legislature remains in session.[48] Continuances are not required if another administrative proceeding is pending that may affect the matter in issue.[49] If a criminal prosecution arising out of the same conduct is pending, a continuance is generally not required unless severe, direct sanctions will be imposed for asserting the privilege against self-incrimination.[50] If only an adverse inference may be made because of a party's invocation of the privilege, no continuance is required.[51] Continuances should not be made indefinite

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[37] *Id.* 1400.7500.

[38] *Shackelford v. Shackelford*, 254 S.W.2d 503, 503 (Ky. 1953); *Searcy v. Three Point Coal Co.*, 280 Ky. 683, 134 S.W.2d 228, 231 (1939).

[39] *Carter-Wallace, Inc. v. Gardner*, 417 F.2d 1086, 1095 (4th Cir. 1969); *N. Nat'l Bank v. Banking Bd.*, 511 P.2d 940, 942 (Colo. Ct. App. 1973); *Giampa v. Ill. Civil Serv. Comm'n*, 89 Ill. App. 3d 606, 611, 411 N.E.2d 1110, 1114 (1980).

[40] *Roche v. State Bd. of Funeral Dirs.*, 63 Pa. Commw. 128, 133, 437 A.2d 797, 800 (1981).

[41] *Brown v. Air Pollution Control Bd.*, 37 Ill. 2d 450, 454-55, 227 N.E.2d 754, 756-57 (1967).

[42] *Roche,* 63 Pa. Commw. at 133, 437 A.2d at 800.

[43] *See In re Salazar (Levine)*, 48 A.D.2d 75, 78, 368 N.Y.S.2d 297 (1975); *In re Vukovic (Levine)*, 47 A.D.2d 260, 261-62, 367 N.Y.S.2d 112 (1975).

[44] *See Barrese v. Ryan*, 189 F. Supp. 449, 452-53 (D. Conn. 1960); In re Milrad (Levine), 44 A.D.2d 287, 290, 354 N.Y.S.2d 724 (1974). However, a party cannot invoke the right to counsel merely to delay the hearing. *In re Romeo v. Union Free Sch. Dist. No. 3*, 82 Misc. 2d 336, 340, 368 N.Y.S.2d 726 (1975).

[45] *See Simmons v. United States*, 698 F.2d 888, 893 (7th Cir. 1983); *Givens v. Dep't of Alcoholic Beverage Control*, 176 Cal. App. 2d 529, 532, 1 Cal. Rptr. 446 (1959).

[46] *See Simmons*, 698 F.2d at 893; *Mohawk Med. Ctr. v. Quern*, 84 Ill. App. 3d 1026, 1029, 406 N.E.2d 839, 841 (1980).

[47] *See Ark. State Med. Bd. v. Leonard*, 267 Ark. 61, 64, 590 S.W.2d 849, 851 (1979) (holding that continuance in disciplinary proceeding against doctor could be conditioned on restrictions on doctor's drug prescribing practices).

[48] Minn. Stat. § 3.16 (2014); *State v. Indep. Sch. Dist. No. 810*, 260 Minn. 237, 242-43, 109 N.W.2d 596, 600 (1961).

[49] *See FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949).

[50] *Coal. of Black Leadership v. Cianci.*, 480 F. Supp. 1340, 1344 (D. R.I. 1979). The Fifth Amendment privilege applies to administrative proceedings if the disclosure could be used in a criminal prosecution or lead to other evidence that could be so used. *In re Gault*, 387 U.S. 1, 47□48 (1967).

[51] *See Arthurs v. Stern*, 560 F.2d 477, 478-80 (1st Cir. 1977).


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without explanation. One court held that an unexplained two-year continuance of an unemployment insurance hearing denied the employer a fair hearing.[52]

Continuances may be necessary to enable a party to examine newly discovered evidence,[53] and they are often appropriate when an undisclosed witness is called to testify or undisclosed evidence is offered.[54] The testimony of undisclosed witnesses may be excluded if its admission will result in prejudice to the other side, but the trial court has discretion to impose other sanctions or grant a continuance. The factors to consider in determining the existence of prejudice and the appropriate sanction include "(1) the extent of preparation required by an opposing party in preparing for cross-examination or rebuttal of expert witnesses; (2) when the expert agreed to testify; (3) when the party calling the expert notified the opposing party of the expert's availability; (4) when the attorney calling the expert assumed control of the case; (5) whether a party intentionally and willfully failed to disclose the existence of a trial expert; and (6) whether the opposing party reasonably sought a continuance or other remedy."[55]

## 7.1.4 Stays

In some circumstances, an agency may choose to stay its contested case proceeding. If two administrative agencies have concurrent jurisdiction over a controversy, one may, as a matter of administrative comity, stay its proceedings until those of the other are complete. The agency in the best position, because of its statutory status, administrative competence, and regulatory expertise, to resolve the most critical facets in the controversy should proceed first.[56]

Sometimes parties attempt to force a stay of an agency proceeding by obtaining a court injunction. The exhaustion-of-remedies doctrine comes into play in such cases. The rule is that no one is entitled to injunctive protection against the actual or threatened acts of an agency until administrative remedies have been exhausted unless on jurisdictional or constitutional grounds it can be shown that immediate and irreparable harm will result.[57] Immediate and

[52] *In re Milton Hardware Co.*, 19 Ohio App. 2d 157, 166, 250 N.E.2d 262, 268 (1969); *see also Nix v. O'Keeffe*, 255 F. Supp. 752, 754 (N.D. Fla. 1966) (concluding that the failure to hold a hearing "some 2 years after a claim was filed and 18 months after request for hearing is so unreasonable as to be a denial of plaintiff's right to a forum provided him by law").

[53] *Cf. Padilla v. Bd. of Med. Exam'rs*, 382 N.W.2d 876, 882 (Minn. Ct. App. 1986).

[54] *Krech v. Erdman*, 305 Minn. 215, 218, 233 N.W.2d 555, 557 (1975) ("In situations where the failure to disclose is inadvertent but harmful, the court should be quick to grant a continuance and assess costs against the party who has been at fault."); *see Prechtel v. Gonse*, 396 N.W.2d 837, 840 (Minn. Ct. App. 1986) (failure to disclose inadvertent but harmful); *Kraushaar v. Austin Med. Clinic, P.A.*, 393 N.W.2d 217, 222-23 (Minn. Ct. App. 1986) (failure to disclose attributable to attorney rather than party); *Whitney v. Buttrick*, 376 N.W.2d 274, 279 (Minn. Ct. App. 1985) (failure to disclose caused little prejudice and was not willful); *N. Messenger, Inc. v. Airport Couriers, Inc.*, 359 N.W.2d 302, 305 (Minn. Ct. App. 1984) (failure to disclose witnesses due to unexpected withdrawal of eight intervenors).

[55] *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986).

[56] *City of Hackensack v. Winner*, 82 N.J. 1, 32, 410 A.2d 1146, 1161 (1980).

[57] *State ex rel. Sheehan v. District Court*, 253 Minn. 462, 466, 93 N.W.2d 1, 4 (1958); *Thomas v. Ramberg*, 240 Minn 1, 4-5, 60 N.W.2d 18, 20 (1953); *see also Garavalia v. City of Stillwater*, 283 Minn. 335, 345, 168 N.W.2d 336, 347 (1969); *State ex rel. Turnbladh v. District Court*, 259 Minn. 228, 238, 107 N.W.2d 307, 314 (1960). *But see Minn. Chippewa Tribe v. State Dep't of Labor*, 339 N.W.2d 55, 56 (Minn. 1983) (stating that "whether or not the


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irreparable harm is, however, not to be found in the mere fact that a party may incur expenses in the administrative proceedings.[58] The doctrine of primary jurisdiction, under which courts postpone exercise of their jurisdiction in order to allow an agency to exercise its expertise by proceeding first,[59] may also be relevant when a stay of agency proceedings through a court order is sought.

## 7.2. The Right to Counsel or Other Representation

The parties to administrative proceedings do not always have a constitutional right to be represented by retained counsel.[60] Therefore, where the right is not of constitutional dimensions, it will depend on applicable statutes and agency rules or regulations. Under the federal APA, parties and witnesses required to appear at contested case hearings have a statutory right to retain counsel.[61] The Minnesota APA does not grant a similar right to parties and witnesses in contested cases. However, under the contested case rules, all parties have a right to retained counsel, but witnesses compelled to appear do not.[62] Some state statutes[63] and agency rules[64] also entitle the parties to particular proceedings to be represented by counsel,

In agency adjudications outside the scope of the contested case rules, the right to counsel, in the absence of an express provision granting that right, will depend on due process considerations, and not on the Sixth Amendment.[65] With some exceptions, the parties to quasi-judicial administrative proceedings have a right to counsel whenever a hearing is required by due process or by an express provision of law. The Minnesota Supreme Court has articulated three indicia of quasi-judicial actions: "(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim."[66] Thus, courts have recognized that the right to counsel

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Workers' Compensation Act applies to the [Minnesota Chippewa] Tribe . . . is a proper subject for declaratory judgment"); *State Bd. of Med. Exam'rs v. Olson*, 295 Minn. 379, 387, 206 N.W.2d 12, 17 (1973) (stating that "[t]he doctrine of exhaustion of administrative remedies does have some limitations" such as "[w]here it would be futile to seek redress from an administrative body"). ).

[58] *Sheehan*, 253 Minn. at 467, 93 N.W.2d at 5; *Thomas*, 240 Minn. at 7, 60 N.W.2d at 21-22.

[59] *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 283 (Minn. 2011); *Minnesota-Iowa Television v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297, 302 (Minn. 1980).

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

[61] 5 U.S.C. § 555(b) (2012).

[62] *Cf.* Minn. R.1400.5800 (2013).

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

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

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

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


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exists in adjudicative proceedings to terminate welfare benefits,[67] to prevent air pollution,[68] to remove a civil service employee,[69] to evict a public housing tenant,[70] to revoke a license,[71] to determine public utility rates,[72] to classify civil service employees,[73] to determine workers' compensation entitlement,[74] or to establish unemployment compensation entitlement.[75] Where pupil dismissals are involved, some courts have found a right to counsel,[76] but others have not.[77]

Although the right to counsel usually exists in quasi-judicial administrative proceedings, such as contested cases, the right is seldom recognized in agency investigatory proceedings.[78] The Minnesota Supreme Court has adopted this view.[79] However, if the investigation occurs when criminal charges arising from the same acts are pending, the right to counsel, at least for consultation and advice, has been held to exist.[80]

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[67] *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

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

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

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

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

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

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

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

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

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

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

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

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

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


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The right to counsel is the right to retain counsel at the party's expense. Usually, parties have no right to have counsel appointed or paid for by the agency if they are indigent.[81]

## 7.2.1 Notice, Denial, and Waiver

Under the contested case rules, a party is entitled to notice of his right to counsel in a contested case proceeding.[82] Notice must be included in the notice of and order for hearing and must be explained to parties unrepresented by legal counsel at the commencement of a contested case proceeding.[83] In agency adjudications outside the scope of the APA, the agency may be required to advise parties of their right to counsel, especially in a parole revocation proceeding,[84] but there are cases to the contrary.[85]

A party is denied the right to counsel if consultations with counsel occur in the presence of an informer working for the agency.[86] Moreover, unreasonably short notice of hearing can constitute the denial of counsel,[87] as can the refusal to continue a hearing when counsel's wife suddenly becomes ill.[88] Lack of counsel coupled with other improprieties or unfairness may result in the denial of a fair hearing.[89]

On the other hand, courts have upheld some direct limitations on a party's right to counsel. The denial of counsel at the preliminary stages of an administrative proceeding is not

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

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

[83] Minn. R. 1400.7800 B(2) (2013).

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

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

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

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

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

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


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prohibited if assistance is available in subsequent proceedings.[90] At least one court sustained the complete denial where the party suffered no prejudice.[91] Direct limitations also may be permissible when they are imposed because of the improper motives of a party or the improper conduct of counsel. Thus, a party may not invoke the right to counsel merely to delay the hearing,[92] and disruptive counsel may be excluded from an administrative hearing without denying his or her client's right to counsel.[93] Although a party is normally entitled to counsel of his or her choice,[94] counsel retained by a party may be precluded from participation in a contested case proceeding if that participation would violate the Minnesota Rules of Professional Conduct.[95] Motions to exclude counsel retained by parties to contested cases have been decided by ALJs when based on violations of those rules. Trial courts may disqualify counsel to maintain public confidence in the legal profession and the integrity of the judicial process. However, the disqualification decisions must attempt to maintain the "delicate balance" that exists between a party's right to counsel of choice and the need to uphold ethical standards. In order to maintain that balance, the Minnesota Supreme Court has adopted the following three-pronged process for determining if disqualification is appropriate where potentially conflicting representations are involved:

> (a) Considering the facts and the issues involved, is there a substantial, relevant relationship or overlap between the subject matters of the two representations? (b) If so, then certain presumptions apply: First, it is presumed, irrebuttably, that the attorney received confidences from the former client and he or she will not be heard to claim otherwise. Second, it is also presumed but subject to rebuttal that these confidences were conveyed to the attorney's affiliates. (c) Finally, at this stage, if reached, the court weighs the competing equities.[96]

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

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

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

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

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

[95] The OAH has asserted inherent authority to regulate the conduct of attorneys appearing in contested case hearings and to ensure compliance with the Minnesota Rules of Professional Conduct. *See* Minn. R. Prof. Conduct 8.3; *see also, Lavin v. Civil Serv. Comm'n*, 18 Ill. App. 3d 982, 990, 310 N.E.2d 858, 865 (1974) (stating that "an administrative agency must act within the rules and regulations which it has enacted"). *But see Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment*, 44 N.C. App. 539, 543, 261 S.E.2d 520, 523 (1980) (stating that "the formal rules of evidence applicable to the General Court of Justice, even if they were controlled by the Code of Professional Responsibility, are not binding on local municipal administrative agencies").

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


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Various indirect limitations on a party's right to counsel have also been upheld. Thus, an agency's refusal to grant a continuance to a party whose counsel has another engagement at the time of the scheduled hearing does not abridge the right to counsel.[97] Also, the right to counsel is not impaired when agency rules limit the amount of attorneys' fees counsel may charge. In one case, an agency rule limiting attorneys' fees to ten dollars was upheld.[98] Moreover, a party is not denied the right to counsel if his or her counsel is incompetent.[99] The adverse effect of that rule is mitigated, to some degree, by the ALJ's obligation to develop a complete record on which the ultimate decision is to be made.[100] A party's right to counsel may be waived.[101] A knowledgeable waiver does not provide grounds for appeal.[102] Lack of counsel coupled with other factors may result in an unfair hearing,[103] but lack of counsel itself is not necessarily prejudicial.[104]

## 7.2.2 Personal and Nonlawyer Representation

Parties to contested case proceedings are not required to be represented by attorneys. Under the contested case rule, parties may represent themselves, or they may be represented by a person other than a lawyer if that representation is not prohibited as the unauthorized practice of law.[105] Normally, an individual or a partnership may appear in court pro se, that is, on their own behalf and without counsel. The same rule would apply in contested cases or other agency proceedings. As in court, however, a party who appears with counsel may not be allowed to represent himself by questioning witnesses or making argument.[106] When a

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

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

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

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

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

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

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

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

[105] Minn. R. 1400.5800 (2013).

[106] *See* H.C. Lind, Annotation, *Right of Litigant in Civil Action Either to Assistance of Counsel Where Appearing Pro Se or to Assist Counsel Where Represented*, 67 A.L.R. 2d 1102 (1959) and 67 Later Case Serv. 1102


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corporation is involved, the usual rule is that the corporation may not appear in court pro se and that any appearance on behalf of the corporation by a person other than a lawyer constitutes the unauthorized practice of law, even if the representative owns all of the corporation's stock.[107] Likewise, an individual or partnership that does not appear pro se may not be represented by any person other than a licensed attorney.

The power to regulate the practice of law on the state level is a judicial power vested only in the courts.[108] However, as a matter of comity, the courts may accept legislative declarations of policy pertaining to the practice of law.[109]

Generally, an administrative agency may not, by rule, permit the unauthorized practice of law or grant immunity to one who engages in it.[110] Moreover, many courts have held that practice before a state administrative agency constitutes the practice of law.[111] However, there is authority to the contrary.[112] The Colorado Supreme Court authorized nonlawyers to appear in agency proceedings of a legislative nature but refused to allow such appearances in cases of a quasi-judicial nature unless no legal issues were involved and the amounts in controversy were too small to warrant the employment of an attorney.[113] The only restriction the court imposed on nonlawyer representation in legislative type hearings was that it occur only if no vested liberty or property rights are involved.

In addition to the contested case rule, some other agency rules permit parties to be represented by nonlawyers.[114] In some cases, representation by nonlawyers is authorized by statute.[115] However, a non-lawyer cannot file an appeal of an administrative case with the Minnesota Court of Appeals on behalf of an individual or a corporation, even though the agent was allowed by statute to represent a party at the agency hearing.[116]

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(2007); *see also* Ernest H. Schopler, Annotation, Comment Note.-*Right to Assistance by Counsel in Administrative Proceedings*, 33 A.L.R. 3d (1970 and Supp. 2012).

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

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

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

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

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

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

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

[114] *See, e.g.,* Minn. R. 5215.1400 (2013) (Occupational Safety and Health Review Board).

[115] *See, e.g.,* Minn. Stat. § 268.105, subd. 6 (2014) (authorizing representation by nonlawyers in unemployment insurance hearings).

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


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The Minnesota Workers Compensation Court of Appeals has directly addressed the issue of whether corporations can be represented by non-attorneys before administrative law judges at OAH. In *Leopold v. Hillandale Farms,* the Minnesota Workers Compensation Court of Appeals concluded that a corporate insurer could not be represented in proceedings at OAH by a non-attorney.[117] Citing *Nicollet* and a Minnesota Attorney General Opinion from 1970,[118] the *Hillandale* court admonished that "[a] corporation is a legal entity, not a natural person; therefore any individual appearing before OAH on behalf of a corporation would be practicing law."[119] Two years later, the Minnesota Workers Compensation Court of Appeals extended its holding in *Hillandale* to find that a non-attorney could not represent an uninsured corporation in an administrative hearing at OAH.[120]

This outcome is consistent with the rule under Minnesota common law that "a corporation must be represented by an attorney in legal proceedings."[121] The leading Minnesota case addressing the issue of corporate representation by counsel is *Nicollet Restoration, Inc. v. Turnham*.[122] In *Nicollet*, a commercial landlord-tenant dispute was removed from conciliation court[123] to district court, and when the commercial real estate company refused to retain counsel for the district court proceeding, the case was dismissed.[124] The Minnesota Court of Appeals affirmed the dismissal and the Minnesota Supreme Court agreed, holding that a corporation must always be represented by an attorney when appearing in district court.[125] The *Nicollet* court explained the rationale for its decision:

> A non-attorney agent of a corporation is not subject to the ethical standards of the bar and is not subject to court supervision or discipline. The agent knows but one master, the corporation, and owes no duty to the courts. In addition, a corporation is an artificial entity which can only act through agents. To permit a lay individual to appear on behalf of a corporation would be to permit that individual to practice law without a license.[126]

The *Nicollet* court determined that Minnesota Statutes, section 481.02, subdivision 2 (2014), prohibits a corporation from appearing "in any court in the state" through a non-

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[117] 48 W.C.D. 257, 262 (Minn. Workers' Comp. Ct. App. 1993).

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

[119] *Hillandale*, 48 W.C.D. at 262.

[120] *See Christian,* 55 W.C.D. at 395-96.

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

[122] 486 N.W.2d 753 (Minn. 1992)

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

[124] *Nicollet*, 486 N.W.2d at 753-54.

[125] *Id.* at 754-55.

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


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attorney agent.[127] "Since corporations are distinct legal entities, any individual attempting to appear on behalf of the corporation would, in effect, be practicing law."[128] The court interpreted the unauthorized practice of law statute to allow a corporation to appear without counsel only when that individual is specifically named as a party to a lawsuit.[129]

Federal agencies routinely permit parties to be represented by nonlawyers, but such persons generally must be licensed by the relevant agency and meet specified criteria.[130] A person authorized to appear before a federal agency may not appear before a state agency in similar matters if prohibited by state law.[131] However, that person's appearance before the federal agency does not constitute the unauthorized practice of law.[132]

## 7.2.3 Attorneys' Fees and Costs

Before 1986, few state statutes permitted parties to be awarded their attorneys' fees in contested case proceedings.[133] In the absence of a specific statutory provision or an agreement or stipulation to pay them, the general rule is that attorneys' fees, or a party's costs and disbursements, may not be awarded in an administrative proceeding.[134] This follows the so-called "American rule" applied in civil actions.[135] Under this rule, an agency may not order one litigant to pay the expenses of another, even if public interests are involved, unless the agency has specific statutory authorization to do so.[136] However, one state court has permitted such an award under the common-fund theory in quasi-judicial reparations cases.[137] One of the factors precluding the award of attorneys' fees in administrative proceedings is an agency's frequent

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[127] *See Nicollet,* 486 N.W.2d at 755.

[128] *Id*.

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

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

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

[132] *Sperry*, 373 U.S. at 384-85.

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

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

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

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

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


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participation as a party. Agencies generally are considered to be immune from the payment of attorneys' fees, costs, or disbursements.[138]

The restriction on awards of attorneys' fees in administrative proceedings was lifted somewhat with the enactment of the Equal Access to Justice Act.[139] It authorizes an award of attorneys' fees and costs to a prevailing party in contested cases. However, because the act is a limited waiver of sovereign immunity, courts strictly construe its language.[140] *Party* is defined in the act to include only small businesses, namely those with not more than 500 employees or annual revenues over seven million dollars.[141] Recovery is only available against the state,[142] and only in cases where the state's position is represented by counsel and does not have a reasonable basis in law and fact.[143] Recovery is not available in proceedings to fix rates or in proceedings to grant or renew licenses. The adverse effects of a party's inability to obtain attorneys' fees in other contested cases may be mitigated in those cases where agencies may limit the attorneys' fees chargeable or where a party has a right to counsel provided by a third party.[144] In other cases, a successful party may be permitted to include those costs in its rate

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

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

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

[141] Minn. Stat. § 15.471 subd. 6 (2014).

[142] See City of Mankato v. Mahoney, 542 N.W.2d 689, 692-93 (Minn. Ct. App. 1996) (holding that landlord was not entitled to attorney fees and expenses under the Minnesota Equal Access to Justice Act in action challenging municipality's decision to revoke his rental license, since municipality was not equivalent of "state" within meaning of the Act, and city council did not have statewide jurisdiction to be considered state agency under Minnesota Administrative Procedure Act.)

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

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


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requests.[145] Moreover, agencies may be required to limit a party's costs.[146] When attorneys' fees may be awarded, only those services performed in the contested case should be considered.[147] The right to attorneys' fees will depend on the statute in force at the termination of the proceeding[148] and on the proper promulgation of agency rules.[149] In addition, the right to attorneys' fees may be different for different parties.[150]

Some agencies have the power, in disciplinary proceedings, to order a licensee to pay all costs of the proceeding resulting in disciplinary action. For example, under Minn. Stat. § 150A.08, subd. 3a, the Board of Dentistry may recover "the cost of the investigation and proceeding," which specifically includes attorneys' fees and investigation costs incurred by the attorney general in addition to statutory costs and disbursements.[151]

Administrative agencies and tribunals are not courts.[152] Therefore, statutes that authorize courts to award attorneys' fees and costs do not apply to administrative agencies.[153] Likewise, administrative proceedings (like contested cases) are not actions.[154] Consequently, statutes that authorize the award of attorneys' fees, costs, or disbursements in actions do not apply to administrative proceedings. However, on appeal from an agency decision in a contested case the prevailing party may be entitled to an award of attorneys' fees.[155]

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

[146] *See, e.g.,* Minn. Stat. § 268.105, subd. 6 (2014) (unemployment insurance).

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

[148] *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982).

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

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

[151] Minn. Stat § 150A.08, subd. 3a (2014).

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

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

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

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


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# 7.3 Prehearing Conferences and Settlement Procedures

## 7.3.1 Prehearing Conferences

A contested case is commenced when the notice of and order for hearing or other authorized pleading is served by the agency.[156] At that time, the ALJ obtains jurisdiction over the case and the contested case rules become operative. Those rules specifically authorize prehearing conferences.[157] The prehearing conference may be scheduled by the agency in its hearing notice, or the judge may order that one be held. The judge's order may be issued on the judge's own motion or at the request of a party.[158]

The purpose of the prehearing conference is apparent from the broad language of the rule. It states that the purpose of the prehearing conference is to simplify issues, to consider amendments to the hearing notice, to obtain factual and evidentiary stipulations, to consider proposed witnesses, to identify and exchange documentary evidence, to establish discovery deadlines and hearing dates, to explore settlement or the use of available settlement procedures, and to consider other necessary and advisable matters relating to the case.[159]

The subjects addressed at the prehearing conference will vary significantly from one case to another depending on the nature of the issues and the number of parties involved. In some cases, it may be necessary to establish a detailed schedule of prehearing procedures, including deadlines for the filing of intervention petitions, motions, and prefiled testimony. It may also be necessary to establish a discovery timetable, determine the order and burden of proof, ascertain the desire for court reporters, transcripts and/or interpreters, discuss the possibility of mediation, and resolve other housekeeping matters. The prehearing conference is commonly used to establish procedures to decide legal issues that should be resolved before the hearing. Thus, where evidentiary or jurisdictional issues are identified, a timetable for filing the necessary motions and argument may be set. Likewise, if no material facts are in dispute, procedures for resolving the matter on a motion for summary disposition can be set.

Prehearing conferences are generally held by telephone at a prescheduled time before the scheduled hearing date. Telephone conferences are particularly appropriate when one party resides outside the metropolitan area or when the prehearing issues to be considered are limited in number and simple in nature. Whether conducted by telephone or in person, a record of the proceeding may be made. With limited exceptions, prehearing conferences are not required to be on the record and are usually recorded only in complex cases or at a party's request. Under the contested case rules, any matters addressed at the prehearing conference, including the agreements and stipulations of the parties, may be entered on the record or may be made the subject of an order by the judge. [160] Commonly, the agreements, stipulations, and orders made during the prehearing conference are incorporated into a subsequent prehearing order issued by the judge. If the prehearing order misstates any agreements made or any

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[156] Minn. R. 1400.5600, subp. 1 (2013).
[157] *Id.* 1400.6500.
[158] *Id.*
[159] *Id.*
[160] *Id.*


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proceedings had, it must be promptly challenged. If no challenge is made, the parties will be bound by the order issued.

The major impediment to a productive prehearing conference is confusion over the parties' respective claims and defenses. Although the agency is required to include a statement of the allegations or issues involved in the contested case in its notice of and order for hearing, agency statements are frequently framed in broad and general terms. This is often due to the agency's lack of knowledge of the grounds for appeal that have been taken from administrative decisions.[161] Issue confusion also arises because respondents are not generally required to file a responsive pleading to the agency's hearing notice.[162] Therefore, issue identification is a fundamental goal of many prehearing conferences. Until the issues are known, the parties are unable to determine their discovery needs, the witnesses and exhibits they intend to use, or the expected duration of their cases-in-chief.

In order to have a productive prehearing conference, the judge is authorized to require that the parties file a prehearing statement before the scheduled conference.[163] The judge may require the parties to address any matters he or she deems necessary for a productive prehearing conference in the statement. In many cases, the most useful prehearing statement is one that clarifies and sharpens the factual and legal issues in dispute. Consequently, prehearing statements are commonly required to contain each party's statement of the issues, his or her claims and defenses, and a short summary of the facts relied on. In other cases, such as lengthy and complex ratemaking proceedings, the prehearing statement may be made in the form of a proposed prehearing order suggesting a detailed procedural timetable governing all prehearing matters.

## 7.3.2 Settlement Procedures

Under the contested case rules, a variety of formal and informal settlement procedures are available. These include prehearing conferences, settlement conferences, mediation, and orders for settlement discussions. Generally, the ALJ may make settlement inquiries and explore the parties' interest in mediating their dispute during the prehearing conference. Where there are few issues and a limited number of factual disputes, the prehearing conference can be a useful vehicle for productive settlement discussions. If the parties are reluctant to seriously discuss a settlement in the judge's presence, they may ask the judge to excuse himself or herself while they do so. In such cases, the judge may either recess the prehearing conference while settlement discussions take place or conclude the conference and request that the parties discuss a settlement after the judge leaves.

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[161] Many agency rules permit appeals from staff determinations without requiring a statement of the grounds for the appeal.

[162] In some cases, responsive pleadings are required under the rules of the agency involved in the contested case. In discrimination cases under the Minnesota Human Rights Act, both a complaint and an answer must be filed. *See* Minn. R. 5000.0900, .1200 (2013).

[163] *Id*. 1400.6500, subp. 2.


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## 7.3.3 Settlement Conference

In addition to prehearing conferences, the contested case rules specifically authorize settlement conferences.[164] The purposes of a settlement conference and the procedures applicable to such a conference are different from the purposes and procedures of a prehearing conference. The principal purpose of a settlement conference is to assist the parties in resolving the dispute; the consideration of other issues commonly addressed at a prehearing conference is secondary.

Settlement conferences are held only at the direction of the chief ALJ and on the request of a party or the judge assigned to the case. If requested, the chief judge is required to assign the case to a judge other than the assigned hearing judge for the purpose of conducting the settlement conference. Using a judge other than the one who will preside at the hearing encourages the parties to discuss their cases openly and without fear of prejudice. It also permits the settlement judge to take an active role in the settlement negotiations that might otherwise be deemed improper. If the parties have previously engaged in mediation, a settlement conference will be ordered only if all parties agree. Similarly, unless all parties and the settlement judge agree, a unilateral request for a settlement conference does not constitute good cause for a continuance.[165]

Settlement conferences are held at a time and place agreeable to all parties and the settlement judge. If any party would be required to travel more than 50 miles to attend the conference, it must be conducted by telephone unless the traveling party otherwise agrees. The parties are required to attend or be available by telephone at the time of the settlement conference and must be prepared to participate in meaningful settlement discussions. Although the primary purpose of the conference is to reach a settlement, the parties must also be prepared to provide information on and to discuss the other matters contained in the prehearing conference rules. The parties are also required to discuss settlement options before the conference if they believe that a reasonable basis for settlement exists.[166] This requirement is designed to encourage the parties to resolve the case, if possible, before the settlement conference in order to save the judge's time and reduce the costs of the proceeding. Even if unsuccessful, this requirement helps the parties identify the specific matters in dispute and gives them an opportunity to hear and evaluate their adversary's position before the settlement conference is held. In that way, the settlement conference can be conducted with greater dispatch and in a more meaningful manner.

If a settlement is not reached during the settlement conference, other prehearing procedures and issues are considered just as they would be at a prehearing conference. If any agreements or stipulations are made pertaining to the facts or other issues in the case, the settlement judge must issue an order approving those agreements or stipulations. That order is binding on the judge who will preside at the hearing.[167]

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[164] *Id*. 1400.6550.
[165] *Id.*, subp. 2.
[166] *Id.*, subp. 4.
[167] *Id.*, subp. 6.


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## 7.3.4 Mediation

In the early 1980s, public interest grew in alternative forms of dispute resolution in civil and administrative proceedings. Parties and their attorneys were looking for ways to resolve disputes that did not involve the costs, delays, and strained relations associated with litigation. This interest prompted an amendment to the APA authorizing the chief ALJ to adopt rules governing voluntary mediation in rulemaking and contested cases.[168] In 1985, rules governing voluntary mediation in contested cases were adopted.[169] As defined in those rules, mediation is a voluntary process undertaken by the parties, with the assistance of a neutral mediator, in an attempt to resolve the dispute.

Mediation is a substantially different process from other settlement procedures under the rules. It is wholly voluntary and is undertaken only on the agreement of all the parties. Unlike other settlement procedures, legal issues are not decided, and prehearing procedures are not considered. Moreover, mediation sessions are not held before the judge who may hear the case, and the mediator, unlike a judge, issues no orders and usually expresses no opinion on the merits of the parties' positions. The mediator has no authority to impose a settlement on the parties and will not express preferences on settlement options, propose solutions, or evaluate the strengths or weaknesses of a party's case. The parties have sole responsibility for reaching an agreement.

Mediation has a variety of benefits over litigation. It can substantially reduce the costs and time delays of formal legal proceedings, and it helps preserve the relationship between the parties. Moreover, mediation involves no coercion. A party may refuse to mediate a dispute, and even if consent is given, it can be revoked at any time.[170] Since the parties retain complete control over the matter, they can avoid an "imposed" decision, and they are generally more satisfied with the ultimate resolution of the matter. This results in better compliance than that which would come from a decision on the merits. Mediation may also free staff time and may permit more active involvement by administrators and experts and less involvement by attorneys.

Mediation may be particularly useful in contested cases that do not involve major factual disputes or in very complex cases that would be extremely difficult and expensive to litigate. Mediation may also be useful in those cases where the agency involved has some discretion. Where the dispute involves policy choices and agency discretion, the agency will be in a better position to mediate a settlement than it will be in cases where a statute or rule mandates a specific result.

Agencies must comply with statutory requirements and are usually bound by their own rules.[171] Hence, any settlement agreement reached during mediation must be consistent with

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[168] 1985 Minn. Laws ch. 13, § 87, at 2166 (amending Minn. Stat. § 14.51 (1984)).

[169] Minn. R. 1400.5950 (2013).

[170] *Id.*

[171] *See White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 7-9 (Minn. 1982) (rule); *Sellner Mfg. Co. v. Comm'r of Taxation*, 295 Minn. 71, 74, 202 N.W.2d 886, 888 (1972) (statute). However, courts have recognized that agencies may depart from their rules in limited circumstances. *See, e.g., State Dep't of Commerce v. Matthews Corp.*, 358 So. 2d 256, 259 (Fla. Dist. Ct. App. 1978); *Koronis Manor Nursing Home v. Dep't of Pub. Welfare*, 311 Minn. 375, 379-80, 249 N.W.2d 448, 451 (1976).


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state and federal statutes and must normally be consistent with agency rules. This is appropriate because mediation should not be used as a vehicle for avoiding compliance with agency rules. If mediation could be used in that manner, politics and favoritism could corrupt the mediation process and the rule of law.

Under the rule, OAH mediation services may be provided to any state agency, court, or political subdivision. The services are available in contested case proceedings or in any other contested matter except labor relation disputes under the jurisdiction of the bureau of mediation services.[172] A contested case need not be commenced in order to obtain the services. In order to initiate mediation when a contested case has not been commenced, the state agency, court, or political subdivision must file a written request with the chief ALJ. Copies of the request must be served on all persons that would be named as parties if a contested case were commenced. If a contested case has been commenced, the request for mediation may be made by any party or the judge assigned to the case.[173]

On receipt of a request for mediation, the chief judge must contact all parties or persons directly affected to determine if they are willing to mediate the dispute. If there is any opposition to mediation, the request will be denied. However, if all the parties or persons directly affected are willing to participate, an order for mediation setting forth the name of the mediator and the date by which mediation must be initiated will be issued. Parties may properly express a preference for particular mediators. The mediator appointed will be an ALJ.[174]

If mediation is unsuccessful and the same judge who mediated the dispute is assigned to hear it, or if that judge discusses the mediation with the judge assigned to hear the case, the parties could be prejudiced. Recognizing this, parties would be reluctant to mediate or to engage in the type of frank and open discussions necessary in mediation sessions. The mediation rule contains several provisions that were designed to eliminate any such prejudice and to remove any inhibition to the free flow of information and ideas in the mediation process. The mediator is precluded from hearing the matter if mediation is unsuccessful[175] and may not, without the consent of the participants, directly or indirectly communicate with any person regarding the facts and issues involved in the mediation.[176] Moreover, any offers to compromise or evidence of conduct or statements made during mediation are not admissible in any subsequent hearing.[177]

The mediation rule does not specify how mediation sessions are to be conducted or spell out the role of the mediator or the parties. As a general rule, the mediator will meet with all the participants and their representatives to discuss the underlying facts, the participants' respective positions, and proposed settlement offers. When necessary to further negotiations, the mediator may caucus privately with one party. The mediation sessions are informal meetings. No testimony is taken and no record is made. Although the participants may be represented by counsel, the parties will normally take an active role in the meetings held. The

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[172] Minn. R. 1400.5950, subp. 2 (2013).
[173] *Id.*, subp. 3.
[174] Minn. Stat. § 14.48, subd 3(e) (2014).
[175] Minn. R. 1400.5950, subp. 7 (2013).
[176] *Id.*, subp. 4.
[177] *Id.*, subp. 6.


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initial meeting will usually be devoted to the establishment of guidelines for future meetings. At that time, deadlines may be established for the exchange of information and the mediator's role can be discussed. Because mediation is a voluntary process and entails the active involvement of all participants, the rule allows them to fashion procedures and schedules they feel are appropriate to the nature of the case.

Since mediation is a voluntary process, the mediator, the judge, and the chief judge have no power to require the parties to perform any specific act, to require a person to appear at a mediation session, or to rule on any motions. Likewise, once mediation has begun, there are no procedures whereby interested persons may intervene in the mediation process or comment on any agreements made. However, as discussed elsewhere, interested persons other than those who participated in the mediation process may have a right to comment on any settlement agreement made.[178]

Mediation is terminated when any participant announces an unwillingness to continue or when a settlement agreement is negotiated and signed.[179] On termination, the mediator must forward the agreement to the agency or the judge assigned to the case for appropriate action, or give notice that mediation has been terminated without agreement. When a contested case has been initiated, the settlement agreement should be submitted to the judge assigned to it. If no contested case has been commenced, the agreement may be submitted directly to the agency, court, or political subdivision involved.

## 7.4 Motions and Subpoenas

### 7.4.1 Motions

Before an ALJ is assigned to a contested case, any motions regarding the matter must be made to the agency responsible for commencing the contested case. The motions allowable at the preassignment stage will be governed by the procedural rules of the agency or the *ad hoc* procedures it is willing to adopt. However, after a judge is assigned to the matter,[180] all motions must be made to the judge, and motions to the agency are unauthorized.[181] The judge's exclusive jurisdiction to hear and decide motions normally continues until the judge's report is issued. When the judge's report consists of a nonbinding recommendation to the agency, the judge loses jurisdiction to hear and rule on motions when the report is issued.[182] Likewise, when a recommendation is involved, the rules provide that the judge may not amend the report after it is issued except to correct clerical or mathematical errors.[183] Therefore, for nonbinding reports, petitions for rehearing or reconsideration must be made to the agency once the judge's report is issued.[184]

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[178] *See* § 7.5 in this chapter.
[179] Minn. R. 1400.5950, subp. 5 (2013).
[180] The assignment of judges is governed by Minn. R. 1400.5400 (2013).
[181] Minn. Stat. § 14.58 (2014); Minn. R. 1400.7600 (2013).
[182] Minn. R. 1400.8300 (2013).
[183] *Id.*
[184] *Id.*


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When the judge's decision is binding on the agency, the judge's jurisdiction to hear and rule on motions continues after the decision is issued. Therefore, in such cases, motions for rehearing or reconsideration must be filed with the judge, and not with the agency.[185] However, once the judge's report or the agency's decision is appealed to the courts, the jurisdiction of the judge or the agency over the matter ends, absent a remand order by the court.[186]

All motions filed with the judge must comply with the requirements of the contested case rules. Those rules require that all applications to a judge for an order must be made by motion.[187] However, not every request for an order is a motion. Some orders must be requested from the chief ALJ. They include requests for mediation services, requests for settlement conferences, and requests for orders imposing sanctions for frivolous delays in precomplaint proceedings under the Minnesota Human Rights Act.[188] In addition, affidavits of prejudice requesting the removal of a judge from a contested case must be filed with the chief judge.[189]

Oral motions are only permitted during a hearing or a prehearing proceeding.[190] All other motions must be in writing and must be served on all parties, the judge, and the agency, even if the agency is not a party. Written motions must set forth the relief or order sought, and the grounds for the relief requested must be stated "with particularity."[191] The memorandum of law filed with the motion may not exceed 25 pages in length, without permission from the judge.[192] When the relief sought depends on facts not in the record, the motion should be supported with necessary affidavits, as in civil practice. Since the judge may not schedule a hearing on the motion, affidavits may be essential for establishing one's entitlement to relief. Affidavits can also be used to reduce a party's costs and to avoid delays. An affidavit containing necessary factual information may make a hearing unnecessary or may persuade other parties not to file objections that might otherwise be filed.

The judge will schedule a motion hearing only if it is necessary to develop a full and complete record in order to make a proper decision.[193] Thus, if disputed fact issues must be resolved to decide the motion, a motion hearing will usually be held. On the other hand, if the motion raises purely legal issues, a hearing will not usually be scheduled. Since the judge has discretion in determining whether a hearing will be ordered, the parties are required to state their desire for a hearing at the time their motion or response is filed.[194] Although not required

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[185] *Id.*

[186] *See Anchor Cas. Co. v. Bongards Co-op Creamery Ass'n*, 253 Minn. 101, 106, 91 N.W.2d 122, 126 (1958). However, for regulatory purposes, the agency retains jurisdiction to act unless a stay is issued under Minn. Stat. § 14.65 (2014). *See Rock Island Motor Trans. Co. v. Murphy Motor Freight Lines*, 239 Minn. 284, 293, 58 N.W.2d 723, 729 (1953); *Stearns-Hotzfield v. Farmers Ins. Exchange*, 360 N.W.2d 384, 389 (Minn. Ct. App. 1985) (agency's right to reverse an earlier erroneous adjudication lasts until jurisdiction is lost by appeal or until a reasonable time has run that would be at least co-extensive with the time required for review).

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

[188] *Id.* 1400.5950, subp. 3, .6550, subp. 2, .7050, subp. 1.

[189] *Id.* 1400.6400.

[190] *Id.* 1400.6600.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*


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by the rule, any request should state the reasons why a hearing is necessary. When a hearing is necessary, it may be held in the presence of the parties or, if only oral argument is involved, by telephone.

The written motion must advise other parties that if they wish to contest the motion, they must file a written response with the judge and serve copies of the response on all other parties within ten working days after the motion is received.[195] The response must set forth the nonmoving party's objection to the relief or order requested. The parties to contested cases frequently desire prompt resolution of a particular motion. In such cases, they may, with the judge's consent, arrange expedited procedures. In motion practice, like other prehearing procedures, ALJs strive to create flexible procedures.

In ruling on motions, when the contested case rules are silent the judge is required to apply the Minnesota Rules of Civil Procedure for the District Courts if it is determined appropriate in order to promote a fair and expeditious proceeding.[196] This provision makes it possible for the parties and the judge to apply traditional and familiar concepts and precedents to a variety of issues the contested case rules do not address. Generally speaking, the same types of motions that arise in civil practice will arise in a contested case proceeding. Motions may be made to change the location of a hearing, to quash a subpoena, to limit discovery, or to exclude evidence. Motions may also be made to obtain summary disposition, dismissal on jurisdictional grounds, or a more definite statement of the issues or charges involved in a case.

Summary disposition is the administrative equivalent to summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[197] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[198] However, motions for dismissal are seldom granted on the completion of the case-in-chief of the party with the initial burden of producing evidence. The traditional view has been that such a disposition is inappropriate in administrative proceedings and that a complete record should be obtained before a matter is decided.

The written orders issued by the judge are generally in the form of formal orders. All orders are binding on the parties in the absence of a timely objection.[199]

No motions may be made directly to an agency once a judge is assigned to the contested case, but an agency may decide a motion or may review a judge's order on a motion if the judge certifies the motion to the agency during the course of the proceeding.[200] Under the contested case rules, a party may request that a pending motion be certified to the agency, and after the judge has issued an order on a motion, any party adversely affected by the order may request that the motion and order be certified to the agency. When a party requests that a pending motion be certified, the judge may decide the motion before certification or may

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[195] *Id.*

[196] *Id.*

[197] MINN. R. CIV. P. 56.03; *Sauter v. Sauter*, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K (2013).

[198] *See* MINN. R. 1400.6600 (2013).

[199] *Id.* 1400.7100, subp. 3.

[200] *Id.* 1400.7600.


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certify it without first considering the merits and issuing an order. In deciding whether to rule on a motion before certification, the judge will consider the same factors that must be considered in determining whether certification is appropriate. Especially weighty are considerations of timeliness, agency expertise, and the nature of the issue involved. Thus, if a prompt decision is necessary or agency expertise is involved, the likelihood of certification without prior consideration by the judge is greater than if a legal issue concerning which there is a substantial ground for a difference of opinion exists.

Motions regarding the admissibility of evidence and the application and interpretation of the contested case rules of the OAH cannot be certified, and certification is not permitted when the judge's report contains a decision that is binding on the agency.[201] For example, the judges' decisions in discrimination cases arising under the Minnesota Human Rights Act and in contested cases arising under the Minnesota Occupational Safety and Health Act are binding on the departments initiating those cases. Therefore, the certification of motions in contested cases arising under those statutes is not permissible. However, where the judge makes a recommendation to the agency, rather than a binding decision, the agency may review all orders on motions made during the course of the matter in its final order.[202]

Under Rule 103.03(h), Minnesota Rules of Civil Appellate Procedure, two types of interlocutory trial court orders may be appealed if the trial court certifies that the question presented is important and doubtful. The rule only applies to orders denying a motion to dismiss for failure to state a claim upon which relief can be granted and orders denying summary judgment. Although a "trial court" is defined as "the court or agency whose decision is sought to be reviewed"[203] an ALJ's order - even when the ALJ is making a final decision - apparently is not appealable under the rule.[204]

When a motion is certifiable, the judge must consider six specific criteria in deciding whether to certify it:

1. whether the motion involves a controlling question of law concerning which there is substantial ground for a difference of opinion;
2. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing;
3. whether the delay between the ruling and the motion to certify would adversely affect the prevailing party;
4. whether to wait until after the hearing would render the matter moot and render it impossible for the agency to reverse or for a reversal to have any meaning;

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[201] *Id.*

[202] *Id.; see also Surf & Sand Nursing Home v. Dep't of Human Servs.*, 422 N.W.2d 513, 519 (Minn. Ct. App. 1988) (citing this rule and holding that an ALJ's decision on procedural matters is not final as to the agency).

[203] MINN. R. CIV. APP. P. 101.02, subd. 4.

[204] In *State, by Johnson v. Hibbing Taconite Co.*, No. C6-89-2041, C8-89-2042 Minn. App. Dec. 12, 1989), the court refused to review an ALJ's interlocutory order denying reconsideration of a motion for summary judgment. The court apparently concluded that Rule 103.03 does not apply to agency orders in the absence of a statutory authorization for a party to seek review. In the context of discovery, however, the court has granted discretionary review of an ALJ's discovery order. *See In re Parkway Manor Healthcare Ctr.*, 448 N.W.2d 116, 118 (Minn. Ct. App. 1989).


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5. whether it is necessary to promote the development of the full record and avoid remanding; and
6. whether the issues are solely within the expertise of the agency.[205]

## 7.4.2 Subpoenas

In contested case proceedings, there are several sources of subpoena power. The primary source is the APA. It authorizes the chief judge to issue subpoenas "for the attendance of a witness or the production of books, papers, records or other documents as are material to any matter being heard."[206] There is an important difference between administrative subpoena practice and district court practice. The contested case rule implementing this subpoena power permits subpoenas to be issued only on written request to the judge assigned to the case and with a written justification.[207] The rule does not expressly limit the right to request a subpoena to only hearing participants. However, the statute permits subpoenas only on the initiative of the chief judge or on the written request of an "interested party."[208] The statutory language suggests that subpoenas cannot be issued on the written request of a participant that does not have party status. Moreover, the contested case rule governing the rights of such a participant does not include the right to obtain subpoenas.[209] Nonetheless, a good policy argument can be made that persons who have a statutory right to participate in a contested case or persons who are permitted to participate under the rule should be able to obtain subpoenas in an appropriate case. Without subpoenas, their right to participate may be impaired and important evidence may not be presented. In fact, the failure to issue subpoenas requested by a party will require reversal, at least where the record does not disclose why the witnesses did not appear.[210]

The written request for a subpoena must contain a brief statement demonstrating the potential relevance of the evidence or testimony sought. The request must also specifically describe any documents sought and must state the full name and the home or business address of all persons to be summoned. If known, the date, time, and place for responding to the subpoena must also be included in the request.[211] Failure to comply with the requirements in the rule will result in the denial of subpoena requests. Discovery subpoenas to non-parties generally cannot be issued without notice to the litigants.[212]

If it is determined that the subpoena request should be approved, the judge recommends issuance to the chief judge who has final authority to grant the request under the statute. If a subpoena is authorized by the chief judge, it is prepared at the OAH and mailed to the person who requested it. More expeditious handling can be arranged when appropriate.

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[205] MINN. R. 1400.7600 (2013).

[206] Minn. Stat. § 14.51 (2014).

[207] Minn. R. 1400.7000, subp. 1 (2013).

[208] Minn. Stat. § 14.51 (2014).

[209] *See* Minn. R. 1400.6200, subp. 5 (2013).

[210] *See Ntamere v. DecisionOne Corp.*, 673 N.W.2d 179, 181-82 (Minn. Ct. App. 2003); *Thompson v. Cnty. of Hennepin*, 660 N.W.2d 157, 160-61 (Minn. Ct. App. 2003).

[211] MINN. R. 1400.7000, subp. 1 (2013).

[212] *See Sandberg v. Comm'r of Revenue*, 383 N.W.2d 277, 281-82 (Minn. 1986).


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The party requesting the subpoena is responsible for its service. Under the rules, the subpoena must be served in the manner provided by the Rules of Civil Procedure for the District Courts, unless the statutes applicable to the case provide otherwise.[213] so service of the subpoena can generally be made by any person not a party to the contested case.[214] The cost of service and the fees and expenses of any subpoenaed witness must be paid by the party at whose request the witness appears. The costs and fees are generally regulated by statute.[215] In most cases, the party causing a subpoena to be served is not required to file the subpoena and a proof of service with the judge. However, proof of service will be required if a party files a motion for an order imposing sanctions for the failure to comply with any subpoena issued by the chief judge.[216]

Under the contested case rules, any person served with a subpoena issued by the judge or the chief judge may object to it by filing an objection with the judge. Objections must be filed promptly and cannot be filed after the time specified for compliance in the subpoena. The objection must be in the form of a motion to the judge requesting that the subpoena be canceled or modified.[217] The rule does not recognize challenges by third persons. Consequently, the question of whether a subpoena may be challenged by a person other than the person to whom it is issued will depend on the subject matter involved and the interest asserted. The usual rule is that an administrative subpoena cannot be challenged by a person other than the person to whom it is directed absent a showing of a proprietary right to the information sought, the existence of a privilege, or a constitutional, statutory, or common-law right to suppress the information.[218] The person served with the subpoena may object to it on the grounds that it violates the rights of another person. Thus, it has been suggested that an employer may be able to assert that the constitutionally protected privacy rights of its employees precludes disclosure.[219]

The procedures followed in considering the objections to subpoenas are the same as those followed in deciding other motions. Based on the filings made or on the hearing held, the judge may cancel or modify the subpoena if it is unreasonable or oppressive. In making that determination, the judge must consider the issues and amounts in controversy in the case, the costs and burdens of compliance when compared with the value of the testimony or evidence sought to the party's case, and whether alternative methods of obtaining the desired testimony or evidence are available.[220] For example, a party's request to subpoena an agency head may be denied if the evidence to be elicited can be obtained from a lower-ranking staff member. A

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[213] Minn. R. 1400.7000, subp. 2 (2013).

[214] Minn. R. Civ. P. 45.02.

[215] The controlling statute in most cases is Minn. Stat. § 357.22 (2014).

[216] Minn. R. 1400.7000, subp. 2 (2013).

[217] *Id.*, subp. 3.

[218] *See In re Selesnick*, 115 Misc. 2d 993, 454 N.Y.S.2d 656, 658 (1982); *see also Vogue Instrument Corp. v. Lem Instruments Corp.*, 41 F.R.D. 346, 348 (S.D.N.Y. 1967) (confidential trade secrets may be protected); *In re Camperlengo v. Blum*, 56 N.Y.2d 251, 253-56, 436 N.E.2d 1299, 1300-1301, 451 N.Y.S.2d 697, 698-99 (1982) (physician-patient privilege does not create absolute privilege protecting psychiatrists' patient records from agency subpoenas in investigation of billing practices).

[219] *See United States v. Allis-Chalmers Corp.*, 498 F. Supp. 1027, 1030-31 (E.D. Wis. 1980).

[220] Minn. R. 1400.7000, subp. 3 (2013).


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subpoena may also be limited if it goes to a matter that is outside the scope of the party's intervention or conflicts with the rights and privileges of the party.

If the subpoena requests trade secrets, proprietary information, or nonpublic data under the Minnesota Government Data Practices Act,[221] the judge may issue necessary protective orders. Moreover, the judge may require the requesting party to pay the reasonable costs incurred in producing any documents or other tangible things.

Unless authorized by a constitutional or statutory provision, administrative agencies and officials have no contempt powers.[222] Since ALJs, including the chief judge, have not been vested with such powers a person may not be held in administrative contempt and fined or jailed for failing to comply with a contested case subpoena. Nonetheless, when a party fails to comply with a contested case subpoena, it may be subject to other sanctions.[223] Some courts have recognized that sanctions may be imposed on a party that refuses to comply with a subpoena issued by an agency official in a quasi-judicial proceeding,[224] and the contested case rules suggest that sanctions may be imposed on a party in that situation. The subpoena rule alludes to the imposition of sanctions when a person fails to comply with a subpoena,[225] but no rule specifically authorizes sanctions for noncompliance with subpoenas, and the kinds of sanctions and the conditions for their imposition are not addressed. One would expect the discovery rules to address the issue. However, they permit sanctions only if a party fails to comply with a discovery order.[226] Since subpoenas are not obtained on notice and motion, a subpoena is not an order for purposes of that rule. It follows that sanctions may not be imposed on a party that refuses to comply with a subpoena unless an order directing compliance is obtained first, which requires a motion to the judge, consistent with the procedure alluded to in the subpoena rule. If a party fails to comply with the order for compliance, the sanctions available under the discovery rule are available. Alternatively, the party may be held in default.[227] If a person other than a party refuses to comply with a subpoena of the chief judge, no specific sanctions are available under the contested case rules. In that case, to obtain compliance with the subpoena, the party who requested it would be

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[221] Minn. Stat. §§ 13.01-.90 (2014).

[222] *See ICC v. Brimson*, 154 U.S. 447 (1894), *overruled on other grounds by Bloom v. State of Ill.*, 391 U.S. 194, 199-200 (1968); *State ex rel. Peers v. Fitzgerald*, 131 Minn. 116, 119-21, 154 N.W. 750, 752 (1915); *Wright v. Plaza Ford*, 164 N.J. Super. 203, 215-16, 395 A.2d 1259, 1265-66 (1978) (legislature may not validly grant criminal contempt powers to administrative agency).

[223] *See* § 8.7.

[224] *See, e.g., NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970); *General Motors Corp. v. Blair*, 129 N.J. Super. 412, 423-24, 324 A.2d 52, 58 (1974). *But see NLRB v. Int'l Medication Sys.*, 640 F.2d 1110, 1114-16 (9th Cir. 1981). *See generally* Robert L. Williams, *Authority of Federal Agencies to Impose Discovery Sanctions: The FTC - A Case in Point,* 65 GEO. L.J. 739, 756 (1977).

[225] Minn. R. 1400.7000, subp. 2 (2013).

[226] *Id.* 1400.6700, subp. 3.

[227] Under Minn. R. 1400.6000 (2013), a default occurs when a party fails to comply with any interlocutory order of the judge.


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required to seek enforcement in the district court in the district in which the subpoena is issued, as permitted by statute.[228]

In addition to the subpoenas that are available under the APA and the contested case rules of the OAH, subpoenas may be available under other statutes and rules in contested cases. The statutes applicable to the contested cases of some agencies specifically authorize the judge to issue subpoenas. For example, the Minnesota Human Rights Act authorizes the ALJ to issue subpoenas after a complaint is filed.[229]

Many statutes authorize state agencies to issue investigatory subpoenas.[230] Occasionally, agencies have utilized their independent subpoena power in contested case proceedings instead of obtaining subpoenas under the contested case rules. Some courts have permitted that practice,[231] but the Minnesota courts have not had an opportunity to determine when it is permissible. Although an agency's subpoena power should not be unnecessarily impaired or diluted, once a contested case is commenced, an agency acting in an administrative capacity as a party should not be permitted to issue investigative subpoenas solely to obtain discovery in a contested case or to compel witnesses to appear at the contested case hearing. When the agency is a party to a contested case, it should be subject to the same procedural rules that apply to other parties. It is inequitable for it to gain any unfair advantage over another party by using its own subpoena power. Thus, it should not be permitted to use its subpoena power to obtain discovery that the judge has refused to allow. Also, an agency's use of its independent subpoena power as a surrogate for the subpoenas that are available under the contested case rules is inconsistent with the spirit and intent of the Minnesota APA. The act contemplates that all parties will be governed by a uniform set of procedural rules.[232] Therefore, it is likely that the courts will carefully review any agency action to enforce investigative subpoenas during the pendency of a contested case. If no investigation is in progress, or if the agency is attempting to gain an unfair advantage by the use of its own subpoenas, the courts will likely deny relief on the grounds that enforcement would be an abuse of judicial process.

Agencies have seldom exercised their subpoena powers in contested cases. When they have, the other parties have invariably objected to the use of those powers, and some have sought to have the subpoenas quashed on motion to the ALJ. However, it is doubtful that the judge has any authority to quash the subpoenas of state agencies. The judge may quash

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[228] *See* Minn. Stat. § 14.51 (2014). If the relevant statute only permits an agency to seek enforcement, a private party must seek enforcement through an *ex relatione* proceeding. *See Ex-Cell-O Corp. v. Little*, 268 F. Supp. 755, 758 (S.D. Ind. 1966).

[229] Minn. Stat. § 363A.29, subd. 10 (2014).

[230] *See, e.g.,* Minn. Stat. §§ 15.08 (departments of management and budget and administration), 46.04, subd. 1 (department of commerce - banks), 144A.12 (department of health - nursing homes), 214.10, subd. 3 (licensing boards), 611A.56, subd. 2(1) (Crime Victims Reparations Board) (2014).

[231] *Mich. Dep't of Social Servs. v. Arden*, 81 Mich. App. 210, 215-16, 265 N.W.2d 91, 93 (1978); *cf. Nat'l Plate & Window Glass Co. v. United States*, 254 F.2d 92, 93 (2d Cir. 1958); *FCC v. Waltham Watch Co.*, 169 F. Supp. 614, 619-20 (S.D.N.Y. 1959); *In re Carvel Corp. v. Lefkowitz*, 77 A.D.2d 872, 875, 431 N.Y.S.2d 615, 618 (1980).

[232] Minn. Stat. § 14.51 (2014) (providing that the contested case rules supersede all other conflicting agency rules).


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subpoenas issued under the contested case rules,[233] but the quashing of investigatory subpoenas, like their enforcement, is a judicial act.[234]

Most statutes granting subpoena power to agencies require judicial action for enforcement.[235] Consequently, where a party objects to the agency's use of its own subpoenas in a contested case proceeding, it must challenge the subpoena in court or refuse to comply and must force the agency to seek enforcement in the courts. Since the ALJ cannot enforce agency subpoenas, the judge will not impose sanctions on a party for noncompliance with them as a judge would in situations involving subpoenas issued by the judge or the chief judge. However, the party may be exposed to sanctions by the agency if it fails to comply with the agency's subpoena.[236] For that reason, a court challenge rather than noncompliance may be advisable.[237] Administrative subpoenas must be issued in a timely and proper fashion to be enforceable.[238] Moreover, the courts will not enforce agency subpoenas if enforcement would constitute an abuse of judicial process. Thus, the courts will not enforce agency subpoenas issued after a criminal prosecution is begun if they are issued so that the government can strengthen its case,[239] to harass a party to settle a collateral suit, or for some other improper purpose.[240]

Some of the quasi-judicial hearings held by judges of the OAH are not APA contested cases. For example, by statute, the OAH holds quasi-judicial personnel hearings for Hennepin County.[241] It may also hold a variety of other quasi-judicial hearings for municipalities and school districts under its statutory authority to contract with political subdivisions for hearing services.[242] In these types of quasi-judicial hearings, the availability of subpoenas will depend on the authority and the procedural rules of the body for whom the hearing is held. If that body has subpoena power, the practice has been for the chief judge to exercise it consistent with the statutes and rules applicable to the particular proceeding. The subpoena powers of the body are exercised by the chief judge on the theory that the subpoena powers of that body are delegated to her when that body contracts for hearing services.[243] If the agency or political

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[233] Minn. R. 1400.7000, subp. 3 (2013).

[234] *See, e.g., FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 973-74 (D.C. Cir. 1980).

[235] *See, e.g.,* Minn. Stat. §§ 14.51, 15.08, 46.04, 144A.12 (2014).

[236] It is doubtful whether an agency may take disciplinary action against a licensee that refuses to comply with an administrative subpoena and challenges it in court. *See Silverman v. State Liquor Auth.*, 47 A.D.2d 226, 228-30, 366 N.Y.S.2d 449, 452-53 (1975).

[237] But some courts have held that they do not have authority to quash an administrative subpoena. *See, e.g., Pa. Crime Comm'n v. Doty*, 9 Pa. Commw. 328, 334-35, 305 A.2d 921, 924 (1973).

[238] *See, e.g., In re Commodity Futures Trading Comm'n v. First Nat'l Bullion Corp.*, 461 F. Supp. 659, 661 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 609 (2d Cir. 1979); *Wilson & Co. v. Oxberger*, 252 N.W.2d 687, 689-90 (Iowa 1977).

[239] *See Dep't of Revenue v. Olympic Sav. & Loan Ass'n*, 78 Ill. App. 3d 668, 674, 396 N.E.2d 1295, 1300 (1979); *cf. United States v. Art Metal-U.S.A., Inc.*, 484 F. Supp. 884, 886-87 (D. N.J. 1980).

[240] *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *Kohn v. State*, 336 N.W.2d 292, 297 (Minn. 1983).

[241] Minn. Stat. § 383B.38 (2014).

[242] *See* Minn. Stat. § 14.55 (2014).

[243] *Cf. Whalen v. Minneapolis Special Sch. Dist. No. 1*, 309 Minn. 292, 294-95, 298, 245 N.W.2d 440, 442, 444 (1976) (holding that board's right to administer oaths is delegated to its appointed hearing officer). It is usually held that an agency may delegate its subpoena power. *See FTC v. Gibson*, 460 F.2d 605, 607 (5th Cir. 1972). The delegations of power made by state agencies must follow the procedures specified in Minn. Stat. § 15.06, subd. 6 (2014).


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subdivision has no subpoena power that the chief judge may exercise, the parties may obtain subpoenas from the clerk of district court under rule 45.[244] The rule permits the clerk to issue subpoenas for witnesses in cases before any board or other person authorized to examine witnesses. The civil rule has been successfully used to obtain subpoenas in proceedings held by judges under contracts with political subdivisions.

A subpoena commands a person to appear before a court or some other designated official and to present testimony or produce specific documents at a designated time and place. A subpoena is not the legal equivalent of a search warrant[245] and does not authorize the official before whom the appearance is to be made to conduct a search and seizure of any documents that are not produced as commanded. Generally speaking, an administrative search and seizure is permissible only under a search warrant authorized by a court of law.[246]

## 7.5 Informal Dispositions, Settlement Agreements, Consent Orders, and Defaults

The APA permits the informal disposition of contested cases by arbitration, stipulation, agreed settlement, consent order, or default.[247] Some statutes preclude default adjudications by prohibiting agency action without a hearing, even if the person affected by the proposed action does not appear at the hearing and could otherwise be held in default.[248] Under such statutes, a hearing is required even though the matter is uncontested or the adverse party defaults, and the proponent must normally establish a prima facie showing of its entitlement to relief.

### 7.5.1 Settlement Agreements and Consent Orders

Under the contested case rules, a stipulation, agreed settlement, or consent order may be made at any point in the proceeding.[249] Unless formal approval procedures are required,

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[244] MINN. R. CIV. P. 45. The supreme court held that a similar provision applied to administrative proceedings and to the production of documents. *Wolf v. State Bd. of Med. Exam'rs*, 109 Minn. 360, 362, 123 N.W. 1074, 1075 (1909); *City of Minneapolis v. Wilkin*, 30 Minn. 140, 143, 14 N.W. 581, 582 (1883).

[245] *Mancuzi v. DeForte*, 392 U.S. 364, 370-72 (1968).

[246] *See v. City of Seattle*, 387 U.S. 541, 544-45 (1967); *State v. Hansen*, 286 N.W.2d 163, 166-67 (Iowa 1979). In some cases, the court will permit warrantless administrative inspections of persons subject to extensive governmental regulation if permitted by law. *United States v. Biswell*, 406 U.S. 311, 315-16 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); *State v. Wybierala*, 305 Minn. 455, 459-60, 235 N.W.2d 197, 200 (1975). *See generally* chapter 3.

[247] Minn. Stat. § 14.59 (2014). Informal settlement is encouraged by the courts. *Mankato Aglime & Rock Co. v. City of Mankato*, 434 N.W.2d 490, 494 (Minn. Ct. App. 1989).

[248] Minn. Stat.§§ 121A.47, subd. 1 (proceeding to expel public school student), 144A.11, subd. 3 (suspension or revocation of nursing home licenses), 148.629, subd. 1 (revocation of dietitian or nutritionist license) (2014). If a party stipulates to the facts, a hearing is not required. *See In re Mostrom*, 390 N.W.2d 893, 895 (Minn. Ct. App. 1986).

[249] Minn. R. 1400.5900 (2013). A party may stipulate that a violation of the statute occurred and agree to leave the penalty to the agency's discretion. If the party disagrees with the penalty imposed, an appeal is permissible. *See Mostrom*, 390 N.W.2d at 895-96.


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when a consent order or other agreement resolves all the issues in a case, further proceedings are canceled, the case is removed from the judge's docket, and the official record is returned to the agency with a cover letter from the judge. As a general rule, the judge does not review and approve any agreements made or issue a report and recommendation regarding them. The same procedure is followed when a party withdraws its appeal or the agency unilaterally agrees to take the action sought by the adverse party.

When a consent order or settlement agreement is made, the parties may file a copy with the judge and request that further proceedings be canceled and that the official record be returned to the agency. However, in most cases, the parties are not required to file copies of these documents with the judge. Settlement agreements and consent orders are generally not required to be included in the official record under the APA or the contested case rules.[250] Under the rules, the only stipulations, consent orders, and agreements that must be included in the official record are those made before the convening of a contested case hearing.[251] If the hearing is never convened, these documents are not required to be made part of the official record. Since a hearing is seldom convened if the case has been settled, the contested case rule has limited applicability to the filing of stipulations, consent orders, and settlement agreements. It applies only to the orders and agreements that do not fully resolve the issues in a case or to those that are subject to the judge's approval or a hearing requirement.

Most settlement agreements are reduced to writing and executed by the parties. However, when agreements are reached just before or during the hearing, the parties sometimes state the terms of their agreement on the record. If a transcript of the hearing is not made, however, the parties' oral agreement should be written down and executed at a later date. This is a necessary safeguard because most contested case proceedings are recorded and the tapes are eventually erased. When erasure occurs, no record of the verbal agreement will exist unless a transcript has been prepared or the agreement has been put in writing.

In some cases, settlement agreements must be filed with the OAH for the judge's review and approval. Before the judge approves the agreement, a hearing may be required so that interested persons other than the parties to the agreement will have an opportunity to voice their objections to it. Under the rules implementing the Minnesota Human Rights Act, class actions cannot be dismissed or compromised without the judge's approval,[252] and class members have a right to a hearing on their objections. Settlement agreements that must be approved by the judge are not binding until approval is obtained, and it has been held that the approval of settlement agreements under the Human Rights Act must not be pro forma.[253]

The Minnesota APA and the contested case rules do not expressly require that settlement agreements be approved by all the parties to a case before they are adopted by an agency, and in the absence of a requirement for unanimity, the approval of all parties is usually

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[250] *Cf.* Minn. Stat. § 14.60, subd. 2 (2014); Minn. R. 1400.7400, subp. 1 (2013).

[251] *Cf.* Minn. R. 1400.7800 C. (2013) (stating that any stipulations, settlement agreements, or consent orders entered into by any of the parties before the hearing must be entered into the record).

[252] MINN. R. 5000.1100, subp. 5 (2013). The judge may issue orders embodying the terms of settlement agreements in other discrimination cases. *Id*. 5000.0800, subp. 3.

[253] *State v. St. Joseph's Hosp.*, 366 N.W.2d 403, 407 (Minn. Ct. App. 1985).


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held to be unnecessary.[254] The rights of a party objecting to a settlement agreement do not include the right to a hearing if the objection only raises questions of law and policy. When law and policy is involved, the objector is limited to presenting argument.[255] Whenever an agency accepts a settlement agreement that lacks unanimous consent, it must address the objections raised by the objecting party[256] and make any findings required by applicable laws.[257]

## 7.5.2 Defaults

In the absence of a specific statute to the contrary, any contested case may be disposed of by default. Under the contested case rules, a default occurs when a party fails to appear at the hearing or fails to comply with any interlocutory order of the ALJ.[258] On default, the allegations of or the issues set out in the notice of and order for hearing or other pleading may be taken as true or deemed proved without further evidence. When a default occurs, the judge issues a recommended decision to the agency following the same procedures that are followed in a contested matter.

The power to default a party for its failure to comply with an interlocutory order of the judge is in addition to the sanctions that may be imposed for a party's refusal to comply with discovery orders. Under the contested case rules, the judge may foreclose a party from presenting evidence through witnesses whose statements or identities are not disclosed, may deem unanswered requests for admissions admitted, and may deem facts established or prohibit the introduction of evidence on specific issues when a party fails to comply with discovery order.[259] In addition, the judge may exercise the powers delegated by the procedural rules of specific agencies. For example, when a party is required to file an answer to an agency complaint and fails to do so, the allegations of the complaint are deemed admitted under one rule.[260]

It has been recognized that the power to order a party to perform an act in a quasi-judicial proceeding ordinarily implies an equal right to enforce the order with the imposition of

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[254] *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-14 (1974); *Pa. Gas & Water Co. v. FPC*, 463 F.2d 1242, 1250-51 (D.C. Cir. 1972); *City of Lexington v. FPC*, 295 F.2d 109, 120-22 (4th Cir. 1961); *cf. Textile Workers Union v. NLRB*, 294 F.2d 738, 739 (D.C. Cir. 1961). Some courts have held that an intervenor may continue to litigate a claim after the party who originated the action is dismissed. *U.S. Steel Corp. v. EPA*, 614 F.2d 843, 845 (3d Cir. 1979). However, a party who has no standing as an aggrieved person or as the real party in interest may not continue an action other parties have settled. *See Minn. Educ. Ass'n v. Indep. Sch. Dist. No. 404*, 287 N.W.2d 666, 668-70 (Minn. 1980).

[255] *See Citizens for Allegan County v. FPC*, 414 F.2d 1125, 1128-29 (D.C. Cir. 1969).

[256] *See id*. at 1129; *Textile Workers Union v. NLRB*, 294 F.2d 738, 741 (D.C. Cir. 1961).

[257] *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 313-14 (1974). However, where consent decrees are involved, it has been held that findings of fact and conclusions of law are not required. *Ford Motor Co. v. FTC*, 547 F.2d 954, 956 (6th Cir. 1976).

[258] Minn. R. 1400.6000 (2013).

[259] MINN. R. 1400.6700, subp. 1, 3, 1400.6800 (2013); *see also Caucus Distribs. Inc. v. Comm'r of Commerce*, 422 N.W.2d 264, 268-69 (Minn. Ct. App. 1988) (upholding sanctions imposed for the failure to comply with discovery order).

[260] MINN. R. 5000.1200 (discrimination complaint) 2013.


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sanctions.[261] It has also been held that the decision to impose sanctions rests within the reasonable discretion of the ALJ.[262] However, a party should not be defaulted for its failure to comply with an order unless it contains a date by which compliance is required and a warning of the potential sanctions for noncompliance.[263] Moreover, the imposition of sanctions should be used sparingly when a party is not represented by counsel and misunderstands its obligations.[264]

The power to default a party for its failure to comply with an ALJ's order is substantially equivalent to the district court's power to dismiss an action for noncompliance with its orders under rule 41.02.[265] Like dismissal, the defaulting of a party for noncompliance with an order is a drastic form of relief and is inconsistent with the primary objective of the law to dispose of cases on the merits.[266] Consequently, the contested case rule should be exercised only in exceptional cases and should be applied consistently with the approved application of the civil rule.[267]

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[261] *Hoenig v. Mason & Hanger, Inc.*, 162 N.W.2d 188, 193 (Iowa 1968).

[262] *See First Nat'l Bank v. Dep't of Commerce*, 310 Minn. 127, 135, 245 N.W.2d 861, 866 (1976) (refusal to permit testimony by undisclosed witness).

[263] *Jadwin v. City of Dayton*, 379 N.W.2d 194, 196-97 (Minn. Ct. App. 1985).

[264] *Cf. Helwig v. Olson*, 376 N.W.2d 763, 766 (Minn. Ct. App. 1985).

[265] MINN. R. CIV. P. 41.02.

[266] *Jadwin*, 379 N.W.2d at 196.

[267] *See, e.g., Zuleski v. Pipella*, 309 Minn. 585, 586-87, 245 N.W.2d 586, 586-87 (1976).


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