Chapter 9. Discovery Limitations

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9.1 Introduction

Although the rules of the Office of Administrative Hearings (OAH) vest broad authority in the administrative law judge (ALJ) to order discretionary discovery, a variety of statutory, constitutional, and common-law limitations restrict the scope of matters discoverable. In general, the same limitations on discovery found in a judicial proceeding apply to an administrative contested case. Minnesota Rules part 1400.6700, subpart 2, for example, requires the ALJ to "recognize all privileges recognized at law" in ruling on a motion for expanded discovery. In addition to the generally applicable statutory privileges, conditional privileges and restrictions applicable only to administrative proceedings have developed. The discussion in this chapter of privileges limiting information that is discoverable applies equally to assertions of privilege to limit the introduction of evidence at a hearing.

9.2 Relevancy

Information sought to be discovered must be relevant to the subject matter of the proceeding,[1] that is, the information must satisfy the trial standard of evidentiary admissibility or be related to the proof or defense of issues involved in the proceeding.[2] Relevant evidence, for purposes of admissibility at trial, is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[3] In *State v. Horning*;[4] the Minnesota Supreme Court explained that the "threshold determination of relevance turns on whether the evidence logically or reasonably tends to prove or disprove a material fact in issue, or tends to make such a fact more or less probable, or affords the basis for or supports a reasonable inference or presumption regarding the existence of a material fact."[5]

The scope of inquiry, however, is relevant to the "subject matter of the action" not to the "issues" in the case.[6] Thus, the scope of discovery extends to inadmissible evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[7] In addition, impeachment material may be discovered as relevant information.[8] In

[1] *Kalish v. Mount Sinai Hosp.*, 270 N.W. 2d 783, 784-85 (Minn. 1978); *Jeppesen v. Swanson*, 243 Minn. 547, 549, 68 N.W. 2d 649, 651 (1955); Minn. R. 1400.6700, subps. 2, 3 (2013).

[2] *Jeppesen,* 243 Minn. at 554, 68 N.W.2d at 653.

[3] Minn. R. Evid. 401.

[4] 535 N.W.2d 296 (Minn. 1995).

[5] *Id.* at 289 (citing Minn. R. Evid. 401, committee cmt.)

[6] Minn. R. Civ. P. 26.02(a).

[7] *Ramsey Cnty. v. S.M.F.*, 298 N.W. 2d 40, 42 (Minn. 1980); *Anderson v. Florence*, 288 Minn. 351, 360, 181 N.W. 2d 873, 877 (1970).

[8] *Boldt v. Sanders*, 261 Minn. 160, 164, 111 N.W. 2d 225, 227 (1961).

Jeppesen v. Swanson,[9] the Minnesota Supreme Court discussed the limits of relevancy as regards discovery:

> It would seem to us that, even though the discovery is not to be limited to facts which may be admissible as evidence, the ultimate goal is to ascertain facts or information which may be used for proof or defense of an action. Such information may be discovered by leads from other discoverable information. The purpose of a discovery rule is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial. Where it is sought to discover information which can have no possible bearing on the determination of the action on its merits, is can hardly be within the rule. It is not intended to supply information for the personal use of a litigant that has no connection with the determination of the issues involved in the action of their merits.[10]

In short, matters sought to be discovered in administrative law settings will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment.[11]

9.3 Privilege

9.3.1 Introduction

Relevant matter may be discovered only if it is not subject to a valid privilege against disclosure.[12] The existence of a particular privilege reflects a policy judgment that communications within the context of a stated relationship are to be protected against disclosure even though the exclusion will hamper the discovery of truth. The party asserting a privilege has the burden of establishing the facts necessary to its existence.[13]

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[9] 243 Minn. 547, 68 N.W. 2d 649 (1955), *superseded by court rule*, Minn. R. Civ. P. 26.02(c) (addressing discovery of insurance policy for the purpose of determining advisability of settlement). In 1970, the relevant Federal Rule of Civil Procedure was amended to allow discovery of insurance coverage information, and most states followed suit. *Thomas v. Oldfield*, 279 S.W.3d 259, 263-64 (Tenn. 2009). While the holding in *Jeppesen* was superseded by court rule specifically as to insurance coverage information, the court's discussion in *Jeppesen* regarding limits of relevancy remain informative as to limits of discovery in general.

[10] *Jeppesen*, 243 Minn. at 560, 68 N.W. 2d at 656; *see supra* note 9 (discussing changes in discovery rules specifically as to discovery of insurance coverage information).

[11] For an extensive analysis of relevancy as a condition to discovery, see 6 MOORE'S FEDERAL PRACTICE § 26.41 (3d ed. 1997).

[12] Minn. R. Civ. P. 26.02(b); *Tibbetts v. Crossroads, Inc.*, 411 N.W.2d 535, 540 (Minn. Ct. App. 1987) (finding privileged adoption agency records not subject to discovery); Minn. R. 1400.6700, subp. 2 (2013).

[13] *State v. Martin*, 293 Minn. 116, 125-26, 197 N.W. 2d 219, 225-26 (1972); *State v. Lender*, 266 Minn. 561, 564, 124 N.W. 2d 355, 358 (1963); *Brown v. St. Paul City Ry.*, 241 Minn. 15, 35, 62 N.W. 2d 688, 701 (1954).

Privilege, as that term is used in limiting matters discoverable within administrative law, equates with the meaning of the term as used in the law of evidence generally.[14] Thus, the scope of privilege as limiting discovery is the same as would be applied at trial to restrict the introduction of evidence.[15] Therefore, the discussion of privilege in this chapter as affecting the availability of discovery should not be considered exhaustive.[16] Rather, the following discussion of privilege is meant to briefly enumerate the applicable privileges commonly arising in the context of administrative practice, and to provide representative judicial interpretations.

9.3.2 Statutory Privilege

Minnesota Statutes codify and expand the common law of testimonial privilege.[17] In *In re Parkway Manor Healthcare Center*,[18] the court held that a Minnesota court may not recognize a new privilege, unknown at common law, to serve public policy. The court further concluded that the legislature is the exclusive source of new evidentiary privileges. One such privilege can be found at Minnesota Statute, section 182.659, subdivision 8 (2014), which provides investigators of the state's Occupational Safety and Health Administration (OSHA) with a privilege from subpoena. In *Grussing v. KVAM Implement Co.*,[19] the Minnesota Court of Appeals rejected a constitutional challenge to the testimonial privilege. Given the litigious nature of industrial accidents and the likelihood that OSHA investigators would be subpoenaed in civil proceedings, the court found the legislature's purpose of furthering timely and impartial investigations to be legitimate and rationally related to the privilege.[20] Moreover, the court noted that the parties had access to the full written report of the investigator once the investigative file was closed and made public.[21]

A number of statutes such as Minnesota Statutes section 595.02 contain a specific evidentiary privilege which also limits discovery.[22] Information subject to a privilege against

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[14] *In re Int'l Horizons*, 689 F.2d 996, 1002 (11th Cir. 1982); *Brown*, 241 Minn. at 32-33, 62 N.W. 2d at 700; *see* Minn. R. Civ. P. 26.02, advisory committee note; *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953), *superseded as to military secrets by statute*, 50 U.S.C. § 1806(f), *as recognized in In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 1109, 1118-19 (N.D. Cal. 2008).

[15] 6 MOORE'S FEDERAL PRACTICE, § 26.47(1) (3d ed. 1997).

[16] *See* PETER THOMPSON, MINNESOTA PRACTICE, EVIDENCE §§ 501.01-.10 (1992) (providing a more extensive discussion of privilege in Minnesota); SCOTT N. STONE & ROBERT K. TAYLOR, TESTIMONIAL PRIVILEGES (1993) (providing a detailed analysis of the law of privilege generally).

[17] Minn. Stat. § 595.02 (2014). The Minnesota Supreme Court has adopted a policy of strictly construing all statutory privileges. *Leer v. Chicago, M., St. P. & P. Ry.*, 308 N.W. 2d 305, 309 (Minn. 1981); *Kahl v. Minn. Wood Specialty*, 277 N.W. 2d 395 (Minn. 1977).

[18] 448 N.W.2d 116, 121 (Minn. Ct. App. 1989).

[19] 478 N.W.2d 200 (Minn. Ct. App. 1991).

[20] *Id.* at 204.

[21] *Id.*

[22] *See, e.g.*, Minn. Stat. §§ 145.64 (governing hospital peer review organization records), 259.53, subd. 3 (governing adoption of agency records), 144.336 (2014) (governing tissue donor registry records); In re Petition of Fairview-Univ. Med. Ctr., 590 N.W.2d 150, 153-54 (Minn. Ct. App. 1999) (finding a Board of Medical Practice administrative license hearing falls within the hospital peer review records statute and the Board cannot obtain peer review records involving physicians practicing at the hospital by discovery or subpoena).

testimonial disclosure by statute may not be discovered.[23] The statute is not limited to judicial proceedings but applies to any proceeding before "any person who has authority to receive evidence."[24]

9.3.2 (1) Marital Privilege

A spouse cannot be examined for or against the marital partner or be examined regarding any communication between them made during the marriage without the consent of the other spouse.[25] There are two components of the marital privilege. The first component is the prohibition against examination for or against the party's spouse.[26] To activate the testimonial competency aspect of the privilege, there must be a valid, existing marriage relationship at the time the testimony is sought to be elicited.[27] The privilege extends to events occurring before the marriage.[28] The stability or harmony of the marital relationship is usually held to be immaterial as long as the relationship continues.[29] However, this aspect of the privilege may not hold where a marriage is nearing final dissolution.[30]

The second component of the marital privilege relates to prohibiting the disclosure of communications between husband and wife made during the course of the marriage. The prohibition against the disclosure of marital communications does not apply to communications occurring before the marriage.[31] However, it applies whether or not the legal relationship exists at the time the disclosure is sought to be elicited.[32]

The subject matter of the communications need not be secret as long as it is private.[33] In *State v. Leecy*,[34] the Minnesota Supreme Court characterized the privilege as relating to "confidential interspousal communication." The privilege applies when spouses communicate with a reasonable expectation of privacy and nondisclosure[35] and extends to written as well as oral communications.[36]

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[23] *See supra* note 122.

[24] Minn. Stat. § 595.02, subd. 1 (2014).

[25] *Id*. subd. 1(a). The statute contains stated exceptions to the application of the marital privilege for specific proceedings not directly relevant to administrative contested cases.

[26] *Id*.

[27] *Id*.; *State v. Martin*, 293 Minn. 116, 124, 197 N.W. 2d 219, 224-25 (1972).

[28] *State v. Feste*, 205 Minn. 73, 76, 285 N.W. 85, 87 (1939).

[29] *See, e.g., State v. Kampert*, 139 Minn. 132, 138-39, 165 N.W. 972, 975 (1918); *State v. Freeman*, 302 N.C. 591, 598 n.2, 276 S.E.2d 450, 455 n.2 (1981).

[30] *State v. Leecy*, 294 N.W.2d 280, 283 (Minn. 1980) ("[T]here is modern authority that a marriage well on its way to final dissolution will not support a claim of privilege.").

[31] *State v. Thompson*, 413 N.W.2d 889, 890-91 (Minn. Ct. App. 1987).

[32] Minn. Stat. § 595.02, subd. 1(a) (2014); *Pederson v. Jirsa*, 267 Minn. 48, 56, 125 N.W. 2d 38, 44 (1963); *In re Osbon's Estate*, 205 Minn. 419, 425, 286 N.W. 306, 310 (1939); *Gjesdahl v. Harmon*, 175 Minn. 414, 420, 221 N.W. 639, 641 (1928).

[33] *See White v. White*, 101 Minn. 451, 453, 112 N.W. 627, 628 (1907); *Leppla v. Minn. Tribune Co.*, 35 Minn. 310, 311-12, 29 N.W. 127, 128 (1886).

[34] 294 N.W.2d 280, 283 (Minn. 1980).

[35] *See State v. Smith*, 384 A.2d 687, 689 (Me. 1978); *State v. McMorrow*, 314 N.W.2d 287, 292-93 (N.D. 1982); S. STONE & R. TAYLOR, *supra* note 16, § 5.11.

[36] *State v. Warren*, 252 Minn. 261, 266-67, 89 N.W.2d 702, 707 (1958).

There is conflicting authority in Minnesota concerning whether a third person may invoke the communications privilege between spouses. In *Sommerfield v. Griffith,*[37] the Minnesota Supreme Court held that a third person could not assert the privilege. In a number of other cases, however, the court has reached a contrary result.[38] The privileged communications aspect of the exclusion is waived when a statement is overheard or disclosed to a third party.[39] In addition, the marital privilege has no application to a number of interpersonal and intrafamilial legal proceedings.[40] In *State v. Willette*,[41] the court held that the privilege did not apply to conversations in which one spouse admits to the sexual abuse of an unrelated child staying with the spouses. The court relied on a 1987 amendment to Minnesota Statutes section 595.02, subdivision 1(a) (1986).[42]

9.3.2(2) Attorney-Client Privilege

An attorney or his or her employee cannot, without the consent of the client, be examined about any communication made by the client to the attorney or about any advice given to the client in the course of the lawyer and client's professional relationship.[43] The privilege also prevents a client from being required to disclose information discussed in confidence with his or her attorney.[44] The privilege extends to material in the possession of the client prepared at the request of the attorney for use by the attorney in formulating legal advice.[45] The modern rationale for the attorney-client privilege is based on the assumption that the adversary system can function only if a client is free to fully disclose all relevant facts to his or her attorney without fear of prejudice.[46] In a more recent case, the United States Supreme Court held that the attorney-client privilege survives the death of the client.[47]

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[37] 173 Minn. 51, 216 N.W. 311 (1927).

[38] *See, e.g., Thompson v. Nesheim*, 280 Minn. 407, 418, 159 N.W.2d 910, 918 (1968); *Pederson v. Jirsa*, 267 Minn. 48, 56, 125 N.W. 2d 38, 44 (1963); *Gjesdahl v. Harmon*, 175 Minn. 414, 420, 221 N.W. 639, 641 (1928).

[39] *United States v. Lefkowitz*, 618 F.2d 1313, 1318 (9th Cir. 1980); *State v. Schifsky*, 243 Minn. 533, 539, 69 N.W.2d 89, 94 (1955).

[40] Minn. Stat. § 595.02, subd. 1(a) (2014) (excluding from the privilege civil actions between spouses, criminal actions for crimes by one spouse against the other or against a child under their care, homicide actions under certain circumstances, and actions for nonsupport, neglect, dependency, or termination of parental rights).

[41] 421 N.W.2d 342 (Minn. Ct. App. 1988).

[42] 1987 Minn. Laws ch. 134, § 1, subd. 1(a), at 270 (broadening the exception to the marital privilege in cases involving a crime by a spouse "against a child under the care of either spouse").

[43] Minn. Stat. § 595.02, subd. 1(b) (2014).

[44] *In re VanSlooten*, 424 N.W.2d 576, 579 (Minn. Ct. App. 1988).

[45] *Id*.

[46] *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 895-96 (Minn. 1979); *Channel 10, Inc. v. Indep. Sch. Dist. No. 709*, 298 Minn. 306, 321, 215 N.W.2d 814, 825 (1974). For a detailed discussion of the attorney-client privilege in Minnesota, see THOMPSON, *supra* note 16, § 501.04. For a general discussion of the attorney-client privilege, see S. STONE & R. TAYLOR, *supra* note 16, §§ 1.01-.79.

[47] *Swidler & Berlin v. United States*, 524 U.S. 399, 406-11 (1998) (holding attorney's notes of initial interview with client (Deputy White House Counsel) shortly before client's death are protected by attorney-client privilege and may not be disclosed to the Office of Independent Counsel for use in a criminal investigation).

Although analogous, the attorney-client privilege should be distinguished from the attorney work product doctrine, which relates to material prepared or acquired in anticipation of litigation. In *Leininger v. Swadner,*[48] the Minnesota Supreme Court clearly distinguished the privilege applicable to an attorney's work product under Minnesota Rules of Civil Procedure[49] from the statutory attorney-client privilege. The scope of the work product doctrine is considerably broader than the attorney-client privilege and affords less protection.[50]

To establish a claim of privilege, the proponent must prove the existence of a professional relationship between the attorney and client and a confidential communication made pursuant to that relationship.[51] The communication must be made within the context of an attorney-client relationship whereby the client confers with the attorney for the purpose of securing the attorney's professional opinion.[52] The privilege also extends to communications made to the employees of the attorney.[53] However, an attorney's observations of his or her client are not communications for purposes of the privilege.[54]

In *Kobluk v. University of Minnesota*,[55] the Minnesota Supreme Court considered whether the attorney-client privilege may attach to preliminary drafts of a document, exchanged between a client and lawyer, when the final version is published to a third party. Pursuant to the Minnesota Government Data Practices Act, an assistant professor at the university sought to obtain two earlier drafts of a letter conveying the university's decision to deny him tenure. The university claimed the documents were shielded by the attorney-client privilege.

The court held that the two preliminary drafts of the letter (the third and final version of which was sent to Kobluk) were protected by the attorney-client privilege. As a threshold matter, the court determined that the drafts came into existence by reason of the attorney-client relationship and embodied communications in which legal advice was sought and rendered. Consequently, a presumption of confidentiality arises as to the drafts and evaporates only if "the client does not appear to have been desirous of secrecy."[56] Given that the provost and counsel maintained the confidentiality of the two preliminary drafts, the court found both drafts to be privileged.

The attorney-client privilege is available to a corporation seeking to prevent disclosure of communications made between counsel, whether separately retained or in-house, and

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[48] 279 Minn. 251, 256-57, 156 N.W.2d 254, 258-59 (1968).

[49] *See* Minn. R. Civ. P. 26.02(b), (d).

[50] *United States v. Nobles*, 422 U.S. 225, 238 (1975); *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977).

[51] *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); *Brown v. St. Paul City Ry.*, 241 Minn. 15, 34-35, 62 N.W.2d 688, 700-01 (1954).

[52] *United States v. Huberts*, 637 F.2d 630, 640 (9th Cir. 1980); *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 895-96 (Minn. 1979); *Hanson v. Bean*, 51 Minn. 546, 548, 53 N.W. 871, 872 (1892).

[53] Minn. Stat. § 595.02, subd. 1(b) (2014); *Hillary v. Minneapolis Street Ry.*, 104 Minn. 432, 434-35, 116 N.W. 933, 934-35 (1908); *see Leininger v. Swadner*, 279 Minn. 251, 255-56, 156 N.W.2d 254, 258 (1968) (considering independent expert *not* an employee and, therefore, not within the attorney-client privilege).

[54] *State v. Jensen*, 286 Minn. 65, 72, 174 N.W.2d 226, 230 (1970); *Younggren v. Younggren*, 556 N.W.2d 228, 233 (Minn. Ct. App. 1996).

[55] 574 N.W.2d 436 (Minn. 1998).

[56] *Id*. at 444 (citing 8 JOHN HENRY WIGMORE, EVIDENCE § 2311 at 599 (McNaughton rev. 1961)).

corporate employees.[57] It is likely, however, that the assertion of the privilege by a corporation regarding communication with its in-house counsel will be subjected to closer scrutiny and limitation.[58] The United States Supreme Court has concluded that the existence of the attorney-client privilege in the corporate context must be determined on a case-by-case basis.[59]

The three tests that have been used to apply the attorney-client privilege to corporations have been discussed by the Minnesota Supreme Court without the adoption of a specific test.[60] The tests that have been considered by the court are the "control group" test,[61] the "subject matter" test,[62] and the *Weinstein* test.[63] Although the court in *Leer v. Chicago, Milwaukee, Saint Paul & Pacific Railway Co.*[64] did not adopt a single test for determining the application of the privilege to corporate counsel,[65] the court noted that both the "control group" and "subject matter" tests have been severely criticized.[66] It is clear that not all communications from corporate agents to corporate counsel will be privileged.[67] The Minnesota Supreme Court has adopted a policy of strictly construing all privileges, including the attorney-client privilege.[68]

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[57] *Leer v. Chi., Milwaukee, Saint Paul & P. Ry.*, 308 N.W.2d 305, 309 (Minn. 1981); *Kahl v. Minn. Wood Specialty*, 277 N.W. 2d 395, 399 (Minn. 1977).

[58] *See Simon v. G.D. Searle & Co.*, 816 F.2d 397, 402-03 (8th Cir. 1987) *(*discussing the application of Minn. Stat. § 595.02, subd.1(b), in the context of employee communications with in-house counsel); *see also Fed. Sav. & Loan Ins. Corp. v. Fielding*, 343 F. Supp. 537, 546 (D. Nev. 1972); *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 89-90 n.20 (D. Del. 1962).

[59] *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981).

[60] *Leer*, 308 N.W.2d at 308-09.

[61] The control group test, originating in *City of Philadelphia v. Westinghouse Corp.,* 210 F. Supp. 483, 485-86 (D.C. Pa. 1962), requires that the corporate employee making the communication be in a position to control or take a substantial part in a decision about any action to be taken on the advice of the attorney.

[62] The subject matter test, advanced in *Harper & Row Publishers v. Decker,* 423 F.2d 487, 491-92 (7th Cir. 1970), requires that the corporate employee make the communication at the discretion of his or her supervisor and that the subject matter on which the lawyer's advice is sought be within the performance of the employee's duties.

[63] The *Weinstein* test, adopted by the eighth circuit in *Diversified Indus. v. Meredith,* 572 F.2d 596, 609-10 (8th Cir. 1977), affords the attorney-client privilege to a corporation if all of the following conditions are satisfied:

> (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

[64] 308 N.W.2d at 308-09.

[65] In *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981), the United States Supreme Court criticized the control group test but did not adopt a single test. The Court noted that individual fact-specific determinations are preferable. *Upjohn*, 449 U.S. at 396-97.

[66] For an extensive discussion of *Leer,* see Note, *Attorney-Client Privilege-Corporations*, 5 HAMLINE L. REV. 123 (1982).

[67] *Leer*, 308 N.W.2d at 309; *Kahl v. Minn. Wood Specialty*, 277 N.W. 2d 395, 399 (Minn. 1977).

[68] *Leer*, 308 N.W.2d at 309; *Kahl*, 277 N.W.2d at 399.

The attorney-client privilege may attach to communication between a governmental attorney and an agency client.[69] For a governmental attorney to resist discovery on the basis of the attorney-client privilege, the government must establish, with respect to each requested item of information, that the question elicits communications made to the attorney by the client without the presence of strangers for the primary purpose of securing a legal opinion, services, or assistance in a legal proceeding.[70] The privilege also extends to the attorney's advice to the agency client that "reflect[s] the thoughts and confidences of the client."[71]

The attorney-client privilege attaches only when communications are made in confidence.[72] The presence of disinterested third parties at the time of the making of the communication prevents the attorney-client privilege from attaching.[73] In addition, rules of professional conduct authorize an attorney to disclose information given in confidence by a client when it relates to the future commission of a crime or the prevention of a crime and when necessary to allow the attorney to establish or collect a fee or to defend against a charge of wrongful conduct.[74] Finally, the client is the holder of the attorney-client privilege.[75] Although normally the client must waive the attorney-client privilege,[76] the attorney, acting within the scope of his or her authority to advance the purposes of the client, may waive the privilege.[77]

9.3.2(3) Clergy

A member of the clergy may not disclose a penitential communication made to him or her in confidence by a person procuring religious or spiritual advice, aid, or comfort without the consent of the person making the communication.[78] The communication must be made for the purpose of seeking religious or spiritual aid in a confidential setting.[79] The clergy privilege

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[69] *Costal Corp. v. Duncan*, 86 F.R.D. 514, 520 (D. Del. 1980); *United States v. Gates*, 35 F.R.D. 524, 526 (D. Colo. 1964); *United States v. Anderson*, 34 F.R.D. 518, 522 (D. Colo. 1962).

[70] *Costal Corp.*, 86 F.R.D. at 520; *Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913, 916-17 (E.D. Pa. 1979).

[71] *Costal Corp.*, 86 F.R.D. at 520 n.3; *see United States v. Amerada Hess Corp.*, 619 F.2d 980, 985-86 (3d Cir. 1980); *Costal Gas Corp. v. DOE*, 617 F.2d 854, 863 (D.C. Cir. 1980).

[72] *State v. Schneider*, 402 N.W.2d 779, 787 (Minn. 1987); *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374, 378 (Minn. 1978); *State v. Jenson*, 286 Minn. 65, 72, 174 N.W.2d 226, 230 (1970).

[73] *Schwartz v. Wenger*, 267 Minn. 40, 42, 124 N.W.2d 489, 492 (1964); *Hallenberg v. Hallenberg*, 144 Minn. 39, 43, 174 N.W. 443, 444 (1919).

[74] Minn. R. Prof. Conduct 1.6(b).

[75] *Swanson v. Domning*, 251 Minn. 110, 118, 86 N.W.2d 716, 722 (1958); *Strickmeyer v. Lamb*, 75 Minn. 366, 367, 77 N.W. 987, 988 (1899).

[76] *See State ex rel. Schuler v. Tahash*, 278 Minn. 302, 308, 154 N.W.2d 200, 205 (1967); *Swanson*, 251 Minn. at 118, 86 N.W.2d at 721-22.

[77] *State v. Schneider*, 402 N.W.2d 779, 786-87 (Minn. 1987); *Sprader v. Mueller*, 265 Minn. 111, 117-18, 121 N.W.2d 176, 179-80 (1963).

[78] Minn. Stat. § 595.02, subd 1(c) (2014). For an authoritative discussion of the clergy privilege, see Mary Harter Mitchell, *Clergy Privilege*, 71 MINN. L. REV. 723 (1987).

[79] *State v. Black*, 291 N.W.2d 208, 216 (Minn. 1980), *abrogated on other grounds by State v. Jones*, 556 N.W.2d 903, 909 n. 4 (Minn. 1996) (finding request to jail chaplain to instruct a conspirator to "go ahead and carry out their plans" not privileged since the communication was not made for religious aid); *State v. Lender*, 266 Minn. 561, 565-66, 124 N.W. 2d 355, 359 (1963).

applies equally to voluntary and mandatory confession.[80] The party asserting the privilege must put forth proof of the following: (1) the potential witness is a religious minister; (2) the communicant intended the conversation to be private; and (3) the communicant was seeking religious or spiritual help.[81] Whether the privilege exists should be determined from the facts and circumstances surrounding the communication without requiring disclosure of the communication.[82]

9.3.2(4) Health Care Professionals

A licensed physician, surgeon, dentist, or chiropractor may not, without the consent of the patient, disclose any information or opinion based on information necessary for treatment acquired while attending the patient in a professional capacity.[83] A similar privilege exists for registered nurses, psychologists, consulting psychologists, and licensed social workers.[84] Four elements must be established to invoke the medical privilege: (1) there must be a professional-patient relationship; (2) the information acquired by the treating professional must be of the type contemplated by the statute; (3) the information must be acquired by the professional while attending the patient; and (4) the information must be necessary to enable the health care professional to act in a treating capacity.[85]

The privilege encompasses communications made to attendants or other employees of the health care professional who are acting under his or her direction.[86] In *State v. Sandberg*,[87] the court held that conversations with a crisis intake worker at a mental health center were not subject to a medical privilege. The privilege includes observations as well as verbal communications[88] and applies to both public and private patients.[89] Where the examination is adverse or conducted for a reason other than diagnosis and treatment, no privilege attaches.[90] The health care professional privilege has no constitutional basis and is subject to statutory

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[80] *In re Swensen*, 183 Minn. 602, 604, 237 N.W. 589, 590 (1931).

[81] *State v. Orfi*, 511 N.W.2d 464, 469 (Minn. Ct. App. 1994) (citing *Lender*, 266 Minn. at 564, 124 N.W.2d at 358).

[82] *Swensen*, 183 Minn. at 602, 237 N.W. at 592.

[83] Minn. Stat. § 595.02, subd. 1(d) (2014).

[84] *Id.* (g). But, evidence submitted to establish abuse or neglect of a minor under Minnesota Statutes, chapter 260, or any proceeding under section 245A.08, to revoke a day care or foster home license because of neglect or physical or sexual abuse of a minor is statutorily exempt from the application of the health care professional privilege. *Id.*, subd. 2.

[85] *State v. Staat*, 291 Minn. 394, 398, 192 N.W.2d 192, 196 (1971); *State v. Gullekson*, 383 N.W.2d 338 (Minn. Ct. App. 1986); *King v. Comm. of Pub. Safety*, 366 N.W.2d 613 (Minn. Ct. App. 1985); THOMPSON, *supra* note 16, § 501.07 at 249-50.

[86] *Staat,* 291 Minn. at 400-401, 192 N.W.2d at 197; *State v. Anderson*, 247 Minn. 469, 477, 78 N.W.2d 320, 326 (1956).

[87] 392 N.W.2d 298, 305 (Minn. Ct. App. 1986).

[88] *Staat*, 291 Minn. at 399-400, 78 N.W.2d at 197.

[89] *Id.; State v. Fontana*, 277 Minn. 286, 152 N.W.2d 503 (1967).

[90] *Sate v. Emerson*, 266 Minn. 217, 223, 123 N.W.2d 382, 386 (1963); *In re Skarsten*, 350 N.W.2d 455, 457 (Minn. Ct. App. 1984).

exceptions because it is a legislative creation.[91] For example, the privilege has no application to worker' compensation proceedings[92] and mandatory reporting requirements applicable to health care professionals[93] do not violate the privilege.[94]

The United States Supreme Court has held that federal law recognizes a privilege protecting the confidential communications between a psychotherapist and her patient.[95] While this privilege clearly applies to psychiatrists and psychologists, the Court extended it to include confidential communications made to a licensed social worker. Consequently, the Court found that statements a defendant police officer made to a licensed social worker in the course of psychotherapy, and notes taken during their counseling sessions, were protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.[96] According to the Court, the psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of mental or emotional problems, where such treatment is completely dependent on an atmosphere of confidence and trust.[97] Moreover, the Court recognized that today, social workers provide a significant amount of mental health treatment, particularly to those of modest means who cannot afford the assistance of a psychiatrist or psychologist.[98]

The health care professional privilege is personal to the patient and exists until a knowing waiver occurs.[99] In *Muller v. Rogers*,[100] the Minnesota Court of Appeals held that a defendant in a wrongful death action arising from an automobile accident waived his right to assert physician-patient privilege with respect to medical information he provided to the Department of Public Safety for the benefit of keeping his driver's license or obtaining handicapped license plates. The court found that the defendant's purpose in disclosing this information was not to obtain medical treatment, and that the disclosure occurred outside the context of a patient seeking treatment.[101] A waiver may be intentional or implied when the communication is made in the presence of a third person not subject to the privilege.[102] When the presence of third persons is related to the therapeutic effect of the treatment, however, no waiver occurs.[103]

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[91] *State v. Odenbrett*, 349 N.W.2d 265, 268 (Minn. 1984); *State v. Enebak*, 272 N.W.2d 27, 30 (Minn. 1978).

[92] *Danussi v. Easy Wash*, 270 Minn. 465, 473, 134 N.W.2d 138, 143 (1965).

[93] *See, e.g.*, Minn. Stat. §§ 626.52, subd. 2 (firearm injuries), .556, subd. 8 (child abuse), .557, subd. 8 (vulnerable adults abuse) (2014).

[94] *Odenbrett*, 349 N.W.2d at 268; *State v. Andring*, 342 N.W.2d 128, 132 (Minn. 1984).

[95] *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996).

[96] *Id*. at 18.

[97] *Id*. at 10-11.

[98] *Id*. at 15-17.

[99] *Roeder v. North Am. Life Ins. Co.*, 259 Minn. 168, 174, 106 N.W.2d 624, 629 (1961).

[100] 534 N.W.2d 724, 727 (Minn. Ct. App. 1995).

[101] *Id*.

[102] *State v. Staat*, 291 Minn. 394, 401, 192 N.W.2d 192, 198 (1971); *State v. Kunz*, 457 N.W.2d 265, 267 (Minn. Ct. App. 1990); *State v. Gullekson*, 383 N.W.2d 338, 340 (Minn. Ct. App. 1986); *see also Cerro Gordo Charity v. Fireman's Fund Am. Life Ins.*, 819 F.2d 1471, 1477-78 (8th Cir. 1987) (applying Minnesota privilege law in a diversity action).

[103] *State v. Andring*, 342 N.W.2d 128, 133 (Minn. 1984); *State v. Gullekson*, 383 N.W.2d 338, 240 (Minn. Ct. App. 1986).

In addition, a party who places his or her mental or physical condition directly in issue in a proceeding automatically waives the privilege with respect to that condition.[104] A person who files a claim with the Minnesota Crime Victims Reparations Board waives the health care professional privilege.[105] Irrespective of the existence of the health care professional-patient privilege under state law, a privilege attaches by federal statute to records of patients in a federally assisted or regulated substance abuse program.[106] Disclosure of such records can only be ordered if the disclosure is necessary to protect against an existing threat to life or of serious bodily injury; (2) necessary in conjunction with investigation or prosecution of an extremely serious crime; or (3) in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.[107]

Licensed chemical dependency counselors are also prohibited from disclosing any information or opinion based on information they acquire while counseling persons in a professional capacity.[108] However, three exceptions to this privilege exist:

> (1) when informed consent has been obtained in writing, except in those circumstances in which not to do so would violate the law or would result in clear and imminent danger to the client or others; (2) when the communications reveal the contemplation or ongoing commission of a crime; or (3) when the consulting person waives the privilege by bringing suit or filing charges against the licensed professional whom that person consulted.[109]

9.3.2(5) Public Officers

A public officer may not disclose communications received in official confidence when the public interest would suffer by the disclosure.[110] For a communication to come within the public officer privilege, it must be a confidential communication, the disclosure of which would seriously and demonstrably injure the public interest.[111]

The Minnesota Supreme Court has not developed a precise definition of what constitutes a serious injury to the public interest. The privilege, however, has been characterized as referring to "matters affecting the affairs of the state, as state secrets, and communications by informers."[112] In *Sprader v. Mueller*,[113] the court cites a secondary source

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[104] Minn. R. Civ. P. 35.03; *Wenninger v. Muesing*, 307 Minn. 405, 407, 240 N.W.2d 333, 335 (1976); *Padilla v. Bd. of Med. Exam'rs*, 382 N.W.2d 876, 883-84 (Minn. Ct. App. 1986) (holding witnesses testifying against a doctor in a license revocation proceeding do not thereby automatically waive their medical privilege under Minn. R. Civ. P. 35.03).

[105] Minn. Stat. § 611A.62 (2014).

[106] 42 U.S.C. § 290dd-2(a) (2012).

[107] 42 C.F.R. 2.63.

[108] Minn. Stat. § 595.02, subd. 1(i) (2014).

[109] *Id*.

[110] *Id.* (e).

[111] *State v. Lender*, 266 Minn. 561, 565, 124 N.W. 2d 355, 358 (1963); *Rockwood v. Pierce*, 235 Minn. 519, 534, 51 N.W. 2d 670, 679 (1952).

[112] *Thaden v. Bagan*, 139 Minn. 46, 51, 165 N.W. 864, 866 (1917).

[113] 269 Minn. 25, 130 N.W.2d 147 (1964).

stating that courts have been loath to find that a particular disclosure would be contrary to the public interest.[114] Allegations that the public will be less likely to confide in a public officer in the discharge of his or her functions have been held insufficient to establish the privilege.[115] A statement made to a public officer in the presence of third persons is not made in confidence so as to come within the privilege.[116]

9.3.2(6) Interpreters

An interpreter for a person with limited English proficiency or a speech or hearing impairment may not, without the consent of the communicating person, disclose a communication if that communication would be privileged in the absence of the interpreter.[117]

9.3.2(7) Parent-Child Privilege

A parent or a minor child may not be examined regarding any communication made in confidence by the minor child to the parent.[118] The privilege, however, does not apply to specified actions involving the welfare of the child.[119] Such a communication is made in confidence when it is made out of the hearing of persons not members of the immediate family.[120] The privilege may be waived by express consent or by failure to object when the content of the communication is demanded.[121] Although the Minnesota Supreme Court has not interpreted the statutory parent-child privilege, the similarity between the language and policy of this privilege and the marital privilege makes it likely that the case law applicable to the marital privilege will serve as a guide to the definition of the parent-child privilege. The marital privilege, however, is mutual between spouses. The parent-child privilege applies on its face only to communications from the minor child to the parent.

9.3.2(8) Sexual Assault Counselor Privilege

A sexual assault counselor may not testify about any opinion or information received from or about the victim without the consent of the victim unless the proceeding involves child neglect or termination of parental rights and good cause for the disclosure is shown.[122] In a proceeding involving a child neglect or termination of parental rights, disclosure may be required if the public interest and need for disclosure outweigh the negative effect on the victim and adverse impact on the treatment relationship resulting from disclosure.[123] A sexual assault counselor is statutorily defined as a person who has completed at least forty hours of

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[114] *Id*. at 33, 130 N.W.2d at 152.
[115] *Id.* at 25, 130 N.W.2d at 147.
[116] *Lender,* 266 Minn. at 565-66, 124 N.W.2d at 359; *Rockwood*, 235 Minn. at 534-35, 51 N.W.2d at 679.
[117] Minn. Stat. § 595.02, subd. 1(h) (2014); Minn. R. Prof. Resp. for Interpreters, CANNON 5.
[118] Minn. Stat. § 595.02, subd. 1(j) (2014).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*(k).
[123] *Id.*

crisis counseling training and works under the direction of a supervisor in a crisis center that renders advice, counseling, or assistance to victims of sexual assault.[124]

9.3.2(9) Mediation and Alternative Dispute Resolution Privilege

Communications or documents made or prepared in the course of mediation occurring pursuant to agreement to mediate are privileged from testimonial disclosure.[125] The privilege does not extend to preexisting documents, work notes, or communications, nor does the privilege apply to a judicial proceeding to set aside or reform a mediation settlement.[126] Minnesota Statute, section 583.26, subdivision 7(b) (2014) affords a testimonial privilege to a mediator engaged in agricultural debtor-creditor meditation. In *Krueger v. Washington Federal Savings Bank*,[127] statements by a participant concerning the propriety of mediation under the act were not privileged. In addition, no person presiding at an alternative dispute resolution (ADR) proceeding shall be competent to testify in any subsequent civil proceeding or administrative hearing as to any statement, conduct, decision or ruling occurring at or in conjunction with the ADR proceeding.[128] This privilege does not apply to statements or conduct that could constitute a crime; give rise to disqualification proceedings under the rules of professional conduct for attorneys; or constitute professional misconduct.[129]

9.3.2(10) News Media

The Minnesota Free Flow of Information Act[130] gives the news media a "substantial privilege not to reveal sources of information or disclose unpublished information" in any proceeding before any court, agency, department or branch of the state, subject to specific exceptions for criminal and defamation actions.[131] The privilege applies to any person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public.[132]

In criminal cases, disclosure of the source may be compelled only after a determination by a district court, following a hearing and based on clear and convincing evidence, that three factors exist: (1) there is probable cause to believe that the specific information sought (a) is clearly relevant to a gross misdemeanor or felony, or (b) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained (2) that the information cannot be obtained by alternative means or remedies less destructive of first amendment rights; and (3) that there is a compelling and overriding interest requiring disclosure of the information where the disclosure is

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[124] *Id.*

[125] *Id.* (l); *Sonenstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1, 6 (Minn. Ct. App. 1985).

[126] Minn. Stat. § 595.02, subd. 1(l) (2014).

[127] 406 N.W.2d 543 (Minn. Ct. App. 1987).

[128] Minn. Stat. § 595.02, subd. 1a (2014).

[129] *Id.*

[130] *Id.* §§ 595.021-.025.

[131] § 595.022; §595.024 (criminal); §595.025(defamation); *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 672 (Minn. 2003).

[132] §595.023

necessary to prevent injustice.[133] This exception applies only to confidential sources and information leading to their identity.[134] Accordingly, the courts have declined to apply the Act to reporters who witness crimes or to unpublished nonconfidential photographs.[135]

The Court of Appeals applied the privilege to a phone conversation between a reporter and a man involved in a standoff with police who later took his own life. *In re Death Investigation of Skjervold*,[136] In *Skjervold* the reporter used his recorded phone conversations with Skjervold as the basis for an article in the local newspaper published the day after the standoff and Skjervold's suicide. The county attorney argued that disclosure of the tapes was necessary to fully understand events leading up to Skjervold's suicide and that doing so would prevent injustice.[137] The court disagreed holding that the statute required that a particular injustice be identified and that the county attorney failed to establish by clear and convincing evidence that there was a compelling and overriding interest requiring disclosure to prevent a specific injustice.[138]

In defamation actions, the person seeking disclosure must demonstrate that disclosure of the source's identity will lead to relevant evidence on the issue of actual malice.[139] "The person seeking disclosure must also show (a) that there is probable cause to believe that the source has information clearly relevant to the issue of defamation; and (b) that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights."[140]

In *Weinberger v. Maplewood Review*, the Minnesota Supreme Court held that a reporter was required to disclose the identity of sources who made allegedly defamatory statements about a high school football coach.[141] The plaintiff, Weinberger, alleged that three individual defendants made defamatory statements that appeared as attributed to unnamed sources in a news article in the Maplewood Review. The district court granted his application to compel the reporter to reveal the sources of the statements.[142] The order was limited to the three named defendants and thirteen specific statements.[143] The parties did not dispute that this satisfied the requirements of Minn. Stat. § 595.025, subd.2 (b).[144] After determining that the identities of the speakers would lead to relevant evidence on the issue of actual malice and there was probable cause to believe the sources had information clearly relevant to the issue of defamation the court upheld the order.[145]

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[133] *Id.* § 595.024, subd. 2. *In re Death Investigation of Skjervold*, 742 N.W. 2d 686 (Minn. Ct. App. 2008).

[134] *Turner*, 550 N.W.2d at 631; *State v. Knutson (Knutson II)*, 539 N.W.2d 254, 257 (Minn. Ct. App. 1995).

[135] *Turner*, 550 N.W.2d at 631; *Knutson II*, 539 N.W.2d at 257; *Heaslip*, 511 N.W.2d at 23-24.

[136] 742 N.W. 2d 686 (Minn. Ct. App. (2008).

[137] *Skjervold*, 742 N.W.2d at 689.

[138] *Id.* at 690.

[139] Minn. Stat. §595.025, subd.1.

[140] Minn. Stat.§595.025, subd.2(a) and (b).

[141] *Weinberger,* 688 N.W.2d at 675.

[142] *Id.* at 669.

[143] *Id.* at 674.

[144] *Id.* at 675.

[145] *Id.*

9.3.3 Attorney Work Product

The discovery rule of the OAH makes no specific reference to a privilege against discovery to be afforded an attorney's work product. Minnesota Rules, however, require an ALJ to recognize all privileges available at law.[146] Hence, the applicable provision of the Minnesota Rules of Civil Procedure governs the conditions under which an attorney's work product may be discovered in an administrative proceeding.

The Minnesota Rules of Civil Procedure afford a conditional privilege against discovery to material prepared in anticipation of litigation or for trial by an attorney.[147] Such information may be discovered on a showing that the party seeking discovery has substantial need for the materials in the preparation of his or her case and is unable to obtain the substantial equivalent of the materials by other means without undue hardship. Furthermore, the rule affords virtually an absolute privilege to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.[148] In *Dennie v. Metropolitan Medical Center*,[149] the court stated:

> "Work product" is defined as an attorney's mental impressions, trial strategy, and legal theories in preparing a case for trial. It has long been the rule in Minnesota that such work product is not discoverable. However, materials prepared in anticipation of litigation that do not contain opinions, conclusions, legal theories, or mental impressions of counsel are not work product and are discoverable under Minn. R. Civ. P. 26.02(3). Discovery of trial preparation materials requires of the party requesting them a showing of substantial need and inability to obtain the information by other means.[150]

The attorney work product doctrine was initially recognized by the United States Supreme Court in *Hickman v. Taylor.*[151] The initial requirement to be met in establishing the attorney work product privilege is that the matter sought to be discovered be embodied in a document or other tangible thing.[152] Although documents and things prepared in anticipation of litigation may be protected under rule 26.02(d), the rule does not prohibit an independent inquiry into the facts that may have been incorporated into the documents or tangible things.[153] The second condition that needs to be met in order to apply the attorney work product privilege is that the material sought must have been prepared in anticipation of litigation. The

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[146] Minn. R. 1400.6700, subp. 2 (2013).

[147] Minn. R. Civ. P. 26.02(d).

[148] *Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592-93 (3d Cir. 1984); *In re Doe*, 662 F. 2d 1073, 1079 (4th Cir. 1981); *Byers v. Burleson*, 100 F.R.D. 436, 439-40 (D. D.C. 1983); *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979).

[149] 387 N.W.2d 401 (Minn. 1986).

[150] *Id.* at 406 (citations omitted). Minn. R. Civ. P. 26.02(3) has since been renumbered as rule 26.02(d).

[151] 329 U.S. 495 (1947).

[152] Minn. R. Civ. P. 26.02(d).

[153] *Hickman*, 329 U.S. at 504, 508-09; *In re International Sys. & Control Corp. Sec. Litig.*, 91 F.R.D. 552, 561 (S.D. Tex. 1981); *vacated on other grounds,* 693 F.2d 1235 (5th Cir. 1982); *see also Lundin v. Stratmoen*, 250 Minn. 555, 558, 85 N.W. 2d, 828, 831 (1957).

customary test applied is whether the materials were prepared in the usual course of business or specifically in preparation for litigation.[154]

Preexisting documents that were not prepared in anticipation of litigation may not be protected from discovery merely by transferring them to an attorney when litigation appears imminent.[155] Nevertheless, when counsel has arranged a number of preexisting documents into a meaningful compilation in anticipation of litigation, the collection may be subject to the work product privilege.[156] The attorney does not have to prepare the work personally. The privilege may protect trial preparation efforts of the party or his or her consultant, surety, indemnitor, insurer, or agent.[157] The focus has clearly shifted from the identity of the preparer to the fact of pretrial preparation on behalf of a party.[158] It should be noted that discovery of the work product of an expert is governed by a separate provision of rule 26 of the Minnesota Rules of Civil Procedure.[159]

The phrase *in anticipation of litigation* arguably contemplates a judicial proceeding. It could be suggested, therefore, that materials prepared in anticipation of a contested case proceeding are not prepared in anticipation of litigation. The work product doctrine, however, has been applied to proceedings other than those conducted by a court of general jurisdiction.[160] The ability to resolve claims by an attorney on behalf of a client in an adversarial setting satisfies the requirement of preparation in anticipation of litigation.[161] On the other hand, the Minnesota Supreme Court has suggested that the work product doctrine might be inapplicable to workers' compensation proceedings.[162]

The attorney work product privilege extends to government attorneys in their official capacities representing administrative agencies.[163] An agency attorney seeking to shield material from discovery must establish the conditions for the application of the privilege.[164] An

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[154] *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401-02 (8th Cir. 1987) (thorough treatment of the requirement that the material subject to work product privilege be prepared specifically for litigation); *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3rd Cir. 1979); *Brown v. St. Paul City Ry.*, 241 Minn. 15, 36, 62 N.W. 2d 688, 701-02 (1954); D. MCFARLAND & W. KEPPEL, 2 MINNESOTA CIVIL PRACTICE § 1506 (1990).

[155] *Brown*, 241 Minn. at 33, 62 N.W 2d at 700; *see also United States v. Lipshy*, 492 F. Supp. 35, 45 (N.D. Tex. 1979).

[156] *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982).

[157] Minn. R. Civ. P. 26.02(c).

[158] *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 736 (4th Cir. 1974); 6 MOORE'S FEDERAL PRACTICE, *supra* note 15, § 26.70.

[159] Minn. R. Civ. P. 26.02(e).

[160] *Upjohn Co. v. United States*, 449 U.S. 383, 402 (1981); *Natta v. Hogan*, 392 F.2d 686, 693 (10th Cir. 1968).

[161] *See Natta*, 392 F.2d at 693; *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 42 (D. Md. 1974).

[162] *Kahl v. Minn. Wood Specialty*, 277 N.W. 2d 397, 397 n.1 (Minn. 1977).

[163] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975); *Jordan v. Dep't of Justice*, 591 F.2d 753, 755 (D.C. Cir. 1978); *Kent Corp. v. NLRB*, 530 F.2d 612, 623-24 (5th Cir. 1976*); United States v. Anderson*, 34 F.R.D. 518, 522 (D. Colo. 1962).

[164] For a textual discussion of the work product doctrine as applicable to government attorneys, see Comment, *Discovery and Litigation with Federal Agencies Seeking Information in the Challenge of Interpretive Rules*, 28 KAN. L. REV. 487, 499-501 (1980).

agency attorney seeking to avoid discovery of information prepared for a governmental client may also assert the attorney-client[165] and governmental privileges.[166]

The attorney work privilege is not, however, a complete bar to discovery. Material within the attorney work product privilege may be ordered discovered on a showing that the party cannot, without undue hardship, obtain its substantial equivalent by other means and that there is a substantial need for the materials.[167] The party seeking discovery must support the request for discovery with a showing of facts to establish the conditions stated in rule 26.02(d).[168] In determining whether the requisite showing of facts has been made to justify disclosure of otherwise protected information, the need to safeguard pretrial preparation must be balanced against the opposing party's need for the materials and the prejudice to the party's case from their absence. Courts, in individual cases, have been sensitive to the uniqueness of the material sought and its importance to the case of the party seeking discovery.[169]

The Minnesota Rules of Civil Procedure do afford the mental impressions, conclusions, opinions, and legal theories of an attorney or other representative of a party substantially more protection than is afforded to documents within the work product exception.[170] The rules provide that the court shall protect against the disclosure of mental impressions, conclusions, opinions, or legal theories. Case law interpreting the rule clearly affords these thought processes a high degree of protection. Some courts hold that such material is not subject to disclosure.[171] Other courts state that such discovery will be allowed only in extraordinary circumstances.[172] In addition, the Minnesota Rules of Civil Procedure enlarged the scope of interrogatories to include opinions or contentions that relate to fact or the application of law to fact.[173] Consequently, opinions, contentions, and mixed conclusions of law and fact of a party may be requested under such rules even though they may also be contained in trial preparation material.[174]

The work product privilege is more expansive than the attorney-client privilege in that it is not personal to the client and may be asserted by either the client or the attorney.[175] Furthermore, the privilege may also be claimed by a government agency[176] or a corporation.[177]

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[165] *See supra* notes 66-68 and accompanying text in this chapter.

[166] *See* § 9.3.4.

[167] Minn. R. Civ. P. 26.02(d).

[168] *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982); *Burlington N. v. N.D. Dist. Ct.*, 264 N.W.2d 453 (N.D. 1978).

[169] For representative decisions regarding the requisite showing, see S. STONE & R. TAYLOR, *supra* note 16, § 2.08; 6 MOORE'S FEDERAL PRACTICE, *supra* note 15, § 26.70(5)(b).

[170] Minn. R. Civ. P. 26.02(d).

[171] *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974); *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979).

[172] *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981); *Hickman v. Taylor*, 329 U.S. 495, 510-14 (1947); In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

[173] Minn. R. Civ. P. 33.02, 36.01.

[174] D. MCFARLAND & W. KEPPEL, *supra* note 15454, § 1506 at 331-33.

[175] *See, e.g., In re Special Sept. 1978 Grand Jury*, 640 F.2d 49, 63 (7th Cir. 1980); *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 935 (6th Cir. 1980); *In re Grand Jury Proceedings*, 604 F.2d 798, 801 (3d Cir. 1979).

[176] *See supra* notes 157-155 in this chapter.

[177] *Grand Jury Subpoena*, 622 F.2d at 935; S. STONE & R. TAYLOR, *supra* note 16, § 2.04 at 2-15 n. 76.

However, the work product privilege is subject to waiver.[178] Testimonial use of the material contained in the work product waives the privilege.[179] Disclosure to a nonadversary third party does not, however, automatically waive the work product privilege.[180] A voluntary transfer of work product to an adverse party or person associated with an adverse party waives the privilege with respect to the work product disclosed.[181]

9.3.4 Limitations on Discovery from Governmental Entities

Privileges have been recognized at common law that were originally related to the attorney work product doctrine and that restrict the discovery available from a governmental entity in contested proceedings. Some of the privileges afforded governmental entities are absolute and totally prevent discovery, while others are conditional and may be overcome by an appropriate showing of need. The discussion of governmental privileges below presupposes that a contested case proceeding has been commenced and that the issue presented is one of discovery rather than one of the availability of governmental data before the commencement of the proceeding.[182]

If governmental data must be made available under an appropriate disclosure statute,[183] no question of privilege is raised in the administrative proceeding. A party to an administrative proceeding is unlikely to attempt to exclude from discovery data made public by statute. What is more likely is that information statutorily restricted from general disclosure will be claimed not to be subject to discovery in an administrative proceeding.[184]

The federal courts, interpreting the Freedom of Information Act, have held that the statute governing the dissemination of government data does not control discovery in a judicial or contested case proceeding.[185] Since a litigant has a stronger interest in disclosure than the public generally, data not made public by federal statute may be subject to discovery in a

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[178] *See, e.g., In re Murphy*, 560 F.2d 326, 339 n.24 (8th Cir. 1977).

[179] *United States v. Nobles*, 422 U.S. 225, 239 (1975).

[180] *See United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979).

[181] See In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 585 (N.D. Ill. 1981).

[182] For a discussion of the availability of governmental data generally, see 6 MOORE'S FEDERAL PRACTICE, *supra* note 15, § 26.52 and S. STONE & R. TAYLOR, *supra* note 16, §§ 9.01-9.35. For a discussion of the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.99 (2014), see Don A. Gemberling & Gary A. Weissman, *Data Practices at the Cusp of the Millennium*, 22 WM. MITCHELL L. REV. 767 (1996); Don A. Gemberling & Gary A. Weissman, *Data Privacy*, 8 WM. MITCHELL L. REV. 573 (1982); and chapter 13.

[183] Freedom of Information Act, 5 U.S.C. § 552-552b (2012); Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.90 (2014).

[184] The Minnesota Government Data Practices Act prohibits disclosure of information, even to the person who is the subject of the information, when the data is collected for the purpose of the commencement or defense of a "pending civil legal action." Minn. Stat. § 13.39, subd. 2 (2014). The term *pending civil legal action* includes administrative proceedings. *Id.*, subd. 1. A determination as to whether a civil legal action is pending is to be made by the chief attorney acting for the affected governmental unit or agency. *Id.*

[185] *See Wash. Post Co. v. U.S. Dep't of Health*, 690 F.2d 252, 258 (D.C. Cir. 1982); *Pleasant Hill Bank v. United States*, 58 F.R.D. 97, 99-100 (W.D. Mo. 1973).

judicial or quasi-judicial proceeding.[186] In short, the availability of discovery is governed by the existence of a privilege at common law or under rule 26 of the Federal Rules of Civil Procedure rather than by the exemptions found in the federal governmental data statute.

The relationship between discovery in a judicial or quasi-judicial proceeding and the Minnesota Government Data Practices Act has not been as thoroughly determined as the corresponding relationship at the federal level. If the data sought to be discovered is within the possession of a government attorney, the act clearly establishes the primacy of the discovery rules. The use, collection, storage, and dissemination of data by a government attorney acting in a professional capacity is governed by the statutes, rules and professional standards concerning discovery, production of documents, and introduction of evidence in official proceedings, and not by the Minnesota Government Data Practices Act.[187] On the other hand, if the data sought to be discovered is not public and within the possession of the government as a party to the proceeding, the Act mandates the ALJ or other presiding officer to employ a two-part analysis: first, determining whether the data sought is discoverable under applicable rules; and then, if discoverable, balancing the benefit to the party seeking access against the harm to the confidentiality interests of those affected by discovery.[188] The ALJ must also consider the need to notify the subject of the data about the disclosure and propriety of any protective order.[189]

The statute also authorizes an ALJ to change the classification of data under the Data Practices Act as may be appropriate for the conduct of contested case proceedings[190] and thereby make the data subject to discovery without conflict with the act. In addition, the rules of the Minnesota Department of Administration adopted to implement the act provide that the discovery procedures available in a civil or criminal action or administrative proceeding take precedence over the data practices rules.[191]

Thus, both the provisions of the Data Practices Act and its administrative and judicial interpretations support the conclusion that the discovery rules take precedence over the limitations on disclosure contained in the act in appropriate circumstances. It should be noted, however, that the governmental data disclosure statues are not entirely irrelevant; the exemption provision of such statutes are meant to largely parallel the existing privileges.[192]

The issue of governmental or agency privilege may be raised both in proceedings in which a governmental agency is a party and in proceedings between private parties in which

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[186] *See Baldridge v. Shapiro*, 455 U.S. 345, 360 n.15 (1982); *Wash. Post*, 690 F.2d at 258; *Ass'n for Women in Science v. Califano*, 566 F.2d 339, 342-43 (D.C. Cir. 1977); *Pleasant Hill Bank*, 58 F.R.D. at 99-100; Janice Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843, 848-54 (1981).

[187] Minn. Stat. § 13.393 (2014).

[188] *Id.* § 13.03, subd. 6; *N. Inns Ltd. v. Cnty. of Beltrami*, 524 N.W.2d 721, 722 (Minn. 1994); *Montgomery Ward & Co., Inc. v. Cnty. of Hennepin*, 450 N.W.2d 299, 306 (Minn. 1990); *Erickson v. MacArthur*, 414 N.W.2d 406, 408 (Minn. 1987); *State v. Renneke*, 1997 WL 274330 (Minn. Ct. App. 1997); *see also* § 13.9.

[189] *Montgomery Ward*, 450 N.W.2d at 308.

[190] Minn. Stat. § 13.03, subd. 6 (2014).

[191] Minn. R. 1205.0100, subp. 5 (2013).

[192] *See* 5 U.S.C. § 552(b)(5) (2012); *EPA v. Mink*, 410 U.S. 73, 85-86 (1973), *superseded by statute as stated in CIA v. Simms*, 471 U.S. 159, 189 n.5 (1985) (Marshal, J., concurring); *Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132, 1138-39 (5th Cir. 1980).

the aid of a hearing officer is sought in obtaining discovery from a governmental agency. When the governmental agency is not a party to the proceedings, the courts have not always ordered discovery. Generally, a subordinate official will not be compelled to testify and produce documents in private proceedings where an authorized departmental rule makes disclosure subject to approval of the agency head.[193] When the government agency is not a party to the proceedings, the ALJ lacks any authority to sanction an official within the same executive branch for noncompliance with a discovery order. The agency may be called upon to respond to a subpoena issued under Minnesota Statute, section 14.51, however. Any objection by the agency is then resolved under an OAH rule.[194]

When the governmental agency is a party to the proceedings, common-law governmental or agency privileges may protect military and state secrets, information obtained for law enforcement purposes, the identity of informers, the mental processes of personnel engaged in quasi-judicial decision making, and communications prepared for use in the governmental deliberations process. A governmental agency may assert any other privilege recognized at law, including the attorney-client privilege[195] and the work product privilege.[196]

In *In re Parkway Manor Healthcare Center*,[197] the court stated that the legislature has reserved to itself the recognition of evidentiary privileges. At least when the privilege asserted has no common law antecedent, the court considered it inappropriate for the judiciary to create a new privilege. The limitations on discovery from a governmental entity hereinafter discussed are not specifically recognized by statute. Some, like the state secret privilege, were recognized at common law. Others, like agency deliberative privilege, are of more recent origin. When the Minnesota court has specifically recognized a limitation on the discovery available from a government entity, it has done so either without discussing the primacy of the legislature in establishing evidentiary privileges, or by derivation from the public officer privilege contained in Minnesota Statutes, section 595.02, subdivision 1(e).[198]

9.3.4(1) State Secret Privilege

The state secret privilege absolutely prevents disclosure of information that would reasonably pose a threat to the military, diplomatic, or intelligence-gathering capabilities of the government.[199] Generally, the state secret privilege must be formally claimed by the head of the applicable agency, must specifically describe the privileged documents, and must state why the

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[193] *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951); see Boske v. Comingore, 177 U.S. 459, 460-61 (1900); *Ex parte Sackett*, 74 F.2d 922, 924 (9th Cir. 1935); 6 MOORE'S FEDERAL PRACTICE, *supra* note 15, § 26.52[9].

[194] Minn. R. 1400.7000, subd. 3 (2013).

[195] *See supra* notes 69-71 and accompanying text in this chapter.

[196] *See supra* notes 163 and accompanying text in this chapter.

[197] 448 N.W.2d 116 (Minn. Ct. App. 1989).

[198] *State v. Rothstein*, 422 N.W.2d 300, 302-03 (Minn. Ct. App. 1988); *Parkway Manor*, 448 N.W.2d at 118-19.

[199] *Molerio v. FBI*, 749 F.2d 815, 820-21 (D.C. Cir. 1984); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982).

information has to be kept confidential.[200] *In camera* inspection should be used to resolve questions regarding the applicability of the privilege to the requested information.[201]

9.3.4(2) Agency Deliberative Privilege

Whether termed the intragovernmental memoranda privilege or the agency deliberative privilege, the protection from discovery afforded specific governmental information is designed to protect the government's deliberative processes.[202]

The agency deliberative privilege is traceable to *Kaiser Aluminum & Chemical Corp. v. United States,*[203] in which Kaiser Aluminum & Chemical Corporation sought discovery of internal general service administration reports, memoranda, and documents related to the company. When the government resisted production of the documents, the court denied discovery on the ground that intragovernmental communications of a deliberative nature must be protected in order to safeguard the administrative decision-making processes.

In a number of subsequent decisions, an ill-defined area of qualified privilege has been recognized against the disclosure of documents and information reflecting advisory opinions, recommendations, and deliberations involved in decisionmaking and policy formulation based on the conclusion that disclosure of such information would be injurious to the consultative functions of government.[204] The nature of the qualified privilege and the factors justifying its existence were stated by the Court in *Carl Zeiss Stifting v. V.E.B. Carl Zeiss, Jena:*[205]

> This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate and thus achieves an objective akin to those attained by other privileges more ancient and commonplace in character. Nowhere is the public

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[200] *In re Eisenberg*, 654 F.2d 1107, 1110-12 (5th Cir. 1981).

[201] *Id.* at 1112; *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

[202] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52, (1975); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-25 (D. D.C. 1966) *aff'd*, 384 F.2d 979 (D.C. Cir. 1966); *see also Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946-47 (Ct. Cl. 1958); Comment, *Discovery of Government Documents and Official Information Privilege,* 76 COLUM. L. REV. 142, 142-43 (1976).

[203] 157 F. Supp. at 946-47.

[204] *See, e.g., United States v. Winner*, 641 F.2d 825, 831 (10th Cir. 1981); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881-882 (5th Cir. 1981); *Black v. Sheraton Corp.*, 564 F.2d 531, 544 (D.C. Cir. 1977); *SEC v. Nat'l Student Mktg. Corp.*, 538 F.2d 404, 407 (D.C. Cir. 1976); *Kerr v. U.S. Dist. Court*, 511 F.2d 192, 198-99 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976); *Carl Zeiss Stiftung*, 40 F.R.D. at 324.

[205] 40 F.R.D. at 324-25 (citations omitted).

> interest more vitally involved than in the fidelity of the sovereign's decision- and policy-making resources.[206]

The courts have used two tests to determine the existence of the qualified agency deliberative privilege. In the first test, a distinction is made between facts and opinions. Agency documents containing factual information, rather than advice or opinions, are not privileged.[207] In more recent cases, the courts have also made use of a pre-decisional/post-decisional test.[208] Under this test, information that predates the decision and is used in its formulation is privileged, and post-decisional information or communication designed to explain the decision is subject to discovery.[209] Though few generalizations may be drawn, the decisionmaker faced with a claim of privilege based on the governmental deliberative process must balance the factors supporting the qualified privilege against the need of the requesting party to receive the information and the unavailability of similar information from other sources.[210]

9.3.4(3) Mental Process Privilege

A court or ALJ may not order discovery of the mental processes of an executive or administrative officer exercising quasi-judicial or decisional authority.[211] Although the Minnesota Supreme Court has not determined the extent to which agency personnel can be examined directly for their motives and intentions as an element of discovery in an administrative proceeding, in related post-decisional challenges the court has allowed only very limited discovery to establish the fulfillment of procedural requirements and lack of bad faith.[212] Moreover, in each such post-decisional challenge, the court has cited *United States v. Morgan*,[213] with approval.[214] It is unlikely that the scope of discovery afforded in an inquiry into the motives, intentions, and thought processes of administrative agency personnel would be broader in any context.

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[206] *Id.*

[207] *See, e.g., EPA v. Mink*, 410 U.S. 73, 87-88 (1973); *Branch*, 638 F.2d at 882; *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 660-61 (D.C. Cir. 1960).

[208] *E.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 359-60 (1979); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-54 (1975).

[209] *See, e.g., Mobil Oil Corp. v. Dep't of Energy*, 520 F. Supp. 414, 416 (N.D.N.Y. 1981).

[210] *See, e.g., J.H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 234 (5th Cir. 1972); *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979); *Gregg v. Or. Racing Comm'n*, 38 Or. App. 19, 588 P.2d 1290, 1294 (1979).

[211] *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Nat'l Courier Ass'n v. Bd. of Governors*, 516 F.2d 1229, 1242 (D.C. Cir. 1975).

[212] *In re Lecy*, 304 N.W.2d 894, 899-900 (Minn. 1981); *People for Envtl. Enlightenment v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978); *see Mampel v. E. Heights State Bank*, 254 N.W.2d 375, 378 (Minn. 1977).

[213] 313 U.S. at 422.

[214] *See, e.g., Mampel,* 254 N.W.2d at 378; *Ellingson v. Keefe*, 396 N.W.2d 694, 696 (Minn. Ct. App. 1986) (holding discovery may be had from administrative executive only upon written interrogatories directed toward questioning the satisfaction of procedural requirements; mental processes of the administrative decision maker not subject to discovery).

9.3.4(4) Investigatory Files

A qualified privilege has been afforded to the investigatory files of an agency charged with the enforcement of the criminal or civil law. A number of courts have found that a qualified privilege exists for the investigative files of a government agency charged with civil or criminal law enforcement.[215] One of two circumstances must be shown to exist before a qualified privilege can be successfully asserted: (1) disclosure of the specific material must prejudice the investigating function, or (2) such disclosure must disclose the identity of protected informants.[216] If the required showing of prejudice to the investigatory function is made by the government, the need of the litigant for discovery must be balanced against the government's interest in nondisclosure. The process has been characterized as follows:

> The qualified privilege for . . . investigations permits the court to balance the interests of the litigant seeking the information against the government's interest in nondisclosure. If the litigant demonstrates that his need for the information outweighs the government's interest in maintaining secrecy, the qualified privilege is overcome.[217]

The Minnesota courts have specifically recognized the qualified privilege that attaches to investigatory files of a government agency charged with civil or criminal law enforcement responsibilities. In *Erickson v. MacArthur*,[218] the court stated:

> Section 595.02, subd. 1(e) provides: "A public officer shall not be allowed to disclose communications made to the officer in official confidence when the public interest would suffer by the disclosure." We recognize that the statutory privilege broadly enunciated in Section 595.02, subd. 1(e) covers communications made to police officers, including those made during the course of Internal Affairs investigations. The scope of the privilege shall be determined on a case-by-case basis by balancing the need for disclosure against the public interest in confidentiality.

In determining the scope of the privilege, the liberality of the discovery rules dictates that it be narrowly construed. In short, there is no blanket insulation of investigatory files.[219]

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[215] *See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *United States v. Winner*, 641 F.2d 825, 831 (10th Cir. 1981).

[216] *See Sirmans v. City of S. Miami*, 86 F.R.D. 492, 495 (S.D. Fla. 1980); *Kinoy v. Mitchell*, 67 F.R.D. 1, 10-11 (S.D.N.Y. 1975); *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973).

[217] *Sirmans*, 86 F.R.D. at 495.

[218] 414 N.W.2d 406 (Minn. 1986); *see also City of Minneapolis v. Lynch*, 392 N.W.2d 700, 705-06 (Minn. Ct. App. 1986); *Connolly v. Comm'r of Pub. Safety*, 373 N.W.2d 352, 354 (Minn. Ct. App. 1985).

[219] *United States v. O'Neill*, 619 F.2d 222, 230-31 (3d Cir. 1980); *Sirmans*, 86 F.R.D. at 495; *Kinoy*, 67 F.R.D. at 2.

9.3.4(5) Identity of Informants

The identity of government informants may also be subject to a qualified privilege.[220] When the disclosure of an informer's identity or the contents of his or her communications with the government is, however, essential to a fair determination of a case, the privilege must yield.[221] In each case, the legitimate needs of the government to protect its sources of confidential information must be weighed against the need of the party seeking discovery for the information.[222] Although the government informer privilege originated in the context of criminal proceedings, it applies generally to civil and quasi-judicial administrative cases.[223] If the identity of an informer is made known to the party seeking discovery, appropriate protective orders should be fashioned.[224]

9.3.4(6) Asserting the Governmental Privilege

A resolution of the question of the existence of any aspect of the governmental privilege is to be made by the court or administrative tribunal rather than by the agency of which discovery is sought.[225] Although there is some inconsistency in the case law concerning who must assert the privilege, it is clear that at a minimum, the head of the governmental agency or department who would be responsible for the disclosure of the information either must have examined the material personally and claimed the privilege or must have established internal guidelines to determine whether a privilege should be asserted.[226] The privilege may not be successfully asserted by the governmental attorney involved in the litigation.[227] An assertion of privilege must be specific with respect to both the documents to be protected and the precise reasons for preserving confidentiality.[228] The agency must articulate "precise reasons why the public interest would be affected adversely by disclosure."[229]

When an initial claim of governmental privilege has been made with specificity, an *in camera* inspection of the material is appropriate if there is a probability that the party seeking

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[220] *Roviaro v. United States*, 353 U.S. 53, 61 (1957); *Erickson v. MacArthur*, 414 N.W.2d 406, 407-08 (Minn. 1987) (finding names of persons who made statements to police internal affairs officers entitled to protection from discovery); *Hughes v. Dakota County*, 278 N.W.2d 44, 45-46 (Minn. 1978);, 422 N.W.2d 300, 303 (Minn. Ct. App. 1988) (holding police officer may withhold identity of informants).

[221] *Roviaro*, 353 U.S. at 60-61.

[222] *United States v. McManus*, 560 F.2d 747, 751 (6th Cir. 1977); *Westinghouse Corp. v. City of Burlington*, 351 F.2d 762, 768-69 (D.C. Cir. 1965).

[223] *In re United States*, 565 F.2d 19, 22 (2d Cir. 1977); *Hodgson v. Charles Martin Inspectors of Petroleum*, 459 F.2d 303, 306 (5th Cir. 1972); *Donovan v. E.J.D.*, 98 F.R.D. 632, 633 (D. Vt. 1983).

[224] *OKC Corp. v. Williams*, 461 F. Supp. 540, 553-54 (N.D. Tex. 1978); *Erickson v. MacArthur*, 414 N.W.2d 406, 410 (Minn. 1987).

[225] *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

[226] *Id.* at 7-8; *Black v. Sheraton Corp.*, 564 F.2d 531, 534 (D.C. Cir. 1977); *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983); *Thill Sec. Corp. v. N.Y. Stock Exch.*, 57 F.R.D. 133, 138 (E.D. Wis. 1972).

[227] *See, e.g., United States v. O'Neill*, 619 F.2d 222, 225-26 (3d Cir. 1980); *Mobil Oil Corp. v. Dep't of Energy*, 520 F. Supp. 414, 416 (N.D.N.Y. 1981).

[228] *O'Neill*, 619 F.2d at 226; *Smith v. FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975); *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 101 (D. D.C. 1974), *rev'd on other grounds,* 564 F.2d 531 (D.C. Cir. 1977).

[229] *Exxon v. Dep't of Energy*, 91 F.R.D. 26, 44 (N.D. Tex. 1981).

production is entitled to access to some of the materials requested.[230] As a condition prerequisite to obtaining an *in camera* inspection, the party seeking production must demonstrate both a legitimate need for the information in the presentation of its case or defense and the lack of alternative sources. When both the existence of the privilege and the opposing party's need for the information have been established, the application of the privilege may then be determined.

9.4 Self-Incrimination

A person has a constitutional right not to disclose material that may be incriminating.[231] The privilege against self-incrimination also applies to administrative proceedings.[232] For the privilege to be applicable in an administrative or civil proceeding, the testimony sought must enhance the threat of criminal prosecution to such an extent that reasonable grounds exist to apprehend its danger.[233]

When discovery is resisted on the ground of self-incrimination, the position of a party or a witness who voluntarily testifies or participates may be distinguished from a person testifying under compulsion. The rule that one who testifies in his own behalf thereby foregoes the right to invoke the privilege against self-incrimination regarding matters made relevant by direct examination is controlling when a party refuses to comply with pretrial discovery requirements on the grounds of self-incrimination.[234]

In *Christenson v. Christenson*,[235] the Minnesota Supreme Court held that a plaintiff who, on the ground of privilege against self-incrimination, refused to answer questions in depositions and refused to answer the defendants' requests for admissions, was required to either waive her privilege against self-incrimination or have her civil action dismissed. With respect to a plaintiff who asserts the privilege against self-incrimination, the Minnesota Supreme Court stated:

> The interdiction of this constitutional safeguard in civil cases must be balanced against the purposes and policies supporting the discovery rules. Minn. R. Civ. P. 26.02 provides that parties may only obtain discovery

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[230] *Erickson v. MacArthur*, 414 N.W.2d 406, 409 (Minn. 1987) (finding *in camera* inspection required by trial court to balance competing interests prior to ruling on discovery requests); *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987) (finding *in camera* inspection a condition to release of confidential welfare records to criminal defendant); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 330 (D. D.C. 1966) *aff'd*, 384 F.2d 979 (D.C. Cir. 1966).

[231] U.S. CONST. amend. V; MINN. CONST. art. 1, §7.

[232] *Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976); *Unifd. Sanitation Men Ass'n v. Sanitation Comm'r*, 392 U.S. 280, 284-85 (1968); *Spevak v. Klein*, 385 U.S. 511, 516-17 (1967); *see Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55-56 (1964); *State v. Gensmer*, 235 Minn. 72, 77, 51 N.W.2d 680, 684 (1952).

[233] *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951); *Parker v. Hennepin Cnty. Dist. Court*, 285 N.W.2d 81, 83 (Minn. 1979).

[234] *Parker*, 285 N.W.2d at 83; *Christenson v. Christenson*, 281 Minn. 507, 519, 162 N.W.2d 194, 201 (1968); *In re J.W.'s Welfare*, 374 N.W.2d 307, 310 (Minn. Ct. App. 1985), *rev'd on other grounds,* 391 N.W.2d 791 (Minn. 1986).

[235] 281 Minn. at 524, 162 N.W.2d at 204.

> regarding matters not constitutionally privileged, but Rules 26.02 is not intended to allow the exploitation of the Fifth Amendment to unfairly prejudice an adversary in a civil case. This court will not permit a plaintiff to use the judicial forum to make allegations only to later insulate himself by invoking the Fifth Amendment as a shield from cross-examination. . . . As we have previously stated: ". . . a person ought not to be permitted to divulge only that part of the story favorable to his or her position and thus present a distorted and misleading picture of what has really happened."[236]

The Minnesota Supreme Court recognizes that different considerations may apply to defendants:

> Invocation of the Fifth Amendment by a civil defendant, however, requires a more subtle response because of the involuntary nature of a defendant's participation in a lawsuit, and the appearance of compulsion. Nevertheless, courts have been able to safeguard the constitutional foundation of the privilege "without permitting the civil defendant to gain an unfair advantage especially since, in private civil litigation, the plaintiff's only source of evidence is frequently the defendant himself, and since the type of case where the privilege is most frequently asserted . . . involve[s] intentional and often malicious conduct." Thus, in some situations where a civil defendant has refused to answer on Fifth Amendment grounds, courts have struck his pleadings, counterclaims or affirmative defenses, entered judgment against him, or compelled him to repeat his refusal to answer to read his deposition in front of the jury. Such sanctions do not punish a defendant for his assertion of the privilege, but for his failure to answer as he typically would have under normal circumstances.[237]

In *Parker v. Hennepin County District Court,*[238] the defendants asserted a Fifth Amendment privilege as a justification for refusal to answer certain discovery requests. The Minnesota Supreme Court permitted the imposition of sanctions on the defendants by treating the questions as admitted when the defendants refused to answer based on a valid assertion of the Fifth Amendment privilege.

Although the language of the court in *Parker* regarding the imposition of sanctions on defendants for failure to make discovery on grounds of self-incrimination is broad, it is properly understood in the context of proceedings between private litigants. When the government is a party and seeks to deprive one of a right, a defendant cannot constitutionally be subject to

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[236] *Parker*, 285 N.W.2d at 83 (citations omitted).

[237] *Id*. (citations omitted); *see In re J.W.'s Welfare*, 374 N.W.2d at 310 (applying *Parker* to the imposition of discovery sanctions); *see also Stubblefield v. Gruenberg*, 426 N.W.2d 912, 915 (Minn. Ct. App. 1988) (finding civil defendant's privilege against self-incrimination not violated by striking affirmative defense of fraud, even if due to maker's invocation of Fifth Amendment rights).

[238] 285 N.W.2d at 81.

unlimited sanction for a valid assertion of the Fifth Amendment privilege.[239] In *C.I.R. v. Fort*,[240] the Minnesota Supreme Court rejected the Commissioner of Revenue's attempt to use a taxpayer's assertion of the self-incrimination privilege as a decisive factor in concluding the taxpayer constructively possessed cocaine. The court held that such adverse use of the taxpayer's self-incrimination objection would penalize the taxpayer for exercising her constitutional rights.[241]

Similarly, public employees may not be dismissed from employment for asserting the privilege against self-incrimination.[242] Public employees may, however, be required to answer even potentially incriminating questions "if they have not been required to surrender their constitutional immunity."[243] Refusal to answer questions narrowly related to job performance where there has been no requested surrender of protected rights is a ground for dismissal.[244] Individuals may not be disqualified from participating in public contracts if they refuse to waive prospectively their Fifth Amendment rights regarding their performance under the contracts.[245]

A witness can only be compelled to testify or produce documents over a valid assertion of a Fifth Amendment privilege if the witness is granted immunity from subsequent use against him or her of both the information provided and any fruits of that information, the so-called use and derivative use immunity.[246] Certain statutes grant blanket immunity against subsequent prosecution for the provision of information that may tend to incriminate the person providing the information. For example, in a proceeding before the public utilities commission regarding electric and natural gas rates, the ability to prosecute, punish, or penalize a person required to produce information is removed except for a subsequent prosecution for perjury.[247]

The privilege against self-incrimination operates differently within a corporate setting. A corporation, partnership, or other business entity cannot claim the privilege against self-incrimination.[248] This is true even when the business entity is merely an alter ego of the owner.[249] A corporate agent may invoke the personal privilege with respect to depositions or

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[239] *Spevak v. Klein*, 385 U.S. 511, 518-19 (1967) (finding Attorney could not be disbarred for asserting a Fifth Amendment privilege in a disciplinary hearing); *In re Welfare of J.W.*, 415 N.W.2d 879, 883 (Minn. 1987) (finding waiver of claim of self-incrimination may not be condition of avoiding proceedings for termination of parental rights).

[240] 479 N.W.2d 43 (Minn. 1992).

[241] *Id*. at 48.

[242] *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977); *Unifd. Sanitation Men Ass'n v. Sanitation Comm'r*, 392 U.S. 280, 283-84 (1968); *Spevak v. Klein*, 385 U.S. 511, 517-18 (1967); *Gardner v. Broderick*, 392 U.S. 273, 279 (1968); *In re Kelvie*, 384 N.W.2d 901, 905 (Minn. Ct. App. 1986).

[243] *Lefkowitz*, 431 U.S. at 806 (citing *Gardner*, 392 U.S. at 278-79).

[244] *Id*. For a thorough discussion of the case law applicable to assertions of Fifth Amendment rights by public employees, see *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982) and *In re Kelvie*, 384 N.W.2d at 905.

[245] *Lefkowitz v. Turley*, 414 U.S. 70, 77-78 (1973).

[246] *Minn. State Bar Ass'n v. Divorce Assistance Ass'n*, 311 Minn. 279, 291, 248 N.W.2d 733, 738 (1976). There must, however, be specific authority to grant such immunity. *In re Kelvie*, 384 N.W.2d at 905.

[247] Minn. Stat. § 216B.31 (2014).

[248] *Bellis v. United States*, 417 U.S. 85, 88 (1974); *Kohn v. State*, 336 N.W.2d 292, 298 (Minn. 1983); *State v. Alexander*, 281 N.W.2d 349, 353 (Minn. 1979).

[249] *Hair Indus. Ltd. v. United States*, 340 F.2d 510, 511 (2d Cir. 1964); *Kohn*, 336 N.W.2d at 298.

interrogatories, but in that case, the corporation must appoint one who can respond without self-incrimination.[250]

9.5 Discovery Related to Constitutional Questions

An administrative agency and an ALJ lack authority to declare unconstitutional an agency rule or governing statute.[251] One court has held that since an administrative agency lacks authority to declare a rule or governing statute unconstitutional, it may not authorize discovery to establish such unconstitutionality.[252] Even though an administrative agency lacks authority to declare an agency rule or governing statute unconstitutional, such a claim may form the basis of an appeal of an adverse agency decision. Under such circumstances and subject to other limitations on discovery, allowing a participant in an administrative proceeding to develop the evidentiary record before the agency that will allow proper presentation of the constitutional question on appeal appears appropriate. The record on appeal is limited to evidence considered by the agency.[253] In *Johnson v. Elkin,*[254] the North Dakota Supreme Court encouraged the development of the record of evidence on constitutional questions before the administrative agency even though that agency would lack authority to decide the questions. Such a procedure would avoid the requirement of a remand to the administrative agency for the taking of additional evidence.

9.6 Proprietary Data

The rules of the OAH protect parties from the disclosure of proprietary information.[255] An ALJ faced with a claim of proprietary information may fashion appropriate protective orders and proceed as otherwise provided for by law. Confidential information includes trade secrets and proprietary information and those matters that, although not strictly proprietary in an economic sense, ought to receive some protection from disclosure to protect the source of the information.

The Minnesota Supreme Court, in *Cherne Industrial v. Grounds & Associates*,[256] defined trade secrets and proprietary information in terms of the following tests:

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[250] *United States v. Kordel*, 397 U.S. 1, 8 (1970); *Kohn*, 336 N.W.2d at 298-99.

[251] *Wronski v. Sun Oil Co.*, 108 Mich. App. 178, 187, 310 N.W.2d 321, 324 (1981); *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 369 (Minn. 1977); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In re Rochester Ambulance Serv.*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993); *Holt v. Bd. of Med. Exam'rs*, 431 N.W.2d 905, 906-07 (Minn. Ct. App. 1988) ("[While] true that administrative bodies generally lack subject-matter jurisdiction to decide constitutional issues . . . constitutional claims may be asserted on appeal from an agency decision."); *Padilla v. Bd. of Med. Exam'rs*, 382 N.W.2d 876, 882 (Minn. Ct. App. 1986) (holding constitutional claims may be asserted on appeal from an agency decision); *First Bank v. Conred*, 350 N.W.2d 580, 585 (N.D. 1984).

[252] *State Dep't of Admin. Div. of Pers. v. State Dep't of Admin. Div. of Hearings*, 326 So. 2d 187, 188-89 (Fla. Dist. Ct. App. 1976).

[253] Minn. Stat. § 14.68 (2014).

[254] 263 N.W.2d 123, 127 (N.D. 1978).

[255] Minn. R. 1400.6700, subp. 4 (2013).

[256] 278 N.W.2d 81 (Minn. 1979).

> Certain common elements can be distilled from these definitions and fashioned into a workable test encompassing both concepts. The elements comprising that test are: (1) The protected matter is not generally known or readily ascertainable, (2) it provides a demonstrable competitive advantage, (3) it was gained at expense to the employer, (4) it is such that the employer intended to keep it confidential. It is commonly recognized that " . . . matters of general knowledge within the industry may not be classified as trade secrets or confidential information entitled to protection."[257]

The Minnesota Uniform Trade Secrets Act contains a similar definition of proprietary information.[258]

The Tenth Circuit, in *Centurion Industries v. Warren Stuerer & Associates,*[259] stated the conditions for disclosure of proprietary information:

> "[T]here is no absolute privilege for trade secrets and similar confidential information." . . . To resist discovery under Rule 26(c)(7), a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful . . . If these requirements are met, the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to the action. . . . The district court must balance the need for the trade secrets against the claim of injury resulting from disclosure. . . . If proof of relevancy or need is not established, discovery should be denied. . . . On the other hand, if relevancy and need are shown, the trade secrets should be disclosed, unless they are privileged or the subpoenas are unreasonable, oppressive, annoying, or embarrassing.[260]

If the existence of relevant proprietary information sought to be discovered is established, the ALJ may issue such orders as are reasonably necessary to protect the integrity of the information, including a denial of discovery if protection can be afforded in no other manner.[261] An order compelling disclosure of trade secrets may require the party obtaining the discovery to treat the material obtained as confidential.[262] Allegations of harm due to the release of proprietary data must be specific and not merely conclusory.[263]

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[257] *Id.* at 90 (citation omitted); *see also Electro-craft Corp. v. Controlled Motion*, 332 N.W.2d 890 (Minn. 1983) (requisites of trade secrets); *Jostens, Inc. v. Nat'l Computer Sys.*, 318 N.W.2d 691 (Minn. 1982) (computer software as trade secret); *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628 (Minn. 1982) (reasonable efforts required to maintain secret of trade secret).

[258] Minn. Stat. § 325C.01, subd. 5 (1998). *See generally* Note, *Protection and Use of Trade Secrets,* 64 HARV. L. REV. 976, 977-78 (1951).

[259] 665 F.2d 323 (10th Cir. 1981).

[260] *Id.* at 325-26 (citations and footnotes omitted).

[261] *See* Minn. R. 1400.6700, subp. 4 (2013); *Thermorama v. Shiller*, 271 Minn. 79, 86, 135 N.W.2d 43, 45-46 (1965); Minn. R. Civ. P. 26.03; *see also Snyker v Snyker*, 245 Minn. 405, 408, 72 N.W.2d 357, 359 (1955).

[262] *Centurian Industries*, 665 F.2d 323, 326 (10th Cir. 1981); *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1351 (D. Hawaii 1975); *Triangle Ink & Color Co. v. Sherwin-Williams Co.*, 61 F.R.D. 634, 636 (N.D. Ill. 1974).

[263] *In re Rahr*, 632 N.W.2d 572, 576 (Minn. 2001) (denying a writ of prohibition against the tax court because Rahr's allegations of harm were conclusory but remanded to allow Rahr to present data to the tax court at an *in camera* hearing).

Logically distinct from trade secret information is material the disclosure of which might subject a party to annoyance, embarrassment, or oppression.[264] When information, although not of an economically proprietary nature, would have an extreme adverse impact on a party if disclosed, the same factors that make a protective order appropriate or that are considered in regard to a trade secret apply.[265] Both the governing statute[266] and the rules of civil procedure,[267] made applicable to the OAH, provide ample authority for an ALJ to issue an appropriate protective order when the discovery of confidential material not qualifying as proprietary information is sought.[268]

9.7 Discovery of Public Documents

A number of courts have held that discovery of public documents cannot be ordered.[269] The reason underlying the rule is that if a document is a matter of public record, it is equally available to both parties, and there is no justification to order the production of such a document.[270] Under particular circumstances, however, including a showing of hardship, the production of matters of public record as part of discovery has been required.[271]

9.8 Partially Discoverable Information and Protective Orders

Information subject to discovery may be intermingled with privileged material. When the subject of discovery contains a mixture of privileged and nonprivileged material, the ALJ may, in the exercise of sound discretion, permit discovery of the nonprivileged information subject to the conditions necessary to reasonably protect the person for whose benefit the

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[264] Minn. R. Civ. P. 26.03.

[265] *See In re Richardson-Merrell*, 97 F.R.D. 481, 484 (S.D. Ohio 1983); *Thermorama*, 271 Minn. at 83, 135 N.W.2d at 46; *see also Beatty v. Republican Herald Publ'g Co.*, 291 Minn. 34, 38-39, 189 N.W.2d 182, 185 (1971).

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

[267] Minn. R. Civ. P. 26.03.

[268] For a discussion of the circumstances under which a protective order from discovery is appropriate to protect a party from annoyance, embarrassment, or oppression, see 6 MOORE'S FEDERAL PRACTICE, § 26.105 (3d ed. 1997). Specific authority for an ALJ to issue a protective order to protect against annoyance, embarrassment, oppression, or undue burden or expense was added in 2001 to Minn. R. 1400.6700, subp. 4.

[269] *See In re Kohn*, 357 So. 2d 279, 282 (La. Ct. App. 1978); *Connolly v. Comm'r of Pub. Safety*, 373 N.W.2d 352, 354 (Minn. Ct. App. 1985) (availability of documents in government file sufficient response to interrogatories and request for production of documents); *In re John Hancock Mut. Life Ins. Co.*, 81 Misc. 2d 269, 366 N.Y.S.2d 93, 95 (1975).

[270] *See Inc. Town of Sallisaw v. Chappelle*, 67 Okla. 307, 171 P. 22, 23 (1918).

[271] *See Martin v. Weld County*, 43 Colo. App. 49, 54, 598 P.2d 532, 535 (1979); *Marshall v. Elward*, 78 Ill. 2d 366, 374, 399 N.E.2d 1329, 1333 (1980); *State ex rel. Von Hoffman Press v. Saitz*, 604 S.W.2d 770, 722 (Mo. Ct. App. 1980).

privilege exists.[272] A protective order may be entered, or the ALJ may undertake separate privileged information from discoverable material.[273]

9.9 Privacy Considerations as Limiting Discovery

The courts have generally recognized that an individual's legitimate interest in privacy and associational relationships may limit discovery. In *Caucus Distributors, Inc. v. Commissioner of Commerce*,[274] the court recognized that the compelled disclosure of the name of campaign contributors through discovery may amount to an intrusion into First Amendment rights of privacy, association, and belief. The court approved the requested discovery only after finding that a compelling state interest was involved and that the subjects of the disclosure had been afforded maximum protection available by a protective order. Similarly, in *County of Ramsey v. S.M.F.*,[275] the court held that interrogatories dealing with a person's history of sexual relations involved a well-established zone of privacy. Such discovery can only be justified by a legitimate, important state interest and the intrusion must be by the least intrusive means.[276]

In *Humenansky v. Minnesota Board of Medical Examiners*,[277] the Minnesota Court of Appeals upheld the constitutionality of Minnesota Statute, section 147.091, subdivision 6, allowing the Board to order a physician to submit to mental and physical examinations in order to determine the physician's fitness to continue treating patients. The court construed the statute as allowing mental examinations if such examination was the least intrusive means of determining a physician's mental condition.[278] While the court recognized that the examinations infringed on some privacy expectations, the court found these expectations did not outweigh the government's compelling interest in the safety of its people.[279]

Overly broad discovery interrogatories eliciting more than the required information are objectionable when a privacy or associational interest is involved.[280] A number of courts have

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[272] *Erickson v. MacArthur*, 414 N.W.2d 406, 410 (Minn. 1987) (finding protective order to safeguard privacy interests of internal affairs witnesses appropriate); *Thermorama v. Shiller*, 271 Minn. 79, 83, 135 N.W.2d 43, 45-46 (1965); *Snyker v Snyker*, 245 Minn. 405, 407-08, 72 N.W.2d 357, 359 (1955); *Caucus Distrib., Inc. v. Comm'r of Commerce*, 422 N.W.2d 264, 268-69 (Minn. Ct. App. 1988) (finding protective order against general disclosure of names of contributors to political party appropriate).

[273] *Snyker*, 245 Minn. at 407-08, 72 N.W.2d at 359. For a discussion of the scope of a protective order in the analogous area of trade secret protection, *see supra* § 9.4, notes 245-246 and accompanying text in this chapter. *See* Minn. R. 1400.6700, subp. 4 (2013).

[274] 422 N.W.2d at 268; *see also NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958); *Jones v. Unknown Agents of the Fed. Election Comm'n*, 513 F.2d 864, 874 (D.C. Cir. 1979); *Fed. Election Comm'n v. The LaRouche Campaign*, 644 F.Supp. 120, 123 (S.D.N.Y. 1986).

[275] 298 N.W.2d 40 (Minn. 1980).

[276] *Id*. at 42; *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984); *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987); *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572, 578-79 (N.D. 1981); *Fults v. Superior Court*, 88 Cal. App. 3d 899, 904, 152 Cal.Rptr. 210 (1979).

[277] 525 N.W.2d 559 (Minn. Ct. App. 1994).

[278] *Id*. at 567.

[279] *Id*. at 568.

[280] *Cnty. of Ramsey v. S.M.F.*, 298 N.W.2d 40, 42 (Minn. 1980).

also included an individual's private financial data within the protected zone of privacy.[281] Although the Minnesota court has not specifically considered the question of the protection to be afforded personal financial data, it has recognized the right of privacy as a limitation on discovery.[282] When an administrative law judge determines that the need for the protected information outweighs the individual's privacy or associational interests, he or she should enter an appropriate protective order.[283]

[281] *Fraternal Order of Police, Lodge 5 v. City of Philadelphia*, 812 F.2d 105, 115 (3rd Cir. 1987); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1982); *Plante v. Gonzalez*, 575 F.2d 1119, 1132-33 (5th Cir. 1978).

[282] *S.M.F.*, 298 N.W.2d at 42; *Caucus Distrib., Inc. v. Comm'r of Commerce*, 422 N.W.2d 264, 268 (Minn. Ct. App. 1988).

[283] *Erickson v. MacArthur*, 414 N.W.2d 406, 409-410 (Minn. 1987); *Caucus Distrib.*, 422 N.W.2d at 268-69; *see May Ctrs. Inc. v. S.G. Adams Printing*, 153 Ill. App. 3d 1018, 1021-23, 506 N.E.2d 691, 694-95 (Ill. App. 1987) (discussing appropriateness of protective order throughout); *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 317-19, 187 Cal. Rptr. 4, 7-9 (Cal. App. 1983) (same).