

Administrative Appeals – Making an Appropriate Record
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I. Scope of this outline. You may represent a client before an agency in a rulemaking proceeding, requesting a declaratory order, or in a contested case. This outline only covers contested case proceedings. You may also represent clients who are taking judicial review from agency action. This outline also does not cover judicial review. For basic rulemaking requirements, please see Iowa Code §§ 17A.1 – 17A.8 (2001) and the rules of the agency in question. For basic declaratory order requirements, please see Iowa Code § 17A.9 (2001) and the rules of the particular agency. For basic judicial review requirements, please see Iowa Code § 17A.19 (2001) and the rules of the particular agency.

II. Introduction – (Things to know as soon as you start representing a client before an agency.)

A. Procedural Rules. Iowa Code Chapter 17A (2001) is the basic bible of administrative law, and you should be familiar with it. Iowa Code §§ 17A.10 – 17A.18A (2001) apply to contested cases. However, Chapter 17A is a generalized minimum procedural code. Almost every agency has its own procedural rules, and you must be familiar with them to be able to effectively practice before the agency. You must follow the agency's procedural rules unless you request, and are granted, a waiver by the agency.

B. Effect of Executive Order Eight. Executive Order Eight, signed by Governor Vilsack on September 14, 1999, requires every agency to perform a comprehensive review of its rules and make revisions as appropriate. The agencies have been working on this for the last two years. On November 1, 2001, all agencies are required to submit an assessment report to the Governor. The assessment report tells the Governor what the agency plans to do with respect to revision of its rules. According to Executive Order Eight, between November 1, 2001 and March 1, 2002, Brian Gentry, the Governor's general counsel and administrative rules coordinator, will meet with a representative of each agency to review the agency's assessment report. Mr. Gentry may approve, reject or suggest modifications to the assessment reports. Once the agency has the approval of the Governor's office, it may proceed with formal rulemaking to change its rules as outlined in the assessment report. This is important to you because there could be massive changes to both procedural and substantive rules in many agencies during the next year or two.

C. Possible Decision Makers. The judge or judges in your case may be an administrative law judge, the head(s) of an agency such as the three-member Iowa Utilities Board, a professional licensing board, or a panel of a professional licensing board. Chapter 17A refers to the decision makers as "presiding officers."

1. Professional licensing boards hear cases either as the entire board, or as a panel of several members of the board. An administrative law judge (ALJ) sits with the board and conducts the hearing. The ALJ controls the hearing and rules on objections. Board members sometimes ask questions of witnesses. When making a decision, the board will go into closed session pursuant to Iowa Code § 21.5(1)(f) (2001) and the rules of the board. The board members, not the ALJ, make the decision in the case. The administrative law judge sits with the board in closed session, and then writes the board's decision on behalf of the board. If a panel of the board hears the case, the decision is a proposed decision and appeal is to the entire board. If the entire board hears the case, the decision is final agency action and appeal is to district court.

2. Administrative law judges may hear any cases delegated to them by the head of an agency. Most agencies use ALJs from the Department of Inspections and Appeals Division of Administrative Hearings. This is a central panel of ALJs who hear cases from most agencies in state government. The ALJs tend to specialize, and hear cases from particular agencies. For example, there are a number of ALJs who hear cases primarily from the Department of Human Services, and a number who hear cases primarily from the Department of Transportation and DIA health facilities. There are currently two ALJs who hear Department of Revenue cases, and one who hears the Department of Insurance cases. There is also one ALJ who hears most of the miscellaneous cases, such as those from the professional licensing boards, alcoholic beverages, Department of Natural Resources, public health, and agriculture, and the rest of the ALJs serve as backup for those types of cases.

When the agency itself is not a party to the contested case, it may have an ALJ housed in the agency so long as that person does not perform duties inconsistent with the person's responsibilities and duties as a presiding officer. Iowa Code § 17A.11(b) (2001). For example, I work for the Iowa Utilities Board and have my office there, and the parties in our contested cases are generally the Consumer Advocate, a utility, and a customer, or the Consumer Advocate and one or more utilities. Another example of in-house decision-makers are the deputy industrial commissioners who hear workers' compensation cases. They may be in-house because the parties are the employer and the employee, not the agency itself. (If the agency itself is the employer, an ALJ from Inspections and Appeals would hear the case.) Workforce Development also has in-house ALJs (for the cases where the agency is not a party), as does Corrections and the PERB Board.

When an ALJ issues a decision in a contested case, the decision is a proposed decision and is appealed to the head of the agency.

3. The judge(s) in a contested case may also be the head of the agency. This could be a single person or a board or commission consisting of

several people. For example, the Iowa Utilities Board has three members. The presiding judge could be one, two, or three members of the Board. Some agencies have an ALJ sit with Board or Commission to conduct the hearing and rule on motions for the agency, although the head of the agency would still make the decision in the case.

On appeal from the proposed decision of an ALJ, the agency head has all the power, which it would in initially making the final decision. Iowa Code § 17A.15(3) (2001). Theoretically, the agency could completely hear the case again. In practice, this never happens. Parties must make their case before the ALJ, and the agency head acts as an appellate reviewing body. If the agency head hears the case first, the parties make their case to the agency head.

If the entire agency head, as in all three members of the Iowa Utilities Board, hears the case, the decision of the board is final agency action and appeal is to district court. Iowa Code § 17A.15(1) (2001).

D. Code of Administrative Judicial Conduct.

1. Agency heads who are acting as judges in contested cases are subject to restrictions on their activities, most of which are designed to ensure they are not exposed to information or influence that is outside the record in the contested case. Decisions in contested cases must be based solely on evidence in the record and on matters officially noticed in the record. The agency head or ALJ may set policy within a contested case, but when it does so, the policymaking must be incident to the individual controversy being decided. This quasi-judicial role is sometimes in conflict with the agency heads' other role of being open, political, policy makers in their quasi-legislative activities, such as rulemaking. There are very specific restrictions that apply to Board members when they are acting as judges in contested cases. These are contained in the Code of Administrative Judicial Conduct.

2. Most ALJs do nothing but act as judges in contested cases. The rules that apply to ALJs are even more restrictive than those applicable to agency heads because the statutes and rules contemplate that ALJs will be working as judges' full time. The requirements discussed below apply to agency heads only when they are acting as judges in contested cases. They apply to ALJs all the time, and there are some rules that do not apply to agency heads that do apply to ALJs. Even if an ALJ does not hear cases all the time, agencies who assign work to them must be careful about what other duties they perform to make sure they are not inconsistent with the primary role as ALJ. Iowa Code § 17A.11(b) (2001). For example, because I am the ALJ for the Utilities Board, I could not litigate cases on behalf of the Board.

3. The code of administrative judicial conduct governs the conduct of all persons who act as presiding officers in contested cases. It is a code of

reason. One purpose of the code is to promote the essential independence of presiding officers in making judicial decisions. Although the code is contained in the DIA Division of Administrative Hearings rules at 481 IAC 10.29, it applies to all persons in all agencies who act as presiding officers under Iowa Code Chapter 17A (2001).

4. There are four canons in the code: 1) A presiding officer shall uphold the integrity and independence of the administrative judiciary; 2) A presiding officer shall avoid impropriety and the appearance of impropriety in all adjudicative functions in contested cases; 3) A presiding officer shall perform the duties of the office impartially and diligently; and 4) A presiding officer shall regulate extra judicial activities to minimize the risk of conflict with judicial duties. Canon four does not apply to agency heads, because it is recognized they have other non-judicial functions they must perform. Each canon contains detailed restrictions and requirements. Canon three contains specific rules regarding disqualification of presiding officers. If you are considering whether to request disqualification of a presiding officer, it is essential that you review these rules and any applicable rules of the particular agency.

5. Disqualification. Presiding officers are subject to disqualification for bias, prejudice, interest, or any other cause for which a judge may be disqualified, and for any of the reasons listed in canon three. Iowa Code 17A.11(2) (2001); 481 IAC 10.29(3)(b). If the presiding officer knows of information that might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, he or she must disclose the information on the record and state why withdrawal is unnecessary. 481 IAC 10.29(3)(c).

Any party may request disqualification by filing a motion. The presiding officer decides whether to grant the request, and must state facts and reasons for the decision. Iowa Code 17A.11(3) and (4) (2001).

III. Contested Case Hearings.

A. Rules of Evidence in Contested Cases and Official Notice (aka Objections That Count). There are very few rules of evidence in administrative contested cases. They are contained at Iowa Code § 17A.14 (2001). Rules of evidence that apply to district court cases do not apply to administrative contested cases.

1. These are the only objections that mean something in administrative contested cases:
 - a) Irrelevant;
 - b) Immaterial;
 - c) Unduly repetitious;

- d) It's not the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs; and
 - e) It's privileged (i.e. attorney/client privilege, doctor/patient privilege, privilege between married persons, priest/penitent privilege, journalist/source privilege, executive privilege).
- Iowa Code § 17A.14(1) (2001).

2. All other objections (hearsay, foundation, etc.) do not apply in contested cases. This is because the rules of evidence do not apply to contested cases, and agencies may base their findings on evidence that would be inadmissible in a jury trial, so long as the evidence does not violate one of the above requirements. Hearsay is admissible so long as it does not violate one of the requirements in paragraph 1. Iowa Code § 17A.14(1) (2001).

3. The response by the ALJ or agency head to any of these other rules of evidence-based objections will likely be, "your objection is noted for the record, and is denied." (The evidence will be admitted). The response may also include "your objection may be considered in deciding the weight to be given the evidence." Although the evidence will be admitted, you may have pointed out a reason why the decision-maker may give the evidence less weight. I would not overdo these objections. They bog down the hearing, are basically irrelevant and may eventually irritate the presiding officer, and presiding officers are experienced in wading through evidence that is not very persuasive. If you have reason to think the evidence is flawed, it is much more persuasive to have your witness attack the evidence in direct testimony rather than object to its admission.

4. If a party objects to evidence, the objection must be noted in the record. This does not mean the evidence is excluded. Iowa Code § 17A.14(1) (2001).

5. Subject to the requirements in paragraph one, any part of the evidence may be required to be submitted in verified written form when a hearing will be expedited and there is no substantial prejudice to the parties. Iowa Code § 17A.14(1) (2001).

6. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties must be given the opportunity to compare the copy with the original, if available. Iowa Code § 17A.14(2) (2001).

7. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Types of things that are commonly officially noticed include agency reports, or statutes or judicial or agency orders from other states or the federal government.

Parties usually must be given notice of the facts proposed to be noticed and their source, and must be given an opportunity to contest the facts. Iowa Code § 17A.14(4) (2001).

8. The agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence. We do this all the time. Iowa Code § 17A.14(5) (2001). In utilities board cases, technical staff are assigned to advise the board or the ALJ regarding evaluation of the technical evidence. For example, technical staff may include those with financial or engineering expertise. The utilities board is the only agency I am aware of that does this. In addition, the majority of professional licensing board members are members of the profession they are regulating, and they always use their expertise in evaluation of the evidence.

B. Ex Parte Communication and Separation of Functions. The ex parte provisions of Iowa Code § 17A.17 were significantly amended in 1999. The following discussion includes highlights of what was changed. The bottom line is the ex parte communications requirements are taken very seriously so don't initiate them.

1. The presiding officer in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law in that contested case, with any person or party, except upon notice and opportunity for all parties to participate as provided by rule. The section was amended to prohibit presiding officers from consulting members of the agency who personally investigated the case under consideration or a pending factually related case. Previously, the presiding officer could consult members of the agency, so long as they had not prosecuted or advocated in the case under consideration or a pending factually related case, but there was no prohibition against consulting those who personally investigated the case. Iowa Code § 17A.17(1) (2001). For example, if an investigator for a professional licensing board personally investigates a case against a professional, the board may no longer talk with that investigator about the case without notice to the parties and an opportunity for them to be present.

2. The statute continues to allow the presiding officer to have the aid and advice of members of the agency, other than those who have personally investigated, prosecuted or advocated in either the case under consideration or a pending factually related case involving the same parties, without notice and opportunity for all parties to participate, but adds the following limitation:

... so long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

Iowa Code § 17A.17(1) (2001).

3. When a technical staff person advises a presiding officer regarding evaluation of technical evidence, there is sometimes a tension between using the staff person's technical expertise, which is allowed, and the staff person telling the presiding officer facts that are not in the record, which is not allowed. Iowa Code §§ 17A.14(5); Iowa Code § 17A.17(1) (2001).

4. The statute continues to prohibit parties and their representatives from discussing issues of fact or law with the presiding officer without all parties being present. The new 17A adds that, in addition to parties and their representatives, persons with a "direct or indirect interest in such a case" shall not communicate, directly or indirectly, with the presiding officer on any issue of fact or law in the case. Iowa Code § 17A.17(2) (2001).

5. Chapter 17A also contains several new provisions governing what must be done with ex parte communications if they occur.

a) A presiding officer must make disclosure of any ex parte communications received prior to serving as the presiding officer if the communication relates "directly to the merits of the proceeding over which that person subsequently presides," and if the information has not already been disclosed to the parties. Iowa Code § 17A.17(3) (2001). For example, an agency head may hear ex parte communication regarding something that later becomes a contested case before the agency head. If the parties have revealed everything in the ex parte communication in their pleadings filed in the case, there would be no need to duplicate information already in the record. The point is that all parties should know what information the decision maker is using to make the decision, and have the opportunity to rebut that information if desired.

b) If a presiding officer receives an ex parte communication that violates this section, the presiding officer must place details of the ex parte communication on the record of the pending matter and must tell the parties this has been done. Any party desiring to rebut the prohibited ex parte communication must be allowed to do so. Iowa Code § 17A.17(4) (2001).

c) If the effect of the ex parte communication received in violation of the statute is so prejudicial that it cannot be cured by the above procedure, the presiding officer who received the communication must be disqualified and the portions of the record pertaining to the communication must be sealed by protective order. Iowa Code § 17A.17(5) (2001).

d) The agency and any party may report any violation of this section to appropriate authorities for any disciplinary proceedings provided

by law. In addition, each agency by rule must provide for appropriate sanctions, including default, suspending or revoking a privilege to practice before the agency, and censuring, suspending, or dismissing agency personnel, for any violations of this section. Iowa Code § 17A.17(6).

e) A party to a contested case may file a timely and sufficient affidavit alleging a violation of any provision of the ex parte rules. We must then determine the matter as part of the record in the case. When we make such a determination with respect to an agency member, that determination is subject to de novo judicial review in any subsequent review proceeding of the case. Iowa Code § 17A.17(7) (2001).

6. A person who prosecutes, advocates, or who has personally investigated a case cannot serve as a presiding officer. However, a person is not precluded from serving as a presiding officer solely because that person determined there was probable cause to initiate the proceeding. In professional licensing board cases, this means that the licensing board may determine probable cause to begin a disciplinary proceeding, and may hear and decide the case later. Iowa Code § 17A.17(8) (2001).

7. It is a violation of due process if the decision maker in a contested case has also acted as an investigator, advocate, or prosecutor in the case, or if a person who has personally investigated the case acts as an advisor to the decision maker. Bradham v. State, 476 N.W.2d 369 (Iowa App. 1991).

C. Default Decisions. Default decisions are specifically allowed by Iowa Code § 17A.12(3) (2001).

1. The section requires that notice of the default decision be given to the parties, and provides a procedure for vacating default decisions. If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may enter a default decision or proceed with the hearing and make a decision in the absence of the party. In practice, I always proceed with the hearing and make a decision in the absence of the defaulting party. It is obviously a huge disadvantage to the party who fails to appear. Iowa Code § 17A.12(3) (2001).

2. The default decision becomes the final decision of the agency unless, within fifteen days (or as otherwise specified by statute or rule) after the date of notification or mailing of the decision, further appeal is initiated. Iowa Code § 17A.12(3) (2001).

3. If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause (not defined), the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the

request. Some agencies define good cause by rule. For example, DNR rules set out fairly broad good cause reasons for setting aside a default at 561 IAC 7.9(4): mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer must vacate the decision and conduct another evidentiary hearing, after proper service of notice. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer will deny the motion to vacate. Iowa Code § 17A.12(3) (2001).

D. ALJ Hearings. (The comments in this section apply to hearings before an agency head as well as ALJ hearings unless specifically stated otherwise. Professional licensing board hearings are different in many respects, and I will try to note those differences.) The order of most contested case hearings is similar to that of a trial, including opening statements, the presentation of testimony and exhibits and cross-examination of witnesses, and closing arguments. Unless your case is extremely simple and uncontested, I would always make an opening and closing statement. These do not need to be lengthy. However, they give you an opportunity to present your view of the case to the judge(s), and if done well, can be very persuasive. Witnesses at the hearing are subject to cross-examination. This includes witnesses who have submitted prefiled written testimony, which is used in utilities board cases.

1. Prehearing matters. The ALJ issues a notice of hearing that sets forth the issues in the case known at the time the order is written, the applicable law, and the procedural schedule, including the hearing date. Professional licensing boards schedule their hearings. Iowa Code § 17A.12 contains required information that must be included in the notice of hearing. All parties must be given notice of the hearing. The notice must be in writing. 17A requires that notice be given by personal service or certified mail, return receipt requested unless an agency provides for service by ordinary mail. Some agencies, such as the Utilities Board, have statutes or rules that allow for service by ordinary mail and by publication in certain circumstances. Each agency may have statutes and rules that set forth timeframes in which hearings must be held and decisions issued.

2. In almost all Utilities Board cases, parties must submit prefiled written testimony, although this is not required by 17A or Board statutes, and is not done in any Iowa agency other than the Utilities Board. The purpose of requiring submission of prepared evidence prior to hearing is to identify disputed issues of fact to be addressed at the hearing and areas needing further clarification at the hearing. This allows staff and the ALJ to learn what the parties' testimony and exhibits will be prior to the hearing. Most Utilities Board cases involve highly complex evidence that make the use of prefiled testimony necessary. Prefiled testimony contains all statements that a witness intends to give under oath at the hearing, set forth in question and answer form. The use of prepared testimony prevents surprise at the hearing and helps each party and

the ALJ to prepare adequately for the hearing, so that a full and true disclosure of the facts can be obtained. Iowa Code §§ 17A.14; 478.4 (2001).

3. Prior to hearing, the parties may use the normal discovery procedures applicable in civil actions. Iowa Code § 17A.13(1) (2001). Due to shortened times required for hearing and decision in some cases, the time for discovery may be limited by order of the ALJ or agency rules. Discovery procedures in Utilities Board cases include data requests (unique to the Board). Data requests are written requests for information submitted to the other party. The other party is required to provide the information asked for in the data request within seven days of receipt. The parties do not submit the data requests or the information obtained to the Board unless there is an objection regarding the data request (overbroad, burdensome, etc.), a party decides to submit the information obtained in the data request as evidence, or if the data requests are referred to in testimony or cross-examination (if parties do not object). Parties may request an agency to issue subpoenas. Agencies have subpoena powers granted to them in their enabling statutes and 17A.13(1).

4. The ALJ's role at the hearing is like that of a trial judge. The ALJ controls the hearing, regulates the course of the hearing, handles procedural matters, rules on objections, and keeps the hearing orderly and dignified. The ALJ makes sure the parties act professionally and courteously. If someone is disruptive, the ALJ has the authority to order the person to leave the hearing. The ALJ has the authority to control the media so the hearing is not disrupted. The ALJ should always be patient, courteous, impartial, respectful, and dignified, even when it is difficult. 481 IAC 10.29 and rules of each agency.

5. In general, at the beginning of the hearing, the ALJ will make a preliminary statement that is a very general statement of what the case is about and who the parties and their lawyers are. Most agencies tape record hearings. Hearings in IUB and professional licensing board cases are court reported. The court reporter creates the official record of the case. Part of what is being done in the hearing is creation of an understandable record for any reviewing agency head or court. When you are creating your record in a contested case, I would try to imagine you are a reviewing court reading the transcript and looking at the exhibits in the case. Ask yourself, could I understand what is happening? Could I understand this evidence, and does it support and completely explain my position? All parties have the right to be represented by a lawyer at their own expense, and may request a transcript of the hearing. You will have to pay for the transcript.

6. All witnesses must be sworn before they testify, because all testimony must be taken under oath. Either the ALJ or the court reporter may swear witnesses. In most agency hearings, the lawyer for the witness will then ask questions just as in district court. Keep the form of your questions short and simple. Think about whether the person listening to the question could

immediately understand what is being asked. If you refer to statements previously made, tell the listener specifically what you are referring to. Be respectful at all times when questioning.

In Utilities Board cases, when a witness who has submitted prepared testimony takes the stand, the witness does not ordinarily repeat the written testimony or give a substantial amount of new testimony. The lawyer for the witness will ask that the prefiled testimony be spread upon the record. The lawyer will ask the witness if s/he has anything to add or correct in the prefiled testimony and if the testimony is essentially the same as if the witness were asked and answered the questions at the hearing. Then the witness is cross-examined by the other parties concerning the statements already made in writing. It is hoped this procedure will diminish the length of the hearing, and spare the parties the expense and inconvenience of additional hearings. In all agency hearings, witnesses are subject to cross-examination. All parties have the right to respond to evidence presented by opposing parties and to present evidence on their own behalf on all issues in the case. Iowa Code § 17A.12 and .14 (2001).

7. If a party is unrepresented by a lawyer, the ALJ has an obligation to help the party to a certain extent. This includes educating inexperienced parties in hearing procedures. However, the ALJ does not represent the party, and has to be very careful that assistance does not turn into favoritism or presenting the case for the party. It is essential that the ALJ remain a neutral, unbiased judge throughout the proceedings.

8. ALJs may ask questions of witnesses during the hearing. I know this makes some advocates uneasy. ALJs (and agency heads) vary a lot in the amount of questioning they do. This questioning is different in character from questioning by advocates. Questions must be relevant to the issues identified in the procedural order and by the parties' testimony. They must be designed to elicit information and not to berate or lecture the witness. ALJ questioning must not argue with the witness about the merits of the witness's testimony or offer any opinions about the merits of any issue in the case. The ALJ should reserve any expressions of opinion about the case until drafting the decision. The ALJ should guard against forming opinions regarding the case until all the evidence is heard and the parties have made their closing arguments. In this way, the ALJ can truly be a neutral decision maker, an essential element of due process.

9. Work out arguments about introduction of documentary evidence with opposing counsel as much as possible ahead of the hearing. If there is going to be a fight about evidence, ask for a ruling ahead of the hearing so the judge has time to research any issues and make a thoughtful decision. (In some high volume hearings with short statutory decision times this may not be possible.) Please remember the rules of evidence that actually apply to

administrative contested cases as discussed above when arguing whether something should be admitted or not.

10. If there is any doubt about the simplicity of the law in the case, ask to file a brief. If you ask, or if the ALJ wants briefs, he or she will probably set a briefing schedule at the conclusion of the hearing. In some cases, the ALJ will have set a briefing schedule in the procedural order with the notice of hearing. When you write a brief, be sure to address evidence that is adverse to you as well as that supporting your position. Be sure to address contrary statutes, rules, and case law. Explain why the facts or law that are contrary to your position are not persuasive or controlling. When you make a statement of fact, cite specifically to the part(s) of the record that support the fact. There are some cases, such as high volume Department of Transportation driver's license cases, in which briefs are not filed. If in doubt, ask.

IV. Decisions. Decisions must be in writing and must include findings of fact and conclusions of law, separately stated. Iowa Code § 17A.16 (2001).

A. Findings of Fact.

1. If findings of fact are stated in statutory language, the decision must include a concise and explicit statement of the underlying facts supporting the findings. Id. Parties may submit proposed findings of fact according to an agency's particular rules. Id. If they do so, the ALJ must rule on each proposed finding. Id. In all the years I've been an ALJ, I have only had one party submit proposed findings of fact. It seems to me that this could be a particularly valuable thing to do, and I'm not sure why more lawyers don't do it.

2. The findings of fact must be based solely on the evidence in the record and on matters officially noticed in the record. Iowa Code § 17A.12(8) (2001). The record in a contested case includes the items listed at Iowa Code § 17A.12(6): a) all pleadings, motions and intermediate rulings; b) all evidence received or considered and all other submissions; c) a statement of all matters officially noticed; d) all questions and offers of proof, objections, and rulings thereon; e) all proposed findings and exceptions; and f) any decision, opinion, or report by the ALJ. Agencies may provide by rule that certain information is part of the record in certain types of cases. For example, in Utilities Board formal complaint cases, the written complaint and all supplemental information must be made a part of the record in the formal complaint proceeding. 199 IAC 6.7.

3. The decision must explain why the relevant evidence in the record supports each material finding of fact, and should also explain why contrary evidence was not persuasive or was rejected. When witness credibility is important to resolving disputed facts, the ALJ's opinion on witness credibility should be discussed. The decision should set forth the facts and the law, and explain how the ALJ arrived at the decision. Iowa Code § 17A.16 (2001).

B. Conclusions of Law. Conclusions of law must be supported by cited authority or reasoned opinion.

C. Relevance of new judicial review provisions to decision writing. You may see additional detail in decisions you haven't seen before. The 1999 amendments to Chapter 17A modified the judicial review standards. They require the court reviewing a particular finding of fact to consider the evidence cited in the record, which detracts from the finding as well as the evidence which supports it. The reviewing court also must consider the determinations of veracity by the presiding officer. Iowa Code § 17A.19 (2001). Given this judicial review standard, it is important for the decision writer to articulate his or her view of at least the most obvious evidence detracting from the factual findings, and why this evidence did not lead to a contrary result. If witness credibility is an issue, the decision writer should also provide the reason(s) why the witness was found to be credible or not credible. The amount of detail provided will vary depending on the complexity and significance of the case.

D. Service of the decision. Unless otherwise provided by agency rule, the written decision must be sent by certified mail, return receipt requested, or personally delivered. Iowa Code § 17A.12(1) and 17A.16(1) (2001). Some agencies by rule allow decisions to be delivered by first-class mail to all parties in the case. 199 IAC 7.8(1).

V. There are two new types of hearing procedures available to agencies since Chapter 17A was amended in 1999.

A. No factual dispute. If there is no factual dispute, contested case procedures still may be available to parties. This is only available upon petition by a party. Presentation of evidence is not required, but all other provisions applicable to contested cases apply. Iowa Code § 17A.10A (2001).

B. Emergency proceedings. Emergency adjudicative proceedings may be held for situations involving an immediate danger to the public health, safety, or welfare requiring immediate agency action. The agency must follow the procedures in Iowa Code § 17A.18A (2001). Some agencies, such as the Department of Natural Resources and the professional licensing boards had this authority in their enabling statutes prior to 1999.

VI. Appeals from ALJ decisions.

A. When the ALJ makes a decision, it becomes the final decision of the agency unless there is an appeal to the agency head, or the agency head decides to review the decision on its own motion, within the time provided by the agency's rules. Iowa Code 17A.15(3). The Utilities Board rules state that an

appeal must be filed within 15 days after the proposed decision is issued. 199 IAC 7.8(2). Therefore, be aware that the time period for filing an appeal may vary by agency.

B. The notice of appeal must contain the contents specified in the agency's rules. Parties must be given the opportunity to file exceptions, present briefs, and with the consent of the agency, present oral argument to the Board. Iowa Code § 17A.15(3). Agency rules may contain other specific requirements regarding appeals from ALJ decisions. For example, Utilities Board rules require that the other parties must respond to the notice of appeal within 14 days after the notice of appeal was filed. 199 IAC 7.8(2)"c".

C. In an appeal from an ALJ decision, the agency has all the power it would have had if it had originally heard the case itself. Iowa Code § 17A.15(3) (2001). The agency may reverse or modify any finding of fact if a preponderance of the evidence will support reversal or modification or if a conclusion of law is wrong. Iowa Code § 17A.15(3) (2001).

VII. Miscellaneous Advice.

A. Judicial review of agency decisions is appellate in nature. Therefore, be sure to make your complete record before the agency. If the hearing is before an ALJ first, you must make the complete record before the ALJ.

B. Always tell the truth. Check out the things your client tells you before you argue it or put evidence in the record to support a statement. Most ALJs in Iowa have been ALJs for a long time and are adept at determining credibility.

C. Make sure the law you are arguing applies to your case. For example, do not make a Sixth Amendment right to confront the witnesses against you argument in an administrative case. [This really happened.] Do not construct an elaborate argument for why evidence should be excluded based on the rules of evidence. [Also really happened – more than once.]

D. Histrionics tend to antagonize professional licensing boards. Agencies and ALJs are not juries, and it is counter productive to use trial tactics before them. Be straightforward. Be kind. Be truthful. Be respectful toward the agency head(s) or ALJ, your witnesses, and even toward opposing counsel and witnesses who are making you angry.

E. Please be sensitive to the fact that most ALJs are severely overworked.

F. Check to make sure that evidence you present is consistent. If there is a discrepancy, explain it.

G. If you are filing an application for a permit, make sure you review the applicable agency statutes and rules, and put in evidence regarding each of the requirements.

H. Be aware that each agency has a waiver rule that allows parties who meet the criteria in the rule to obtain waivers of the agency's rules. For example, the Utilities Board waiver rule is at 199 IAC 1.3.

I. Don't be arrogant. A subpart of this tip is do not read a book during the hearing while opposing counsel is presenting his or her case. (This really happened.)

J. Don't take yourself too seriously or take opposing counsel's or witnesses' arguments personally. Although the client's cases are very important to them, and sometimes we are deciding issues that involve critical elements in people's lives, it is best for the client and most effective to try to maintain a certain amount of professional distance when you are presenting a case in a hearing. This can also help with the stress of being an advocate presenting a case in a hearing.

K. Everyone makes mistakes. We are all human, and in order to be a good advocate, you do not need to do things perfectly. If you make a mistake, acknowledge it as promptly as you discover it, and do what you can to remedy the situation.