

BANKING DIVISION[187]

Notice of Intended Action

Proposing rule making related to contested cases and providing an opportunity for public comment

The Iowa Division of Banking (IDOB) hereby proposes to amend Chapter 11, “Contested Cases,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is proposed under the authority provided in Iowa Code sections 17A.3 and 524.213.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code chapter 17A.

Purpose and Summary

The proposed amendments reflect the Iowa Division of Banking’s compliance with Iowa Code section 17A.7(2), which states that, as of July 1, 2012, “over each five-year period of time, an agency shall conduct an ongoing and comprehensive review of all of the agency’s rules [and t]he goal of the review is the identification and elimination of all rules of the agency that are outdated, redundant, or inconsistent or incompatible with statute or its own rules or those of other agencies.” The proposed amendments to Chapter 11 are intended to clarify the discovery process and applicability of the rules of civil procedure in contested cases and to enable communications and submissions pertaining to a contested case via telephone, email, and other electronic means.

Fiscal Impact

No current fees are being changed, and no new fees are being added; therefore, the IDOB has concluded that the proposed amendments will not have a fiscal impact to the State of Iowa.

Jobs Impact

Because no existing authorized activities are being restricted, no new activities are being authorized, no existing fees are being increased, and no new fees are being added, the IDOB has concluded that the proposed amendments will have no impact on jobs in Iowa.

Waivers

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the IDOB for a waiver of the discretionary provisions, if any, pursuant to 187—Chapter 12.

Public Comment

Any interested person may submit written comments concerning this proposed rule making. Written comments in response to this rule making must be received by the IDOB no later than 4:30 p.m. on September 4, 2018. Comments should be directed to:

Zak Hingst
Iowa Division of Banking
200 East Grand Avenue, Suite 300
Des Moines, Iowa 50309-1827
Phone: 515.281.4014
Email: zak.hingst@idob.state.ia.us

Public Hearing

No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)“b,” an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee’s meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Amend rule 187—11.1(17A) as follows:

187—11.1(17A) Scope and applicability of the Iowa Rules of Civil Procedure. Except when inconsistent with Iowa Code chapter 524, this chapter applies to contested case proceedings conducted by the ~~Division of Banking~~ division of banking. Except as expressly provided in Iowa Code chapter 17A and these rules, the Iowa Rules of Civil Procedure do not apply to contested case proceedings. However, upon application by a party, the division may permit the use of procedures provided for in the Iowa Rules of Civil Procedure unless doing so would unreasonably complicate the proceedings or impose an undue hardship on a party.

ITEM 2. Amend rule **187—11.2(17A)**, definitions of “Contested case” and “Presiding officer,” as follows:

“*Contested case*” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under ~~1998 Iowa Acts, chapter 1202, section 14~~ Iowa Code section 17A.10A.

“*Presiding officer*” means the superintendent of banking, the superintendent’s designee or, under certain circumstances, ~~the~~ an administrative law judge.

ITEM 3. Amend subrule 11.5(2) as follows:

11.5(2) Contents. The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the division or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address, and telephone number of the person who will act as advocate for the division or the state and of parties’ counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;

- g. Reference to the procedural rules governing informal settlement;
- h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., superintendent, superintendent's designee, administrative law judge from the department of inspections and appeals); ~~and~~
- i. Notification of the time period in which a party may request, pursuant to ~~1998 Iowa Acts, chapter 1202, section 15(1), Iowa Code section 17A.11 and rule 187—11.6(17A)~~, that the presiding officer be an administrative law judge;
- j. A statement requiring the respondent to submit an answer of the type specified in subrule 11.11(2) within 20 days after service of the notice of hearing;
- k. Information on whom to contact if, because of a disability, auxiliary aids or services are needed to enable a person to participate in the matter;
- l. If applicable, the date, time, and manner of conduct of a prehearing conference under rule 187—11.16(17A); and
- m. The mailing address and email address for filing with the division and notice of the option of email service as provided in subrule 11.12(6).

ITEM 4. Amend rule 187—11.8(17A) as follows:

187—11.8(17A) Telephone and electronic proceedings. The presiding officer may resolve preliminary procedural motions by telephone conference or other electronic means in which all parties have an opportunity to participate. ~~Other telephone proceedings may be held by telephone or other electronic means~~ with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for ~~telephone~~ hearings held by telephone or other electronic means. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen. Disciplinary hearings will generally not be held by telephone or electronic means in the absence of consent by all parties, but the presiding officer may permit any witness to testify by telephone or other electronic means. Parties shall disclose at or prior to the prehearing conference whether any witness will be testifying by telephone or other electronic means. Objections, if any, shall be filed with the division and served on all parties at least three business days in advance of hearing.

ITEM 5. Amend rule 187—11.9(17A) as follows:

187—11.9(17A) Disqualification.

11.9(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party;
- b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;
- c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;
- d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;
- e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;
- f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or
- g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

11.9(2) The term “personally investigated” means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term “personally investigated” does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person’s investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other division functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. A person voluntarily appearing before the division waives any objection to a division staff member’s participation in the appearance and later participation as a decision maker or aid to the decision maker in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section ~~17A.17~~ as amended by 1998 Iowa Acts, chapter 1202, section 19, 17A.17(3) and subrules 11.9(3) and 11.23(9).

11.9(3) In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

11.9(4) If a party asserts disqualification on any appropriate ground, including those listed in subrule 11.9(1), the party shall file a motion supported by an affidavit pursuant to ~~1998 Iowa Acts, chapter 1202, section 19(7)~~ Iowa Code sections 17A.11(3) and 17A.17(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

11.9(5) If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

11.9(6) A motion to disqualify a division staff member or other person shall first be directed to the affected division staff member or other person for determination. If the division staff member or other person determines that disqualification is appropriate, the division staff member or other person shall withdraw from further participation in the case. If the division staff member or other person determines that withdrawal is not required, the presiding officer shall promptly review that determination, provided that, if the person at issue is an administrative law judge, the review shall be by the division. If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule ~~187—~~11.25(17A), if applicable, and seek a stay under rule ~~187—~~11.29(17A).

ITEM 6. Amend subrule 11.11(2) as follows:

11.11(2) Answer. An answer shall be filed within 20 days of service of a petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

~~An~~ Unless otherwise provided in the notice of hearing, an answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

~~An~~ Unless otherwise provided in the notice of hearing, an answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

ITEM 7. Amend subrule 11.12(4) as follows:

11.12(4) Filing—*how and when made.* Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the division of banking, delivered to an established courier service for immediate delivery to that office, ~~or~~ mailed by first-class mail or state interoffice mail to that

office, so long as there is proof of mailing, or delivered by electronic transmission to the email address specified in the notice of hearing. Filing by electronic transmission is complete upon transmission unless the party making the filing learns the attempted filing did not reach the division. The division will not provide a mailed file-stamped copy of documents that are filed by email or other approved electronic means.

ITEM 8. Adopt the following new subrule 11.12(6):

11.12(6) *Electronic service.* The presiding officer may by order or a party or a party's attorney may by consent permit service of particular documents by email or similar electronic means, unless precluded by a provision of law. In the absence of such an order or consent, electronic transmission shall not satisfy service requirements but may be used to supplement service when rapid notice is desirable. Consent to electronic service by a party or a party's counsel shall be in writing, may be accomplished through electronic transmission to the board and other parties, and shall specify the email address for such service. Service by electronic transmission is complete upon transmission unless the board or party making service learns the attempted service did not reach the party to be served.

ITEM 9. Amend rule 187—11.13(17A) as follows:

187—11.13(17A) Discovery.

~~11.13(1) Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure. The scope of discovery described in Iowa Rule of Civil Procedure 1.503 shall apply to contested case proceedings.~~

~~11.13(2) Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 11.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion. The following discovery procedures available in the Iowa Rules of Civil Procedure are available to the parties in a contested case proceeding: depositions upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, and things; and requests for admission. The time frames for discovery in the specific Iowa Rules of Civil Procedure govern those specific procedures, unless they are lengthened or shortened by the presiding officer.~~

~~a. Iowa Rules of Civil Procedure 1.701 through 1.717 regarding depositions shall apply to any depositions taken in a contested case proceeding. Any party taking a deposition in a contested case shall be responsible for any deposition costs, unless otherwise specified or allocated in an order. Deposition costs include, but are not limited to, reimbursement for mileage of the deponent, costs of a certified shorthand reporter, and expert witness fees, as applicable.~~

~~b. Iowa Rule of Civil Procedure 1.509 shall apply to any interrogatories propounded in a contested case proceeding.~~

~~c. Iowa Rule of Civil Procedure 1.512 shall apply to any requests for production of documents, electronically stored information, and things in a contested case proceeding.~~

~~d. Iowa Rule of Civil Procedure 1.510 shall apply to any requests for admission in a contested case proceeding. Iowa Rule of Civil Procedure 1.511 regarding the effect of an admission shall apply in contested case proceedings.~~

~~11.13(3) Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding. The mandatory disclosure and discovery conference requirements in Iowa Rules of Civil Procedure 1.500 and 1.507 do not apply to contested case proceedings. However, upon application by a party, the presiding officer may order the parties to comply with these procedures unless doing so would unreasonably complicate the proceedings or impose an undue hardship. As a practical matter, the purpose of the disclosure requirements and discovery conference is served by the division's obligation to supply the information that is described~~

in Iowa Code section 17A.13(2) upon request while a contested case is pending and by the mutual exchange of information that is required in a prehearing conference under rule 187—11.16(17A).

11.13(4) Iowa Rule of Civil Procedure 1.508 shall apply to discovery of any experts identified by a party to a contested case proceeding.

11.13(5) Discovery shall be served on all parties to the contested case proceeding but shall not be filed with the division.

11.13(6) A party may file a motion to compel or other motion related to discovery in accordance with this subrule. Any motion filed with the division relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is lengthened or shortened by the presiding officer. The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

11.13(7) Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

ITEM 10. Amend paragraph **11.14(1)“a”** as follows:

a. A division subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, email address, and telephone number of the requesting party.

ITEM 11. Amend rule 187—11.16(17A) as follows:

187—11.16(17A) Prehearing conference and disclosures.

11.16(1) Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer’s own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the presiding officer to all parties. For good cause the presiding officer may permit variances from this rule.

11.16(2) Each party shall bring disclose at or prior to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

11.16(3) In addition to the requirements of subrule 11.16(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

11.16(4) Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference. Unless otherwise provided in the order setting a prehearing conference, the prehearing conference shall be conducted by an administrative law judge.

11.16(5) The parties shall exchange copies of all exhibits marked for introduction at hearing in the manner provided in subrule 11.21(4) no later than three business days in advance of hearing, or as ordered by the presiding officer at the prehearing conference.

ITEM 12. Amend rule 187—11.20(17A) as follows:

187—11.20(17A) Hearing procedures.

11.20(1) The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

11.20(2) All objections shall be timely made and stated on the record.

11.20(3) Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, shareholder, or duly authorized agent. Any party may be represented by an attorney, or another person authorized by law, at the party's expense.

11.20(4) Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

11.20(5) The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

11.20(6) Witnesses may be sequestered during the hearing.

11.20(7) The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

11.20(8) Depositions may be used at hearing to the extent permitted by Iowa Rule of Civil Procedure 1.704.

11.20(9) Witnesses are entitled to be represented by an attorney at their own expense. The attorney may assert legal privileges personal to the client but may not make other objections. The attorney may only ask questions of the client to prevent a misstatement from entering the record.

11.20(10) The parties in a contested case shall be responsible for any witness fees and expenses incurred by witnesses appearing at the contested case hearing, unless otherwise specified or allocated in an order. The costs for lay witnesses shall be determined in accordance with Iowa Code section 622.69. The costs for expert witnesses shall be determined in accordance with Iowa Code section 622.72. Witnesses are entitled to reimbursement for mileage and may be entitled to reimbursement for meals and lodging, as incurred.

ITEM 13. Amend subrule 11.21(4) as follows:

11.21(4) The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record. The state's exhibits shall be marked numerically, and the applicant's or respondent's exhibits shall be marked alphabetically.

~~All exhibits admitted into evidence shall be appropriately marked and be made part of the record.~~

ITEM 14. Amend subrule 11.22(6) as follows:
11.22(6) “Good cause” for purposes of this rule shall have the same meaning as “good cause” for setting aside a default judgment under Iowa Rule of Civil Procedure ~~236~~ 1.971.

ITEM 15. Amend subrule 11.27(1) as follows:
11.27(1) *Appeal by party.* Any adversely affected party may appeal a proposed decision to the superintendent within 30 days after issuance of the proposed decision. Such an appeal is required to exhaust administrative remedies and is a jurisdictional prerequisite to seeking judicial review.

ITEM 16. Amend paragraph **11.29(1)“b”** as follows:
b. Any party to a contested case proceeding may petition the division of banking for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy. Seeking a stay from the division is required to exhaust administrative remedies prior to seeking a stay from the district court.

ITEM 17. Amend subparagraph **11.31(2)“b”(5)** as follows:
(5) ~~Fax~~ Electronic service. Fax or email may be used as the sole method of delivery if the person required to comply with the order has filed a written request that division orders be sent by fax or email and has provided a fax number or email address for that purpose.

ITEM 18. Amend ~~187~~—**Chapter 11**, implementation sentence, as follows:
These rules are intended to implement Iowa Code chapter 17A ~~as amended by 1998 Iowa Acts,~~
~~chapter 1202.~~