



Mike Kreidler- Insurance Commissioner

As required by

The Washington State Administrative Procedures Act

Chapter 34.05 RCW

Matter No. **R 2021-09**

**CONCISE EXPLANATORY STATEMENT; RESPONSIVENESS
SUMMARY; RULE DEVELOPMENT PROCESS; AND
IMPLEMENTATION PLAN**

Relating to the adoption of

Rulemaking to Optimize Administrative Hearings

November 17, 2021

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Section 1: Introduction

Revised Code of Washington (RCW) 34.05.325(6) requires the Office of Insurance Commissioner (OIC) to prepare a “concise explanatory statement” (CES) prior to filing a rule for permanent adoption. The CES shall:

1. Identify the Commissioner's reasons for adopting the rule;
2. Describe differences between the proposed rule and the final rule (other than editing changes) and the reasons for the differences; and
3. Summarize and respond to all comments received regarding the proposed rule during the official public comment period, indicating whether or not the comment resulted in a change to the final rule, or the Commissioner's reasoning in not incorporating the change requested by the comment; and
4. Be distributed to all persons who commented on the rule during the official public comment period and to any person who requests it.

Section 2: Reasons for Adopting the Rule

Current regulations in WAC 284-02-070 incorporate by reference many of the civil discovery rules, for OIC administrative hearings. Incorporating by default the civil discovery rules causes several problems, where opposing parties engage in discovery, without requiring prior approval of the presiding officer. This results in the OIC processing excessively broad discovery requests, which do not assist the administrative hearing process and can hinder proceedings or delay agency action. The OIC is also required to reach electronic service agreements on a case-by-case basis with all opposing parties.

The reasons supporting this rulemaking proposal are to optimize discovery, such as limiting depositions, interrogatories, requests for production, and requests for admissions, and allow electronic service in all OIC hearings, in the interest of avoiding delays and achieving administrative efficiencies.

Section 3: Rule Development Process

On July 2, 2021, the Commissioner filed a Preproposal Statement of Inquiry (CR-101), providing public notice of intent to adopt rules and initiating rulemaking on this topic. The CR-101 provided a comment period beyond three weeks, which expired on July 28, 2021. Multiple comments were received on the CR-101, which are outlined in the Responsiveness Summary (Section 5).

On July 20, 2021, the Commissioner issued a working draft of the amended regulations which presented an example of the proposed rules regarding administrative hearings. The Commissioner notified all parties interested in administrative hearing rules and provided public notice of the draft on the OIC website. The draft was posted to the OIC website and stakeholders were notified via GovDelivery, where comments and feedback were accepted for a limited

period of three weeks. Multiple comments were received on the working draft, which are outlined in the Responsiveness Summary (Section 5).

On August 30, 2021, the Commissioner filed a CR-102 Proposed Rule Making. The comment period for the CR-102 was open through October 18, 2021. Multiple comments were submitted in response to the CR-102 filing, which are outlined in the Responsiveness Summary (Section 5).

On October 19, 2021, the Commissioner held a public hearing to hear testimony on the proposed rules. Several people attended the public hearing and testimony was provided from four attendees. The Hearing Summary is contained in Appendix A.

On November 17, 2021, the Commissioner will adopt the regulations proposed under R 2021-09 relating to optimizing administrative hearings, with an effective date of December 21, 2021.

The Responsiveness Summary included in Section 5 addresses all comments and testimony received in response to this rulemaking (R 2021-09).

Section 4: Differences Between Proposed and Final Rule

None.

Section 5: Responsiveness Summary

OIC Rulemaking – Comments – R 2021-09 Administrative Hearings

<u>Comments</u>	<u>Consideration</u>
<p>Comments received pertaining to the OIC’s rulemaking on Administrative Hearings, and how this could adversely impact insurers in matters where Administrative Hearings are necessary. In detail, the commenter raised concerns about limiting discovery in all administrative hearings, as they believe this could dramatically restrict litigant rights under the Administrative Procedures Act (APA). The commenter mentioned that current state law and regulations already provide OIC with discretion to manage discovery requests or abuses.</p> <p>The commenter believes the proposed rules are unnecessary and could jeopardize the appearance and actual fairness state agencies must provide in administrative hearings under the APA.</p>	<p>Comments considered with no resulting changes to the rules.</p> <p>Washington State agencies may by rule determine whether or not discovery is to be available in adjudicative proceedings, and which forms of discovery may be used (RCW 34.05.446(2)).</p>
<p>The commenter is concerned these rules would drastically restrict discovery in all insurance administrative hearings; The commenter asserts litigant rights under the APA would be restricted with discovery limitations in these rules. Both the APA and OIC rules permit discovery with Civil Rules; Comments mention state laws and rules already afford the OIC discretion to limit discovery on a case-by-case basis; Comments state the wholesale restriction on discovery would potentially violate the APA, in providing actual fairness and the appearance of fairness in administrative processes; Comments assert the proposed regulations could be unconstitutional, as they affect protected property rights, such as a certificate of authority, or interest in rate/form filings; Comment – <i>“The proposed regulations appear to conflict with the APA and RCW 34.05.437(1) The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement. Comment - There is no need for OIC to restrict the discovery rights; and Comment - Should the Commissioner seek to address discovery abuse in a case, his internal hearing officer already possesses the ability on a case-by-case basis to manage the parties in terms of both discovery abuse remedies and permission needed in an individual matter for things such as issuing a subpoena. See, RCW 34.05.446(3) and WAC 284-02-070(2)(e)(i) through (iii).”</i></p>	<p>Comments considered with no resulting changes to the rules.</p> <p>Rulemaking authority on the topics of administrative adjudicative proceedings and discovery is delegated to state agencies by the APA. Discovery under the APA is conditioned upon the state agency’s associated rules (RCW 34.05.446(2)).</p>
<p>Comments in opposition, based on severely limiting the rights of “the accused” with concerns on property rights, limits on the Administrative Procedure Act (APA), protective orders, and the Rules of Civil Procedure. Requests rules to be withdrawn.</p>	<p>Comments considered with no resulting changes to the rules.</p> <p>Comments communicate concerns that these regulations would unfairly limit litigants’ abilities in cases with OIC under the APA. The commenters raise several concerns with the limited</p>

	<p>fairness and ability to conduct discovery if depositions are removed as a discovery tool. The commenters also mention that current authorities already afford the OIC abilities to limit discovery (RCW 34.05.446(3) and (WAC 284-02-070(2)(e)(iii))).</p> <p>This rulemaking will not remove depositions as a discovery tool. This rulemaking has been strategically drafted and will apply fairly to all affected parties.</p> <p>This rulemaking is authorized by the APA, including RCW 34.05.446(2) “An agency may by rule determine whether or not discovery is to be available in adjudicative proceedings, and if so, which forms of discovery may be used” and RCW 34.05.446(3), which states “Except as otherwise provided by agency rules, the presiding officer may decide to permit the taking of depositions...”</p>
<p>Comments – <i>“This rule should be rejected. A license or the right to exercise a profession is an important right for all. At no time should we ever remove a license from someone unless we have truly prove they have done something wrong that makes them dangerous to others.”</i></p> <p><i>“Depositions are a powerful tool to make sure the accuser of someone, for the removal of the license, is actually truthful and the process is done in openness. Along with this the burden of proof should be higher than a mere preponderance of evidence. A license is something someone invested in and an important right to earn income. Please stop this rule.</i></p> <p><i>Administrative efficiency should never be pursued at the expense of someone else’s rights. Remember OIC’s constitution makes the first duty of government to protect the individual and not efficiency.”</i></p>	<p>Comments considered with no resulting changes to the rules.</p> <p>Depositions will still be available as a limited discovery tool and the proposed rules do not remove or erode rights of parties in administrative adjudicative hearings.</p>
<p>Comments in opposition, due to lack of input/participation from the WSBA, requests an explanation of the reasons for the changes, and state the rules are unnecessary, and should be outweighed by the negative affect it will have on WSBA members.</p>	<p>Comments considered with no resulting changes to the rules.</p> <p>OIC appreciates the feedback provided by this comment.</p>
<p>Comments in opposition, based on a number of perceived substantive legal issues related to a blanket restriction on discovery in all administrative hearings. The commenter suggests that these restrictions would limit a party’s protected rights to a full and fair hearing, which could involve property. Contends that under the APA, any agency rulemaking affecting administrative hearings, must</p>	<p>Comments considered with no resulting changes to the rules.</p> <p>The proposed rules do not offer a blanket restriction on discovery in all administrative hearings. Instead, the</p>

<p>afford all parties the full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement (RCW 34.05.437(1)), which the commenter believes will be impeded by these rules. Mentions the current authorities/abilities to limit discovery. Requests withdrawal of the rulemaking.</p>	<p>proposed regulations provide discovery limitations for the different discovery tools to be used in administrative adjudicative proceedings.</p> <p>These rules will not affect other administrative hearings or discovery related to rule-making hearings (WAC 284-02-070(1)).</p>
<ul style="list-style-type: none"> • Comments submitted with concerns regarding insurers being hindered in meaningfully participating in contested cases. Urges OIC to withdraw R 2021-09. • Comment – <i>“The OIC and Administrative Hearing Purpose – Published on OIC’s website “for the presiding officer to be presented with all pertinent information in order to make the best decision.” https://www.insurance.wa.gov/about-administrative-hearings</i> <ul style="list-style-type: none"> ○ <i>Comments – “This goal can never be met if insurers are prohibited from gathering documentation necessary to present “all pertinent information” to the presiding officer.”</i> • Improper Notice of Rulemaking – Comments state that OIC’s notice fails to explain how these statutes support the agency’s proposed action. <i>The proposed rulemaking would severely limit, if not eliminate, the opportunity for regulated entities to “respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence” by foreclosing discovery of relevant evidence. The CR-101 Notice asserts that the Commissioner is considering the rulemaking “to improve administrative hearings, discovery and service processes” but does not identify deficiencies in the administrative hearing process itself that require “improvement.”</i> • <i>Existing authorities provide sufficient recourse. (Default discovery limitation versus individual case remedies.)</i> • <i>“Administrative efficiencies must not come at the expense of transparency, fairness and insurer due process protection rights.”</i> • <i>“Restricting adjudicative hearing discovery will prevent development of an adequate record for judicial review.”</i> 	<p>Comments considered with no resulting changes to the rules.</p> <p>OIC carefully considered these comments, but concluded there is no reason to alter OIC’s course of rulemaking on administrative hearings.</p> <p>Under the APA, discovery is limited to what the agency allows via rule (RCW 34.05.446(2)). This rulemaking attempts to achieve efficiencies and allows the agency to focus more on adjudicating the actual issues in a given case, rather than investing time and resources on extraneous matters.</p> <p>The proposed regulations will not completely eliminate depositions, but instead changes the default rule, requiring opposing parties to request this additional discovery tool and bear the burden for establishing its necessity and unavailability by other means. The other forms of discovery including interrogatories, requests for production, and requests for admissions, will still be available.</p> <p>The proposed regulations will also limit the frequency of other forms of discovery (interrogatories, requests for productions, and requests for admissions) to ten requests per discovery form, in an attempt to avoid waste, achieve administrative efficiencies, and align with statutory authorities.</p> <p>These efforts will optimize the administrative hearing process for all</p>

	affected parties, including authorizing electronic service.
Commenter communicated concerns with limiting discovery, when APA affords litigants rights to address and respond fully to all allegations and pleadings. Additionally, mentions APA's actual and appearance of fairness standard, as well as constitutional arguments.	Comments considered with no resulting changes to the rules.
Commenter expanded on previous objections to rulemaking, referencing restrictions to all pertinent information in hearings, notes that the commissioner's authority will not be reduced, communicates issues with authorizing discovery types, and argues an incomplete record will be left for judicial review.	<p>Comments considered with no resulting changes to the rules.</p> <p>Under the proposed rules, if depositions are necessary, then they can be requested, and if approved, then included in the record for judicial review.</p> <p>The proposed regulations apply evenly to entities regulated under Title 48 RCW, and the OIC, in cases involving administrative adjudicative proceedings, conducted under the Administrative Procedure Act (Chapter 34.05 RCW) and Chapter 48.04 RCW.</p>
Commenter discussed legal issues such as the proposed regulations overriding the APA, rulemaking beyond OIC's scope of authority, and argues that language for precedence is against controlling case law.	Comments considered with no resulting changes to the rules.
Commenter communicates concerns with limits on discovery, which commenter believes could lead to a lack of accountability. Additionally, comments state that current authorities provide methods to optimize discovery and avoid delays.	Comments considered with no resulting changes to the rules.
Commenter submitted statements to include issues with limiting discovery in all hearings, constitutional due process arguments (Fifth and Fourteenth Amendment), removing due process rights (such as fairness in fact and appearance of fairness), and that OIC has the ability to limit discovery under the current authorities (RCW 34.05.446 , WAC 284-02-070(2)(e)(iii)).	<p>Comments considered with no resulting changes to the rules.</p> <p>The proposed regulations will change the default rule, requiring opposing parties to request this additional discovery tool and bear the burden for establishing its necessity and unavailability by other means.</p> <p>The other forms of discovery including interrogatories, requests for production, and requests for admissions, will still be available.</p>
Comments include support for the authorization of electronic service, but recommend rejection of the rest of the proposed regulations. The recommendation for rejection is due to concerns of due process, litigation standards, fairness, and overruling the APA.	Comments considered with no resulting changes to the rules.

<p>The commenter has attached redacted depositions to reinforce their points and also mentioned that there already exist provisions in place to protect the OIC from abusive litigants, such as protective orders.</p>	
<p>Multiple commenters communicated concerns with the proposed regulations appearing imbalanced or unfair. These commenters seem to have taken the position that the discovery limitations contained in the proposed rules will only apply to entities regulated under Title 48 RCW and will not apply to the OIC.</p>	<p>Comments considered with no resulting changes to the rules.</p> <p>The proposed regulations apply equally to entities regulated under Title 48 RCW, as well as the OIC, in cases involving administrative adjudicative proceedings, conducted under the Administrative Procedure Act (Chapter 34.05 RCW) and Chapter 48.04 RCW. The proposed regulations are strategically located within a section of the WAC, which provides regulatory duties for both the OIC and opposing parties (WAC 284-02-070) in these cases.</p> <p>There are no exemptions, exceptions, disclaimers, qualifiers, or other discovery provisions contained in the proposed rules that provide the OIC will not adhere to the same authorities and regulations in these cases.</p>

Section 6: Implementation Plan

A. Implementation and enforcement of the rule.

After the permanent rule is filed and adopted with the Office of the Code Reviser:

- Policy staff will distribute copies of the final rule and the Concise Explanatory Statement to all interested parties through the State's Gov Delivery email system.
- The CR-103 documents and adopted permanent rule will be posted on the Office of the Insurance Commissioner's website.

B. How the Agency intends to inform and educate affected persons about the rule.

Type of Inquiry	Division
Consumer assistance	Legal Affairs
Rule content	Policy
Authority for rules	Policy
Enforcement of rule	Legal Affairs
Market Compliance	Company Supervision

C. How the Agency intends to promote and assist voluntary compliance for this rule.

The agency will provide instructions, guidance, and customer service to Title 48 RCW regulated entities, and all other affected parties.

D. How the Agency intends to evaluate whether the rule achieves the purpose for which it was adopted.

The agency will continuously monitor administrative adjudicative hearings for efficiencies present in proceedings and achieved through optimized discovery and electronic service.

Appendix A

CR-102 Hearing Summary

Summarizing Memorandum

**To: Mike Kreidler
Insurance Commissioner**

**From: Michael Walker, Policy Analyst
Presiding Official, Hearing on Rule-making**

Matter No. R 2021-09

Topic of Rule-making: Administrative Hearing Rules in WAC 284-02-070

This memorandum summarizes the hearing on the above-named rule making, held on October 19, 2021, at 10:00 AM over which I presided in your stead.

The following agency personnel were present:

Policy Analyst, Michael Walker
Administrative Assistant 2, Jesse Wolff
Attorney Manager, Darryl Coleman
Holding Company Manager, Ron Pastuch
Presiding Officer, Julia Eisentrout
Paralegal 2, Rebekah Carter

In attendance and testifying:

Mel Sorensen - (Testified in Opposition)
Kenton Brine - (Testified in Opposition)
Bill Head - (Testified in Opposition)
Noah Davis - (Testified in Opposition)

Contents of the presentations made at hearing:

- Mel Sorenson –
 - Presented testimony with contents that substantially aligned with information included in previously submitted comments. Referenced previous comment letters, which are included in the administrative record for this rulemaking, and are published on the OIC website.
 - Testimony provided included a belief that the proposed rules are unnecessary and could jeopardize the appearance and actual fairness state agencies must provide in administrative hearings under the APA (RCW 34.05.449(2)). The proposed regulations appear to conflict with the APA and [RCW 34.05.437](#). The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement. What goes along with the idea of presenting relevant evidence is the ability to gather relevant evidence. That is the function of discovery. The proposed rules, as drafted, appear unbalanced. The rules do not restrict the OIC's authority or ability to conduct discovery, but they do limit the regulated entities' abilities to conduct discovery. If the rules were intended to apply evenly to the OIC and regulated entities, then revisions are necessary.
 - However, if the rules are unbalanced by design, then the rules should be withdrawn entirely, as they directly impair the rights of the regulated entities to gather information to defend their interest in the event of administrative hearings.
 - These hearings can take place in a variety of circumstances, involving agency action, fines, and penalties, affecting licenses, registrations, or certificates of authority. This is the lifeblood of these entities, and to restrict the ability of entities to gather information that is directly relevant to the decisionmaker, is unwise, unnecessary, and completely outside the expectations of the hearing process outlined in the APA for administrative hearings. Regulated entities should have access to information that affects their business and so it can be presented in the proper court, or for judicial review (of an adverse decision).
 - Testimony is in opposition to the proposed rules, based on limiting the rights of regulated entities with concerns communicated on property rights and the Administrative Procedure Act (APA). Testimony also requests rules to be withdrawn.
- Kenton Brine –
 - Presented testimony including information on comments submitted for this rulemaking, which communicated similar issues.
 - First, comments were included that the OIC is not limiting their ability to conduct discovery, but instead is only limiting the discovery ability of regulated entities and opposing parties, and excludes depositions, which appears to be in conflict with the APA (Chapter 34.05 RCW).

- The OIC is attempting to require opposing parties to request information, which they may not know exists. The OIC is attempting to place a heightened burden on opposing parties here. The rule change will not speed up the process, but instead will slow it down, by requiring a needless motion for discovery. This causes expense to small businesses, which will be great. In any case involving a case with OIC, the opposing party is forced to bring a needless motion that they are already entitled to. This rule would be an added burden for small business.
- Testimony. At this point in any case, the OIC has already completed discovery, because the agency has other authorities that provide access to information and discovering additional information. When OIC issues an initial action, the OAH and ALJ must give deference to the agency (OIC), so this creates a stacked deck, where the only leveler is discovery.
- The APA, which OIC seeks to amend through this rule, has goals of uniformity, fairness, and public access. These are the same concepts that are under attack with this rulemaking. This will shift the burden onto the accused, which is contrary to the APA.
- Testimony indicated that comments were submitted on this rulemaking, including copies of depositions, which should be included as part of the administrative rulemaking record. Testimony states that the depositions show that there are issues with lack of accountability and faults with OIC's administrative hearings. OAH and ALJ must give great deference to the OIC and these faulty processes. Admissions in depositions are critical in administrative law and in appeals.
- Testimony asserts that OIC should be an agency of accountability, with due process, and this rule should be rejected.

The hearing was adjourned.

SIGNED this 19 day of October, 2021

Michael S. Walker
Michael Walker, Presiding Official