

August 10, 2021

Mike Kreidler
Insurance Commissioner
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

RE: Comment in opposition to Draft Administrative Hearings Regulation (R 2021-09)

Commissioner Kreidler:

This comment letter is presented in opposition to your proposed regulation R 2021-09 identified as “Administrative Hearings – Optimizing Discovery and Authorizing Electronic Service” (hereafter, “Proposed Regulation”). The Proposed Regulation purports to amend an existing regulation, specifically, WAC 284-02-070.

The Proposed Regulation is substantively flawed in several particulars, some of which I enumerate below. I do not intend in this opposition comment letter to list or identify with specific legal references all of the legal failings of the Proposed Regulation for the simple reason that I anticipate that, if you adopt this Proposed Regulation as currently written, there will be a legal challenge at which time all of the legal flaws and substantive errors will be carefully examined and explained. The purpose of this opposition comment letter is to encourage you to withdraw the Proposed Regulation now and consider other, legal, mechanisms to bring about whatever your intention is in drafting the Proposed Regulation in the first place.

Below is a listing of the significant legal flaws in the Proposed Regulation:

- The Proposed Regulation purports to severely limit and curtail discovery in administrative adjudicative proceedings. RCW 34.05, the Administrative Procedure Act, sets out and delineates the procedural and evidentiary standards in the conduct of administrative adjudicative proceedings. This Proposed Regulation attempts to override the Administrative Procedure Act and is clearly beyond the scope of authority of the Office of the Insurance Commissioner.
- The Insurance Commissioner has authority to propose and adopt regulations only for effectuating activities relating to Title 48 Revised Code of Washington, that is, the Insurance Code. The Proposed Regulation which precludes and limits discovery in an authorized administrative adjudicative proceeding involving the Office of the Insurance Commissioner is not a regulation intended to effectuate any provision of the Insurance Code, and is, therefore beyond the scope of the Insurance Commissioner’s statutory authority.
- The Proposed Regulation clearly usurps the exclusive authority of the Washington State Supreme Court. Title 2 Revised Code of Washington grants the Supreme Court exclusive authority and power to prescribe and regulate practice and procedure rules and standards for legal actions of any and all nature in the State of Washington. The Supreme Court has, in fact,

carried out its exclusive power and authority over practice and procedure in all legal proceedings by adopting Rules of Civil Procedure and Rule of Evidence, among other such standards. The Proposed Regulation is a clear attempt by the Insurance Commissioner to usurp the exclusive authority of the Washington State Supreme Court. Accordingly, it is quite likely that the Proposed Regulation, if adopted, will be declared void and of no effect.

- The Proposed Regulation not only attempts to severely limit and restrict discovery in administrative adjudicative proceedings involving the Office of the Insurance Commissioner, which, as noted above, is beyond the authority of the Insurance Commissioner, but also attempts to alter, and even abolish, the rule of law with regard to legal precedent. Inserted in the language of the Proposed Regulation is this statement: "Adjudicative proceedings are determined on the merits of the individual case and are not binding precedence (*sic*) on unrelated cases." This is yet another attempt by the Insurance Commissioner to ignore, override, and usurp the authority of the Supreme Court and all the lesser courts in the State of Washington, as well as the authority of judges, including duly-appointed and authorized administrative law judges with respect to the well-established legal principle of precedent. The rule of law requires that adherence to legal precedent is essential if consistent and uniform legal standards and practices are to effect and guide the actions of all persons, whether individual or entity, in the conduct of their affairs in the State of Washington. Surreptitiously inserting in the Proposed Regulation, which purports to discuss discovery in legal proceedings (albeit without authority), language that would contradict, disregard, and defy the notion of legal precedent in sanctioned legal proceedings is well beyond the purpose and intent of regulations of any kind, and is clearly beyond the authority of the Insurance Commissioner.

In summary, the Proposed Regulation is seriously flawed from virtually every legal, statutory, and constitutional perspective and should be withdrawn from further consideration.

Regards,

A handwritten signature in blue ink, appearing to read "B. Kreger", with a long horizontal flourish extending to the right.

Brian F. Kreger

Copy: Rules Coordinator, Office of Insurance Commissioner (rulescoordinator@oic.wa.gov)

NOTE: The comments and opinions expressed herein are those of the author exclusively, and may not be shared by any other person associated with the firm of Kreger Beeghly, PLLC.