



NW Insurance Council



NAMIC
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES



**American Property Casualty
Insurance Association**
INSURING AMERICA apci.org

July 28, 2021

State of Washington Office of the Insurance Commissioner
302 Sid Snyder Ave., SW
Olympia, WA 98504
Attention: **Michael Walker**

Sent via email to: rulescoordinator@oic.wa.gov.

**RE: Subject of possible rulemaking: Administrative Hearings
Insurance Commissioner Matter (R 2021-09)**

Dear Commissioner Kreidler:

On behalf of the National Association of Mutual Insurance Companies (NAMIC), the American Property Casualty Insurance Association (APCIA), and the NW Insurance Council (NWIC), we write to share our concerns with the OIC's announced plan to engage in rulemaking that would impose discovery restrictions in Administrative Hearings, specifically adjudicative hearings in contested cases. We believe that restricting the discovery rights of insurers, while leaving untouched the Commissioner's broad powers to require that insurers provide documents, depositions and other materials on demand, would unjustly hinder the ability of insurers to meaningfully participate in adjudicative hearings in contested cases.

Please note that we intend to submit a separate comment letter, by the August 10, 2021 deadline, addressing the July 2020 Stakeholder Draft titled "R 2021-09 Administrative Hearings – Optimizing Discovery and Authorizing Electronic Service."

For the reasons set forth in more detail below, we urge you to immediately withdraw R 2021-09 and the related Stakeholder draft.

The Trades

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe.

The National Association of Mutual Insurance Companies is the largest property/casualty insurance trade group with a diverse membership of more than 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66 percent of the homeowner's insurance market and 53 percent of the auto market.

NW Insurance Council is a non-profit, insurer-supported organization providing information about auto, home and business insurance to consumers, media and policymakers in Washington state, with a diverse membership of Washington-based, regional and national insurers providing coverage to Washington's drivers, homeowners, renters, agriculturalists and businesses.

Administrative Hearing Purpose

The Commissioner's own website describes the goal of an administrative hearing: "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> That goal can never be met if insurers are prohibited from gathering documentation necessary to present "all pertinent information" to the presiding officer.

The Notice Fails to Justify the Proposed Rulemaking

The July 2, 2021 CR-101 Notice cites various provisions of **RCW Title 48** (Insurance) and **RCW 34** (the Washington Administrative Procedure Act (APA)) as authority for the proposed rulemaking but fails to explain how these statutes support the agency's proposed action. The Notice fails to demonstrate how the proposed rulemaking will further the "full disclosure of relevant facts and issues" required under the Administrative Procedure Act, **RCW 34.05.449**, which provides that the presiding officer in an adjudicative hearing "shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order." These provisions of the APA align with the Administrative Hearing goal described on the Commissioner's website. 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." Reducing the ability of aggrieved parties to access documents or evidence relevant to defending an action against it by eliminating or severely restricting the use of discovery tools is inconsistent with the goal of improving in the administrative hearing process.

Existing Adjudicative Hearing Rules Provide Sufficient Remedies for Discovery Abuses

Pursuant to **RCW 48.37.070 (5)(a)**, "the commissioner may take depositions, ... or documentary evidence, administer oaths, and examine under oath any individual relative to ...the subject of any hearing or investigation": The Commissioner may also issue subpoenas pursuant to **RCW 34.05.446**. Notably, the CR 101 Notice does not propose any change in the scope of these powers.

The Notice complains that the incorporation by reference of civil discovery rules into **WAC 284-02-070** results in “parties” propounding “overly broad” discovery yet ignores the remedies contained within those same civil discovery rules designed to address purported discovery abuses. **RCW 34.05.06(3)** governs discovery procedure and provides, in relevant part, that “the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.” If the Commissioner is concerned about “overly broad” discovery in any contested case, he need only ask the presiding officer to exercise discretion to set appropriate discovery parameters.

The description of the alleged “problems” arising from application of the civil discovery rules, without any reduction in the Commissioner’s power to demand production of documents by insurers signals that the Commissioner’s intent is to reduce the amount of work required by his staff to respond to discovery requests from insurers, without consideration of the relevance or significance of the discovery requested. The existing administrative hearing process provides sufficient remedies to guard against discovery abuses; wholesale elimination of the discovery rights of insurers involved in adjudicative hearings in contested cases is not the answer. Administrative efficiencies must not come at the expense of transparency, fairness and insurer due process protection rights.

Restricting Adjudicative Hearing Discovery Will Prevent Development of an Adequate Record for Judicial Review

RCW 34.05 establishes the exclusive means of judicial review of agency action, and RCW 34.05.562 limits the circumstances under which a Court may consider evidence beyond that contained in the hearing record to only evidence that “relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

The proposed rulemaking to restrict discovery by insurers will not only impede the ability of insurers to meaningfully participate in adjudicative hearings but also prevent insurers from seeking appropriate judicial review.

For the reasons set forth above, we urge you to immediately withdraw R 2021-09 and the related Stakeholder draft.

Thank you for your consideration.

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