

# THE ADMINISTRATIVE HEARING PROCESS OR GOVERNMENT OVERREACH

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## THE ADMINISTRATIVE STATE



# THE ADMINISTRATIVE LAW PROCESS

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- The Administrative Procedures Act, RCW 34.05 and WAC 10.08 provide the framework for all adjudicative proceedings.
- Some Departments have created their own regulations that vary from the APA so it is critical that you look at the relevant statute to see what differences there are.
- For example, the Department of Health has developed its own set of regulations governing hearings. WAC 246-10



# HOW DO AGENCIES INITIATE AN ACTION

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- Some investigations and regulatory actions are driven by citizen complaints.
- Some actions are the result of agency activity, such as an audit. For example, DFI may visit the licensee's place of business to ensure that corrective action has been taken or to investigate a complaint. RCW 19.146.235.
- Once there is a complaint, the door has been opened for an agency to evaluate and resolve other issues it discovers. See *Nations Capital Mortgage Corp. v. DFI*, 137 P.3d 78 (Div. 2 2006).

# COMMON ISSUES IN INVESTIGATIVE PHASE

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- Must a Licensee Submit to an In-Person Interview? It depends.
- Department investigators sometimes demand that a licensee submit to an in-person interview. Investigators will cite to a statute that states that a licensee must cooperate in an investigation or risk losing their license. However, those rules usually require only that a licensee answer written questions and provide documents. If you decline an in person interview, or insist that a recording be made (which the investigator will usually decline to do), they will state that your refusal will be passed on to the decision maker to determine if charges will be pressed for unprofessional conduct. That may not be the truth.
- The authority for an in-person interview is regulation specific. See, e.g., RCW18.130.095. Some Agencies can require an interview. Others may depose their licensees. Most can do neither.



# “INFORMAL” DISCOVERY

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- DFI does not have a rule limiting the availability of discovery. The agency rules merely require that requests be made by motion to the "presiding officer." A statement of charges is issued under the authority of the director, and so he is the presiding officer in this matter until an ALJ is appointed under his authority. See, e.g., RCW 34.05.425(1)(a).
- We have found that, upon receipt of a request for the full investigative file, the Director of DFI will immediately ask for an administrative hearing and an assistant attorney general will write demanding that you cease contacting their client. We have then had to turn around and file the same request, in motion form, with the newly appointed ALJ, who will do nothing to address the matter until the prehearing conference.
- DFI has also determined that the investigative file is limited to the material that it intends to use at hearing. Thus, it has been known to remove all exculpatory material.

# LOOK CLOSELY AT THE INVESTIGATION AND THE CHARGES

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- Examples of inadequate investigations abound. Look closely at the statutes the clients are being charged under and the factual basis of the complaint. There is also an argument to be made that institutional racism is rampant in Olympia. Contacting witnesses is very fruitful, and can lead to the dismissal of charges. Don't ever take their evidence for granted or assume that it is accurate on its face.
- Interview their witnesses. It has proven fruitful to contact and obtain affidavits.
- Mischarging: Departments will make basic errors regarding the statutes under which they assert charging authority or violations by the client.



# YOU CAN CONTACT AGENCY EMPLOYEES

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- The Attorney General's Office insisted for years that all employees of a Department were represented by them. The AG even went so far as to prevent the WSBA's ethics committee to rule on the issue for close to three years, purportedly.
- See Ethics Opinion 201803.
- Follows *Wright v. Group Health Hospital*, 103 Wn.2d 192 (1984). Cannot interview those who have speaking authority for the corporation.



# COMMENCEMENT OF AN ACTION BY AGENCY

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- RCW 34.05.413 allows that an Agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.
- A Department may not exceed its statutory authority because administrative agencies have no inherent powers. *State ex. rel. Pub. Util. Dist. No. 1 of Okanogan County v. Dep't of Pub. Serv.*, 21 Wn.2d 201, 208-09, 150 P.2d 709 (1944). Agencies may exercise only those powers conferred upon them expressly or by necessary implication.
- If an enabling statute does not authorize a particular regulation, either expressly or by necessary implication, "that regulation must be declared invalid despite its practical necessity or appropriateness." *Wash. Indep. Telephone Ass'n v. Telecomm. Ratepayers Ass'n for Cost-Based & Equitable Rates*, 75 Wn.App. 356, 363 (1994).
- The rule of "necessary implication" includes only those powers that are essential to the declared purpose of the legislation, "not simply convenient, but indispensable" to carrying out the legislative purpose. *City of Los Angeles v. L.A. City Water Co.*, 177 U.S. 558, 570-71, 20 S. Ct. 736 (1900).



# COMMENCEMENT OF ACTION BY CITIZEN

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- As allowed by law, any person may apply for an adjudicative proceeding. RCW 34.05.413.
- An agency may provide forms for and, by rule, may provide procedures for filing an application for an adjudicative proceeding. An agency may require by rule that an application be in writing and that it be filed at a specific address, in a specified manner, and within specified time limits. The agency shall allow at least twenty days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application.
- The agency has 90 days to approve or deny the application.



# ADMINISTRATIVE HEARING

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- STATEMENT OF CHARGES
- The statement of charges (“SOC”) sets out the factual and legal basis the state has for imposing an Order. The Order can impose fines, order restitution, require the payment of investigative costs, revoke licenses and ban someone from the industry.
- See RCW 18.130.090 for request for hearing
- See RCW 18.130.100 – APA 34.05 governs.



# PRESIDING OFFICERS

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- The agency head has the discretion to determine who the presiding officer will be.
- The agency head or his designee may serve as the presiding officer. RCW 34.05.428
- An administrative law judge assigned by the Office of Administrative Hearings may also serve.
- Or any person designated by the Secretary of Health pursuant to RCW 43.70.740.
- A presiding officer may be disqualified for bias, prejudice, interest or any other cause provided in this chapter (34.05) or for which a judge is disqualified. See also WAC 10-08-050: “Motions of prejudice with supporting affidavits under RCW [34.12.050](#) must be filed at least three days prior to the hearing or to any earlier stage of the adjudicative proceeding at which the administrative law judge may be required to issue a discretionary ruling.”

# SUMMARY SUSPENSION

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- A department may immediately and summarily suspend a license when it finds that there is an imminent danger to a patient or the public, or the public health, safety, or welfare require emergency action. See, e.g., WAC 170-03-0300(1).
- A motion for stay of a summary suspension may be made. An ALJ may grant a stay of the summary suspension if the ALJ finds that the stay is in the public interest and is made for good cause.

# COMPUTATION OF TIME

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- WAC 10-08-083 holds that, “In computing any period of time prescribed or allowed by any applicable statute or rule, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.”



# SERVICE PURSUANT TO WAC 10-08-110

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- For the Department: When placed in the mail by the Department.
- For the citizen: When received by the Department during regular business hours “at any office of the agency.”
- Fax filing is a valid means of serving papers upon an Agency and is “perfected when a complete and legible copy of the documents is reproduced on the agency's fax machine during regular business hours.” The party fax filing bears the risk that “the documents will not be timely received or legibly printed, regardless of the cause. If the fax is not received in legible form, filing will not be perfected.”



# CONFERENCES - PROCEDURE AND PARTICIPATION

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- Most adjudicative proceedings have an initial status conference to set a case schedule. There are also often status conferences near the hearing date. Some agencies also have settlement conferences by rule.
- Agencies may hold prehearing or other conferences for the settlement or simplification of issues. Every agency shall by rule describe the conditions under which and the manner in which conferences are to be held. RCW 34.05.431.
- In the discretion of the presiding officer, and where the rights of the parties will not be prejudiced thereby, all or part of the conference may be conducted by telephone, television, or other electronic means.



## PLEADINGS, BRIEFS AND MOTIONS.

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- At appropriate stages of the proceedings, the presiding officer may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders. RCW 34.05.437
- A party may move to consolidate multiple adjudicative proceedings involving common issues or parties. WAC 10-08-085.
- A party may move for a continuance orally or in writing. All parties must be notified of the request. “If all parties do not agree to the continuance, the presiding officer shall promptly schedule a prehearing conference to receive argument and to rule on the request.”
- Motions for summary judgment are specifically permitted. WAC 10-08-135.





# DISCOVERY UNDER APA

- Hearsay is admissible if it is the kind of evidence a reasonably prudent person would rely on in the conduct of their ordinary affairs. 34.05.452
- Absent an agency rule, discovery is governed by RCW 34.05.446, which provides that:
  - 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. SEE DOH WHICH DOES NOT ALLOW FOR INTERROGATORIES WITHOUT LEAVE OF THE PRESIDING OFFICER, which is NEVER granted.
  - Except as otherwise provided by agency rules, 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.
- Subpoenas may be issued and have a statewide effect The presiding officer, upon motion made, may quash or modify a subpoena if it is unreasonable and oppressive. WAC 10-08-120; RCW 34.05.446. Enforcement of a subpoena occurs in superior court, and not in an administrative hearing. RCW 34.05.588

# OBJECTIONS TO EVIDENCE

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- All rulings upon objections to the admissibility of evidence shall be made in accordance with the provisions of RCW [34.05.452](#).
- The presiding officer has broad powers over the admissibility of evidence. WAC 10-08-140.
- Parties can challenge the authenticity of documents. WAC 10-08-140.
- Usually objections are made formally in a motion in limine.
- The presiding officer may issue protective orders.





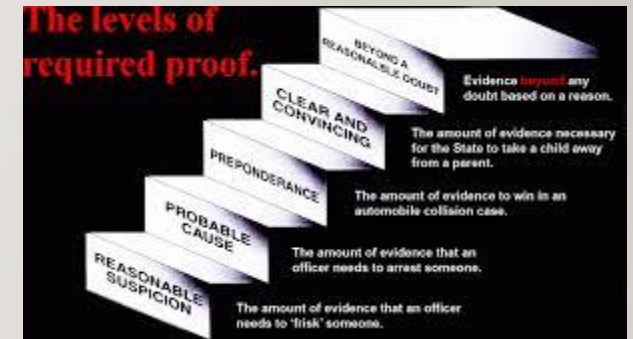
# STAY

- A party may file a motion in the reviewing court seeking a stay or other temporary remedy. RCW 34.05.550.
- Courts may impose stays in civil cases where criminal charges arising from the same facts are pending. The Fifth Amendment privilege permits a person to refuse to answer official questions where the answer might tend to incriminate her in future criminal proceedings. “The mere pendency of related civil and criminal proceedings does not prevent the civil proceeding from going forward...But when the civil and criminal proceedings arising from the same transactions or conduct are pending simultaneously, the court faces a dilemma.” *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 16 P.3d 45, 52 (Div. I 2000).
- In determining whether to impose a stay, Courts balance the following issues: the extent to which a defendant’s rights are implicated; similarities between the civil and criminal cases; status of the criminal case; Plaintiff’s interest and potential prejudice; the burdens on the party asserting the privilege; convenience and efficiency of the court; interests of non-parties to civil litigation, and; public interest in civil and criminal litigation. *Olympic Pipeline*, 16 P.3d at 56-61. Whether to impose a stay is within the discretion of the trial court.

# STANDARD OF PROOF

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- Licensure matters are either determined on a “preponderance of the evidence” or “clear and convincing evidence.”
- Look to the statute to see what the standard is.
- See also *Nguyen v. State, Dep’t of Health Med. Quality Assurance Comm’n*, 144 Wn.2d 516 (2001). The Court held that proof by clear and convincing evidence was required to revoke a medical license



# TELECONFERENCE HEARINGS

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- One of the critical issues regarding telephonic hearings is that the presiding officer should not make credibility determinations regarding witnesses heard only telephonically.
- In *Washington v. McCabe*, the Court held that live testimony is superior to telephonic because the fact finder was unable to judge the witness's demeanor. 161 Wn. App. 781 (2011). An appellate court may thus disregard a fact finder's determination of credibility. *In re Disciplinary Proceeding Against Sanai*, 167 Wn.2d 740, 751 (2009).

# WHAT IS “UNPROFESSIONAL CONDUCT”?

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- See RCW 18.130.180
- Is it unprofessional for a real estate agent to have been convicted of misdemeanor shoplifting? The Department of Licensing considers a shoplifting conviction to constitute unprofessional conduct because it raises concerns about a real estate broker’s propensity to abuse his or her professional responsibilities and tends to harm the standing of the profession in the eyes of the public, both of which it asserts lead to “reasonable apprehension about public welfare.” The DOL cites *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 736 (1991), in support of this conclusion.
- By contrast—Washington reversed an administrative order determined by the Registration for Professional Engineers and Land Surveyors because it erroneously interpreted the nexus between the profession and the misconduct, where the licensee’s child molestation convictions had no “nexus” with, or related to, the practice of professional engineering. *Ritter v. State, Bd. Of Registration for professional Engineers and Land Surveyors*, 161 Wn.App. 758, at 766 (2011).

# SUBSTANTIAL COMPLIANCE

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- Strict compliance with legislatively mandated procedures is not always required. *Kim v. Lee*, [102 Wn.App. 586](#), 591, [9 P.3d 245](#) (2000). "It is well recognized that the underlying purpose inherent in the function of judicial interpretation of statutory enactments is to effectuate the objective--often referred to as the intent--of the legislature." *Murphy v. Campbell Investment Co.*, 79 Wn.2d 417, 420, [486 P.2d 1080](#) (1971) (emphasis omitted).
- To comply substantially with a statute, courts must find "actual compliance in respect to the substance essential to every reasonable objective of the statute." *Chrisp v. Goll*, [126 Wn.App. 18](#), [104 P.3d 25](#), 28 (2005) (quoting *In the Matter of the Application for a Writ of Habeas Corpus of Richard J. Santore*, [28 Wn.App. 319](#), 327, 623 P.2d [127 Wn.App. 218] 702, review denied, 95 Wn.2d 1019 (1981)). This analysis requires courts to determine whether "there has been actual compliance with the statute, albeit procedurally faulty." *Chrisp*, 104 P.3d at 28 (quoting *Seattle v. Public Employment Relations Comm.*, 116 Wn.2d 923, 928, [809 P.2d 1377](#) (1991)).

# EQUITABLE ESTOPPEL

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- The argument of Equitable Estoppel is specifically allowed by rule in DSHS proceedings. See WAC 388-02-0495.
- There are five elements of equitable estoppel.
  - A. The department made a statement or took an action or failed to take an action, which is inconsistent with a later claim or position by the department.
  - B. You reasonably relied on the department's original statement, action or failure to act.
  - C. You will be injured to your detriment if the department is allowed to contradict the original statement, action or failure to act.
  - D. Equitable estoppel is needed to prevent a manifest injustice.
  - E. The exercise of government functions is not impaired. For example, the use of equitable estoppel in your case will not result in circumstances that will impair department functions.
- The standard of proof is clear and convincing evidence.



# INITIAL OR FINAL ORDER

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- The presiding officer enters an initial order in circumstances where additional review is available.
- A final order is entered where no additional review is available.
- An initial and final order shall include a statement of findings and conclusions, and the basis therefor, on all the material issues of fact, law or discretion. RCW 34.05.46 I.
- Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.
- Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely on in the conduct of their affairs.

# SETTLEMENT

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- Administrative proceedings are geared towards settlement. Discovery and pre-hearing maneuvering are meant to establish the groundwork for a favorable settlement. Few cases go to hearing, unless there are allegations of abuse or neglect as to DSHS [APS, CPS]—the Department tends to err on the side of itself [for the public's sake] and proceed to hearing.
- See RCW 18.130.098





- Agency Review – AKA a waste of time and the client’s money.

Here, you are asking the Department to decide if what they have just won through an administrative hearing was fair.

In 2015 the DSHS Review Board sided with the State 86% of the time.

In 2016 the Review Board sided with the State 81% of the time.

In 2017 the Review Board sided with the State 80% of the time.

- The Department Director has the authority to reverse the initial decision of the ALJ.
- Appeal to Superior Court. See RCW 34.05.510 onward.