



## **Notice of Rule Change Concise Explanatory Statement Administrative Hearings and Administrative Violation Notices (AVN)**

This explanatory statement concerns the **Washington State Liquor Control Board's review and adoption of rule changes regarding administrative hearings and administrative violation notices (AVN)**.

The Administrative Procedure Act (RCW 34.05.325(6)) requires agencies to complete a concise explanatory statement before filing adopted rules with the Office of the Code Reviser. This statement must be provided to anyone who gave comment about the proposed rule making.

Once persons who gave comment during this rule making have had a chance to receive this document, the Liquor Control Board will file the amended rule with the Office of the Code Reviser. This rule change will become effective 31 days after filing (approximately September 15, 2008).

The Liquor Control Board appreciates your involvement in this rule making process. If you have any questions, please contact Rules Coordinator, at (360) 664-1648 or e-mail at [rules@liq.wa.gov](mailto:rules@liq.wa.gov).

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### **What are the agency's reasons for revising this rule?**

The Washington Administrative Procedures Act (APA) outlines the process by which agencies conduct adjudicatory hearings. The Office of Administrative Hearings has adopted model procedural rules for agencies to adopt covering procedures common to most agencies.

As part of the Liquor Control Board's on-going rules review process, the rules on conducting administrative hearings and processing administrative violation notices have been reviewed to further eliminate duplication with the APA and the model rules and clarify rules regarding agency administrative procedure.

## What changes are being made?

After review and comparison to current provisions of the APA and the model rules provided by the Office of Administrative Hearings, 9 sections are proposed for repeal because of duplication or lack of necessity, and 10 sections are proposed for modification or as new sections to clarify and update the current rules. As a result of public comment and additional staff comment, non-substantive changes were made to the proposal filed under WSR # 08-09-048 (CR 102).

Repeal in green; Modify in red; and changes to proposal in blue.

Current WAC	Action
314-42-020 Appearance and practice before the board — Who may appear.	Keep with no change. This section further clarifies RCW 34.05.428 CHANGE: This section was repealed in the CR 102 rule proposal.
314-42-025 Appearance in certain proceedings may be limited to attorneys.	Repeal
314-42-030 Appearance by former employee of board or former member of attorney general's staff.	Modify for clarity
314-42-040 Practice and procedure.	Modify - Reference both 10-08 and 34.05 as the governing laws and rules unless the agency adopts more customized rules for LCB.
314-42-045 Service of process — Filing with agency.	Modify for clarity
314-42-050 Subpoenas — Fees.	Repeal - Covered in 34.05.466 and 66.24.010(3)(c) and (d)
314-42-051 What are the procedures when a licensee or mandatory alcohol server training permitholder requests an administrative hearing?	New section – moves subsection (3) of 314-29-010 to chapter 314-42 WAC.
314-42-060 Depositions upon interrogatories — Submission of interrogatories.	Repeal - Covered in 34.05.446(3)
314-42-065 Official notice — Material facts.	Repeal - Not applicable to LCB processes.
314-42-070 Presumptions.	Modify for clarity and update language. CHANGE: In response to public comment, subsection (3) is revised for clarity.
314-42-075 Stipulations and admissions of record.	Repeal – Predates APA and Model Rules 1963
314-42-080 Form and content of decisions in contested cases and proposed orders.	Repeal and Replace with a clearer statement of what happens after an administrative hearing from 314-29-010(4) See 314-42-095 below.
314-42-085 Written arguments.	Modify for clarity and update language CHANGE: Clarify the term “attorney for the board” in the context of a

Current WAC	Action
	hearing.
314-42-090 Definition of issues before hearing.	Repeal - Prehearing conference is part of the model rules
314-42-095 What happens after an administrative hearing?	New section – moves subsection (4) of 314-29-010 to chapter 314-42 WAC.
314-42-100 How can a person petition the board for the adoption, amendment, or repeal of a rule?	Repeal. Covered in the APA
314-42-105 How can a person petition the board for a declaratory order?	Repeal. Covered in the APA
314-29-003 Purpose	Modify to update CHANGE: Technical change for language consistency.
314-29-005 What are the procedures for a licensee or a mandatory alcohol server training permit holder to be notified of an alleged violation of a board statute or regulation?	Modify to update and clarify CHANGE: Technical correction in terminology and eliminate language duplication and unnecessary language.
314-29-010 What options does a licensee or permit holder have once he/she receives a notice of initial board action?	Modify to update and clarify. Subsections (3) and (4) are moved to chapter 314-42 WAC as part of the administrative hearings process. CHANGE: Remove unnecessary language and change terminology for consistency.

## Rule Adoption

The Board adopted these rule changes on August 6, 2008. Repeal of this rule will be filed on August 15, 2008 and will be effective September 15, 2008.

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## Summary of all public comments received on this rule proposal.

The Liquor Control Board received public comment in writing on rule changes for administrative hearings during the comment period that ended **July 16, 2008** under filing WSR #08-09-048.

### Summary of comments

#### **Comment:**

1. Under the rule on “presumptions” (314-42-070), the description of the term “Interference with remedy” is awkward. I suggest using “(3) Spoliation. When a party in bad faith destroys, suppresses, or withholds evidence material to the case, the administrative law judge can presume the evidence would have been unfavorable to that party’s position.”

**Response:** The agency agrees and modifies its rule proposal to use the term “Spoliation” and its descriptive language rather than “Interference with remedy”.

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## Public Comment Participant List

### **Name and Affiliation**

#### Written comments

**Robert Krabill**, Lead Administrative Law Judge, Office of Administrative Hearings

Testimony at Public Hearing – July 9, 2008 at Olympia, WA

**None**

**TEXT OF RULES BEGINS ON THE NEXT PAGE (5)**

Text of modified rule (Estimated effective date is September 15, 2008)

## **Administrative hearings and administrative violation notices (AVN)**

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### **Chapter 314-29 WAC**

#### **~~((HEARINGS))~~ VIOLATIONS AND PENALTIES**

AMENDATORY SECTION (Amending WSR 03-09-015, filed 4/4/03, effective 5/5/03)

**WAC 314-29-003 Purpose.** The purpose of chapter 314-29 WAC is to outline what a liquor licensee or a mandatory alcohol server training permit holder can expect if a licensee or ~~((employee violates))~~ permit holder receives an administrative violation notice alleging a violation of a liquor control board ~~((law or rule))~~ statute or regulation.

[Statutory Authority: RCW 66.08.030, 66.24.010, 66.24.120. 03-09-015, § 314-29-003, filed 4/4/03, effective 5/5/03.]

AMENDATORY SECTION (Amending WSR 01-03-086, filed 1/17/01, effective 2/17/01)

**WAC 314-29-005 What are the procedures for notifying a licensee or a mandatory alcohol server training permit holder ~~((to be notified))~~ of an alleged violation of a board statute or regulation?** (1) When an enforcement ~~((agent))~~ officer believes that a licensee or a mandatory alcohol server training permit

holder has violated a board statute or regulation, the ~~((agent will))~~ officer may prepare an administrative violation notice (AVN) and mail or deliver the notice to the licensee, licensee's agent or permit holder. ~~((This notice will constitute the notice of initial board action, and the remaining steps in the prehearing procedure as outlined in WAC 314-17-010 will be followed.))~~

(2) The AVN notice will include:

(a) A brief narrative description of the violation(s) the ~~((agent))~~ officer is charging;

(b) The date(s) of the violation(s);

(c) A copy of the law(s) and/or regulation(s) allegedly violated;

(d) An outline of the licensee's or permit holder's options as outlined in WAC 314-29-010; and

(e) The recommended penalty ~~((as follows:))~~.

(i) ~~((For cases in which there are no aggravating circumstances as outlined in WAC 314-12-330 and 314-12-340 as now or hereafter amended,))~~ If the recommended penalty ~~((will be))~~ is the standard penalty ~~((as outlined in WAC 314-12-170 and 314-12-300 through WAC 314-12-320))~~, see WAC 314-29-020 through 314-29-035 for licensees, and ~~((in WAC 314-14-160 and 314-14-165))~~ WAC 314-17-100 and 314-17-105 for mandatory alcohol server training permit holders~~((, as now or hereafter amended))~~.

(ii) For cases in which there are aggravating or mitigating circumstances ~~((as outlined in WAC 314-12-330 and 314-12-340 as now or hereafter amended, the agent will describe the~~

~~circumstances in a report to the director of the enforcement and education division or the director of the licensing and regulation division. Under the provisions of WAC 314-12-330 and 314-12-340 as now or hereafter amended, the director of the education and enforcement division or the director of the licensing and regulation division may recommend a penalty other than the standard penalty outlined in WAC 314-12-170 and 314-12-300 through WAC 314-12-320)), the penalty may be adjusted from the standard penalty. See WAC 314-29-015 for licensees, and ((in WAC 314-14-160)) WAC 314-17-110 for mandatory alcohol server training permit holders(, as now or hereafter amended)).~~

[Statutory Authority: RCW 66.08.030, 66.44.010. 01-03-086, § 314-29-005, filed 1/17/01, effective 2/17/01.]

AMENDATORY SECTION (Amending WSR 01-03-086, filed 1/17/01, effective 2/17/01)

**WAC 314-29-010 What options does a licensee or permit holder have once he/she receives a notice of ((initial board action)) an administrative violation?** (1) ((When)) A licensee or a mandatory alcohol server training permit holder ((receives a notice of initial board action from a liquor control agent in the mail or in person, the licensee or permit holder)) has twenty days from receipt of the notice to:

(a) Accept the recommended penalty; or

(b) Request a settlement conference in writing; or

(c) Request an administrative hearing in writing.

A response must be submitted on a form provided by the agency.

(2) **What happens if a licensee or mandatory alcohol server training permit holder does not respond to the administrative violation notice within twenty days?** If a licensee or permit holder does not respond to the administrative violation notice within twenty days, the recommended penalty will go into effect.

(3) **What are the procedures when a licensee or mandatory alcohol server training permit holder requests a settlement conference?**

(a) If the licensee or permit holder requests a settlement conference, the ~~((agent in charge or designee will schedule the conference))~~ hearing examiner or captain will contact the licensee or permit holder to discuss the violation.

(b) Both the licensee or permit holder and the ~~((agent in charge or designee))~~ hearing examiner or captain will discuss the circumstances surrounding the charge, the recommended penalty, and any aggravating or mitigating factors.

(c) If a compromise is reached, the ~~((agent in charge or designee))~~ hearing examiner or captain will prepare a ~~((proposed))~~ compromise settlement agreement ~~((and will forward it))~~. The hearing examiner or captain will forward the compromise settlement agreement, authorized by both parties, to the board for approval.

(i) If the board approves the compromise, a copy of the signed settlement agreement will be sent to the licensee or permit holder, and will ~~((conclude the case))~~ become part of the licensing history.

(ii) If the board does not approve the compromise, ~~((the board will notify))~~ the licensee or permit holder will be notified of the decision. The licensee or permit holder will be given the option ~~((of agreeing to any changes the board has made in the agreement))~~ to renegotiate with the hearings examiner or captain, of accepting the originally recommended penalty, or of requesting an administrative hearing on the charges ~~((in writing within twenty days of receipt of the notice of board action))~~.

(d) If the licensee or permit holder and the ~~((agent in charge or designee))~~ hearing examiner or captain cannot reach agreement on a settlement proposal, the licensee may accept the originally recommended penalty, or the ~~((agent in charge or designee))~~ hearing examiner or captain will forward a request for an administrative hearing to the board's hearings coordinator.

~~((3) What are the procedures when a licensee or mandatory alcohol server training permit holder requests an administrative hearing?~~

~~(a) If the licensee or permit holder requests an administrative hearing in writing within twenty days, it is conducted pursuant to chapter 34.05 RCW (Washington Administrative Procedure Act).~~

~~(b) The board's hearing coordinator will notify the assistant attorney general of the licensee's or permit holder's request for an administrative hearing.~~

~~(c) The assistant attorney general will draft an administrative complaint and send it to the licensee or permit holder and to the office of administrative hearings.~~

~~(d) The office of administrative hearings will schedule the hearing date, and notify the licensee or permit holder and his/her attorney and the assistant attorney general in writing of the hearing date, time, and location.~~

~~(e) The hearing will be conducted by an administrative law judge assigned by the office of administrative hearings. Subpoenas may be issued by an attorney for any party, or by the assigned administrative law judge.~~

~~(f) At the hearing, the assistant attorney general or a designee will present witnesses and other evidence on behalf of the board's enforcement staff.~~

~~(g) At the hearing, the licensee or permit holder may be represented by an attorney or may choose to represent himself or herself. The licensee or permit holder or his/her attorney will be allowed to present witnesses or other relevant information.~~

~~(4) **What will happen after the administrative hearing?**~~

~~(a) Following the hearing, the administrative law judge will prepare an initial order and send it to the licensee or permit holder and the assistant attorney general.~~

~~(b) Either the licensee or permit holder or the assistant attorney general may file a petition for review of the initial~~

~~order with the liquor control board within twenty days of the date of service of the initial order. The petition for review must:~~

~~(i) Specify the portions of the initial order to which exception is taken;~~

~~(ii) Refer to the evidence of record which is relied upon to support the petition; and~~

~~(iii) Be filed with the liquor control board within twenty days of the date of service of the petition.~~

~~(iv) Copies of the reply must be mailed to all other parties or their representatives at the time the reply is filed.~~

~~(c) The administrative record, the initial order, and any exceptions filed by the parties will be circulated to the board members for review.~~

~~(d) Following this review, the board will enter a final order which is appealable under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).~~

~~(5) **What happens if a licensee or mandatory alcohol server training permit holder does not respond to the notice of initial board action within twenty days?** If a licensee or permit holder does not respond to the notice of initial board action within twenty days, the recommended penalty will go into effect.))~~

[Statutory Authority: RCW 66.08.030, 66.44.010. 01-03-086, § 314-29-010, filed 1/17/01, effective 2/17/01.]

## Chapter 314-42 WAC

AMENDATORY SECTION (Amending WSR 01-11-058, filed 5/11/01, effective 6/11/01)

**WAC 314-42-030 (~~(Appearance by)~~) May a former employee of board or former member of attorney general's staff(~~(-)~~) appear before the board and under what circumstances?** No former employee of the board or member of the attorney general's staff may (~~(at any time after severing his/her employment with the board or the attorney general)~~) appear(~~(, except with the written permission of the board,~~) in a representative capacity on behalf of other parties in a formal proceeding wherein he/she previously took an active part as a representative of the board unless the board grants permission in writing.

[Statutory Authority: RCW 66.08.030, 66.44.010, 66.24.010(3), chapter 34.05 RCW. 01-11-058, § 314-42-030, filed 5/11/01, effective 6/11/01.]

AMENDATORY SECTION (Amending WSR 01-11-058, filed 5/11/01, effective 6/11/01)

**WAC 314-42-040 ((Practice and procedure.)) What rules apply to the procedures used in practice before the board?** The board ((hereby)) adopts the model rules of procedure, found in chapter 10-08 WAC, promulgated by the office of administrative hearings ((insofar as they are not in conflict with a specific board)) unless the board implements a different procedure by rule.

[Statutory Authority: RCW 66.08.030, 66.44.010, 66.24.010(3), chapter 34.05 RCW. 01-11-058, § 314-42-040, filed 5/11/01, effective 6/11/01.]

AMENDATORY SECTION (Amending WSR 01-11-058, filed 5/11/01, effective 6/11/01)

**WAC 314-42-045 ((Service of process--Filing)) How do you file papers with ((agency.)) the board?** Papers required to be filed with the board are deemed filed upon actual receipt by the board during office hours at its headquarters office in Olympia.

[Statutory Authority: RCW 66.08.030, 66.44.010, 66.24.010(3), chapter 34.05 RCW. 01-11-058, § 314-42-045, filed 5/11/01, effective 6/11/01.]

NEW SECTION

**WAC 314-42-051 What are the procedures when a licensee or mandatory alcohol server training permit holder requests an administrative hearing?** (1) If the licensee or permit holder requests an administrative hearing, it is conducted pursuant to chapter 34.05 RCW (Washington Administrative Procedure Act and chapter 314-42 WAC).

(2) The board's hearing coordinator will notify the assistant attorney general of the licensee's or permit holder's request for an administrative hearing.

(3) If the hearing concerns an administrative violation notice, the assistant attorney general will draft an administrative complaint and send it to the licensee or permit holder and to the office of administrative hearings.

(4) The office of administrative hearings will schedule the hearing date, and notify the licensee or permit holder and his/her attorney and the assistant attorney general in writing of the hearing date, time, and location.

(5) The hearing will be conducted by an administrative law judge assigned by the office of administrative hearings. Subpoenas may be issued by an attorney for any party, or by the assigned administrative law judge.

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AMENDATORY SECTION (Amending WSR 01-11-058, filed 5/11/01, effective 6/11/01)

**WAC 314-42-070 Presumptions.** Upon proof by direct, clear, and convincing evidence of the predicate facts ~~((specified))~~ in the following ~~((six))~~ subdivisions ~~((hereof without substantial dispute and by direct, clear, and convincing evidence))~~, the board, with or without prior request and with adequate notice to all parties, may make the following presumptions~~((, where consistent with all surrounding facts and circumstances and consistent with the following subsections:))~~. The facts may not be in substantial dispute and must be consistent with all surrounding facts and circumstances.

(1) ~~((**Continuity.** That a fact of a continuous nature, proved to exist at a particular time, continues to exist as of the date of the presumption, if the fact is one which usually exists for at least that period of time;~~

~~(2))~~ **Identity.** ~~((That))~~ Persons and objects of the same name and description are identical~~((;))~~.

~~((3))~~ (2) **Delivery.** ~~((Except in a proceeding where the liability of the carrier for nondelivery is involved, that))~~ Mail ~~((matter))~~, communications, express or freight, properly addressed, marked, billed and delivered ~~((respectively))~~ to the post office, ~~((telegraph, cable or radio company,))~~ or authorized common carrier of property with all postage~~((, tolls~~

~~and charges)) properly prepaid, is or has been delivered to the addressee or consignee in the ordinary course of business((+)).~~

~~((4) **Ordinary course.** That a fact exists or does not exist, upon proof of the existence or nonexistence of another fact which in the ordinary and usual course of affairs, usually and regularly coexists with the fact presumed;~~

~~(5) **Acceptance of benefit.** That a person for whom an act is done or to whom a transfer is made has, does or will accept same where it is clearly in his/her own self-interest to do so;~~

~~(6) **Interference with remedy.** That evidence, with respect to a material fact which in bad faith is destroyed, removed, suppressed or withheld by a party in control thereof, would if produced, corroborate the evidence of the adversary party with respect to such fact.))~~ (3) **Spoliation.** When a party in bad faith destroys, suppresses, or withholds evidence material to the case, the administrative law judge can presume the evidence would have been unfavorable to that party's position.

[Statutory Authority: RCW 66.08.030, 66.44.010, 66.24.010(3), chapter 34.05 RCW. 01-11-058, § 314-42-070, filed 5/11/01, effective 6/11/01.]

AMENDATORY SECTION (Amending WSR 01-11-058, filed 5/11/01, effective 6/11/01)

**WAC 314-42-085 Written arguments.** (1) At the conclusion of the evidentiary portion of a hearing, the ~~((examiner))~~ administrative law judge may call for an oral legal argument on the record, ~~((after which the examiner shall render his/her oral proposals;))~~ or ~~((r))~~ the ~~((examiner))~~ administrative law judge may call for written arguments to be submitted to his/her office by the licensee or his/her attorney and the ~~((board's))~~ assistant attorney general. Such written arguments must be submitted in triplicate to the ~~((hearing examiner))~~ administrative law judge and may not be exchanged by opposing counsel.

(2) When both arguments have been received, the ~~((hearing examiner))~~ administrative law judge shall deliver one of the copies of the licensee's argument to the ~~((board's))~~ assistant attorney general, and one copy of the board's argument shall be forwarded to the licensee or his/her attorney.

(3) Unless a different time is fixed at the ~~((field))~~ hearing, written arguments must be filed within ten days after the conclusion of the taking of the testimony at the ~~((field))~~ hearing.

(4) After the receipt of both written arguments, the ~~((hearing examiner))~~ administrative law judge shall ~~((render his/her written proposals))~~ issue an initial order which will be served on the licensee or his/her attorney and the assistant attorney ~~((for the board))~~ general.

[Statutory Authority: RCW 66.08.030, 66.44.010, 66.24.010(3), chapter 34.05 RCW. 01-11-058, § 314-42-085, filed 5/11/01, effective 6/11/01.]

NEW SECTION

**WAC 314-42-095 What happens after an administrative hearing?** (1) Following an administrative hearing, the administrative law judge will prepare an initial order and send it to the licensee or permit holder, the assistant attorney general, the board's offices, and any other party to the administrative hearing.

(2)(a) Either the licensee, permit holder, or the assistant attorney general may file a petition for review of the initial order with the liquor control board within twenty days of the date of service of the initial order. With notice to all parties the board may change the time for filing a petition for review of the initial order. The board may extend or shorten the filing time based on a voluntary stipulation of the parties or upon motion of a

party that demonstrates a clear and convincing showing of exigent circumstances. The petition for review must:

(i) Specify the portions of the initial order to which exception is taken; and

(ii) Refer to the evidence of record which is relied upon to support the petition.

(b) Within ten days after service of the petition for review, any party may file a reply with the liquor control board and copies of the reply must be mailed to all other parties or their representatives at the time the reply is filed.

(3) The administrative record, the initial order, and any petitions for review and replies filed by the parties will be circulated to the board members for review.

(4) Following this review, the board will enter a final order which is appealable under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act). The board may issue a final order that differs from the initial order even though no party has filed a petition for review or reply.

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#### REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 314-42-025 Appearance in certain proceedings may be limited to attorneys.

WAC 314-42-050 Subpoenas--Fees.

WAC 314-42-060 Depositions upon interrogatories--Submission of interrogatories.

WAC 314-42-065 Official notice--Material facts.

WAC 314-42-075 Stipulations and admissions of record.

WAC 314-42-080 Form and content of decisions in contested cases and proposed orders.

WAC 314-42-090 Definition of issues before hearing.

WAC 314-42-100 How can a person petition the board for the adoption, amendment, or repeal of a rule?

WAC 314-42-105 How can a person petition the board for a declaratory order?