# Administrative Law Section

*of the Washington State Bar Association*

## Minutes [DRAFT]
## Administrative Law Section Executive Committee and Committee Chairs
## In-Person Meeting January 28, 2017

**Summary of Board Action Taken Between Board Meetings**

**January 18, 2017**: Stephen Manning made email motions for the Board to take a position on SSB 5057, which requires a super-majority vote of the Board. The motions were:

1. That SSB 5057, relating to party's ability to request a hearing with OAH, affects the practice of law and the administration of justice.
2. That the Administrative Law Section opposes SSB 5057 for the reasons set forth in the attached position memo. [Memo is ATTACHMENT A to these minutes.]

Lisa Malpass seconded the motions. **Votes:** Yes: Stephen Manning, Chad Standifer, Lisa Malpass, Margie Gray, Polly McNeill, Gabe Verdugo, Susan Pierini, Paula Martin, Jon Bashford, Janell Stewart, Katy Hatfield. Abstain: Thomas Fain, Robert Rhodes, Robert Krabil. **Motions pass with over 75% of Board voting to approve.**

**January 23, 2017**: Stephen Manning made email motions for the Board to take a position on SB 5350, which requires a super-majority vote of the Board. The motions were:

1. That SB 5350, relating to a deadline to make final administrative determinations, affects the practice of law and the administration of justice.
2. That the Administrative Law Section opposes SB 5350 for the reasons set forth in the attached position memo [attached to the 1/23/2017 email]

Jon Bashford expressed reservation about the attached memo, in that it may not provide the useful feedback to the Legislature about the Board's concerns. Further discussion occurred. Robert Krabill seconded Stephen's motion. A vote occurred, but ultimately failed to obtain 75% of the Board voting yes. **The motion failed to obtain sufficient yes votes for super-majority.**

**January 25, 2017**: Stephen Manning amended the SB 5350 position to take into account the comments from Board members regarding the original draft. Stephen amended his original motion to have the section oppose SB 5350 for the reasons set forth in the amended position memo. [Memo is ATTACHMENT B to these minutes.]

Jon Bashford seconded the motion. **Votes:** Yes: Stephen Manning, Robert Krabil, Robert Rhodes, Lisa Malpass, Margie Gray, Polly McNeill, Gabe Verdugo, Susan Pierini, Paula Martin, Jon Bashford, Janell Stewart, Katy Hatfield. Abstain: Thomas Fain, Chad Standifer. **Motions pass with over 75% of Board voting to approve.**

**Meeting Location:**
Summit Law Group
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104-2682

**Executive Board Members Present:** Stephen Manning (chair), Gabe Verdugo (immediate past chair), Polly McNeill (chair elect), Katy Hatfield (secretary), Jon Bashford (treasurer), Susan Pierini, Lisa Malpass (telephonic), Chad Standifer (telephonic), Robert Rhodes, Robert Krabill, Margie Gray, Janell Stewart. **Also Present:** Liz Steen, John Gray, Richard Potter (telephonic), Eileen Keiffer, Julianne Unite. **Absent:** Thomas Fain, Paula Martin, Alex Caggiano.

Meeting called to order by Stephen at 11:14 am.

1. **Legislative Committee Update – Richard Potter**
   Richard provided a hand-out of the Legislative Committee's bill tracking for the 2017 legislative session. WSBA has asked the section to review approximately 45 bills this session. The committee has done an in-depth review on approximately 25 bills. The section has formally opposed 2 bills and has continued to express the same concerns about former SB 6019 which was introduced again this year as SB 5211. Richard is watching closely another ½ dozen or so bills and may suggest that the board take a formal position on them if it appears they have any chance of passing. No action by the Legislature has been taken yet on any bills that are of concern to the committee. February 17 is the policy cut off date for a bill to be out of its committee of origin. Polly asked if there are any bills that are particularly problematic and discussion had about whether we can meet with Legislators or suggest technical changes that might make bills better. Richard explained that any such work should be approved by WSBA's lobbyist but that is a possibility if it looks like a bill might pass. Richard shared past success with making suggestions about PRA exceptions being placed in the PRA itself, and the committee plans to continue to make suggestions about that. Richard was thanked for doing an excellent job tracking and researching all of these bills on behalf of the section.

2. **Approve Prior Minutes**

November 15, 2016 minutes: Motion by Margie to approve the minutes, Robert seconds
**Vote: All in favor; minutes approved**

3. **Financial Update – Jon Bashford**

Jon went over the Statement of Activities through December 2016 (25% of year complete). At this time, we have earned 43% of budgeted revenue and have spent only 6% of budgeted expenses. Earnings from mini CLE are on statement, but expenses are not because they will not post to January – when expenses post, it will show we made a modest profit on mini-CLE (approximately $100). Last year, we budgeted to spend down $28K, but we actually spent down only $10K, reducing our fund balance from approximately $60K to approximately $50K.

This year's budget budgets us to spend down $28K, bringing our fund balance to approximately $20K. WSBA approved our budget, in part, because WSBA thinks we are conservative budgeters and it does not actually think we will drop that low. This year's budget allows for the possibility of funding two $5000 scholarships instead of just one.

Discussion was had about whether WSBA plans to "rake" sections' budgets in the future, for the benefit of other sections or possibly even WSBA generally. There is a lot of confusion and rumors about this topic. Julianne confirmed that she heard that initially, but that the BOG is not considering that at this time. Board members discussed importance of having a sufficient rainy day fund that we can take fiscal risks on programming for our members, but spending enough that we provide quality benefit to the section members. It is difficult to know what our funding streams may be in the future. Discussion about possibility of a member survey to find out what services members want from the section.

**4. <u>WSBA Bylaws Amendments – Stephen Manning</u>**

WSBA BOG amended the WSBA bylaws in a way that impacts sections. All sections will likely have to amend their bylaws to be in compliance. Biggest areas of change include (1) changes to the membership, where our bylaws would need to specifically state is "judicial" status members could be on executive committee; and (2) elections process. New WSBA process will require sections to use an online application system plus an alternative process. Voting will be done by electronic ballot. Elections will take place between March and May, which is significantly different from when our section currently has elections. Benefit will be that incoming board will have overlap time with outgoing board, before official start of term on Oct 1. WSBA's process will not be mandatory until 2018. Goal is for all section's bylaws to be amended, approved by WSBA, and implemented by January 1, 2018 so that 2018 elections can occur in the Spring under new system. Discussion was had about whether our section wants to voluntarily move to a more electronic system this spring to learn about the process now before it is mandatory. Bylaws Section 7.4 authorize our elections to be done differently if authorized by the Board.

**Action item: Bylaws Committee (Stephen, Katy, Polly, Robert, with help from Julianne) will work on suggested bylaw changes that can hopefully be presented to the Board for approval at June Board Retreat.**

**VOTE: Motion by Jon Bashford that the Board adopt a resolution for electronic balloting in 2017 for the 2018 officers and board members, to be done between March and May of 2017. Polly seconded. All votes in favor, except Susan voted to oppose. Motion passed.**

Requests were made for a nominating committee for next year, and Stephen appointed all who were interested, which were himself, Robert Krabill, Susan Pierini, and Margie Gray.

**Action Item: Nominations committee will advertise to section, put together a slate, and work with WSBA on electronic balloting system for 2017.**

**Action Item: Stephen will initiate meeting of Bylaws Committee and newly formed Nominations Committee.**

**5. <u>Committee Reports</u>**

(a) Newsletter – Liz Steen
Newsletter is going to move towards a more formalized announcement process (that is applicable at any time of year) because time-sensitive announcements were being delivered too late. Goal of the newsletter is to continue quarterly schedule with a long article and WA State caselaw updates in each newsletter. Liz hopes next newsletter will be published in one month from now. **Action item: Robert Rhodes is going to work with Liz on figuring out how to make the newsletters .pdf searchable.**

(b) Public Service Committee – Janell Stewart
i. No update

(c) Legislative Committee – Richard Potter
[Report taken out of order and discussed above]

(d) Publication and Practice Manual – Gabe Verdugo
i. Gabe in process of setting up transition meeting with Jeff Litwak. Jeff sending extra copies of Admin Law Practice Manual to Gabe. Gabe has been in contact with KCBA Pro Bono Coordinator to see what clinics could most benefit from donation of the books.

(e) CLE Committee – Jon Bashford
i. December dinner CLE in Seattle was a great event and presentation, with a presentation by AAG Julian Bray on the ethics of representing an organizational client. Approximately 20 people attended. We charged $0 for members for the CLE (people paid the cost of their own dinner) as a member benefit. We netted approximately $100 for the event.
ii. Suzanne, Tom, and Alex attended the WSBA's webinar training.
iii. CLE Committee hopes to do two-three more mini CLEs this year. Suzanne has tagged Lisa and Paula on the possibility of doing one topic in two cities: Spokane and Vancouver, as a benefit for our members in those cities. Section also plans to do mini-CLE in June in conjunction with Board Retreat.
iv. Conversation about whether to attempt an all-day CLE in September. WSBA has dates available for its conference center. Potentially Thomas Fain (not present) would be willing to assist with planning a CLE. We could not do an all-day CLE without the commitment of people to do the work needed to put it on. Discussion of doing joint CLE with another WSBA Section or non-WSBA organization such as Immigration Law Project. Margie brought up that partnering with non-WSBA organization and hosting at a location like Seattle University could be a way to earn more money as WSBA takes 50% of our profits. Possible interest from Board in a

CLE that addresses the limits of federal power or how changes in federal law/regulation are impacting administrative law in Washington (marijuana, Medicaid/healthcare, immigration, sanctuary cities). John Gray mentioned that WA/OR CLE was originally meant to be an annual CLE, but he is not sure what interest is from OR counterparts. John Gray will reach out to Jeff Litwak and Jim Mountain to take the temperature.

(f) Diversity and Outreach – John Gray

i. John sent a message of inclusion to all WSBA minority bar associations, that the Admin Law Section welcomes all and that the practice of administrative law is broad and diverse. Four or five groups affirmatively sent positive responses to John, including from Becca Glasgow (former board member) who is now chair of Washington Women's Lawyers.
ii. John wrote a newsletter article on the topic of inclusion for the newsletter.
iii. John has talked with Suzanne about possibility of doing a mini-CLE on topic of inclusion or diversity

**6. Open Section's Night**

WSBA has an open section's night in Seattle in Winter and Spokane in Fall. Other sections have more advertising, and discussion was had that we should use some of our recruitment budget to create a visual, or have more display items. Because administrative law is procedural, rather than substantive, a lot of new lawyers don't realize that they may be interested in the practice. Talked again how a member survey could be beneficial to learn about the substantive areas of law that our members work in, which potentially could be made into a chart or display.

**7. WSBA Website**

Paris Ericson sent out request to sections to appoint one liaison for updating the WSBA Secton's website. Stephen appointed **Robert Rhodes** to take on this role on behalf of section.

**8. Homan Award – Margie Gray**

No update. Board members were very pleased with recent presentation of winner, especially how nominator presented award and gave speech. An article about Homan winners with photos should be included in the newsletter.

**9. Annual Retreat**

Admin Law Section's annual retreat will be Saturday June 10 at Alderbrook (Union, WA), with a mini CLE on Friday afternoon June 9.

**Meeting adjourned at 1:59pm.**

**ATTACHMENT A: Board's approved position statement on SSB 5057**
**ATTACHMENT B: Board's approved position statement on SB 5350**

Position Statement on SSB 5057

Administrative Law Section of the Washington State Bar Association

January 18, 2017

**Position**: Opposed

**Summary of Concerns**

The executive committee of the Administrative Law Section opposes SSB 5057.

More than 75% of the members of the Section's executive committee voted that this bill meets the requirements of GR 12 and voted to approve the reasoning set forth in this position statement. Please note that the members of the Administrative Law Section's executive committee cast their votes in their personal capacities and are not expressing the opinions of their employers.

This bill would run counter to countless administrative appeal procedures currently in place under the Administrative Procedures Act ("APA") and other statutes by taking away the discretion that agency heads have to hear cases.

**Analysis and Discussion**

SSB 5057 seeks to amend RCW 34.05.413, which currently allows for an agency to commence an adjudicative proceeding at any time within the agency's jurisdiction. RCW 34.05.413(1). SSB 5057 would amend RCW 34.05.413 by allowing any party to remove an adjudicative proceeding to the office of administrative hearings ("OAH") upon notice provided within ten days following the commencement of an adjudicative proceeding.

Allowing any party to remove a hearing to the OAH unnecessarily invokes a generic approach to numerous agency hearings and procedures, all of which have unique requirements. SSB 5057 would not merely require agencies to redo hearing procedures to account for OAH involvement, but it would conflict with current legal requirements and appeal procedures. For example, RCW 34.05.425 gives discretion to the agency head to determine who the presiding officer in an administrative hearing shall be. Taking final decision authority and responsibility away from agency heads (at least when they are acting as the presiding officer) and giving it to administrative law judges would be a very significant change in the state's administrative law – law that has been created largely through broad based stakeholder consensus after careful and thorough consideration of both practical and philosophical factors.

Notwithstanding these procedural concerns, SSB 5057 would put undue strain on OAH, which currently hears only a small subset of the cases agency heads currently hear. Allowing parties to file cases at OAH would take cases away from the subject matter experts, and put cases in the hands of a single over-worked agency with much less expertise in the given area.

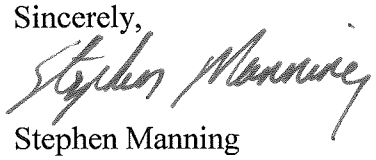
Perhaps SSB 5057 could be fixed if it was more specifically tailored towards achieving a solution. For example, if we knew whether the sponsor of SSB 5057 had a concern with the

existing hearing officers for a given agency, we might be able to suggest a more targeted and certain approach to a solution.

However, as currently written, the Administrative Law Section opposes SSB 5057.

Thank you for your consideration.

Sincerely,



Stephen Manning

Chair, WSBA Administrative Law Section

Position Statement on SB 5350

Administrative Law Section of the Washington State Bar Association

January 24, 2017

**Position**: Opposed

**General Concerns**

The executive committee of the Administrative Law Section (the "Section") opposes SB 5350 in its current form.

More than 75% of the members of the Section's executive committee voted that this bill meets the requirements of GR 12 and voted to approve the reasoning set forth in this position statement. Please note that the members of the Administrative Law Section's executive committee cast their votes in their personal capacities and are not expressing the opinions of their employers.

This bill would impose a deadline to make a final administrative determination or disposition within two years of the commencement of the adjudicative proceeding unless the parties agree to waive or stay the proceedings. If an agency fails to meet this deadline, a person is presumed to have exhausted all administrative remedies if filing for judicial review. It appears that the bill sponsor is reacting to one or more specific situations of agency tardiness in issuing orders in adjudicative proceedings.

Many aspects of the proposed solution in SB 5350 are problematic. First, it is the Section's belief that having hearings at the administrative level will ordinarily increase access to justice. The courts simply do not have the time or resources to devote days or weeks of hearing time to taking evidence in routine administrative matters. SB 5350 would put these administrative cases into the courts, which will mean not just delays and added costs, but more than likely these cases would suffer with less attention being paid to evidence and arguments of parties challenging agency action.

Further, the 2-year deadline that SB 5350 proposes may be reasonable for some types of hearings but not for others. Putting that limit in the APA directly may have the undesirable consequence of shunting some of the most complex agency appeal types into court, where the formal procedures will only serve to slow things further and drive up costs for both the regulated parties and the agency. If the perceived scope of the problem relates to the Employment Security Department as suggested by the public testimony in support of the previous iteration of SB 5350 (2016 SB 6464), the less drastic action might be to place a 2-year limit in RCW 50.32. Similarly, specific limits could be placed in the RCW chapters of other types of agency determinations based on the specific needs of different types of appeals.

If the Section knew the specific circumstances that trouble the sponsor, the Section might be able to help craft a better approach.

**Analysis of SB 5350**

The bill's four sections would amend four sections of the Administrative Procedure Act (the "APA"). Each bill section's proposed APA amendments are discussed in turn below.

**Section 1: Amending RCW 34.05.413**

The bill would add a new final subsection that would read as follows (paragraph breaks added for clarity; italicization added):

> (6) An agency must make a final administrative determination or disposition for any matter that is subject to an adjudicative proceeding within two years *after the commencement of the adjudicative proceeding,* unless all parties to the proceeding agree to waive such time limitation. This time limitation is tolled during any period in which the adjudicative proceeding is stayed and all parties to the proceeding agree to such stay.[1]
>
> The final administrative determination or disposition must allow a person with standing in an adjudicative proceeding to obtain judicial review of any agency action that is subject to the adjudicative proceeding.
>
> For the purposes of this subsection, an adjudicative proceeding includes any hearing under chapter 34.12 RCW.

These three provisions are separately discussed below.

- **2 year decision deadline**

The APA already contains a provision on the time in which an order must be entered.

> RCW 34.05.461 (Entry of orders)
>
> (8)(a) Except as otherwise provided in (b) of this subsection, initial or final orders shall be served in writing *within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings* in accordance with subsection (7) of this section unless this period is waived or extended for good cause shown. The initial or final order may be served on a party via electronic distribution, with a party's agreement.
>
> (b) This subsection does not apply to the final order of the shorelines hearings board on appeal under RCW 90.58.180(3).
>
> (Emphasis added.)

RCW 34.05.419 (Agency action on applications for adjudication) also sets deadlines for agency action in starting adjudicative proceedings:

[1] The APA provides that "an adjudicative proceeding *commences* when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted." RCW 34.05.413(5) (emphasis added).

After receipt of an application for an adjudicative proceeding, other than a declaratory order, an agency shall proceed as follows:

(1) Except in situations governed by subsection (2) or (3) of this section, within ninety days *after receipt of the application or of the response to a timely request made by the agency under subsection (2)* of this section, the agency shall do one of the following:

(a) Approve or deny the application, in whole or in part, on the basis of brief or emergency adjudicative proceedings, if those proceedings are available under this chapter for disposition of the matter;

(b) Commence an adjudicative proceeding in accordance with this chapter; or

(c) Dispose of the application in accordance with RCW 34.05.416;[2]

(2) Within thirty days *after receipt of the application*, the agency shall examine the application, notify the applicant of any obvious errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, mailing address, and telephone number of an office that may be contacted regarding the application . . ..

(Emphasis added.)

Note that an adjudicative proceeding may also be commenced by an agency on its own motion, e.g., enforcement cases.[3]

Thus, the APA currently provides –

- A 90-day deadline for starting an adjudicative proceeding when a party files an application to commence one, and a
- A 90-day deadline for issuing an order, after the evidentiary and legal argument phases of the case are completed, but
- No deadline for the activity in between these events, i.e., the hearing process, and, therefore, no overall deadline for the whole adjudicative process.

SB 5350 would address this gap *in the APA* by instituting an overall 2-year deadline, measured from the commencement of the case.

Other RCW titles contain adjudicative case decision deadlines. For example, RCW 80.04.110(3) provides a 10 month deadline for action by the Utilities and transportation Commission in certain

[2] RCW 34.05.416 (Decision not to conduct an adjudication) If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

[3] RCW 34.05.413 (1) Within the scope of its authority, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

complaint cases.[4] Therefore, as written, SB 5350 would create ambiguities and conflicts with such other RCW provisions. One way this problem could be resolved is by inserting verbiage at the beginning of Section 1 of the bill such as –"Unless provisions of law provide another deadline for agency action, . . ."

Also, as a matter of user-friendly law drafting and organization, this new two-year deadline provision should be added to RCW 34.05.461 (Entry of orders) rather than to RCW 34.05.413 (Adjudicative proceedings – Commencement – When required).

- **Tolling allowed in cases where all parties agree**

The time limit of SB 5350 is tolled during any period in which an adjudicative proceeding is stayed and all parties agree to such stay. The Section is concerned about tactics used by parties to extend a case schedule past the two year cutoff as a strategy against another party. SB 5350 may benefit from exempting those cases where collateral litigation, interlocutory appeals or other extensive delays outside of the agency's control cause delay beyond the two year requirement.

- **Requirement to "allow" judicial review**

SB 5350 allows judicial review as follows:

> The final administrative determination or disposition must allow a person with standing in an adjudicative proceeding to obtain judicial review of any agency action that is subject to the adjudicative proceeding.

The preceding sentence in Section 1 of the bill already states that, within two years of a case's commencement, an agency must issue a "final administrative determination or disposition." Part V (Judicial Review and Civil Enforcement) of the APA already provides that an agency's "final decision" is subject to judicial review. Perhaps the intended new aspect of judicial review is that it would apply to "any agency action that is subject to the adjudicative proceeding" and not just to the final decision itself. This could open the door to unwarranted and burdensome expansions of the scope of judicial review to include interlocutory disputes about how the hearing is being conducted, rather than the ultimate outcome.

RCW 34.05.570 specifies the scope of judicial review; it is already quite broad:

> (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

[4] http://app.leg.wa.gov/RCW/default.aspx?cite=80.04.110

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

If the Section knew what, if any, additional issues the sponsor thinks SB 5350 would add to the scope of judicial review, or if the Section knew with greater clarity what troubled the sponsor, the Section would be willing to evaluate their appropriateness and workability.

- **Applicability to OAH cases**

Section 1 of the bill includes this verbiage:

> For the purposes of this subsection, an adjudicative proceeding includes any hearing under chapter 34.12 RCW.

The referenced chapter is the Office of Administrative Hearings law. Some agency adjudicative hearings are handled by hearing officers from OAH; some are not. The intent of this bill verbiage is not apparent, and it is likely to introduce unnecessary ambiguity into the APA.

The APA already applies to agency adjudicative hearings that are handled by hearing officers from OAH. Thus, if the bill's intent is simply that OAH-handled hearings are subject to the two-year deadline and the other provisions of Section 1, this verbiage is unnecessary.

If the bill's intent is that the two-year deadline and the other provisions of Section 1 apply *only* to agency adjudicative hearings that are handled by hearing officers from OAH, then it needs to say that specifically.

**Section 2: Amending RCW 34.05.534**

RCW 34.05.534 is in the Judicial Review Part of the APA. It currently provides that before a party may seek judicial review of an agency action, it must "exhaust administrative remedies," such as seeking rehearing before the agency. The bill would add a new final subsection:

(4) A person may file a petition for judicial review under this chapter and is presumed to have exhausted all administrative remedies when an agency fails to comply with RCW 34.05.413(6).

When a petition for judicial review is filed under this subsection, the adjudicative proceeding for which judicial review is sought is stayed, pending further order by the court.

The court may grant an exception to the stay only on the petitioner's request that the adjudicative proceeding be continued, concurrent with judicial review, with respect to issues and facts not identified as contested in, or otherwise relevant to, the petition for judicial review.

(Paragraphs breaks added for clarity.)

Notably, the APA already contains remedies for an agency's failure to comply with statutory requirements, including the existing deadlines discussed above. RCW 34.05.570(4) and .574(1)(b) allow parties to file court actions "in the nature of mandamus" where a person's "rights are violated by an agency's failure to perform a duty that is required by law to be performed . . . ." Under these provisions, an aggrieved party could request a court to order an agency to issue a final decision in a given case. Failure to do so would be subject to courts sanctions such as contempt findings.

If enacted, Section 2 of the bill would create a procedural conundrum for the courts and the parties. It applies to situations where an agency has failed to comply with the new two-year decision deadline that Section 1 would add to the APA. Failure to comply with that deadline would mean that the agency has not issued a final decision. With no final decision, there is nothing for a court to consider upon judicial review, because judicial review cases concern objections to final agency orders. Therefore, the amendments to the APA made by Section 2 would may add confusion to all parties. We note that in some cases, an agency has made an initial order, but a final order is still pending two years after commencement. In this case, SB 5350 may do well by stating that (1) any initial order becomes the final reviewable order for purposes of judicial appeal, and (2) if an agency has not made an initial order by the time the party seeks judicial review, the original appealable decision becomes the final order for purposes of judicial appeal.

If the Section knew of the remedies that the sponsor wanted for failure to meet the two-year deadline, it could propose possible additional fixes to the bill.

Note that if the bill were revised to provide new remedies for failure to meet the two-year deadline, such revisions should include a deadline for initiating action seeking such remedies – say, 90 days after expiration of the two-year deadline. Otherwise, the bill would invite gamesmanship by parties allowing the administrative action to proceed as long as it seems likely to go their way, and then moving the case to court if they sense the administrative tribunal is going to rule against them.

**Section 3: Amending RCW 34.05.562**

This APA section concerns "new evidence taken by court or agency." Section 3 of the bill would make two additions to the section.

- **Additional new evidence that may be considered on judicial review**

Subsection (1) of the existing law states that in a judicial review case the court may receive evidence in addition to that contained in the agency record for judicial review "only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding" three listed topics. The bill would add a fourth topic:

> Any issue or fact identified as contested in a petition for judicial review filed under RCW 34.05.534(4).

The referenced RCW 34.05.534(4) is the verbiage that would be added to the APA by Section 2 of the bill, which – as discussed above – would not be effective. Therefore, this verbiage that Section 3 would add would also cause concern.

This provision substitutes the taking of evidence by the administrative tribunal for the taking of evidence by the court. Current law allows administrative tribunals to accept evidence that is not ordinarily admissible in court, such as documents or statements from third parties that constitute hearsay. That flexibility allows ordinary individuals to present evidence without the need for an attorney, and without the need to call numerous witnesses or develop strict chains of custody. The bill as written would seemingly replace that flexibility with the more exacting standards of the Civil Rules. The likely result would be to disadvantage individuals who do not have an attorney. If that is not the intended result, the bill should clarify what rules of evidence apply under the procedure envisioned by this bill.

Additionally, this provision of the bill does not appear to address the situation where the parties have already had an opportunity to present all of their evidence before the administrative tribunal. In that circumstance, it would be unnecessary to require the superior court to take additional evidence.

- **New remand limitation**

The current RCW 34.05.562(2) provides that a court handling a judicial review case may, under certain circumstances, "remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary."

Section 3 of the bill would add a new subsection (3) to RCW 34.05.562:

> When a petition for judicial review is filed under RCW 34.05.534(4), the court may not remand a matter under subsection (2) of this section unless all parties consent.

The intent seems to be to avoid delays in the court case that the sponsor assumes would be caused by such remands. But whatever the merits of that proposal, again – this provision would not likely be effective, because it builds on the likely ineffective proposed new RCW 34.05.534(4).

**Section 4: Amending RCW 34.05.570**

The section this part of the bill would amend is the main judicial review provision in the APA. Section 4 of the bill would add a new final subsection that addresses the scope of judicial review and whether or not review is *de novo* on certain issues.

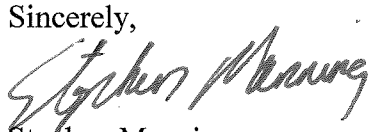
> (5) When a petition for judicial review is filed under RCW 34.05.534(4), review by the court is limited to the issues and facts specifically identified as contested in the petition, or amended petition. If the petition, or amended petition, requests de novo review as to any issue or fact identified as contested, the standard of judicial review is de novo as to that issue or fact only. Where a petition does not request de novo review, the standards of review provided in subsections (1) through (4) of this section apply, and the court must enter a final order based on the agency record and any additional evidence received under RCW 34.05.562.

Again, this provision is likely not effective, because it builds on the likely ineffective proposed new RCW 34.05.534(4).

Perhaps SB 5350 could be fixed if the Section had more information about what exactly the sponsor was trying to achieve. However, as currently written and for the reasons set forth above,the Administrative Law Section opposes SB 5350.

Thank you for your consideration.

Sincerely,



Stephen Manning

Chair, WSBA Administrative Law Section