

1. The draft rule (WAC 10-08-055) appears to interchangeably use the terms “adjudicative proceeding,” “administrative hearing,” “administrative proceeding,” and “hearing process,” to indicate at what point in the agency process the rule applies. My feeling is that all such terms should be changed to “adjudicative proceeding,” since that is a defined term that encompasses all other terms mentioned earlier. RCW 34.05.010(1) defines “adjudicative proceeding” in part as “a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.” (Emphasis added). As the Court explains in *Hutmacher v. Board of Nursing*, 81 Wn. App. 768, 771-772, 915 P.2d 1178 (1996), the umbrella of “adjudicative proceeding,” while it includes an opportunity for a hearing, is broader than just that, and anticipates that a hearing may not occur in the course of an adjudicative proceeding, since the adjudicative proceeding may be completed by a more expeditious route:

An adjudicative proceeding is defined as "a proceeding before an agency in which *an opportunity for hearing* before that agency is required by statute . . . ." RCW 34.05.010(1) (emphasis added). "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). Thus, an adjudicative proceeding is not limited to the formal hearing itself, but also contemplates other stages of proceedings affecting the rights of an individual under the administrative scheme. See generally William R. Anderson, *The 1988 Washington Administrative Procedure Act--An Introduction*, 64 Wash. L. Rev. 781, 789 (1988).

Here, the Board notified Hutmacher that it would be adjudicating her case by serving the Statement of Charges. This service apprised Hutmacher that an adjudicative proceeding had commenced; the only remaining question was whether the proceeding would be completed via informal settlement, formal hearing, or default. We hold that the Board's filing of the Statement of Charges commenced the adjudicative proceeding. See RCW 34.05.413(1).

(Underlined emphasis added). WAC 10-08-035 itself allows for summary judgment in adjudicative proceedings. As case law explains, while the Administrative Procedure Act (RCW Ch. 34.05) does not contain any provisions authorizing agencies to grant summary judgment, a legislatively created agency or board, when acting in a quasi-judicial capacity, may employ summary procedure if there is no genuine issue of material fact. *Eastlake Cmty. Council v. Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132 (“Thus the Board was within its power to grant an order of summary judgment.”)(citing *Asarco, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 697, 601 P.2d 501 (1979)); *Pierce Cty. v. State*, 144 Wn. App. 783, 804, 185 P.3d 594 (2008); *Verizon Northwest, Inc. v. Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915-916, 194 P.3d 255 (2008).

2. RCW 2.48.180 prohibits the unauthorized practice of law. The practice of law includes legal advice and the preparation of legal instruments and contracts by which legal rights are secured. *Andersen v. Northwest Bonded Escrows, Inc.*, 4 Wn. App. 754, 484 P.2d 488 (1971). Two Washington State Attorney General Opinions, AGO 61-62 No. 6, and 1972 Ltr. Op. Atty. Gen. Wash No. 50, conclude that the appearance of a non-attorney in a representative capacity in contested cases before a state administrative agency, constitutes the unauthorized practice of law.

RCW 34.05.428(2), which DSHS mentions in their comments on the draft rule for different reasons, seems to be consistent with RCW 2.48.180, and states: “Whether or not participating in person, any party may be advised and represented at the party’s own expense by counsel or, if permitted by provision of law, other representative.” (Emphasis added). Is there another statutory provision of law that expressly trumps RCW 2.48.180, or satisfies the exception in RCW 34.05.482, and that allows non-lawyers to represent or advocate for parties in matters governed by RCW Ch. 34.05? The draft rule appears to assume so at WAC 10-08-055(2)(b), (11)-(14), (21). Appears to be a murky area of the law that should be tread on very carefully.

3. If the draft rule does move forward, and since RCW 34.05.250 mandates that agencies adopt as much of WAC Ch. 10-08 as is reasonable under the circumstances (unless they vary from it and expressly state why), and a lot have incorporated WAC Ch. 10-08 into their own hearings rule, the definition of “Agency ADA coordinator” in WAC 10-08-055(2)(c) should be broadened to include other possible individuals in all agencies, who either might not have ALJs, or might not want to burden their ALJ(s) with such responsibility. Consistent with RCW 34.05.250, you might also consider stating in stating in the second sentence of WAC 10-08-055(1) that his rule applies not only to requests for representation as an accommodation in adjudicative proceedings before OAH, but before any agency that incorporates by reference the relevant provisions of WAC Ch. 10-08. The use of the term “administrative law judge” in WAC 10-08-055(3), (6), (12), (17)-(23) is a little confusing, and should also be broadened given that RCW 34.05.425 uses the term “presiding officer,” as does WAC 10-08-200, whereas the term “administrative law judge” is used to specifically indicate hearings before an ALJ at OAH.

4. Finally, I would provide the opportunity for other agencies (especially smaller ones) to reap the benefits of OAH per WAC 10-08-055(18) conducting the hard work to create a network of individuals available to be appointed as “suitable representatives,” by noting in subsection (18), or wherever else deemed appropriate in the draft rule, the opportunity for other agencies to rely on an use this list. For each individual agency to have to reinvent the wheel on this seems inefficient and not necessary if OAH already has created an adequate network of such representatives.