

FILED

2011 SEP 13 A 11:15

Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of

No. 11-0088 and 11-0089

ABILITY INSURANCE COMPANY,

RESPONSE OF ABILITY INSURANCE
COMPANY TO MOTION TO EXCLUDE
EXPERT TESTIMONY OF CRAIG
BENNION

An Authorized Insurer and Respondent

OIC's motion to strike and exclude Mr. Bennion's testimony should be denied. OIC does not agree with Mr. Bennion's opinion. OIC chose to not retain its own expert. After hearing the testimony with the sole objection being OIC reserving its right to recall Mr. Bennion for their cross, OIC now brings a motion to exclude and strike the testimony of Mr. Bennion. This is not right.

This contested case hearing of the insurance commissioner is informal in nature. WAC 284-02-070(2)(c). Evidence is admissible if it is the type of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(2). The judge can make her own determination and disregard any testimony she feels strays into legal conclusion without the drastic measure of excluding Ability's expert witness.

At the hearing, OIC asked for specific relief: the authority to require Mr. Bennion to testify, at Ability's expense, over the telephone or other convenient manner. The OIC clarified: "That is the only thing I'm asking for." Ability readily agreed to this request. Time was reserved for this purpose on September 29, 2011.

RESPONSE OF ABILITY INSURANCE COMPANY TO
MOTION TO EXCLUDE EXPERT TESTIMONY OF
CRAIG BENNION - 1

PDX/122574/181300/VNI/8089947.1

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1 Now, at this late hour, OIC has brought a motion to exclude all testimony of Craig
2 Bennion. OIC's motion is unnecessary and should be denied.

3 **I. Statement of Facts**

4 Ability hired Craig Bennion for two purposes: (1) to explain how a professional
5 whose job has been to interpret policies goes about the process of interpreting a policy such
6 as the policy at issue here and (2) to provide testimony that Ability's interpretation is not
7 only reasonable but correct. Declaration of Virginia Nicholson in Support of Ability's
8 Opposition to OIC's Motion to Strike and Exclude Expert Testimony of Craig Bennion, ¶ 4.

9 On July 29, 2011, Mr. Bennion informed us that he was supportive of Ability's
10 position. Nicholson Decl., ¶ 5, Ex. B; Declaration of Craig Bennion in Support of Ability's
11 Opposition to OIC's Motion to Strike and Exclude Expert Testimony of Craig Bennion
12 ("Bennion Decl."), ¶ 2. Not until August 2, 2011, did Ability's counsel and Mr. Bennion
13 meet and discuss Mr. Bennion's opinion in this matter in detail. Nicholson Decl., ¶ 5, Ex. B;
14 Bennion Decl., ¶¶ 2-3.

15 Since July 29, 2011, OIC has known the following regarding Mr. Bennion and his
16 expected opinion: "Craig Bennion is expected to testify regarding interpretation of regulations
17 and statutes in this matter. In particular, Mr. Bennion is expected to testify regarding OIC's
18 interpretation of the beginning date for the five-month unintended lapse period contained in
19 WAC 284-54-253." Nicholson Decl., Ex. A.

20 On the record, Mr. Singer stated that he did not find this disclosure "specifically
21 unreasonable." Nicholson Decl., Ex. B. Yet OIC objected to Mr. Bennion's testimony. The
22 remedy requested by OIC was for Mr. Bennion to be made available, at Ability's expense, for
23 further questioning at a later date. *Id.* Mr. Singer then engaged in extended questioning of Mr.
24 Bennion, without additional grounds for objections being raised at that time.

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1 **II. Argument**

2 Whether or not OIC agrees with Mr. Bennion, if his testimony is helpful in
3 understanding the issues before this informal administrative tribunal, and it is, the testimony
4 should be allowed. This is not a jury trial, where the jury could get confused between the
5 judge's role and the expert's role. Here, the Judge can disregard testimony, if any, that could
6 be construed as legal opinion. A motion to strike and exclude is unnecessary in this forum.

7 OIC knew of the content of Mr. Bennion's testimony since July 29, 2011. Despite
8 OIC's attempts to portray Ability as bad actors, it is clear that Ability did not ignore its
9 obligations or violate the rules of discovery. The OIC's motion is based on
10 mischaracterization of hearing testimony and mischaracterization of Ability's actions during
11 discovery. OIC's motion should be denied.

12 **A. Mr. Bennion's testimony is the type of evidence helpful to resolve**
13 **the issues in this case and he qualifies as an expert witness**

14 Mr. Bennion is an attorney whose practice focuses on insurance coverage. His
15 insurance coverage background spans 28 years analyzing insurance policies and claims, in
16 both first-party property and third-party liability areas. He represents leading national and
17 regional insurers and self-insured risk pools. Mr. Bennion has the requisite knowledge, skill,
18 experience, and training to assist the trier of fact to understand the evidence. See Ability's
19 Answer to Interrogatory No. 10; OIC's Ex. A. "Rule 702 contemplates a broad conception
20 of expert qualifications." *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998,
21 1015 (9th Cir. 2004). "Moreover, the advisory committee notes emphasize that Rule 702 is
22 broadly phrased and intended to embrace more than a narrow definition of qualified expert."
23 *Id.* (calling attention to the Rule 702 advisory committee note: "In certain fields, experience
24 is the predominant, if not sole, basis for a great deal of reliable expert testimony."). Mr.
25 Bennion qualifies as an expert under Rule 702.
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1 Mr. Bennion's significant experience with the industry practices in insurance policy
2 interpretation is not only helpful but also necessary in this action. The issues presented by
3 Ability's challenge to OIC's orders 11-088 and 11-089 involve complex issues; during the
4 hearing, Mr. Bennion shed light upon the process of policy and regulatory interpretation that
5 a seasoned professional uses.

6 Mr. Bennion does not need long-term care policy experience for his opinions to be
7 helpful here. He is not making legal determinations regarding the policy interpretations; he
8 is offering his expertise on how such matters are interpreted in the industry. *See, e.g.,*
9 *Hangarter*, where twenty-five years of experience working with insurance companies and
10 evaluating policies, among other experience, was found to qualify the witness to testify as an
11 expert due to significant knowledge of and experience within the insurance industry:
12 "Clearly, this lays at least the *minimal foundation* of knowledge, skill, and experience
13 required in order to give 'expert testimony' on the practices and norms of insurance
14 companies in the context of a bad faith claim." *quoting Thomas v. Newton Int'l Enters.*, 42
15 F.3d 1266, 1269 (9th Cir. 1994). Similarly here, Mr. Bennion offered his opinions on
16 practices and norms in the context of interpretation of policy and regulation. He is qualified
17 to testify as an expert.

18 Mr. Bennion's testimony cannot improperly invade the province of the jury or the
19 court. Mr. Bennion's testimony was not improper legal conclusion. *Hangarter*, 373 F.3d at
20 1017. In *Hangarter*, the expert testimony did not usurp the court's role by instructing the
21 jury as to the applicable law. It is acceptable for a witness to refer to the law in expressing
22 an opinion without that reference rendering the testimony inadmissible. "Indeed, a witness
23 may properly be called upon to aid the jury in understanding the facts in evidence even
24 though reference to those facts is couched in legal terms." *Id.* The *Hangarter* Court found
25 that the expert's references to statutory provisions were ancillary to the disputed issue of bad
26 faith and the expert testimony was allowed. *Id.* Similarly here, Mr. Bennion's references to

1 Washington statute and regulation are ancillary to the disputed issue of whether OIC's orders
2 were wrongfully issued. Similarly, his expert testimony is allowable.

3 Furthermore, this is an administrative law hearing, not a matter presented to a jury.
4 As OIC's citations illustrate, the danger of allowing an expert to testify regarding legal
5 conclusions is the potential confusion of the jury as to the roles of judges and experts. *Id.*;
6 *see also* OIC's citation to Washington Insurance Law on page 5, which is directly on point:

7 For an expert to testify to the jury on the law usurps the role of the trial judge.
8 . . . Each courtroom comes equipped with a 'legal expert,' called a judge, and
9 it is his or her province alone to instruct the jury on the relevant legal
standards. . . A contrary rule would confuse the jury. . . .

10 That danger is eliminated here. There is no jury and no danger of confusion. Any testimony
11 that strays close to a legal conclusion can be disregarded by the trier of fact. The OIC's
12 motion to strike and exclude is unnecessary and should be dismissed.

13 OIC's arguments misconstrue the "gatekeeping function" of the court, implying that
14 Mr. Bennion must be pre-recognized or pre-accepted by a court. That is not the case. The
15 Court decides whether the witness is an expert; it need not be predetermined. OIC appears to
16 attempt to require the standards of *Daubert*. This is incorrect. Washington does not apply
17 *Daubert*. *See State v. Copeland*, 130 Wn.2d 244, 301, 922 P.2d 1304 (1996) (noting "Courts
18 should guard against converting disputes between scientific experts into admissibility issues
19 requiring Frye hearings, and allow juries to exercise their traditional roles as factfinders.").
20 Even if it did, *Daubert* does not apply in an insurance context. "[T]he 'Daubert factors (peer
21 review, publication, potential error rate, etc) simply are not applicable to this kind of
22 testimony, whose reliability depends heavily on the knowledge and experience of the expert,
23 rather than the methodology or theory behind it." *Hangerter*, 373 F.3d at 1017 (finding that
24 testimony as to whether Defendants' practices were consistent with insurance industry
25 standards is the sort of analysis dependent upon the witness' knowledge of, and experience
26 within, the insurance industry and thus, allowable).

1 Whether or not Mr. Bennion is an expert is determined by the judge in this matter.
2 He is qualified as such. His testimony was helpful to determine the issues in this matter.
3 Although he testified regarding Washington statutes and regulations, such testimony is not
4 necessarily legal conclusion. His testimony serves to establish that Ability's practices are
5 consistent with insurance industry standards. This is a less formal hearing than a jury trial.
6 There is no danger of jury confusion; the judge, who has already heard the testimony, can
7 simply disregard statements, if any, by Mr. Bennion that are within her purview to decide.
8 OIC's motion should be denied.

9 **B. No discovery violation occurred**

10 The OIC has banded about some unfounded and serious allegations, accusing Ability
11 of "knowingly and intentionally giving non-answers" and withholding Mr. Bennion's
12 opinions "until the moment he spoke." Furthermore, OIC has accused Ability of "knowing
13 concealment." There is neither basis nor truth to these allegations, as is clear from the
14 record. OIC did not provide any evidence to contradict the record.

15 Ability provided the basis for Mr. Bennion's opinion on July 29, 2011 which was the
16 first time Mr. Bennion discussed his opinions with Ability. Ability was clear: "Craig
17 Bennion is expected to testify regarding interpretation of regulations and statutes in this matter.
18 In particular, Mr. Bennion is expected to testify regarding OIC's interpretation of the beginning
19 date for the five-month unintended lapse period contained in WAC 284-54-253." Nicholson
20 Decl., Ex. A. OIC agreed that such disclosure was not "specifically unreasonable." Nicholson
21 Decl., Ex. B.

22 OIC mischaracterizes the testimony from the hearing to imply that Ability had full
23 knowledge of Mr. Bennion's opinions on July 20, 2011. See motion, in which OIC asserts:
24 "by mid-to-late July he [Mr. Bennion] had formed almost all his opinions and thoughts
25 substantially as he presented them at the hearing." A review of the record clarifies that is not
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1 what Mr. Bennion testified. Nicholson Decl., Ex. B. It is not true. Nicholson Decl., ¶ 5;
2 Bennion Decl., ¶¶ 2-3.

3 One phone conversation on July 29th, which did not include a detailed discussion of
4 Mr. Bennion's opinion, does not support OIC's unfounded accusations against Ability of
5 withholding information. There was no discovery violation, nor does OIC provide any
6 evidence of one.

7 Expert witnesses are paid. That is neither news nor surprising. OIC's attempt to
8 paint Mr. Bennion and Ability in a bad light is surprising. *See, e.g.*, OIC's motion: "And
9 while it should be at least some concern that Mr. Bennion only reluctantly shared just how
10 much money the Company has paid him for his help . . ." This is a mischaracterization of
11 Mr. Bennion's testimony, as all who attended the hearing will recall. *See* Nicholson Decl.,
12 Ex. B. Mr. Bennion promptly answered Mr. Singer's questions regarding his pay. Expert
13 witnesses are paid for their time. It is unclear how OIC feels this fact supports its motion to
14 exclude expert witness testimony. It is unclear, even if Mr. Bennion had been reluctant to
15 discuss his compensation, which he was not, why that should be "of some concern" to this
16 tribunal.

17 No discovery violation occurred. OIC's motion should be dismissed.

18 C. For the sake of argument only, if a discovery violation had
19 occurred striking and excluding witness testimony would not be
20 the proper response

21 In Washington Courts, a sanction to exclude a witness is a severe sanction. "Although a
22 trial court generally has broad discretion to fashion remedies for discovery violations, when
23 imposing a severe sanction such as witness exclusion, "the record must show three things—
24 the trial court's consideration of a lesser sanction, the willfulness of the violation, and
25 substantial prejudice arising from it." *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 348-
26 349, 254 P.3d 797 (2011). This caution before allowing a severe sanction is because such
sanctions affect a party's ability to present its case. *Id.* (finding an abuse of discretion by the

1 trial court for excluding witnesses without considering the three *Burnet* factors). OIC's
2 motion would be highly unlikely to succeed in the superior courts. The motion ignores
3 OIC's originally requested resolution and instead demands the most severe sanction possible;
4 there is no discovery violation, much less a willful violation; and no prejudice could arise
5 from this tribunal.

6 This is a less formal administrative law hearing. This matters for two reasons: (1) the
7 administrative law judge is free to permit any evidence deemed helpful to a determination of the
8 issues; and (2) the administrative law judge can make her own determination of whether any
9 legal conclusion testimony was offered, and disregard it.

10 In administrative law matters, the judge is not bound by the strict rules of evidence.
11 The judge is allowed the discretion to allow in any evidence that is helpful to the trier of fact
12 to understand the evidence, and use the rules of evidence as a guideline only. See RCW
13 34.05.452(1); ER 702. Mr. Bennion's testimony is helpful and provides a guideline for
14 analysis of the issues here; the judge is free to allow it. As stated *supra*, although Mr.
15 Bennion's testimony did not include legal conclusions, he does discuss regulations and
16 statutes and the process of interpreting them. There is no jury to confuse; here the fact-finder
17 is the Judge, who has heard the testimony and is perfectly capable of ignoring any opinions
18 that stray too close to legal conclusion. There is no danger of Mr. Bennion usurping the role
19 of fact-finder here.

20 The OIC objected to the testimony of Craig Bennion at the hearing, and requested its
21 preferred remedy, which was to require Mr. Bennion to testify again at Ability's expense.
22 This remedy appears to have been abandoned by OIC without further exploration. Ability
23 agreed to provide Mr. Bennion for further testimony. See Nicholson Decl., Ex. B.

24 Thus, if for some reason this tribunal concludes some action is required regarding Mr.
25 Bennion's testimony, the solution has already been agreed upon. At the hearing, OIC did not
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1 ask for the testimony to be stricken or excluded. It made its objections and requested a
2 remedy. OIC should not now be allowed to request severe sanction, after the fact.

3 **III. Conclusion**

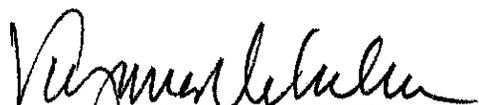
4 The OIC's motion is unnecessary. Mr. Bennion is qualified to be an expert, and
5 provided testimony useful to a discussion of the issues. Discussion of statutes and
6 regulations does not mean that legal conclusions were drawn. Especially in the informal
7 forum, where the fact-finder is the judge and there is no jury, there can be no jury confusion
8 about the roles of the judge and the expert. Mr. Bennion's testimony should be allowed.

9 There was no discovery violation. Disqualification would be a severe sanction;
10 especially since lesser sanctions should be considered and Ability had already agreed to
11 OIC's preferred resolution - to make Mr. Bennion available for further questioning.

12 OIC had the opportunity to find its own expert to support its interpretation. They did
13 not. They disagree with what Mr. Bennion has to say, but is not a proper reason to exclude
14 and strike his testimony. The OIC's motion should be denied.

15 Dated this 13th day of September, 2011.

16 SCHWABE, WILLIAMSON & WYATT, P.C.

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18 By: 
19 Christopher H. Howard, WSBA #11074
20 Virginia R. Nicholson, WSBA #39601
21 Attorneys for Respondent
22 Ability Insurance Company
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2011, I caused to be served the foregoing RESPONSE OF ABILITY INSURANCE COMPANY TO MOTION TO EXCLUDE EXPERT TESTIMONY OF CRAIG BENNION on the following party at the following address:

Alan Michael Singer
Staff Attorney, Legal Affairs Division
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Olympia WA 98504-0255
AlanS@oic.wa.gov

OIC Hearings Unit
Office of Insurance Commissioner
PO Box 40255
Olympia WA 98504-0255
hearings@oic.wa.gov

by:

U.S. Postal Service, ordinary first class mail
U.S. Postal Service, certified or registered mail,
return receipt requested
hand delivery
facsimile
electronic service
other (specify) _____

Chante Tayler
Chante Tayler

FILED

2011 SEP 13 A 11:15

Hearings Unit, DIC
Patricia D. Peterson
Chief Hearing Officer

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of
ABILITY INSURANCE COMPANY,
An Authorized Insurer and Respondent

No. 11-0088 and 11-0089

DECLARATION OF CRAIG BENNION
IN SUPPORT OF ABILITY'S
OPPOSITION TO OIC'S MOTION TO
STRIKE AND EXCLUDE TESTIMONY
OF CRAIG BENNION

Craig Bennion, being over the age of eighteen and fully competent to testify hereto,
declares and states as follows:

1. I was hired by Ability Insurance Company in this matter to review the materials and offer an opinion as an expert. I make this declaration based upon my personal knowledge.

2. Following the hearing, I looked at my time entries regarding the work I did in this matter to determine the following dates. I did not have this information available to me at the hearing. I did not express my opinions in this matter to Ability's counsel until the morning of July 29, 2011. On that date, Ability's counsel called me on the telephone and I expressed that I had found nothing to cause me concern regarding Ability's position, which after my review I thought was correct. At that time, we set up a meeting to go over my opinion in detail.

3. That meeting occurred on August 2, 2011, right before the hearing.

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DECLARATION OF CRAIG BENNION IN SUPPORT OF
ABILITY'S OPPOSITION TO OIC'S MOTION TO
STRIKE AND EXCLUDE TESTIMONY OF CRAIG

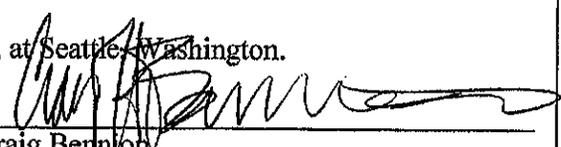
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

Dated this 12th day of September, 2011, at Seattle, Washington.



Craig Bennion

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2011, I caused to be served the foregoing DECLARATION OF CRAIG BENNION IN SUPPORT OF ABILITY'S OPPOSITION TO OIC'S MOTION TO STRIKE AND EXCLUDE TESTIMONY OF CRAIG BENNION on the following party at the following address:

Alan Michael Singer
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AlanS@oic.wa.gov

OIC Hearings Unit
Office of Insurance Commissioner
PO Box 40255
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hearings@oic.wa.gov

by:

U.S. Postal Service, ordinary first class mail
U.S. Postal Service, certified or registered mail,
return receipt requested
hand delivery
facsimile
electronic service
other (specify) _____

Chante Taylor
Chante Tayler

FILED

2011 SEP 13 A 11: 17

Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of

ABILITY INSURANCE COMPANY,
An Authorized Insurer and Respondent

No. 11-0088 and 11-0089

DECLARATION OF VIRGINIA R.
NICHOLSON IN SUPPORT OF
ABILITY'S OPPOSITION TO OIC'S
MOTION TO STRIKE AND EXCLUDE
TESTIMONY OF CRAIG BENNION

Virginia Nicholson, being over the age of eighteen and fully competent to testify hereto, declares and states as follows:

1. I am one of the attorneys for Respondent Ability Insurance Company ("Ability") in this action and make this affidavit for and on behalf of Ability based upon my review of the file in this matter.

2. Attached as **Exhibit A** is a true and correct excerpt from Ability's Witness and Exhibit list, provided to OIC on July 29, 2011. Since July 29, 2011, OIC has known the following regarding Mr. Bennion and his expected opinion: "Craig Bennion is expected to testify regarding interpretation of regulations and statutes in this matter. In particular, Mr. Bennion is expected to testify regarding the OIC's interpretation of the beginning date for the five-month unintended lapse period contained in WAC 284-54-253."

3. To avoid faxing excess paper, attached as **Exhibit B** are true and correct excerpts from a transcription of the hearing in this matter held on August 3-5, 2011. This is a draft transcription, we have not had the opportunity to fully review and finalize it. There are

DECLARATION OF VIRGINIA R. NICHOLSON IN
SUPPORT OF ABILITY'S OPPOSITION TO OIC'S
MOTION TO STRIKE AND EXCLUDE TESTIMONY OF
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1 blanks and some typographical errors, but the conversation remains clear. The excerpts
2 include sections of Mr. Bennion's testimony regarding when he gave information to Ability's
3 counsel about his opinion and what he was paid, along with his testimony generally. Also
4 included is Mr. Singer's request to call Mr. Bennion back for further testimony at Ability's
5 expense.

6 4. Ability hired Craig Bennion for two purposes: (1) to explain how a
7 professional whose job has been to interpret policies goes about the process of interpreting a
8 policy such as the policy at issue here and (2) to provide assurance that Ability's
9 interpretation is not only reasonable but correct.

10 5. On the morning of July 29, 2011, Chris Howard called Mr. Bennion regarding
11 his opinion. Mr. Bennion let us know that he had not yet found anything to suggest that
12 Ability's position was incorrect. Not until August 2, 2011, did Ability's counsel and Mr.
13 Bennion meet and discuss Mr. Bennion's opinion in this matter in detail.

14
15 I declare under penalty of perjury under the laws of the State of Washington that the
16 foregoing statements are true and correct.

17 Dated this 13th day of September, 2011, at Seattle, Washington.

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20 Virginia R. Nicholson

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2011, I caused to be served the foregoing DECLARATION OF VIRGINIA R. NICHOLSON IN SUPPORT OF ABILITY'S OPPOSITION TO OIC'S MOTION TO STRIKE AND EXCLUDE TESTIMONY OF CRAIG BENNION on the following party at the following address:

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OIC Hearings Unit
Office of Insurance Commissioner
PO Box 40255
Olympia WA 98504-0255
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by:

- U.S. Postal Service, ordinary first class mail
- U.S. Postal Service, certified or registered mail, return receipt requested
- hand delivery
- facsimile
- electronic service
- other (specify) _____

Chante Tayler
Chante Tayler

EXHIBIT A

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complaint investigation in this matter.

5. Don Lawler. Don Lawler is expected to testify regarding Ability Insurance's actions and communications in this matter.
6. Alan Singer. Alan Singer is expected to testify regarding the decision to issue press releases in this matter.
7. John Hamje. John Hamje is expected to testify regarding the OIC's interpretation of regulation and statutes in this matter.
8. Mike Bryant. Mike Bryant is expected to testify regarding the OIC's interpretation of regulation and statutes in this matter.
9. Rich Roesler. Rich Roesler is expected to testify regarding the decision to issue press releases in this matter.
10. Craig Bennion. Craig Bennion is expected to testify regarding interpretation of regulations and statutes in this matter. In particular, Mr. Bennion is expected to testify regarding the OIC's interpretation of the beginning date for the five-month unintended lapse period contained in WAC 284-54-253.

Respondent reserves the right to call any individual identified in the Office of the Insurance Commissioner's witness disclosures and hearing witness list and for rebuttal purposes. Respondent reserves the right to call records custodians to authenticate exhibits. Respondent reserves the right to amend this list based after its review of discovery documents produced by OIC.

EXHIBITS

Respondent expects to offer the following documents and items as exhibits at the hearing. Respondent reserves the right to withdraw or redact any of the following exhibits, as is necessary. Respondent reserves the right to amend this list

EXHIBIT B

ABILITY-STATE OF WA OIC

HEARING DAY 3

Clerk	Mr. Bennion, can you raise your right hand? Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth?
Craig H. Bennion	I do.
Clerk	Thank you. And can you please state your name and spell your last name and provide your business address?
Bennion	Craig H. Bennion. B-E-N-N-I-O-N. And my business address is Cozen O'Connor, 1201 Third Avenue, Suite 5200, Seattle, Washington 98101.
Virginia Nicholson	Okay, Craig. First, why don't you tell us about your profession.
Bennion	I'm an attorney.
Virginia Nicholson	And what area of law do you practice?
Bennion	I do insurance law. Specifically, I do insurance called insurance coverage law.
Virginia Nicholson	And for how long have you done insurance coverage law?
Bennion	I first started in this area 28 years ago, I believe it was.
Virginia Nicholson	And how about telling us about your educational background?
Bennion	I got my Bachelor's Degree at Wesleyan University in Connecticut and I graduated from Stanford Law School.
Virginia Nicholson	And what year did you graduate?
Bennion	1980.
Virginia Nicholson	And where have you worked since you graduated from there?
Bennion	I first worked at the Washington Court of Appeals Division I as a law clerk to Judge Barbara Durham. That was nearly two years. And then I worked for a small insurance firm called Foulds, Felker, Johnson & McHugh. It happened to be in this building. And then I started working there in 1982. In 1985, I joined Cozen O'Connor where I am still employed.

Virginia Nicholson	What percentage of your work regarded coverage?
Bennion	About 100%. Well, once in a while I may defend or assist in a defense-type case where the issues are simply torical, you know, toward law or _____, almost always coverage.
Virginia Nicholson	And what types of coverage?
Bennion	It runs a very wide spectrum. I do a lot of work concerning property insurance policies. Also a lot of work concerning general liability policies, errors and omissions policies, or directors and officers. I do a considerable amount of work, coverage work, for a couple of self-insured risk pools, which is very similar to insurance but it's not exactly. Over the years I have dealt with, analyzed, studied other kinds of insurance policies where machinery, builders risk, specialty liability policies of one kind or another, just whatever the clients need assistance with.
Virginia Nicholson	Have you ever worked for or against Ability or Medico?
Bennion	No. In fact, until I was contacted about this matter I had never heard of them before.
Virginia Nicholson	And did we contact you in this case?
Bennion	Yes, yes, you did. You and Mr. Howard.
Virginia Nicholson	And are we paying you?
Bennion	Yes.
Virginia Nicholson	And what were you asked to do?
Bennion	Well, the instructions were actually not very specific. I was asked to review some materials that you'd sent and to review the policy that was issued to Gladys White. And, and generally, I was, I was supposed to analyze that, figure out how the, how the coverage worked and I think we did have some talk about the, about the non-payment of premium.
Virginia Nicholson	Okay. And was any result requested.
Bennion	No. No.
Virginia Nicholson	Do you, do you do metric long-term care insurance in your?
Bennion	No. It's not something that I run into very a lot. The issue that happens that seem to be most prominent with this matter had to do with the non-payment of premium and the consequences of that, you know, and the grace period, the reinstatement provisions and so forth. And I had dealt

Bennion	Yes, well yes. I looked at the regulation which, I can't rattle it off since you all have been doing it. Oh, here it is, here it is. The WAC 284-54-253. And I studied that because that was the central regulation that was an issue here.
Virginia Nicholson	And anything else?
Bennion	Actually I did. I reviewed a couple of Washington cases that talk about the notice that is given when a policy is canceled. And what is required in that situation. And I, I mean I thought of that right away because I've run into that issue a couple of times and one in particular that I wound up litigating in fact, involving the cancellation of a policy for non-payment of premium. And so, you know, I remember I said I know that there is law in that. But, it was a long time ago, so kind of, got up to speed on it.
Virginia Nicholson	Okay. And did you reach an opinion on certain matters regarding Gladys White's policy?
Bennion	Yes, I did.
Virginia Nicholson	And if it would be helpful to use the timeline, could you explain to us...
Bennion	Sure, sure.
Virginia Nicholson	Do you want to use the _____ or the ones in front? Whatever would be most helpful. This one is kind of...
Bennion	Yeah.
Singer	Your honor I would like to just have one interruption at this point. The discovery _____ said that Mr. Bennion hasn't completed his review of the matter and no opinions have been provided. So, I just want to find out when he obtained those opinions. Is that alright your honor?
Judge	Right, yeah go ahead.
Bennion	Sure yeah, gosh, I don't have any particular date, I believe that when I finished my review of all the material and by that I meant you know I probably finished reading it more than one time and working it out as far as what had happened and how the regulation and the policy applied. It must have been early to middle of last week, I believe. I know that I was aware of the Hearing date on Wednesday of this week. And I knew that I needed to be ready and completely familiar with the thing in advance, so.
Singer	Do you recall when you were retained?
Bennion	When I was retained? Well, that was about three or four weeks ago,

Virginia Nicholson	Thank you. Anything else that you ...
Bennion	I don't think so.
Virginia Nicholson	All right.
	In audible background talking
Singer	First question, following up on your last. Do you recall seeing anything in the briefing suggestion that the company had an obligation to make sure that Ms. Silbernale actually received. Or just that the company mailed?
Bennion.	I don't think that that was argued in the brief. I believe there was reference in the description of the facts that she never received it, and I mean the implication there is that well there's something wrong with that. And so that's what got me thinking about that issue but I don't think it was ever actually argued.
Singer	Is there another implication there that this is just somebody doing the best she can with what she knew? You said the implication there is that there is something wrong with that. I presume you are talking about some inference, suggestion, something like that, that the company did something wrong. But isn't it possible also to infer from that fact that she never received it, that she just didn't know. Period.
Bennion	Well, sure.
Singer	And you didn't see an argument in the briefing again, saying that the company was wrong because they can't prove that the document actually ended up in Ms. Silbernale's hand?
Bennion	Um hm.
Singer	There is nothing like that argued, right?
Bennion	I don't remember seeing anything like that. No. No argument.
Singer	Let me get the unsavory fact out for us. You're paid, how much are you paid and how much is the meter at right now for your testimony?
Bennion	_____. Ok. 310 an hour
Singer	You're paid \$310 an hour?
Bennion	Um hm.
Singer	For attending this hearing?

Bennion	Yeah. For providing services as an expert Bennion, yes.
Singer	Ok. As we sit here right now, how much have you earned, not in premium, but in retainer for this matter.
Bennion	I don't know. I mean, I'd have to think about it and figure it out. Um, Yeah, I don't know.
Singer	So, it would include the time you've been sitting in the hearing room for the different days of the hearing
Bennion	Right.
Singer	It would include the time traveling from your office door to the hearing room, correct?
Bennion	Yes, since primarily Wednesday.
Singer	Trip to Olympia. It would include the trip to Olympia as well.
Bennion	Um hmm.
Singer	And it also includes the time from 3 or 4 weeks ago when you picked up the phone and after that retainer agreement was signed, right? Do you have your retainer agreement with you today?
Bennion	I think I do. But it is stuck in here. Hold on just a second here. It's right here.
Singer	Okay. What's the date on that?
Bennion	July 6, 2011
Singer	That's what I was sure it was. And approximately how many hours have you spent reviewing, considering, analyzing for what you would bill \$310 ...
Bennion	Again, I'd have to look that up.
Singer	I used to do insurance work, so I'm familiar
Bennion	Yeah, it, probably, I would guess it's no more than 4 to 6 hours.
Singer	4 to 6, ok.
Bennion	Yeah.

Singer	So, it sounds like most of the time you've incurred has been driving to Olympia and coming to the hearings.
Bennion	Yes. That has taken considerably longer than we thought it would
Singer	It sounds like there's absolutely nothing that you've gained from attending the hearings, really, because your analysis seems to depend upon the language in the contract and the language in the rules, is that correct?
Bennion	Yes it is. And my knowledge of ...
Singer	I don't mean that as a criticism.
Bennion	... insurance contracts. Oh no, no, I understand. Yeah.
Singer	When did you first start to mention these ideas to Mr. Howard and Mis Nicholson about what you were thinking about?
Bennion	You mean my opinion.
Singer	Yes
Bennion	Last week. We had a meeting, we met, and kind of went over everything. I told them what I thought or what my opinion was concerning one particular reinstatement of provision. We've also talked about how grace periods worked.
Singer	And when did you talk to Mr. Howard about that? Or Ms. Nicholson.
Bennion	It was Friday, last week.
Singer	My understanding is that you've had, that prior conversation your are referring to was Friday? But there were conversations prior to that though, weren't there?
Bennion	Brief., brief conversations. I mean I think I ...
Singer	Conversations for which you kept track for billing purposes.
Bennion	Probably, yeah. A couple of phone calls. And, they called me just to ask me how things are going. It was during one of those calls, or maybe I called them earlier last week just to confirm the date of the hearing and still going on and how much are they going to need me, things like that.
Singer	I tend to try to ask to learn from you is when you talked with these two you related your ideas about the lapse date, grace period, same ideas you related here in about 15 minutes.

Bennion	Yeah. I didn't fully explain it in that kind of detail ...
Singer	Sure, sure sure.
Bennion	But you first talked about it.
Singer	Sure but a I think the question came up in at least one of those earlier conversations, simply, what do you think. Do you think our position was correct. Our interpretation of the reinstatement provision. Is it correct? And I said year, at that time
Bennion	Which was when approximately? Relatively early on after you
Singer	Oh, probably, that would have been like mid to late July. I'd have to look up the dates but, my answer was at this time, I haven't run into anything that would convince me that your position was incorrect. But I'm still reviewing it. That's what I know. Because I didn't want to pin myself down.
Singer	I understand. Well, I am only asking these questions about the opinion and the date because it's a little awkward to _____ fact that I received discovery requests. I, something about asking for this information on July 11 I was told that we haven't completed review. And it didn't mention anything about any opinions...
Bennion	That's true.
Singer	Well, after completing the review but the question was what kinds of opinions have you done. Now, with your experience in Bennion disclosures, or expert Benniones, when you've seen them, is it not, you need to disclose what your experts know, right?
Bennion	Umm...
Singer	Need I mention Judge Barbara Rothstein?
Bennion	I mean, under Rule 26, you need to disclose the opinion of an expert by a certain time.
Singer	Well certainly when asked, right?
Bennion	Certainly by the time of the specified case scheduling order.
Singer	Or the discovery request. The rules of discovery request _____.
Bennion	Yeah.

Singer	Okay. So if discovery requests are turned in, and the time they turned in you know they're not accurate, there's a duty to correct them, or supplement them. Your Honor, I'm going to authorize an Exhibit copy of the discovery in the case, just for purposes of showing what facts are to supplement this testimony. At this point, this is something that is of concern, I think anybody that just practices law. What happens in consequence in this sort of thing constitutes a discovery violation. The problem is that Mr. Bennion's testimony has already been heard, he's been here and the only remedy that would have made sense would have been exclusion of the Bennion or maybe some kind of monetary find. With the potential amount of nondisclosure information and basing this on discovery. That noted, here we are and...
Virginia Nicholson	Your Honor, can I just
Singer	...I'm not finished yet. Here we are and the testimony has been given and frankly, I understand your honor's concerns in the case and the questions and I don't find his testimony entirely inculpable so far, but I'm not yet finished with my cross-examination. So at this point I can't really ask for what would be a discovery remedy, but plainly, if I would have had an opportunity to be a little more prepared had I know it was opinions being used, so I'm going to do the best I can under the circumstances. So if the only remedy I can ask for is perhaps another opportunity to call Mr. Bennion back at the respondent's expense. To have him testify over the telephone or a convenient manner, if Your Honor finds it appropriate? That's the only thing I'm asking for, because I'm just hearing this today. I think that they've known this for a while, and time has been of the essence. So I'll just, with that noted, Counsel?
Virginia Nicholson	Your Honor, we had a very short time frame here. We rushed to get discovery responses out. He would not _____ with his opinions. We know what kind of, we received his discovery in the last couple days before the hearing. We were doing our best getting to meet all of the schedules, and then the expert disclosures, we say, he's expected to testify in providing interpretation and regulation of the statutes in particular, he's expected to testify regarding OICs his interpretation of the beginning dates and the five months unintended last period of the regulations. We did, we did disclose, cause it's in here.
Singer	Your Honor, I don't contend that the disclosure was specifically unreasonable. What I contend is that when we issued discovery, we were entitled to answers. The reason we asked for it is to learn and prepare for hearing, this was, the facts speak for themselves. The attorneys in this case discuss with the expert his impressions and views. It has been an issue that you required only two things; looking at the policy, looking at the problem. And you related these initial impressions. Not tying himself down. Noting that they're initial impressions, that the rules of discovery are completely

	thwarted if we pick and choose what we choose to disclose, and that's not appropriate in this case. And so that's the only reason I think it's appropriate, to keep open the door if there's further need, and there may not be, but if there's further need, to have Mr. Bennion summoned again to ask further questions of him.
Virginia Nicholson	Your Honor, I think it's unfair to insinuate that we are withholding any information. Considering that we didn't even get our discovery responses, and they were mailed, until two days before the hearing.
Judge	Well I don't want to hear about this issue and it's narrow, it's about when he expressed his opinion to you. I don't want to hear about what the other side did or didn't do and all that let's just talk about that...
Virginia Nicholson	Okay.
Judge	...that. And the, let's read the question. Because I think that your only other remedy, at this point you're only asking, or just asking for it to be kept open, as to his testimony?
Singer	Just to have a fair opportunity to ask all the questions, and ask Mr. Bennion, I think he's very knowledgeable, very seasoned, and I want to have the opportunity to ask him in his expertise questions as may be helpful to Your Honor.
Virginia Nicholson	And we don't disagree with that, Your Honor I'm just disagreeing with the characterization of our behaviors, because that's not at all our intent to withhold anything. We did our best to give you everything early and I just disagree with that characterization.
Judge	Okay. But you're willing to keep the record open?
Virginia Nicholson	Yes
Judge	Okay, well that's what matters.
Virginia Nicholson	Okay. Well, I guess I need to ask your permission.
Bennion	Well, I'm not available the last week of August.
Singer	We'll work with your schedule.
Bennion	Yeah. Otherwise, otherwise _____
Singer	Back to the questions. Now, so you do a lot of coverage, writing opinion letters, that sort of thing?