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OIC HEARINGS UNIT  
FRANCIA O. PETERSEN  
CHIEF PRESIDING OFFICER

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7 **BEFORE THE STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER**

8 In the Matter of

Docket No. 13-0084

9 **EDMUND C. SCARBOROUGH and  
10 WALTER W. WOLF,**

**OIC'S OPPOSITION TO  
SCARBOROUGH'S MOTION  
TO QUASH**

11 Respondents.

12 **I. INTRODUCTION**

13 Respondent Edmund C. Scarborough ("Respondent" or "Mr. Scarborough") filed a  
14 motion to quash and dismiss the instant proceedings before the Washington State Office of  
15 the Insurance Commissioner ("OIC" or "Commissioner"). This motion contends that either  
16 the Commissioner himself must issue such orders and conduct such hearings personally, or  
17 else he must retain either the Washington State Attorney General ("Attorney General") or one  
of his assistants to take these actions as his sole statutory representative. This is incorrect.

18 All acts of the Commissioner's staff are performed under authority delegated to them  
19 by the Commissioner, who is authorized to so delegate to his staff to act in his name. This  
20 internal matter does not require the use of statutory representation by the Attorney General or  
21 his assistants, nor do the Commissioner's staff members hold any attorney-client relationship  
22 with the Commissioner. The Commissioner's staff members act within the Commissioner's  
23 authority, not as his *legal* representatives. The Attorney General's role is not being usurped.  
Respondent's motion should be denied.

1  
2 **II. FACTS**

3 In or about March of 2013, pursuant to Insurance Code provisions that include RCW  
4 48.15.023(5)(a), the Commissioner issued a cease and desist order ("Order") and a notice of a  
5 request for a hearing ("Notice") identifying the above-named individuals as respondents in  
6 this matter. See Declaration of Alan Michael Singer Opposing Edmund Scarborough's  
7 Motion to Quash ("Decl. Singer") filed herewith. The Notice indicated that the  
8 Commissioner would request a hearing, at which he would request the imposition of fines  
9 against the respondents for violations of the Insurance Code. Both the Order and the Notice  
10 were entered by members of the Commissioner's staff, his employees, who the Commissioner  
11 authorized to perform those acts in his name and by his authority. Subsequently, Respondent  
12 indicated that he contests that he has violated the Insurance Code, and he also made his own  
13 request for a hearing to present his own evidence and views.

14 Mr. Scarborough has appeared in this matter through counsel of his own choosing, and  
15 he has chosen to participate in this matter strictly through his counsel. The Commissioner has,  
16 pursuant to RCW 48.02.100, authorized some of his employees to exercise his powers and  
17 duties under the Insurance Code by acting in his name in this matter. Decl. Singer; see also  
18 Declaration of Mike Kreidler Insurance Commissioner ("Decl. Kreidler.") None of the  
19 Commissioner's staff members have appeared or acted in this matter pursuant to any attorney-  
20 client relationship with the Commissioner; none exists, and none was requested or intended.  
21 Decl. Kreidler.

22 The Commissioner has also chosen to delegate his authority to hear, determine, and  
23 enter final orders to a chief presiding officer, the Chief Hearing Officer. Decl. Singer Exh. C.  
Pursuant to the Commissioner's and Mr. Scarborough's requests for hearing, the chief  
presiding officer has issued a notice of hearing advising the Commissioner and the

1 respondents that a hearing will be held in this matter to consider the Commissioner's and Mr.  
2 Scarborough's requests.

3 To date, the Commissioner has not requested the Attorney General to appear or  
4 otherwise take any specific actions on his behalf as his counsel in this matter. Instead, the  
5 Commissioner has chosen to ask his employees to exercise and discharge his powers and  
6 duties by acting in his name and by his authority as the matter proceeds. Decl. Singer; Decl.  
7 Kreidler. Consequently, the Attorney General has not appeared in this matter on behalf of the  
8 Commissioner, nor has the Attorney General entered any appearance pursuant to WAC 10-08-  
083. Decl. Singer.

9 More than a decade ago, Respondent's counsel submitted the same motion as  
10 Respondent now makes, and it was previously denied. See Decl. Singer Exh. A. In fact, even  
11 the Attorney General disagreed with Respondent's counsel's motion in that matter, and the  
12 Attorney General filed a brief supporting the Commissioner on this issue. *Id.* at Exh. B.

### 13 III. LEGAL AUTHORITY AND ARGUMENT

#### 14 A. OIC staff is permitted to act in the Commissioner's name as a delegate of the Commissioner in internal proceedings such as this one.

15 The Insurance Commissioner is authorized to conduct matters like the instant one,<sup>1</sup> an  
16 informal, internal, adjudicative proceeding conducted by and before the Commissioner.<sup>2</sup> In

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18 <sup>1</sup> Numerous Code provisions authorize and require the Commissioner to issue orders and conduct and participate  
19 in such proceedings as part of his core duty – to enforce the provisions of the Code. For example, RCW  
20 48.15.023(5) authorizes the Commissioner to enter the order entered here. RCW 48.04.010(1) authorizes the  
21 Commissioner to “hold a hearing for any purpose within the scope of this code as he or she may deem  
22 necessary.” This may be commenced in different ways, including by a notice to show cause. RCW 48.04.050.  
23 In the instant matter, the Commissioner is also specifically required to hold a hearing, both because Respondent  
demanded a hearing, and to assess a civil penalty under RCW 48.15.023(5)(a)(ii). See RCW 48.04.010  
(obligating Commissioner to hold a hearing when a hearing is demanded) and RCW 48.15.023(5)(a)(ii)  
(authorizing the Commissioner to assess monetary penalties against unauthorized insurers “after providing notice  
and an opportunity for hearing under chapters 34.05 and 48.04 RCW.”) RCW 48.02.060(3)(c) also authorizes  
the Commissioner to conduct hearings, in addition to those specifically provided for in the Code, as he sees  
“useful and proper” to accomplish “the efficient administration of any provision of the Code.” In carrying out  
his duty under RCW 48.02.060(2) to enforce the provisions of the Code, the Commissioner must protect the  
public interest and preserve inviolate the integrity of insurance. RCW 48.01.030.

1 such matters, the Commissioner carries out duties of a dual nature – both his duty to enforce  
2 the Code and his duty to exercise ultimate decision-making authority. The Commissioner’s  
3 dual responsibilities as both adjudicator and adversary in this setting differ from the  
4 traditional court setting involving a judge and parties, but are not an uncommon  
5 administrative agency feature.<sup>3</sup>

6 The Commissioner’s ability to perform his duties is made possible by the Legislature’s  
7 broad grant of authority allowing him to ask any member of his staff to discharge any of his  
8 duties and powers for him. RCW 48.02.100. This law specifically authorizes the  
9 Commissioner to ask any of his employees to exercise “any” of his powers or duties by acting  
10 “in his name[...].”<sup>4</sup> *Id.* Common sense also dictates that such delegation is appropriate. The  
11 Commissioner cannot single-handedly carry out the mission of his office and simultaneously  
12 discharge every one of the hundreds or thousands of duties he holds under the Code. He must  
13 necessarily delegate his staff members to act on his behalf. As this brief will demonstrate,  
14 when those employees act in the Commissioner’s name this way, they act not as the  
15 Commissioner’s legal counsel or legal staff representing the Commissioner in any attorney-  
16 client sense, but rather, they act *as if they were Commissioner himself*.

17 Pursuant to RCW 48.02.100, the Commissioner has chosen to separate out his dual  
18 responsibilities in this matter by delegating and authorizing two different groups of his staff to

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19 <sup>2</sup> Under WAC 284-02-070, such “[a]djudicative proceedings include both contested case hearings and other  
20 types of adjudicative proceedings which are required by law. Contested case hearings include appeals from  
21 disciplinary actions taken by the commissioner.” WAC 284-02-070(1)(a). Such matters are expressly  
22 “informal” and internal, though open to the public – like rulemaking hearings, for example – where people  
23 discuss issues and the agency’s staff hears what people have to say. “Adjudicative proceedings or contested case  
hearings of the insurance commissioner are informal in nature, and compliance with the formal rules of pleading  
and evidence is not required.” WAC 284-02-070(2)(d). *See also* RCW 34.05.449(5) (hearings open to public).

<sup>3</sup>“That an administrative agency serves as both adjudicator and adversary is a curious, but well-accepted, feature  
of the administrative state.” *Graham v. United States*, 96 F.3d 446, 451 at fn. 2 (9th Cir. 1996) (Dissent, Judge  
Kozinski) citing Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy*, pps. 875-  
879 (2d Ed. 1985).

<sup>4</sup> RCW 48.02.100 provides: “Any power or duty vested in the commissioner by any provision of this code may  
be exercised or discharged by any deputy, assistant, examiner, or employee of the commissioner acting in his or  
her name and by his or her authority.”

1 exercise and discharge his powers and duties in two distinct roles. First, the Commissioner  
2 has delegated his ultimate adjudicative decision-making authority to an impartial chief  
3 presiding officer.<sup>5</sup> Second, to ensure that all relevant facts, reasons, and issues relevant to  
4 enforcing the provisions of the Code are disclosed and considered, the Commissioner also  
5 delegated other employees – specifically including the undersigned OIC staff – to attend and  
6 participate in the matter.<sup>6</sup> By choosing to conduct and participate in such proceedings this  
7 way, through delegation to his employees under RCW 48.02.100, the Commissioner is able to  
8 personally perform his Code duties as he sees fit.<sup>7</sup>

9 <sup>5</sup> Code section RCW 48.02.100 and Washington’s Administrative Procedures Act sections RCW 34.05.461(1)(b)  
10 and 34.05.464 authorize the Commissioner to so designate a staff member to serve in this role and issue final  
11 orders. RCW 34.05.461(1)(b) provides that “[i]f the presiding officer is a person designated by the agency to  
12 make the final decision and enter the final order, the presiding officer shall enter a final order.” In addition,  
13 WAC 284-02-070(2)(d)(i) provides that “[t]he insurance commissioner may delegate the authority to hear and  
14 determine the matter and enter the final order under RCW 48.02.100 and 34.05.461 to a chief presiding officer.”  
Even in proceedings and hearings using the services of an administrative law judge from the Office of  
Administrative Hearings, this chief presiding officer still retains the Commissioner’s power to enter the  
Commissioner’s final orders. *See* WAC 284-02-070(2)(d)(i) (“The initial order of an administrative law judge  
will not become a final order without the commissioner’s review (RCW 34.05.464) and entry of a final order.”)  
RCW 34.05.464 provides rules relating to the review of initial orders and the entry of final orders. The chief  
presiding officer is an impartial individual to ensure fairness. The Commissioner’s chief presiding officer  
remains neutral and “does not report to any of the major divisions of the OIC.” WAC 284-02-070(2)(d)(i).

15 <sup>6</sup> Under RCW 48.02.060(2), the Commissioner “must enforce the provisions of this code.” “When a power is  
16 granted to an agency, ‘everything lawful and necessary to the effectual execution of the power’ is also granted by  
17 implication of law.” (Cite omitted.) *Jackstadt v. Washington State Patrol*, 96 Wn. App. 501, 513, 976 P.2d 190  
18 (1999). “[I]mplied authority is found where an agency is charged with a specific duty, but the means of  
accomplishing that duty are not set forth by the Legislature.” (Cite omitted.) *Id.* Similarly, the Code grants the  
Commissioner “the authority expressly conferred upon him or her by or reasonably implied from the provisions  
of this code.” RCW 48.02.060(1). Under RCW 34.05.449(2), “full disclosure of all relevant facts and issues”  
should occur in this matter.

19 <sup>7</sup> The Commissioner’s decision to delegate his dual responsibilities to different members of his staff is  
20 particularly appropriate here, since doing this preserves the fact and appearance of fairness. In *Jackstadt v.*  
21 *Washington State Patrol*, 96 Wn. App. 501, 976 P.2d 190 (1999), the Washington Court of Appeals approved of  
22 agency officials delegating powers and duties to staff for this purpose. In *Jackstadt*, the Court upheld the  
23 Washington State Patrol (“WSP”) Chief’s recusal and delegation of her adjudicatory authority in a disciplinary  
proceeding against a Trooper where the Chief had previously served as counsel for the Trooper and also for the  
Washington State Troopers Association before becoming Chief. Of this delegation, the Court noted:

“Subdelegation” means “the transmission of authority from the heads of agencies to  
subordinates.” Its usual purpose is to free agency heads to “concentrate their attention upon  
the larger and more important questions of policy and practice.” A narrower purpose,  
however, is that present here: to allow for a fair quasi-adjudicative proceeding when an agency

1 Because the Commissioner has properly delegated his employees (including the  
2 undersigned) to execute and discharge his duties and powers in his name using RCW  
3 48.02.100's express authorization to do so, Mr. Scarborough's motion should be denied.

4 **B. Parties need not be represented by counsel in internal proceedings such as this.**

5 Employing a number of commonly used law-related words and terms that reference  
6 the actions of attorneys representing clients,<sup>8</sup> Respondent's motion implies that OIC staff  
7 members are serving as the Commissioner's *legal* representatives. Setting aside for a moment  
8 the question of whether any attorney-client relationship truly exists between OIC staff  
9 members and the Commissioner,<sup>9</sup> Respondent's motion overlooks that neither the Attorney  
10 General nor any other attorney is required to enter orders for the Commissioner or serve as his  
11 *legal* representative in matters such as this one. Respondent's motion also overlooks relevant  
12 provisions governing this matter which permit lay representatives to appear and represent  
13 others here, even if the lay representative's acts might be considered the practice of law.

14 Washington's Administrative Procedures Act, RCW 34.05 *et seq* ("APA"), which  
15 applies to and governs this matter, specifically does *not* require that the Commissioner or

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16 head who otherwise would be the reviewing officer is subject to a conflict of interest. Initially,  
17 subdelegation was viewed with suspicion by the courts. By the 1960's it was allowed more  
18 freely, and by 1971 it was so well settled that the leading commentator said, "It has almost  
19 disappeared from litigation." By 1994, it had become "a mainstay of government operation,"  
20 and "[p]arties [were] no longer challenging normal subdelegations."

21 *Jackstadt*, 96 Wn. App. at 511-12. As *Jackstadt* makes clear, the Commissioner's delegation here is consistent  
22 not only with the Commissioner's authority, but with the appearance of fairness and modern case law. Similarly,  
23 Washington's Administrative Procedures Act also contemplates separate delegation of functions to adhere  
24 integrity to the process. See, e.g., RCW 34.05.458, which limits who may serve as a chief presiding officer.

25 <sup>8</sup> For example, Respondent's motion makes liberal use of various commonly used legal terms, beginning on page  
26 one of Respondent's motion, where he accuses OIC staff of having "initiate[d]" and "participate[d]" in the  
27 instant proceedings, and having "signed" an "order and notice"; page two claims the Commissioner "employ[ed]"  
28 attorneys to act in any legal or quasi-legal capacity" and "represent" the Commissioner; page three claims these  
29 staff "appear[ed] in a legal or quasi-legal capacity," "represent[ed]" the Commissioner, and "[brought] actions"  
30 here.

31 <sup>9</sup> As this brief will demonstrate elsewhere, there is no attorney-client relationship between the Commissioner and  
32 any of his staff, and for this reason also, Respondent's motion should be denied.

1 anyone else must appear only through their retained counsel in this matter. To the contrary, it  
2 provides that lay representatives and persons other than attorneys are authorized to appear and  
3 to represent others in such matters. See RCW 34.05.428 (APA provision allowing a party to  
4 appear through a “duly authorized representative” or any other person as “permitted by  
5 provision of law”) and WAC 10-08-083 (APA model rule allowing a “representative” that  
6 may or may not be an attorney admitted to practice in this state). Moreover, even if the lay  
7 representative engages in the practice of law in such matters, the law also specifically  
8 accommodates and permits this lay representation.

9 While it is normally a crime for one to engage in the ‘practice of law’ without being a  
10 licensed attorney,<sup>10</sup> the Washington Supreme Court has established ‘practice of law’ standards  
11 which permit a “lay representative” to perform all of the acts OIC staff members have  
12 performed here without violating the proscription against practicing law without a license.  
13 These standards are consistent with the rules and practices of agencies like OIC which allow  
14 lay representatives. The standards expressly permit lay representatives to appear for and  
15 represent others in such matters as this one, regardless of whether the representative holds a  
16 Washington license to practice law and regardless of whether the representative’s conduct  
17 amounts to ‘the practice of law.’ GR 24.<sup>11</sup> Even if a lay representative’s acts meet the  
18 definition and standard of ‘the practice of law,’ when an individual is “[a]cting as a lay  
19 representative authorized by administrative agencies or tribunals,” such action is expressly  
20 “permitted” regardless of whether the person has a license to practice law in the state of  
21 Washington.<sup>12</sup> GR 24(b)(3). Moreover, GR 24(e) emphasizes that nothing in the Court’s

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20 <sup>10</sup> For example, RCW 2.48.180 renders the unlawful practice of law a crime.

21 <sup>11</sup> “[I]t is the province of the Washington Supreme Court to define what constitutes the practice of law, and it has  
22 done so by way of GR 24.” (Cites omitted.) *State v. Janda*, 174 Wn. App. 229, 235, 298 P.3d 751 (2012).

23 <sup>12</sup> Consistent with this, the Commissioner’s March 12, 2013 “Notice of Receipt of OIC Notice of Request for  
Hearing and Hearing Procedures” issued in this matter notes that “pursuant to General Rule 24, Washington  
Rules of Court, attorneys representing individuals or entities in Washington State adjudicative proceedings such  
as this, need not be licensed as an attorney in Washington State.” (Emphasis in original.)

1 standards are to be construed in a manner so as to interfere with governmental agencies  
2 attempting to carry out their responsibilities under law,<sup>13</sup> which is exactly what the  
3 Commissioner is attempting to do here.

4 In support of his claim that the work done by OIC staff members is work that only the  
5 Attorney General can do, Respondent's motion tries characterizing OIC staff members as the  
6 Commissioner's *legal* representatives, using repeated references to OIC staff members  
7 "represent[ing]" the Commissioner. *See, e.g.,* Scarborough Motion at 2-3. While Respondent  
8 thus attempts to place an overly narrow construction on the word "representative," whereby  
9 only attorneys may "represent" clients in the context of an attorney-client relationship, the  
10 actual meaning of "representative" under the aforementioned APA provisions and GR 24 is  
11 far broader. Since the APA and GR 24 do not define what a "representative" is, the word's  
12 dictionary definition governs.<sup>14</sup> Page 1926 of Webster's Third New International Dictionary  
13 (unabridged) (1964, G & C Merriam Co. Publishers) defines it as "standing for or in the place  
14 of another; acting for another or others; constituting the agent for another esp. through  
15 delegated authority." While this definition can encompass attorneys acting as a *legal*  
16 "representative" of a client in the context of an attorney-client relationship, it is also broad  
17 enough to include OIC staff members who the Commissioner authorized to "act in [the  
18 Commissioner's ...] name and by his [...] authority." RCW 48.02.100. OIC staff members  
19 acting "through delegated authority" meet this definition of "representative."<sup>15</sup>

20 <sup>13</sup> "Nothing" in GR 24's standards defining what constitutes "the practice of law" "shall affect the ability of a  
21 governmental agency to carry out responsibilities provided by law." GR 24(e).

22 <sup>14</sup> When a word is not defined in a contract or a statute, Washington courts have looked to Webster's Third New  
23 International Dictionary. *See, e.g., Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 592 fn. 17, 192  
P.3d 306 (2008) (looking to Webster's where word is undefined in the statute at issue.)

<sup>15</sup> This definition fully accords with RCW 34.05.428, WAC 10-08-083, and GR 24, all of which acknowledge  
that the Commissioner's authorized representative can be his employees, regardless of whether the staff may or  
may not happen to be an attorney.

1           **C. OIC staff members are not the *legal* “representatives” of the Commissioner under**  
2           **an attorney-client relationship, and Respondent fails to support the existence of**  
3           **any attorney-client relationship between the Commissioner and his staff.**

4           The burden of establishing the existence of an attorney-client relationship rests on the  
5           party asserting the relationship. *Dietz v. Doe*, 131 Wn.2d 835, 845, 935 P.2d 611 (1997).  
6           “Whether an attorney client relationship exists depends largely on the client’s subjective  
7           belief that it exists.” (Cites omitted.) *In re Discipline of Haley*, 157 Wn.2d 398, 408, 138  
8           P.3d 1044 (2006). But while Respondent’s motion postulates and implies that an attorney-  
9           client relationship exists between the Commissioner and his employees, none in fact exists.  
10          As indicated in footnote 8 above, Respondent’s motion uses only a number of commonly used  
11          words and terms to imply that OIC staff members are serving as the Commissioner’s *legal*  
12          representatives with an attorney-client relationship. But Respondent supplies no actual  
13          evidence to prove that such a relationship ever existed. Again, this is because no such  
14          relationship actually exists.

15          The only relevant evidence is that the involved parties both believed the same thing:  
16          the Commissioner and his employees never created or intended to create an attorney-client  
17          relationship between them. *See* Decl. Singer; Decl. Kreidler. OIC staff members are only the  
18          Commissioner’s employees, not his *legal* representatives. These OIC staff members have  
19          never been retained as Commissioner Kreidler’s attorneys, and have never acted as such. OIC  
20          staff members do not, for example, represent the Commissioner in superior court – the  
21          Attorney General does. Nor does attorney-client privilege exist between the Commissioner  
22          and his staff – when it exists, it exists between the Commissioner and the Attorney General.

23           **D. Respondent’s reliance on Article III section 21 of the Washington Constitution,**  
          **Attorney General statutes, and related cases is misplaced.**

          Respondent’s counsel submitted the same motion as Respondent now makes more  
than a decade ago, and it was previously denied. *See* Decl. Singer Exh. A. In fact, even the  
Attorney General disagreed with Respondent’s counsel’s motion in that matter, and the

1 Attorney General filed a brief supporting the Commissioner on this issue. *Id.* at Exh. B.  
2 Although Respondent's motion does not disclose any of the aforementioned provisions and  
3 mischaracterizes the Commissioner's relationship with his staff, it points to three authorities:  
4 a Washington Constitution provision, Attorney General statutes, and three Washington court  
5 decisions. Respondent argues that these authorities require dismissal here. Though these  
6 arguments and authorities have already been raised before, since these authorities only deal  
7 with the Attorney General acting in the roles and duties reserved to the Attorney General as  
8 *legal* representative of officials, not the actual role and acts performed here by OIC staff  
9 members as the Commissioner's delegates under RCW 48.02.100, they still do not apply and  
should be rejected again here.

10 **1. Article III section 21 of the Washington Constitution does not apply.**

11 First Respondent cites Article III section 21 of the Washington Constitution, which  
12 provides that the Attorney General "shall be the legal adviser of the state officers, and shall  
13 perform such other duties as may be prescribed by law." But this is not relevant here, since  
14 OIC staff members are not acting as the Commissioner's "legal advisers." Again, no  
15 attorney-client relationship exists between the Commissioner and his staff, nor is legal advice  
16 either being sought from or delivered by the Commissioner's staff. Article II section 21 does  
not apply here.

17 **2. RCW 43.10.030(2), 43.10.040, 43.10.065, and 43.10.067 do not apply.**

18 Although Respondent's motion also cites four statutes concerning the Attorney  
19 General (RCW 43.10.030(2),<sup>16</sup> 43.10.040, 43.10.065, and 43.10.067) and contends that these  
20 prevent the Commissioner's staff from acting in the Commissioner's name here, the Attorney  
21 General has previously disagreed and indicated that "Chapter 43.10 RCW does not prohibit an  
22 agency from representing itself in an internal adjudicative proceeding" like the instant one.  
See Decl. Singer Exh. B at pps. 2-3. Respondent's reliance on these provisions is still built

23 <sup>16</sup> Respondent's motion errantly refers to RCW 43.10.030(2) as "RCW 43.10.020(2)." (Emphasis added.)

1 over the false notion that OIC staff members serve the Commissioner as his *legal*  
2 representatives in an attorney-client relationship. For this and the other reasons that follow,  
3 none of these four statutes apply here.

4 First, RCW 43.10.030(2) provides that the Attorney General shall “[i]nstitute and  
5 prosecute all actions and proceedings for, or for the use of the state, which may be necessary  
6 in the execution of the duties of any state officer.” While no court decision has ever held that  
7 RCW 43.10.030(2) requires the Attorney General to represent officials in matters like this  
8 purely internal one before the Commissioner himself, and RCW 43.10.030(2) concerns  
9 “actions and proceedings,” which has only traditionally meant matters before the courts,<sup>17</sup>

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10 <sup>17</sup> “Actions” and “proceedings” requiring attorney representation from a private attorney, prosecutor, or the  
11 Attorney General have traditionally been recognized as lawsuits and court proceedings before Washington’s  
12 courts – not internal matters within agencies. For example, Washington’s Constitution uses the words “actions”  
13 and “proceedings” to matters before the courts. *See, e.g.,* Art. I, §35, Wash. Const. (referencing victims’ rights  
14 in “trial or court proceedings”), Art. IV, §§4 and 5, Wash. Const. (referencing the Washington Supreme Court’s  
15 jurisdiction over “all actions and proceedings” excepting certain “civil actions at law,” and also referencing the  
16 “judgments, decrees, orders and proceedings” of the superior courts), Art. IV, §6, Wash. Const. (describing  
17 superior courts’ jurisdiction over “actions of forcible entry and detainer,” “actions to prevent or abate a  
18 nuisance,” “proceedings in insolvency,” “all cases and [] all proceedings” in which jurisdiction has not “vested  
19 exclusively” before any “other court,” and “special cases and proceedings”), Art. IV, §6, Wash. Const.  
20 (authorizing the court of appeals to review “[s]uperior court actions”), Art. XXVII, §1, Wash. Const. (noting the  
21 protection of “rights, actions, suits, proceedings, contracts or claims” during Territory’s transition to a State),  
22 Art. XXVII, §5, Wash. Const. (stating that criminal prosecutions “and penal actions” being “prosecuted to  
23 judgment, and execution in the name of the state” need to take place before the “court of the state having  
jurisdiction,” and also referencing “actions at law and suits which may be pending in any of the courts”), and  
Art. II, §28, Wash. Const. (referring to “actions” as “civil or criminal”). This is also how the Washington courts  
have construed the words “actions” and “proceedings.” For example, when the Washington Supreme Court  
discusses “actions and proceedings,” it notes that such actions and proceedings occur “before the courts.” *See,*  
*e.g., N. Bend Stage Line v. Dep’t of Public Works*, 170 Wash. 217, 222, 16 P.2d 206 (1932), construing the  
language “all actions and proceedings” in Art. IV, §4, Wash. Const. to refer to matters “of a purely judicial  
nature, which have been determined in some judicial court established by the constitution or in pursuance  
thereof.” Washington courts and the Legislature also have traditionally considered “actions and proceedings” to  
be matters brought *in court*. *See, e.g., Ferris v. Snively*, 172 Wash. 167, 19 P.2d 942 (1933) (considering the  
“practice of law” as the management of “actions and proceedings on behalf of clients before judges and courts”);  
RCW 4.12.040 (referring to “action or proceeding” as something judges in court consider); *State ex rel. Am. Soc.*  
*of Composers v. Wright*, 186 Wash. 194, 196, 57 P.2d 323 (1936) (petition to vacate judgment is an “action or  
proceeding” to be heard by judge in court under RCW 4.12.040); RCW 80.04.260 (specifying that the Attorney  
General may commence an “action or proceeding” in “the superior court”); RCW 10.14.150 (referring to  
“actions and proceedings” as matters within courts’ jurisdiction); *State v. Tracer*, 173 Wn.2d 708, 716, 272 P.3d  
199 (2012), *State v. Williams*, 5 Wn.2d 419, 424, 105 P.2d 723 (1940), *Deno v. Std. Furniture Co.*, 190 Wash. 1,  
66 P.2d 1158 (1937), *Cole v. Trimble*, 172 Wash. 167, 19 P.2d 942 (1933) (all referring to actions and  
proceedings occurring before courts); RCW 48.31.045 (referring to an “action or proceeding” as occurring  
before a “court in this state” where an insurer is a party); *Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d

1 RCW 43.10.030(2) merely reflects that the Attorney General has a duty to serve as an  
2 officer's *legal* representative when such is "necessary" in the execution of the officer's duties.  
3 As previously explained, the Commissioner has the authority and duty to issue orders,  
4 conduct hearings, assess civil penalties, and enforce the Insurance Code. The Commissioner  
5 also has the authority and option under RCW 48.02.100 and the APA provisions cited above,  
6 consistent with GR 24, to delegate his staff to act in his name in matters like the present one.  
7 He thus can execute his duties to issue orders, conduct hearings, assess civil penalties, and  
8 enforce the Code here without needing the Attorney General's services. Since the Legislature  
9 in RCW 48.02.100 has expressly authorized the Commissioner to delegate his duties to his  
10 staff to act in his name *without* the Attorney General's *legal* representation, the Attorney  
11 General's involvement is not "necessary." RCW 43.10.030(2) does not apply.

12 Respondent's motion also cites RCW 43.10.065, a wholly irrelevant statute  
13 authorizing the Attorney General to delegate his duties to his own staff.<sup>18</sup> No Washington  
14 court decision or other authority has made holdings which would render it applicable here.  
15 Whether the Attorney General may under RCW 43.10.065 delegate his own authority to his  
16 assistant Attorneys General is simply not the issue here, though it is ironic that RCW  
17 43.10.065 happens to create in the Attorney General the same right to delegate as the  
18 Commissioner enjoys under RCW 48.02.100.

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19 131 (2006) (holding that RCW 4.96.041's reference to an "action or proceeding" was "for damages and occurred  
20 before a court); and RCW 38.42.060 (authorizing stays to active service members for pending civil "action[s] or  
21 proceeding[s].") Consistent with this, no Washington court decision has ever construed these words to require  
22 *only* the Attorney General to serve as the Commissioner's counsel and represent him before either himself or  
23 before his own delegated chief presiding officer in purely internal agency settings such as the present matter.

<sup>18</sup> RCW 43.10.065 provides that "[t]he attorney general may employ or discharge attorneys and employees to transact for the state, its departments, officials, boards, commissions, and agencies, all business of a legal or quasi legal nature, except those declared by law to be the duty of the judge of any court, or the prosecuting attorney of any county."

1 Respondent also claims RCW 43.10.040<sup>19</sup> requires the Attorney General to represent  
2 the Commissioner in hearings like this one. See Scarborough Motion at 2. But as with the  
3 other statutes cited by Respondent, RCW 43.10.040 only applies when the Attorney General's  
4 legal representation is needed in the attorney-client sense. Like all the other statutes cited by  
5 Respondent, RCW 43.10.040 does not subsume or abrogate other authority, powers, and  
6 duties officers and entities have separately received from the Legislature. As previously  
7 explained, the Attorney General's legal representation is not needed because the  
8 Commissioner has been authorized by the Legislature to delegate his staff to act in his name  
9 here, and the rules that govern this matter expressly permit him to have his staff so act.  
10 Moreover, while this statute prevents the Attorney General from leaving officials,  
11 departments, boards, commissions, and agencies in the lurch without legal representation or a  
12 legal adviser when such is needed or desired, RCW 43.10.040 only deals with actions and  
13 proceedings "in the courts" or "before all administrative tribunals or bodies" – neither of  
14 which is the case here. In this instance, OIC staff members delegated by the Commissioner  
15 are simply participating in the matter for the Commissioner pursuant to that delegation. But  
16 they are not 'in the courts' or before any other bodies – they are before the Commissioner  
17 himself, through his other delegate, the chief presiding officer. While these delegated  
18 functions are separate, there is no "court" or "administrative tribunal or body" apart from the  
19 Commissioner himself. The role of the Attorney General as providing legal advice and legal  
20 representation is not inconsistent with the Legislature's grant of authority to the  
21 Commissioner. RCW 48.02.100 allows him to delegate his enforcement and decision-making

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20 <sup>19</sup> Titled "[r]epresentation of boards, commissions and agencies," RCW 43.10.040 provides that those clients  
whom the Attorney General is bound to serve, when required or requested, shall include the following:

21 The attorney general shall also represent the state and all officials, departments, boards,  
22 commissions and agencies of the state in the courts, and before all administrative tribunals or  
23 bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all  
officials, departments, boards, commissions, or agencies of the state in all matters involving  
legal or quasi legal questions, except those declared by law to be the duty of the prosecuting  
attorney of any county.

1 powers and duties this way, so that delegated OIC staff members – who need not happen to be  
2 trained, educated, or even licensed in the law – may present the matter to the Commissioner’s  
3 delegated chief presiding officer for her entry of a final order in the Commissioner’s name.  
4 RCW 43.10.040 does not apply here.

5 Nor does RCW 43.10.067<sup>20</sup> apply here. This statute only prevents officials from  
6 retaining other counsel to supplant what only the Attorney General must do – serve the  
7 official as their *legal* representative, which is not the issue here. RCW 43.10.067 simply  
8 reflects that the Commissioner may not hire attorneys “to act as” his legal advisor or legal  
9 representative to “exercise of any of the powers or performance of any of the duties specified  
10 by law to be performed by the attorney general.” The Commissioner has not done that here.  
11 Here, his staff members are not serving as his *legal* representatives in the attorney-client  
12 relationship reserved solely to the Attorney General – they instead act as delegates of the  
13 Commissioner under RCW 48.02.100. Since delegated OIC staff members act only pursuant  
14 to this legislatively-granted power to delegate, and are not acting as the Commissioner’s *legal*  
15 representatives or counsel, and they do not need to serve as such in such matters, RCW  
16 43.10.067 also does not apply.

17 **3. Cases relied on by Respondent also do not apply.**

18 Respondent also cites the same three Washington court cases concerning the Attorney  
19 General that Respondent’s counsel cited more than a decade ago in a similar motion, which  
20 was denied. *See* Decl. Singer Exhs. A-B. The Attorney General has agreed that these cases  
21 do not apply here. *See* Decl. Singer Exh. B. While Respondent feels these cases support his  
22 demand for dismissal here, for the reasons that follow, they still do not apply.

23 \_\_\_\_\_  
<sup>20</sup> Excluding exceptions not pertinent here, RCW 43.10.067, “Employment of attorneys by others restricted,” provides “No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general, except where it is provided by law to be the duty of the judge of any court or the prosecuting attorney of any county to employ or appoint such persons.”

1 First Respondent relies on *State v. Hood*, 93 Wn.2d 603, 607-08, 611 P.2d 758 (1980),  
2 a case reciting the Attorney General's duty under RCW 43.10.040 and its conclusion that  
3 RCW 43.10.067 required board members to rely on the legal advice received from the  
4 Attorney General. But *Hood*'s facts render it inapplicable here. In *Hood*, the Attorney  
5 General appealed to the Washington Supreme Court after the trial court granted summary  
6 judgment dismissal of a lawsuit brought by the Attorney General on behalf of the State  
7 Auditor against members of the Washington State Liquor Control Board. The suit alleged  
8 that board members illegally accepted free liquor samples, even though the Attorney  
9 General's own Assistant Attorneys General who had been appointed to advise the board had  
10 long advised the board that their conduct relative to accepting free samples was "okay to  
11 continue." *Hood*, 93 Wn.2d at 606. Upholding dismissal of the action, the Court noted that  
12 "advice was given, and [...] the Board relied upon it, as it was required to do," rejecting the  
13 Auditor's argument that the Assistant Attorney General's "okay to continue" advice was "so  
14 patently erroneous that no reasonable person in the position of the board members could rely  
15 upon it." *Id.* at 609-10. *Hood* correctly protected state officials who rely on even  
16 questionable advice from the Attorney General as their obligatory "legal advisor," but the  
17 case had nothing to do with the question of whether the Commissioner may authorize and  
18 delegate his staff to execute and discharge his duties and powers in his name in purely internal  
19 matters before the Commissioner himself under the RCW 48.02.100's express permission to  
20 do so. While page 3 of Respondent's motion claims *Hood* stands for the idea that the  
21 Commissioner cannot have "an attorney other than the attorney general appear in a legal or  
22 quasi-legal capacity," it does not, nor is any OIC staff member serving as "legal advisor" or  
23 *legal* representative to the Commissioner. *Hood* simply has no relevance here.

21 Respondent next relies on dictum in *State v. Herrmann*, 89 Wn.2d 349, 572 P.2d 713  
22 (1977) regarding the purpose of RCW 43.10.067, claiming it serves as authority for the  
23 proposition that the Commissioner cannot "hir[e] attorneys to represent [him]." *See*

1 Scarborough Motion at 3. But the purpose of RCW 43.10.067 is not at issue here, nor has the  
2 Commissioner retained any staff member to serve as his *legal* representative. In fact, this was  
3 not even the issue in the *Herrmann* case. In *Herrmann*, the issue was whether the Attorney  
4 General was required to represent (through an Assistant Attorney General or a Special  
5 Assistant Attorney General) then Insurance Commissioner Karl Herrmann in a civil suit the  
6 Attorney General filed against Mr. Herrman, alleging Mr. Herrmann committed malfeasance  
7 while in office. Commissioner Herrmann asked the Attorney General to represent him, and  
8 the Attorney General refused, contending that Mr. Herrmann was not entitled to the Attorney  
9 General's representation since the alleged malfeasance supposedly occurred outside the scope  
10 of Mr. Herrmann's office duties. The Court agreed, holding that under other laws (including  
11 RCW 4.92 *et seq*), Mr. Herrmann was not entitled to a legal defense at the expense of the  
12 state, essentially because his alleged acts were beyond the scope of his office's duties.  
13 *Herrmann*, 89 Wn.2d at 356. As with *Hood*, *Herrmann* did not consider whether the  
14 Commissioner may authorize and delegate his employees to execute and discharge his duties  
15 and powers in his name in purely internal matters before the Commissioner himself under  
16 RCW 48.02.100. *Herrmann*, too, is inapplicable here.

17 Finally, at page 3 of his motion Mr. Scarborough argues that *State v. Gattavara*, 182  
18 Wash. 325, 47 P.2d 18 (1935), stands for the proposition that "[w]here an attorney other than  
19 the attorney general appears on behalf of [the Commissioner], the proceeding must be  
20 dismissed."<sup>21</sup> But *Gattavara* also has no application here as it only concerned things *not* at

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21 Respondent is not correct to assert that *Gattavara* dismissed the action because an attorney employed by a  
22 state agency "appeared" instead of the Attorney General. In *Gattavara*, the state agency (department of labor  
23 and industries) employed its own counsel, rather than the Attorney General, to file suit and a summons in a court  
action against another party to garnish unpaid industrial insurance premiums. The department attempted to  
justify its actions by relying on a statute that permitted the agency's director to authorize an attorney it employed  
"to appear for the department in any action instituted for the purpose of collecting industrial insurance  
premiums." But the Court specifically rejected the notion that all the department's lawyer did was simply  
"appear." It found a legally significant difference between the act of merely "appearing" and the act of  
"institut[ing] [court] actions and sign[ing] a summons." "Indeed, the statute relied upon by respondent does not  
authorize such attorneys who are admitted to practice law in this state to institute actions and sign a summons,  
but only to appear for the department in actions which have been brought for the purpose of collecting industrial

1 issue here: the “bringing [of] a suit,” the “institut[ing of an] action,” and the signing of a court  
2 summons. *Gattavara*, 182 Wash. at 329-31. In *Gattavara*, the Washington Department of  
3 Labor and Industries hired a private attorney other than the Attorney General to be its *legal*  
4 representative to bring an action in a Washington superior court. In that forum, an attorney-  
5 client-relationship and the Attorney General’s *legal* representation *was* required. Here, by  
6 contrast, the Commissioner has not instituted any such action, and this matter is not before the  
7 courts, where he must be represented by the Attorney General in an attorney-client  
8 relationship. Respondent also argues that *Gattavara* also establishes that “the authority of the  
9 Attorney General to bring actions is ‘exclusive.’” See Scarborough Motion at p. 3, l. 20-21.  
10 But again, *Gattavara* squarely dealt with just the issue of the Attorney General’s role as the  
11 *legal* representative of state officers bringing “actions” *in court*.<sup>22</sup> *Gattavara* did not address  
12 or consider the Commissioner’s authority under RCW 48.02.100,<sup>23</sup> and did not concern a  
13 matter like the present one where the Attorney General’s *legal* representation is not required.  
14 *Gattavara* only concerned itself with the forum of superior court where an attorney was and  
15 still is required to act as the *legal* representative of the official in whose name the ‘action or  
16 proceeding’ was being brought. *Id.* at 328. Moreover, no Washington court decision in the  
17 intervening 79 years has ever construed *Gattavara* the way Respondent urges, to compel the  
18 Attorney General to intervene in situations where the Legislature has expressly granted an  
19 agency or an official the authority to delegate to their staff the job of conducting such internal  
20 matters themselves. *Gattavara* is inapposite.

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21 insurance premiums.” *Gattavara*, 182 Wash. at 328-29. The Court found the statute “did not give authority to  
22 departments to institute actions in their own right, but only in conjunction with the authority of the Attorney  
23 General.” *Id.* at 333.

<sup>22</sup> As already noted in footnote 17 above, “actions” and “proceedings” traditionally only meant lawsuits brought before Washington’s courts, and nothing suggests the Court in *Gattavara* intended “actions” and “proceedings” to be construed any differently.

<sup>23</sup> In *Gattavara*, the Court only construed and relied on a statute in force in 1935 that required the Attorney General “[t]o institute and prosecute all actions and proceedings.” See *Gattavara*, 182 Wash. at 328.

1  
2  
3 **E. All relevant statutes must be harmonized and construed together.**

4 Respondent's motion also should be denied because it fails to consider and harmonize  
5 *all* relevant statutes, as Washington courts require. "In construing a statute, we give effect to  
6 all its language so that 'no portion is rendered meaningless or superfluous.'" *Friends of*  
7 *Columbia Gorge, Inc. v. Wash. State Forest Practices*, 129 Wn. App. 35, 47, 118 P.3d 354  
8 (2005), citing *Muckleshoot Indian Tribe v. Dep't of Ecology*, 112 Wn. App. 712, 720, 50 P.3d  
9 668 (2002), *review denied*, 150 Wn.2d 1016 (2003). "The construction of two statutes shall  
10 be made with the assumption that the Legislature does not intend to create an inconsistency."  
11 (Cites omitted.) *Peninsula Neighborhood Ass'n v. DOT*, 142 Wn.2d 328, 342, 12 P.3d 134  
12 (2000). "Statutes are to be read together, whenever possible, to achieve a 'harmonious total  
13 statutory scheme . . . which maintains the integrity of the respective statutes.'" (Cites  
14 omitted.) *Id.*

15 Here, Respondent's motion does not harmonize the various Code, APA, and other  
16 authorities mentioned herein which authorize the Commissioner to delegate powers as he has.  
17 In fact, Respondent's motion simply ignores them. But "all" relevant provisions must be  
18 considered and all must be construed together in a harmonious fashion with the goal of  
19 interpreting the statutes "as a whole" and "to give effect to all the language and to harmonize  
20 all provisions." (Cite omitted, emphasis added.) *Davis v. Dep't. of Licensing*, 137 Wn.2d  
21 957, 963, 977 P.2d 554 (1999); *Edmonds Shopping Ctr. v. Edmonds*, 117 Wn. App. 344, 356,  
22 71 P.3d 233 (2003); *see also Draper Mach. Works, Inc. v. Department of Natural Resources*,  
23 117 Wn.2d 306, 313, 815 P.2d 770 (1991) (statutes must be read together "to give each effect  
and to harmonize each with the other.") All statutory language matters, and none should be  
treated as mere surplusage. "[I]n interpreting a statute the court must construe the act as a

1 whole, and effect should be given to all the language used.” (Cite omitted.) *State v. S.P.*, 110  
2 Wn.2d 886, 890, 756 P.2d 1315 (1988).

3 Here, the Attorney General and Constitution provisions above can be harmonized by  
4 recognizing that they mean just what they say: that officials, departments, boards,  
5 commissions, and agencies must use the services of the Attorney General when they require  
6 *legal* representation before external formal bodies such as the courts where an attorney must  
7 normally appear as the *legal* representative of the client. Similarly, the Code, the APA, and  
8 the Court’s General Rule 24 can also be harmonized by recognizing that in such situations as  
9 this matter, they too mean what they say: that the Commissioner has both express and implied  
10 legislative authority to delegate to his staff to carry out any of his powers and duties for him,  
11 in his name, including dual responsibilities the Commissioner has delegated here.

12 Respondent’s contention about the provisions he chose to cite would render superfluous and  
13 meaningless the above-cited language in the provisions he ignores – the Code, APA, and  
14 Court’s General Rule 24. To do such, however, is contrary to the principle that all statutory  
15 language matters, and none should be treated as mere surplusage.

16 Moreover, throughout the Code, the Legislature deliberately used words to indicate  
17 which acts and duties it intended the “Attorney General” to perform, and which ones the  
18 “Commissioner” would perform.<sup>24</sup> While Respondent’s contention asks us to substitute

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19 <sup>24</sup> These include, for example, RCW sections 48.05.185, 48.15.023, 48.17.063, 48.17.560, 48.38.050, 48.44.016,  
20 48.44.166, 48.46.033, 48.46.135, 48.102.031 and .160, and 48.160.080 (providing that the Attorney General  
21 must recover fines by filing civil actions on or in behalf of the Commissioner), RCW 48.30A.035 (requiring the  
22 Attorney General to provide certain notifications), RCW 48.31.190 (requiring the Commissioner to be  
23 represented by the Attorney General in bringing certain show cause orders before the courts), RCW 48.31C.020-  
030 (limiting certain of the Commissioner’s powers to act unless the Attorney General has chosen not to  
undertake certain review, with the Commissioner and Attorney General working together), RCW 48.32.080  
(authorizing the Attorney General to conduct certain investigatory and other functions), RCW 48.36A.320  
(precluding certain petitions for injunctions “unless made by the attorney general”), RCW 48.62.091 and .181,  
and RCW 48.64.080 (Attorney General to collect fines in court action and be notified of certain violations, )  
RCW 48.130.140 (preserving Attorney General’s authority to maintain “actions or proceedings, as authorized by  
law”), and RCW 48.165.030 (requiring Commissioner to “consult with” the Attorney General to make a certain  
determination). Incidentally, as indicated, many of these Code provisions expressly require the Commissioner to  
have as his attorney the Attorney General when he goes before the courts, which is fully consistent with the  
Attorney General’s statutes cited by Respondent.

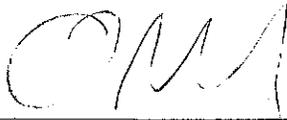
1 reference to the "Attorney General" in Code and APA provisions concerning duties and  
2 powers such as the conducting of hearings, the signing of orders, and the Commissioner's  
3 authority to delegate powers and duties to his staff, it is axiomatic that additional language  
4 cannot be read into a statute, even "regardless of whether an omission was intentional or  
5 accidental." *Desmon v. Wash. State Dep't. of Licensing*, 166 Wn. App. 313, 317-18, 269 P.3d  
6 1070 (2012), citing *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006). Moreover,  
7 there is a "presumption that the Legislature does not engage in unnecessary or meaningless  
8 acts." *Bailey v. Allstate Ins. Co.*, 73 Wn. App. 442, 446-47, 869 P.2d 1110 (1994), citing  
9 *State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064 (1983). Here, there is simply no good  
10 reason to assume the Legislature was careless or even reckless in its choice of the words "the  
11 Commissioner" in some places in the Code and "Attorney General" in others. Had the  
12 Legislature intended the Attorney General to conduct and participate in such matters and sign  
13 orders, it would have specifically stated as much, just as it has done throughout the rest of the  
14 Code.

#### 15 IV. CONCLUSION

16 Based on the foregoing, OIC respectfully requests that Respondent's motion to quash  
17 and dismiss be denied, and OIC cross-moves for an order upholding that OIC staff may act in  
18 the Commissioner's name here.

19 DATED this 4th day of March, 2014.

20 OFFICE OF INSURANCE COMMISSIONER

21 By: 

22 Alan Michael Singer  
23 Staff Attorney  
Legal Affairs Division

1  
2 **CERTIFICATE OF SERVICE**

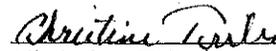
3 The undersigned certifies under the penalty of perjury under the laws of the State of  
4 Washington that I am now and at all times herein mentioned, a citizen of the United States, a  
5 resident of the State of Washington, over the age of eighteen years, not a party to or interested  
6 in the above-entitled action, and competent to be a witness herein.

7 On the date given below I caused to be served the foregoing and the subjoined  
8 declarations of Mike Kreidler and Alan Michael Singer Opposing Edmund Scarborough's  
9 Motion to Quash and Dismiss, with attached exhibits, on the following individuals in the  
10 manner indicated:

11  
12 Timothy Parker  
13 Jason Anderson  
14 Carney Badley Spellman  
15 701 Fifth Ave. # 3600  
16 Seattle, Washington 98104-7010  
17 (XXX) Via U.S. Mail  
18 (XXX) Via E-Mail

16 Hon. Patricia Petersen  
17 5000 Capitol Blvd  
18 Tumwater, Washington  
19 (XXX) Via hand-delivery (c/o Kelly Cairns inbox)  
20 (XXX) Via E-Mail (c/o Kelly Cairns)

21  
22 **SIGNED** this 4th day of March, 2014, at Tumwater, Washington.

23  
  
Christine Tribe

FILED

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OIC HEARINGS UNIT  
REBECCA D. PETERSEN  
CHIEF PRESIDING OFFICER

*In re the Matter of:*

**EDMUND C. SCARBOROUGH and  
WALTER W. WOLF,**

*Respondents.*

) Docket No. 13-0084  
)  
) **DECLARATION OF**  
) **ALAN MICHAEL SINGER**  
) **OPPOSING EDMUND**  
) **SCARBOROUGH'S MOTION**  
) **TO QUASH**  
)

I, Alan Michael Singer, state and declare as follows:

1. My name is Alan Michael Singer. I make this Declaration on the basis of first hand personal knowledge. I am over the age of eighteen (18) years. I am competent and authorized to testify to the matters set forth herein.
2. I am employed by Insurance Commissioner Mike Kreidler ("Commissioner") within the Legal Affairs Division of his Washington State Office of the Insurance Commissioner ("OIC"). My title is Staff Attorney.
3. In or about March of 2013, pursuant to Insurance Code provisions that include RCW 48.15.023(5)(a), the Commissioner issued a cease and desist order ("Order") and a notice of a request for a hearing ("Notice") identifying the above-named individuals as respondents in this matter. The Notice indicated that the Commissioner would request a hearing, at which he would request the imposition of fines against the respondents for violations of the Insurance Code. Both the Order and the Notice were entered by members of the Commissioner's staff, his employees, who the Commissioner authorized to perform those acts in his name and by his authority. Subsequently, Respondent Scarborough ("Respondent" or "Mr. Scarborough") indicated that he contests that he has violated the Insurance Code, and

he also made his own request for a hearing to present his own evidence and views.

4. Mr. Scarborough has appeared in this matter through counsel of his own choosing, and he has chosen to participate in this matter strictly through his counsel. The Commissioner has, pursuant to RCW 48.02.100, authorized some of his employees to exercise his powers and duties under the Insurance Code by acting in his name in this matter. None of the Commissioner's staff members have appeared or acted in this matter pursuant to any attorney-client relationship with the Commissioner; none exists, and none was requested or intended.
5. The Commissioner has also chosen to delegate his authority to hear, determine, and enter a final order in this matter to a chief presiding officer. A true and correct copy of an instrument making this delegation is attached and incorporated herein as **Exhibit C**. Pursuant to the Commissioner's and Mr. Scarborough's requests for hearing, the chief presiding officer has issued a notice of hearing advising the Commissioner and the respondents that a hearing will be held in this matter to consider the Commissioner's and Mr. Scarborough's requests.
6. To date, the Commissioner has not requested the Washington State Attorney General ("Attorney General") to appear or otherwise take any specific actions on his behalf as his counsel in this matter. Instead, the Commissioner has chosen to ask his employees to exercise and discharge his powers and duties by acting in his name and by his authority as the matter proceeds. Consequently, the Attorney General has not appeared in this matter on behalf of the Commissioner, nor has the Attorney General entered any appearance pursuant to WAC 10-08-083.
7. More than a decade ago, Respondent's counsel submitted the same motion as Respondent now makes, and it was previously denied. A true and correct copy of the final order denying

this motion is attached and incorporated herein by reference as **Exhibit A**. In fact, even the Attorney General disagreed with Respondent's counsel's motion in that matter, and the Attorney General filed a brief supporting the Commissioner on this issue. A true and correct copy of the Attorney General's brief is attached and incorporated herein by reference as **Exhibit B**.

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

EXECUTED this 4<sup>th</sup> day of March, 2014 at Tumwater, Washington.



Alan Michael Singer

**DECLARATION OF ALAN MICHAEL SINGER OPPOSING EDMUND SCARBOROUGH'S MOTION TO QUASH**

**Exhibit A**

DEBORAH SENN  
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON



OFFICE OF  
INSURANCE COMMISSIONER

OLYMPIA OFFICE:  
INSURANCE BUILDING  
P.O. BOX 40255  
OLYMPIA, WA 98504-0255  
Phone: (360) 753-7300

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In the Matter of	)		
	)	NO. G99-109	INSURANCE COMMISSIONER
REGENCE BLUE SHIELD	)		LEGAL AFFAIRS DIVISION
	)	ORDER DENYING REGENCE'S	
	)	MOTION TO DISMISS	
A Registered Health Care Service Contractor.	)		

TO: Richard Dean Nelson, President  
Regence Blue Shield  
1800 9<sup>th</sup> Avenue  
Seattle, WA 98101

COPY TO: Timothy J. Parker, Esq.  
Mark E. Cavanagh, Esq.  
Carney, Badley, Smith & Spellman  
701 Fifth Avenue, Ste. 2200  
Seattle, WA 98104-7091

AND TO: Deborah Senn, Insurance Commissioner  
Robert A. Harkins, Chief Deputy Insurance Commissioner  
Jeffrey Coopersmith, Deputy Commissioner, Legal Affairs  
Carol Sureau, Legal Affairs  
Bethany Weidner, Deputy Commissioner, Rates and Contracts  
PO Box 40255  
Olympia, WA 98504-0255

Shannon E. Smith, Assistant Attorney General  
Office of the Attorney General  
PO Box 40128  
Olympia, WA 98504-0128

This matter came on regularly for hearing on January 25, 2000, before Presiding Officer Patricia D. Petersen on the Motion of Regence BlueShield (Regence). Regence was represented by Timothy J. Parker of Carney Badley Smith & Spellman, P.S.. The Office of the Insurance Commissioner (OIC) appeared pro se, by and through its employee Carol Sureau. Argument in

ORDER DENYING REGENCE'S  
MOTION TO DISMISS

No. G99-109

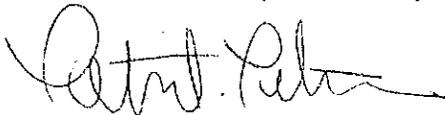
Page 2

opposition to Regence's Motion to Dismiss was also presented as an Amicus Curiae by the Attorney General and Assistant Attorney General Shannon E. Smith.

The Presiding Officer heard and considered Regence's Motion to Dismiss including its corrected page 4, both filed January 18, 2000; Regence's letter of clarification dated January 20, 2000 and filed January 21, 2000; OIC's Opposition to Motion to Dismiss filed January 24, 2000; the Attorney General's Brief of Amicus Curiae Washington Attorney General's Office Regarding Pro Se Participation filed January 21, 2000 and substitute page 3 thereto filed January 24, 2000; the arguments of counsel for Regence, the OIC and Amicus Curiae and the record herein; now, therefore, the undersigned concludes as a matter of law that the OIC is not prohibited from representing itself in a pro se capacity in this adjudicative proceeding. Further, the undersigned concludes that the OIC may select as its representative an employee of the OIC and the fact that the OIC's chosen employee is an attorney does not change the nature of the OIC's representation from one of pro se to one of being legally represented by an attorney. These being the conclusions of the undersigned, IT IS HEREBY ORDERED that Regence's Motion to Dismiss is DENIED.

Further, on January 18, 2000, the OIC filed its Motion for Continuance of the hearing in this matter, requesting that the hearing be continued until March 20, 2000. After argument on the instant Motion on January 25, Regence indicated its agreement to a continuance but concern about the long length of time requested by the OIC. At the suggestion of Regence and agreement of the OIC, the undersigned hereby proposes three dates for commencement of the hearing: February 28, 2000; March 10, 2000; March 20, 2000. IT IS HEREBY ORDERED that the parties shall attempt to reach agreement on one of these dates for commencement of the hearing and shall notify the undersigned of any such agreement. If no such agreement can be reached by February 9, 2000, the undersigned shall promptly select one of the three proposed dates and shall so notify the parties of her selected date.

ENTERED this 4th day of February, 2000, at Olympia, Washington.



PATRICIA D. PETERSEN  
Presiding Officer and Chief Hearing Officer

**DECLARATION OF ALAN MICHAEL SINGER OPPOSING EDMUND SCARBOROUGH'S MOTION TO QUASH**

**Exhibit B**

OFFICE OF THE INSURANCE COMMISSIONER  
STATE OF WASHINGTON

FILED  
JAN 24 2000  
Hearings Unit - OIC  
Patricia D. Petersen  
Chief Hearing Officer

In the Matter of:  
Regence BlueShield  
A Registered Health Care Service Provider

NO. G 99-109

BRIEF OF AMICUS CURIAE  
WASHINGTON ATTORNEY  
GENERAL'S OFFICE  
REGARDING PRO SE  
PARTICIPATION

The Office of the Attorney General submits this brief as *amicus curiae*<sup>1</sup> in opposition to the Motion to Dismiss filed by Regence BlueShield (Regence). The basis for Regence's motion is its argument that the Office of the Insurance Commissioner (OIC) is prohibited from participating in the above-named matter without counsel.<sup>2</sup>

I. FACTS

On October 14, 1999, the OIC filed a Notice of Hearing to Request Imposition of a Fine regarding rate filings made by Regence in the summer of 1999, which the OIC disapproved. The Notice was signed by Carol Sureau, and stated that the OIC would participate in the hearing through Carol Sureau. On October 29, 1999, Shannon Smith, Assistant Attorney General, filed a notice of appearance in this case as counsel for OIC.

On January 14, 2000, Shannon Smith, Assistant Attorney General withdrew as counsel for the OIC in this matter. On that date, Carol Sureau entered an appearance for the OIC, for the OIC to participate in this matter *pro se*. Regence opposes the OIC's decision to participate in this matter without counsel. See Regence's Motion to Dismiss.

<sup>1</sup> The Presiding Officer granted the request of the Office of the Attorney General to file a brief as *amicus curiae* in this matter during the January 18, 2000 prehearing conference. Although Regence argues that the Attorney General must represent the OIC in this matter, Regence nonetheless objected to the request of the Attorney General to file an *amicus* brief on this issue.

<sup>2</sup> In its Motion, Regence asks for dismissal of this matter. However, during the prehearing conference held on January 18, 2000, Regence clarified its requested relief, which would be an order that the Office of the Attorney General represent the OIC in this matter.

## II. ARGUMENT.

### A. Chapter 43.10 RCW Does Not Prohibit an Agency From Representing Itself in an Internal Adjudicative Proceeding Pro Se.

In its Motion to Dismiss, Regence argues that the OIC must be represented by the Attorney General in this matter and that it cannot proceed without counsel. Regence's Motion at 2 (citing RCW 43.10.040). In situations where state agencies are represented by counsel, they must be represented by the Office of the Attorney General. However, nothing in chapter 43.10 RCW prohibits an agency from proceeding *pro se* in an internal adjudicative proceeding.

Regence also argues that if the OIC proceeds in this matter *pro se*, with Carol Sureau as the OIC employee in charge of the matter, then Ms. Sureau must be acting as legal counsel or attorney for the OIC. Regence's Motion at 3. However, Ms. Sureau is not representing the OIC as an attorney in this matter, rather, she is the OIC person designated to present the OIC's *pro se* position. That she is an attorney does not change the fact that she is not, and cannot be, counsel for the OIC.

Other state agencies commonly participate in internal adjudicative proceedings without counsel. For example, the Department of Social and Health Services (DSHS) appears in matters *pro se*. See WAC 388-08-428(2) (DSHS may be represented by a department employee or by the office of the Attorney General); see also WAC 316-02-010(3) (Department of Transportation may appear by an "officer, employee or other authorized personnel."). The OIC does not seek to do anything not done by other state agencies.

This practice is authorized by the Administrative Procedure Act (APA), chapter 34.05 RCW. The APA allows any party to appear in a matter *pro se*. RCW 34.05.428. Regence argues that the OIC is not a party under the APA. Regence's Motion at 4. Regence is wrong.

FILED

JAN 25 2000

Hearings Unit, OIC  
Patricia D. Petersen  
Chief Hearing Officer

The APA defines "party" as:

- (a) A person to whom the agency action is specifically directed;
- (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.

RCW 34.05.010(12). The APA defines "person" as:

[A]ny individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

RCW 34.05.010(14). Clearly, the OIC is a party to this case. If the OIC were not a party, as contended by Regence, then many of the provisions of the APA would not apply to the OIC in this matter, regardless of whether the OIC is represented by the Office of the Attorney General or proceeding *pro se*. See, e.g., RCW 34.05.437(1) (parties may submit and respond to pleadings); RCW 34.05.437(2) (parties may file briefs); and RCW 34.05.449(2) (parties may present evidence, conduct cross-examination, and submit rebuttal evidence) (emphasis added). Like all other parties to an adjudicative proceeding, the OIC may appear *pro se* or through its counsel, the Office of the Attorney General. See also chapter 10-08 WAC (Office of Administrative Hearings does not require any party, including an agency, to be represented by counsel in an administrative hearing).

B. None of the Cases Cited by Regence Support the Argument That an Agency Cannot Proceed *Pro Se* In an Internal Adjudicative Proceeding.

Regence cites several cases in support of its argument that the OIC is prohibited from proceeding in an internal adjudication *pro se*. None of the cases cited by Regence involve the issue in this case, which is whether an agency may participate in an internal adjudication without counsel. Therefore, all of the cases can be distinguished by this fact alone.

Regence cites State v. Gattavara, 182 Wash. 325, 47 P.2d 18 (1935), to support its argument that the OIC cannot proceed *pro se* in this matter. Gattavara can be distinguished on its facts. In that case, attorneys employed by the Department of Labor and Industries filed lawsuits, *in superior court* against several individuals for failure to make industrial insurance payments. 182 Wash. at 326 (emphasis added). The Court held that the matter was improperly

filed in superior court because only the Attorney General can institute a summons and complaint on behalf of the state. Id. at 331.

In this case, the OIC instituted an administrative proceeding to determine whether Regence properly followed the OIC's administrative rules in its rate filings. Unlike the Gattavara case, this matter is not in court. Also, in the present case, the OIC is not represented by counsel, but is participating *pro se*.

Regence next cites State v. Hood, 93 Wn.2d 603, 611 P.2d 758 (1980) for the proposition that state agencies are prohibited from using attorneys on their staff as advocates and legal representatives. However, the Hood court did not make this holding. The issue in Hood was whether members of Liquor Control Board were entitled to rely upon the advice of the Attorney General's Office in conducting certain activities. Id. at 607. The Hood court held that because state agencies must rely exclusively on the advice of the Attorney General, the Liquor Board members were protected from liability in following that advice. Id. at 607, 614. The Hood court never addressed the issue of whether an agency may proceed in an internal adjudicative proceeding *pro se*.

Regence also misreads the holding in State v. Herrmann, 89 Wn.2d 349, 572 P.2d 713 (1977). Regence cites to dicta in Herrmann regarding the purpose of RCW 43.10.067. Regence's Motion at 3 (citing Herrmann, 89 Wn.2d at 354). In Herrmann, the court did not consider whether an agency may proceed *pro se* in an internal adjudication. Rather, the issue in Herrmann was whether the Attorney General was obligated to appoint a special Assistant Attorney General to defend then Insurance Commissioner Karl Herrmann in a case where the Attorney General filed a civil suit for damages against Herrmann. Id. at 713.

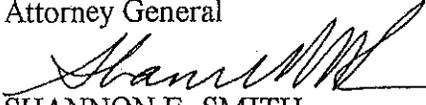
That Herrmann references that fact that RCW 43.10.067 restricts the ability of agencies to employ attorneys to represent them as counsel, does not equate to a holding regarding an agency's ability to proceed in an internal adjudication *pro se*. As stated above, Ms. Sureau is not representing the OIC as legal counsel. She is the person designated as the OIC's *pro se* representative.

### III. CONCLUSION

Nothing in chapter 43.10 RCW prohibits the OIC from proceeding *pro se* in an internal adjudicative proceeding. Rather, chapter 43.10 RCW provides that when an agency is represented by counsel, it must be represented by the Office of the Attorney General. Other state agencies commonly participate in internal adjudicative proceedings *pro se*. The APA permits any party to appear in an adjudicative proceeding *pro se*, and agencies are not excluded from that provision. Therefore, the OIC may decide to participate in this matter *pro se*.

Dated: January 21, 2000

CHRISTINE O. GREGOIRE  
Attorney General



SHANNON E. SMITH  
H. LEE ROUSSEL  
Assistant Attorneys General  
Amicus Curiae for the OIC

**DECLARATION OF ALAN MICHAEL SINGER OPPOSING EDMUND SCARBOROUGH'S MOTION TO QUASH**

**Exhibit C**

MIKE KREIDLER  
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON



OFFICE OF  
INSURANCE COMMISSIONER

P.O. BOX 40265  
OLYMPIA, WA 98504-0265  
Phone: (360)725-7000

DELEGATION OF AUTHORITY

I, Mike Kreidler, Insurance Commissioner of the State of Washington, do hereby delegate to Patricia D. Petersen the full authority to sit as hearing officer for administrative proceedings brought before my office pursuant to ch. 48.04 RCW, ch. 34.05 RCW, and any other applicable statutes.

This delegation is made under the authority granted to the Insurance Commissioner under RCW 48.02.100, and affirms all oral or written delegations of authority previously made by me. As Chief Hearing Officer for the Office of Insurance Commissioner, Patricia D. Petersen continues to have primary responsibility for the conduct of hearings, the procedural matters related thereto, and for the preservation of hearing records.

This delegation expressly includes the authority for Ms. Petersen to delegate any case to the Office of Administrative Hearings for an initial decision, where it is required or appropriate, with authority retained by her to review the initial decision and file, and to render the final decision of this office in each such case.

Dated this 26<sup>th</sup> day of August, 2003.

A handwritten signature in black ink, appearing to read "Mike Kreidler", written over a horizontal line.

Mike Kreidler  
Insurance Commissioner

FILED

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OIG HEARINGS UNIT  
PATRICIA D. PETERSEN  
CHIEF PRESIDING OFFICER

*In re the Matter of:*

**EDMUND C. SCARBOROUGH and  
WALTER W. WOLF,**

*Respondents.*

) Docket No. 13-0084  
)  
) **DECLARATION OF**  
) **MIKE KREDILER**  
) **INSURANCE COMMISSIONER**  
)  
)

I, Mike Kredler, do hereby declare that the following facts are personally known to me, and, if called upon to do so, I could and would testify competently to them.

1. I am the Insurance Commissioner. I was initially elected to this office in November of 2000. I assumed the position of Insurance Commissioner on January 10, 2001, and I have continuously held this position after being re-elected since then. Pursuant to RCW 48.02.090, I appointed Carol Sureau as deputy insurance commissioner in January of 2001. When she retired in 2013, I appointed Charles Brown to fill her position as deputy insurance commissioner. He served in that position until I appointed AnnaLisa Gellermann to that position in 2013. My appointment of Ms. Gellermann as deputy insurance commissioner continues to the present day.
2. The Insurance Code, RCW 48.02.100, provides in part: "Any power or duty vested in the commissioner . . . may be exercised or discharged by a deputy, assistant, examiner, or employee of the commissioner acting in his name and by his authority."
3. Pursuant to RCW 48.02.100, since January of 2001, I have delegated my authority to Ms. Sureau, Mr. Brown, Ms. Gellermann, and the staff employed within their division of this office, the Legal Affairs division, to act in my name and exercise my power and duty, and that of my Office, to present and conduct various cases, including the above-referenced case

against Edmund C. Scarborough and Walter W. Wolf in this administrative proceeding. This delegation of authority continues to the present day.

4. To the extent that I am or would be authorized to appear myself to present and conduct this matter, I have previously authorized Ms. Sureau, Mr. Brown, Ms. Gellermann and their staff to do so in my name pursuant to RCW 48.02.100. Since 2013, I have authorized Ms. Gellermann and her staff to do so in my name pursuant to RCW 48.02.100.

5. In this matter, Ms. Sureau, Mr. Brown, Ms. Gellerman, and the staff employed within their division have not and are not acting as my legal representatives or legal counsel, or as my attorneys, but in my name as delegates of my power and authority as Insurance Commissioner, pursuant to RCW 48.02.100.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed at Tumwater Washington, on February 28, 2014.



Mike Kreidler, Insurance Commissioner