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DIGITAL UNIT  
FEDERAL BUREAU OF INVESTIGATION  
CIVIL PROCEDURE OFFICER

STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of

EDMUND C. SCARBOROUGH and  
WALTER W. WOLF,

Respondents.

No. 13-0084

RESPONDENT EDMUND C.  
SCARBOROUGH'S MOTION FOR  
RECONSIDERATION OF ORDER  
DENYING MOTION TO QUASH

I. INTRODUCTION

On two independent grounds, Respondent Edmund Scarborough respectfully requests reconsideration of the order denying his motion to quash. *First*, the presiding officer correctly determined that agency staff would be prohibited from representing the OIC in this proceeding, but for the attorney general's approval of such representation. Implicit in that determination is the premise that the attorney general has lawful authority to grant such approval. He does not. The requirement of attorney-general representation of state agencies is mandatory, and the Washington Supreme Court has repeatedly held that the attorney general has no discretion in the matter. *Second*, the requirement that all actions and proceedings be instituted by the attorney general is likewise mandatory, and the Washington Supreme Court has held that the failure to abide by this requirement cannot be deemed a "mere technicality." Accordingly, reconsideration is warranted, and the OIC's notice of request for hearing for imposition of fines should be quashed.

RESPONDENT EDMUND C. SCARBOROUGH'S  
MOTION FOR RECONSIDERATION OF ORDER  
DENYING MOTION TO QUASH - 1

CARNEY  
BADLEY  
SPELLMAN

ORIGINAL

Law Offices  
A Professional Service Corporation

701 Fifth Avenue, Suite 3600

Seattle, WA 98104-7010

T (206) 622-8020

F (206) 467-8215

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## II. AUTHORITY AND ARGUMENT

**A. The Attorney General Lacks Authority to “Approve” a State Agency to Represent Itself.**

The presiding officer recognized that this is a “proceeding” under RCW 43.10.040, which requires that an agency be represented by the attorney general and not by its own “staff attorneys.”<sup>1</sup> The presiding officer further recognized that OIC staff attorneys have, in this proceeding and other similar proceedings, represented the OIC and performed legal functions such as writing motions and briefs, arguing motions, presenting opening and closing statements, examining and cross-examining witnesses, and representing witnesses by interposing objections—all of which are “reserved for legal counsel” to be provided by the attorney general under RCW 43.10.040.<sup>2</sup> Nevertheless, the presiding officer concluded that OIC staff attorneys may “handle” this administrative hearing based on approval from the attorney general’s office.<sup>3</sup> This assumes that the attorney general has the authority to grant such approval.

The state constitution is mandatory: “The attorney general *shall* be the legal adviser of the state officers, and *shall* perform other duties as may be prescribed by law.” WASH. CONST. art 3, § 21 (emphasis added). Likewise RCW 43.10.040 is mandatory:

The attorney general *shall* also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or 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.

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<sup>1</sup> *Order on Motion to Quash* at 6-7.

<sup>2</sup> *Id.* at 8.

<sup>3</sup> *Id.* at 9.

1 (Emphasis added.) The term “shall” when used in a statute “is presumptively imperative and  
2 creates a mandatory duty unless a contrary legislative intent is shown.” *Goldmark v.*  
3 *McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011).

4 Citing the mandatory nature of the constitution and statute, the Washington Supreme  
5 Court has repeatedly rejected the notion that the attorney general has any discretion as to  
6 whether to represent an agency. *See Goldmark*, 172 Wn.2d at 573-75, 583-84; *State v.*  
7 *Gattavara*, 182 Wash. 325, 331, 47 P.2d 18 (1935). In *Goldmark*, where the attorney general  
8 had refused to represent a state official, the Supreme Court held that the constitution and  
9 statute conferred no discretion on the attorney general: “Given the mandatory language of the  
10 statute and the prohibition of hiring outside counsel, no discretion is involved, and  
11 representation is required.” 172 Wn.2d at 573-75, 583-84. In granting a writ of mandamus  
12 requiring the attorney general to represent the official, the court observed that “the  
13 commissioner has the choice of one attorney to represent him, and that is the attorney  
14 general.” *Id.* at 574.

15 In *Gattavara*, the Supreme Court held it was error to deny a motion to quash the  
16 summons in an action by the Department of Labor and Industries, on the ground that the  
17 action was not instituted or prosecuted by the attorney general as required by law. 182 Wash.  
18 at 333. In so holding, the court recognized that the law confers no discretion on the attorney  
19 general to allow an agency to institute an action on its own behalf. *Id.* at 331. Specifically,  
20 the court stated, “Nor is there any merit in the contention that only the Attorney General can  
21 raise the question here presented and that he has not done so.” *Id.* The court thus rejected the  
22 notion that only the attorney general has standing to raise the statutory requirements, and thus  
23 may waive them implicitly or otherwise.

24 Because the attorney general has no discretion as to whether to represent a state  
25 agency, the attorney general lacks discretion or authority to “approve” an agency to represent  
26

1 itself. Accordingly, an assistant attorney general's purported approval was not a valid basis  
2 to deny Mr. Scarborough's motion to quash, and reconsideration is warranted.

3 **B. That This Proceeding Was Not Instituted by the Attorney General Cannot Be**  
4 **Deemed a "Mere Technicality."**

5 The presiding officer recognized that the law not only requires that the OIC be  
6 represented by the attorney general, but that all actions and proceedings be instituted by the  
7 attorney general.<sup>4</sup> However, the presiding officer concluded that this proceeding having been  
8 instituted by the OIC rather than the attorney general is a "mere technicality."<sup>5</sup> The presiding  
9 officer reasoned that, "instead of commencing this proceeding through the Notice mechanism  
10 as he chose to do, the Commissioner *could instead* have issued a direct Order Imposing Fines  
11 against Respondents under RCW 48.15.020 without even communicating them first."<sup>6</sup>

12 Regardless of any hypothetical scenario that could have given rise to a similar  
13 proceeding, *the OIC instituted this proceeding*—not the attorney general as required by RCW  
14 43.10.030. The Washington Supreme Court has held that where a proceeding by a state is  
15 instituted by one other than the attorney general, this defect cannot be deemed a "mere  
16 technicality":

17 Litigants who are sued *always* have the right to raise the question that no  
18 proper party has sued them. It goes to the basis of the action. *It is not a mere*  
19 *technicality*, for they are entitled to the protection of the action being  
instituted, maintained, and a judgment validly authorized by the proper  
official.

20 *Gattavara*, 182 Wash. at 331 (emphasis added). The court emphasized that requirement that  
21 the attorney general institute all actions and proceedings by the state gives effect to "a  
22 severance of the various branches of the government, thereby creating one office a check  
23 upon the other[.]" *Id.* at 332-33.

24  
25 <sup>4</sup> *Order on Motion to Quash* at 10, citing RCW 43.10.030(2).

26 <sup>5</sup> *Id.* at 11.

<sup>6</sup> *Id.* (emphasis added).

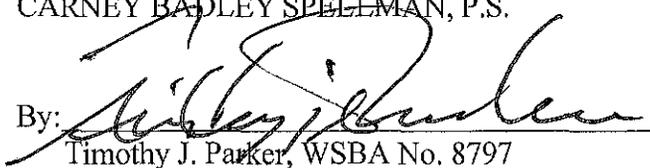
1 Because this proceeding was not instituted by the attorney general, and that defect  
2 cannot be deemed a "mere technicality," Mr. Scarborough's motion to quash should have  
3 been granted, and reconsideration is warranted.

4 **III. CONCLUSION**

5 Based on the mandatory requirements of the state constitution and chapter 43.10  
6 RCW, Mr. Scarborough respectfully requests reconsideration of the order denying his motion  
7 to quash.

8 DATED this 21st day of April, 2014.

9 CARNEY BADLEY SPELLMAN, P.S.

10  
11 By: 

12 Timothy J. Parker, WSBA No. 8797

13 Jason W. Anderson, WSBA No. 30512

14 Attorneys for Respondent Edmund C. Scarborough

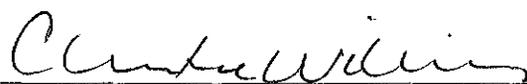
DECLARATION OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On April 21, 2014, I caused to be delivered in the manner indicated a copy of the foregoing document on the following parties at the last known address as stated:

<p>Judge Patricia Petersen – ORIGINAL  Chief Hearing Officer  Office of the Insurance Commissioner  5000 Capitol Boulevard  Tumwater, WA 98501  <u>kellyc@oic.wa.gov</u>  <b>via e-mail and legal messenger</b></p>	<p><u>Attorney for OIC</u>  Mr. Alan M. Singer  Office of the Insurance Commissioner  5000 Capitol Boulevard  Tumwater, WA 98501  <u>alans@oic.wa.gov</u>  <b>via e-mail and legal messenger</b></p>
<p><u>Attorney for Walter W. Wolf</u>  James A. McPhee  Workland &amp; Witherspoon, PLLC  601 W Main Avenue, Suite 714  Spokane, WA 99201  <u>jmcphoe@workwith.com</u>  <b>via e-mail and U.S. mail</b></p>	

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 21st day of April, 2014.

  
\_\_\_\_\_  
Christine Williams, Legal Assistant