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OFFICE OF THE INSURANCE COMMISSIONER, HEARINGS UNIT
STATE OF WASHINGTON

In The Matter of

GHOLAMREZA NIKZAD and WOOD
FINANCIAL SERVICES COMPANY,

Licensees

LICENSEES' PETITON FOR
REVIEW (RCW 34.05.464, WAC 10-
08-211)

TO: JAMES FINKEL
Chief Hearing Officer
Hearings Unit, OIC
PO Box 40255
Olympia, WA 98504

AND TO: CHARLES BROWN
OIC Staff Attorney
Office of the Insurance Commissioner
Legal Affairs Division
PO Box 40255
Olympia, WA 98504

This Petition for Review is submitted on behalf of the above-named Licensees pursuant to RCW 34.05.464 and WAC 10-08-211. Licensees request review of the Findings of Fact, Conclusions of Law and Initial Order of Administrative Law Judge Lisa N. W. Dublin dated November 24, 2014 (OAH Docket No. 2013-INS-0006), which Initial Order affirmed the prior
PETITION FOR REVIEW - 1

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1 order of the Office of the Insurance Commissioner revoking the insurance producer licenses of
2 Licensees Gholamreza Nikzad and Wood Financial Services Company.

3 Licensees assert that the Initial Order is erroneous in the following respects:

4 1. The administrative law judge refused to consider evidence of events or occurrences
5 occurring after July 23, 2013, the date of OIC's order revoking the licensees' producers licenses,
6 ruling that any and all such evidence was "irrelevant"(Initial Order, Footnote 1, page 7).

7 2. Licensees maintain that such evidence is relevant and should have been admitted, and
8 that its exclusion constitutes prejudicial error.

9 3. Licensees contend that such evidence was admissible both as relevant evidence of
10 mitigating factors, and in addition as evidence of modification/waiver/estoppel by OIC of the
11 applicable deadlines and substantive requirements for compliance with OIC's order of November
12 5, 2012. Licensees contend that outright revocation of their licenses is an excessively harsh

13 penalty for partial noncompliance with OIC's prior order of November 5, 2012, particularly in
14 view of the fact that OIC's revocation order was fundamentally based upon a finding of
15 inadequate and improper insurance transaction/financial record-keeping on the part of Licensees,
16 and that OIC has never claimed or contended that Licensee Nikzad engaged in a criminal,
17 fraudulent or larcenous conduct as a licensee, or converted, misappropriated or stole any money
18 or property belonging to any other person, insurance agency, or insurance customer. The post
19 July 23, 2013 evidence offered by licensees would have demonstrated, first of all, that the
20 licensees had, following the date of July 23, 2013, substantially and materially complied with all
21 of the requirements of the November 5, 2012 order of the OIC hearing examiner, and in addition
22 would have demonstrated substantial mitigating facts and circumstances. With regard to the
23 latter, that is, that such evidence would have demonstrated modification/waiver/estoppel by OIC
24

1 with respect to the substantive requirements and deadlines imposed by the prior order of
2 November 5, 2012, by way of example, counsel for OIS intended to offer in evidence the written
3 report prepared by an OIC examiner of a post July 23, 2013 follow-up examination of the books
4 and records of licensees conducted on October 28, 2013 entitled "*Background: Agency Follow-*
5 *Up Examinations, Subsequent Illegal Order*, which was dated October 29, 2013. The specific
6 purpose of which, as stated in the report, was "to determine if licensees (Gholamreza Nikzad and
7 Wood Financial Services Company) had complied with the requirements of the final order (of
8 OIC chief presiding officer Patricia D Petersen dated November 5, 2012). Counsel for OIC
9 specifically listed the written report of the Follow-up Examination of October 29, 2013 in its List
10 of Exhibits submitted in compliance with Administrative Law Judge (ALJ) Steven C. Smith's
11 pre-hearing order, and attached a copy of the written OIC report of the October 28, 2013 Follow-
12 up Examination to OIC's Exhibit List. ALJ Smith, who conducted the initial phase or segment
13 of the hearing in April 2014, on his own motion made an initial or provisional ruling that all such
14 post July 23, 2013 evidence was inadmissible, and then, by subsequent order, required counsel
15 for the parties to brief the issue. Counsel for both parties did so. A copy of the *Memorandum*
16 *Concerning Admissibility of Post Revocation Order Evidence* prepared and submitted by counsel
17 for the licensees is attached and submitted here with as part of this Petition for Review. ALJ
18 Smith subsequently ruled that all such evidence was irrelevant and thus inadmissible, and ALJ
19 Dublin, who replaced ALJ Smith, and presided at the second, subsequent phase of the hearing in
20 September 2014, stated on the record that she had reviewed ALJ Smith's ruling on this issue,
21 agreed with ALJ Smith's ruling, and was affirming it.

22
23 As noted in some detail in the *Memorandum Concerning the Admissibility of Post*
24 *Revocation Order Evidence* submitted by counsel for licensees, ALJ Smith issued a Prehearing

1 Order defining the issues to be adjudicated at the OAH hearing. The Prehearing Order defined
2 these issues as follows:

3 **3.2 Issues for Evidentiary Hearing:**

4 *3.2.1 Issue One: Did Licensees violate Washington law as stated in the*
5 *Washington OIC's Order Revoking License...*

6 *3.2.2 Issue Two: If issue One is decided against one or both Licensees, what is*
the appropriate remedy or penalty (sanction) under Washington law?

7 *3.2.3 The hearing in this matter will be limited to this issue/these issues, unless*
8 *the issues are modified at a later prehearing conference.*

9 Neither party to the OAH proceeding filed an objection either to the Prehearing Order in
10 general, or to the statement of issues set forth at section 3.2 of the Prehearing Order. As such,
11 the issues to be adjudicated in the OAH hearing were established and limited to those set forth at
12 section 3.2 of the Prehearing Order. Section 3.2.2 of the Prehearing Order specifically states that
13 the 2nd issue to be adjudicated in the OAH proceeding was to be a determination of the
14 "appropriate remedy or penalty (sanction)" if a violation of Washington law as stated in the
15 order of revocation was found to have occurred.

16 As such, ALJ Smith determined and confirmed by what then became a non-appealable
17 Prehearing Order that if a violation upon which OIC's revocation order was based was found to
18 have occurred on the part of the Licensees, that the evidentiary hearing should thereupon turn its
19 attention to the issue of what the appropriate remedy or penalty should be. This can only be fairly
20 construed to mean that the question of whether or not revocation is the appropriate penalty for
21 the violation(s) OIC alleges to have occurred is an issue which should have been, but was not
22 decided by the Office of Administrative Hearings ALJ. Indeed, the Initial Order contains no
23 findings of fact, conclusions of law, or, for that matter, any discussion whatsoever of, if a
24 violation was determined to have been committed by the licensees, what the appropriate remedy

1 or penalty (sanction) should be (as required by ALJ Smith's Prehearing Order). Licensees
2 submit, and likewise contended at both the initial and subsequent phase of the OAH hearing that
3 the issue of the appropriateness of revocation as a remedy could not fairly be considered without
4 admitting and considering evidence of mitigating factors, which of necessity required admission
5 and consideration of evidence, including documentary evidence, concerning factual occurrences
6 occurring after July 23, 2013.

7 For the purpose of attempting to preserve its right to claim that the exclusion of such post
8 July 23, 2013 evidence was prejudicial error, counsel for the licensees attempted to make an
9 offer of proof regarding the substance and content of the post July 23, 2013 evidence which
10 licensees intended to offer. ALJ Dublin ruled, on the record, that she would not allow or permit
11 such an offer of proof. Indeed, she appeared to be unfamiliar either the concept or procedure
12 with respect to the making of an offer of proof, and stated, again on the record, that she did not
13 intend to "waste time" listening to such an offer of proof. She appeared to be completely
14 unaware of the fact that under evidence rule 103(2), no claim of error with respect to the
15 exclusion of evidence in a judicial proceeding may later be asserted in the absence of such an
16 offer of proof, and that applicable case law holds that such an offer of proof is available to a
17 party "as a matter of right". Later in the proceedings, after the taking of all testimony was
18 concluded, and both OIC and licensees stated on the record that they rested their cases, ALJ
19 Dublin announced that she would then hear closing arguments. Counsel for OIC waived the
20 right to make a closing argument, and the undersigned counsel for the licensees requested a five-
21 minute recess before making his closing argument. ALJ Dublin granted that request for a short
22 recess, and shortly thereafter returned, and the hearing went back on the record, at which time
23 Charles Smith, counsel for OIC, stated to ALJ Dublin that he was "uncomfortable" with the
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1 record in so far as ALJ Dublin had denied licensees request to make an offer of proof with
2 respect to post July 23, 2013 evidence. ALJ Dublin then reversed her former position, and
3 offered to permit counsel for licensees to make an offer of proof. Counsel for licensees then
4 informed ALJ Dublin that he intended to make an offer of proof by examining licensee Nikzad in
5 question-and-answer form, which under Washington case law, is the preferred form of an offer
6 of proof. ALJ Dublin refused to permit the offer of proof in that form, and permitted only a brief
7 offer of proof in the form of a narrative summary of the evidence in question by counsel for
8 licensees. Counsel for licensees, who at that point in time was prepared to make a closing
9 statement, then had to attempt to briefly, and in truncated form, summarize the excluded
10 evidence. As such, not only was the evidence in question improperly excluded, but counsel for
11 licensees was not permitted to make a full and fair offer of proof.

12 In summary, Licensees contend that refusal to admit post July 23, 2013 evidence was
13 prejudicial, reversible error on the part of the ALJ, both with respect to the issue of mitigatory
14 evidence, and with respect to post July 23, 2013 occurrences evidencing
15 modification/waiver/estoppel by OIC of the substantive requirements and deadlines imposed
16 under the original OIC order of November 5, 2012, including the written OIC follow-up
17 examination report of October 29, 2013.

18 In this regard, Licensees maintain that the date of July 23, 2013 had no particular
19 evidentiary significance with respect to issues of the admissibility of evidence in the OAH
20 proceeding, and that otherwise competent evidence, both documentary and verbal (viva voce) of
21 events and occurrences should have been admitted in evidence in that proceeding, regardless of
22 whether the events or circumstances to which such evidence referred occurred before or after
23 July 23, 2013. Licensees assert that exclusion of any such evidence based solely on the fact that
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1 the events or circumstances to which it may refer occurred subsequent in time to July 23, 2013,
2 was not a proper evidentiary basis for exclusion of such evidence.

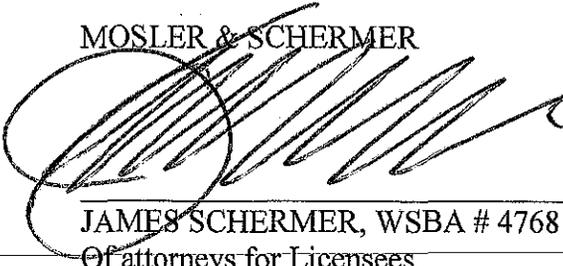
3 Specifically, it is Licensees' position that the fact that OIC engaged in a re-examination
4 of Licensees' books and records on October 28, 2013, and the report dated October 29, 2013
5 generated as a result of that re-examination, is evidence in support of Licensees' defense of
6 ~~modification of the OIC prior order of November 5, 2012, and/or evidence of waiver/estoppel of~~
7 OIC's right or ability to proceed under its order of revocation of July 23, 2013, and that the
8 findings and results of that re-examination of October 28, 2013 are matters which were relevant
9 to the OAH evidentiary hearing and should have been admitted in evidence in that proceeding.

10 In addition, as stated above, it is Licensees' position that any and all evidence of acts or
11 conduct which tend to mitigate the effect, or seriousness of the financial record-keeping
12 violations which OIC contends were committed by Licensees and which were the basis of its
13 revocation of Licensees licenses, should likewise not be excluded solely on the basis that such
14 evidence may refer to acts or circumstances which occurred after the date of OIC's order of
15 revocation of July 23, 2013.

16 If OIC affirms the decision of the ALJ, the effect will be to deprive licensees of the
17 ability to earn a living. Licensee Nikzad has no other source of income. If the order of
18 revocation of Licensees' licenses is affirmed and adopted by OIC, this sanction will, in effect,
19 amount to "economic capital punishment". This remedy would be excessively harsh under the
20 circumstances, particularly so in view of the fact that licensees' offered, but excluded evidence,
21 would have demonstrated that licensees are now in substantial and material compliance with all
22 of the requirements of OIC's prior order of November 5, 2012.

1 Respectively submitted this 12th day of December, 2014

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3 MOSLER & SCHERMER

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6 JAMES SCHERMER, WSBA # 4768
 Of attorneys for Licensees

CERTIFICATION OF FILING AND SERVICE

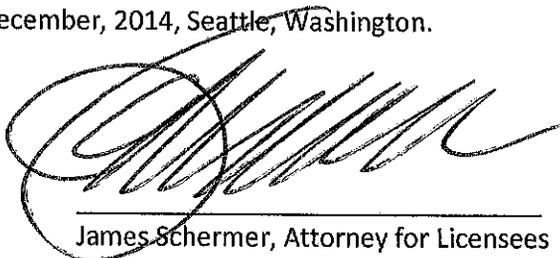
The undersigned certifies under penalty of perjury of the laws of the state of Washington that on the date given below I caused to be served and filed Licensees PETITION FOR REVIEW, upon the following individuals, in the manner below indicated:

James Finkel, Chief Hearing Officer
Hearings Unit, OIC
PO Box 40255
Olympia, WA 98504
Via regular, first class mail, and
Via email to: Kellyc@oic.wa.gov, and
Via facsimile transmission to OIC: (360) 725-7002

Charles D. Brown
OIC Staff Attorney
Legal Affairs Division
5000 Capital Blvd.
Tumwater, WA 98501

Via Email and regular, first class mail

SIGNED this 12TH day of December, 2014, Seattle, Washington.



James Schermer, Attorney for Licensees

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OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF WASHINGTON

In The Matter of

GHOLAMREZA NIKZAD and WOOD
FINANCIAL SERVICES COMPANY,

Licensees

OAH Docket No. 2013-INS-0006

MEMORANDUM CONCERNING
ADMISSIBILITY OF POST
REVOCATION ORDER EVIDENCE

This memorandum is submitted at the request of and pursuant to the order of
Administrative Law Judge (ALJ) Steven C. Smith regarding the admissibility of evidence of
facts and events occurring subsequent to the order of the Office of the Insurance Commissioner
(OIC) dated July 23, 2013, revoking the insurance producers license of licensee Gholamreza
Nikzad and the insurance agency license of Wood Financial Services Company.

I. RECENT PROCEDURAL AND FACTUAL HISTORY

On July 23, 2013 the OIC issued an order revoking the licenses of the above-named
Licensees. Licensees appealed the OIC order revoking their licenses, and pursuant to a Notice of
Hearing, and Order Following Prehearing Conference dated December 23, 2013, ("Order on
Prehearing Conference"), this matter came on for an evidentiary hearing on April 23, 2014.
Prior to commencing the evidentiary portion of the hearing, discussion was held between the
ALJ and counsel for the parties regarding the admissibility of various items of documentary

MEMORANDUM CONCERNING
ADMISSIBILITY OF POST REVOCATION
ORDER EVIDENCE - 1

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1 evidence identified by the parties in their prehearing submissions of proposed evidentiary
2 exhibits. Among the documents listed and attached to OIC's list of exhibits as Exhibit No. 9,
3 was an exhibit entitled "Agency Follow-Up Examination Report", which was dated October 29,
4 2013. On his own motion, the ALJ questioned his authority to consider this exhibit in view of
5 the fact that it was report created based upon an examination of the books and records of the
6 Licensees which occurred subsequent in time to the OIC's revocation order of July 23, 2013.
7 The ALJ ask for argument of counsel on this issue. Licensees, through counsel, argued that OIC
8 Exhibit No. 9 was admissible, among other bases, as evidence of Waiver and/or Estoppel on the
9 part of OIC of its revocation order of July 23, 2013, and counsel for Licensees also informed the
10 ALJ that Licensees intended to present other evidence of events or actions occurring after the
11 date of OIC's revocation order relating to mitigation events and circumstances. As is recited in
12 the Order of Continuance dated April 26, 2013, after hearing responsive argument by counsel for
13 OIC, the ALJ then ruled, without prejudice, that Exhibit No. 9 was irrelevant and inadmissible
14 because it was created and referred to events occurring after the date of OIC's order revocation
15 of September 23, 2013. Counsel for OIC then moved to withdraw Exhibit No. 9 from OIC's
16 exhibit list, and that motion was granted over the objection of counsel for Licensees. Counsel for
17 the Licensees moved to adopt OIC's exhibit No. 9 as Licensees' own exhibit and to have that
18 exhibit admitted into evidence. Exhibit No. 9 was, thereupon, re-designated as Licensees'
19 Exhibit A. Counsel for OIC objected to the admission of re-designated Exhibit A, and the ALJ
20 sustained that objection, and ruled, without prejudice, that the Licensees' Exhibit A was
21 inadmissible because it related to events and occurrences that were subsequent in time to OIC's
22 revocation order of July 23, 2013.

24 II. DISCUSSION

25 MEMORANDUM CONCERNING
ADMISABILITY OF POST REVOCATION
ORDER EVIDENCE - 2

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1 The OIC revocation order giving rise to Licensees' appeal was, fundamentally, based
2 upon a finding of inadequate and improper insurance transaction/financial record-keeping on the
3 part of Licensees.

4 It should be noted that OIC has never claimed, asserted or made any finding that Licensee
5 Gholamreza Nikzad engaged in any criminal, fraudulent, or larcenous conduct as a licensee, or
6 otherwise, nor has OIC claimed, asserted, or made any finding that Licensees converted,
7 misappropriated, or stole any money or property belonging to any other person, insurance
8 agency, or insurance customer. Rather, as above stated, OIC's revocation action was based on
9 examinations finding a failure to maintain adequate financial records in compliance with
10 applicable statutes and regulatory provisions. However, notwithstanding its findings in this
11 regard, and subsequent to the issuance of its order of revocation of July 23, 2013, counsel for the
12 Licensees contacted OIC and requested that Licensees be given an opportunity to demonstrate
13 that Licensees were now conducting their business activities in substantial compliance with
14 applicable statutory and regulatory recordkeeping standards. OIC agreed to do so, and scheduled
15 a re-examination of Licensees' books and records, with the implied, but not the explicit,
16 understanding that if the re-examination demonstrated substantial compliance that OIC's prior
17 revocation order of July 23, 2013 would be rescinded. The re-examination, which occurred on
18 October 28, 2013, was documented in the "10/29/2013 Agency Follow-Up Examination Report"
19 which was submitted by OIC's as proposed Exhibit No. 9 in its prehearing exhibits list
20 submission, referred to and discussed above, and which, as likewise above discussed, was re-
21 designated as Licensees' Exhibit A, and ruled, without prejudice, to be irrelevant and
22 inadmissible by the ALJ on the theory that the events to which it refers occurred later in time
23 than OIC's order of revocation.
24

1 Licensees contend that not only should OIC's Exhibit No. 9, now re-designated as
2 Licensees Exhibit A, be admitted in evidence in this proceeding, notwithstanding that Exhibit A
3 refers to events which occurred after the date of OIC's revocation order of July 23, 2013, but that
4 any and all other post-July 23, 2013 evidentiary facts and events, including those evidencing
5 mitigation factors, should likewise be received in evidence in this proceeding so long as they are
6 otherwise competent.

7 In this regard, Licensees maintain that the date of July 23, 2013 has no particular
8 evidentiary significance with respect to issues of the admissibility of evidence in this proceeding,
9 and that otherwise competent evidence, both documentary and verbal (viva voce) of events and
10 occurrences should be admitted in evidence in this proceeding, regardless of whether the events
11 or circumstances to which such evidence may refer occurred before or after July 23, 2013.
12 Licensees assert that exclusion of any such evidence based solely on the fact that the events or
13 circumstances to which it may refer occurred subsequent in time to July 23, 2013, is not a proper
14 evidentiary basis for exclusion of such evidence.

15 Specifically, it is Licensees' position that the fact that OIC engaged in a re-examination
16 of Licensees' books and records on October 28, 2013, and the report (Licensees' Exhibit A)
17 generated as a result of that re-examination, is evidence in support of Licensees' defense of
18 Waiver and/or Estoppel of OIC's right or ability to proceed under its order of revocation of July
19 23, 2013, and that the findings and results of that re-examination are matters which are relevant
20 to this evidentiary hearing and should be admitted in evidence in this proceeding.

21 In addition, as stated above, it is Licensees' position that any and all evidence of acts or
22 conduct which tends to mitigate the effect, or seriousness of the financial record-keeping
23 violations which OIC contends should be the basis of revocation of Licensees licenses, should
24

1 likewise not be excluded solely on the basis that such evidence may refer to acts or
2 circumstances which occurred after the date of OIC's order of revocation.

3 With respect to Waiver/Estoppel and Mitigatory evidence, Licensees would note the
4 following:

5 1. Waiver/Estoppel. Waiver and/or Estoppel is an affirmative defense, and must
6 be pled as such under the Civil Rules for the Superior Courts of the State of Washington, if, but
7 only if, under the Civil Rules, a responsive pleading is required. Undersigned counsel for
8 Licensees could find no requirement set forth either in the Administrative Procedures Act
9 (Chapter 34.05, RCW), or under the Model Rules of Procedure (WAC 10-08-035 through WAC
10 10-08-215) relating to the Adjudicative Proceedings, which imposes upon Licensees a duty to
11 submit a responsive pleading. Licensees do not contend that the Superior Court Civil
12 Rules are applicable to these proceedings, but refer to them for the limited purpose of
13 demonstrating that, at least under the civil rules, Licensees would not have been required in
14 connection with these proceedings to submit a responsive pleading asserting the affirmative
15 defenses of Waiver/Estoppel. Licensees would note in addition, that undersigned counsel for the
16 Licensees did affirmatively assert these defenses in course of the discussion and argument at the
17 hearing on April 23, 2014, relating to the issue of the admissibility of OIC's Exhibit No. 9 (now
18 re-designated as Licensees Exhibit A).

19 As such, there being no procedural bar to evidence in support of these defenses, such
20 evidence should not be presumed incompetent solely on the basis that the facts or events to
21 which such evidence may refer occurred subsequent to the date of the OIC's order of revocation.
22 Such evidence, like any other evidence should be admitted and considered by the ALJ so long as
23 it is otherwise competent. In this regard, RCW 34.0 5.449, entitled "Procedure at Hearing", at
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1 subsection (2) thereof states that

2 *"To the extent necessary for full disclosure of all relevant facts and issues, the*
3 *presiding officer shall afford to all parties the opportunity to respond, present*
4 *evidence and arguments, conduct cross examination, and submit rebuttal*
5 *evidence..."*

6 In addition, RCW 34.05.452, entitled "Rules of Evidence-Cross Examination", at
7 subsection 1 thereof, states

8 *"evidence, including hearsay evidence is admissible if in the judgment of the*
9 *presiding officer it is the kind of evidence on which reasonably prudent*
10 *persons are accustomed to rely in the conduct of their affairs..."*

11 Further, subsection (2) of RCW 34.05.452 states that *"if not inconsistent with subsection*
12 *(1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as*
13 *guidelines for evidentiary rulings".*

14 Licensees submit that the fundamental purpose of the policies embodied by the above
15 quoted sections of the Administrative Procedures Act is the encouragement of a free-flowing
16 evidentiary hearing subject generally to the guidelines of the Washington Rules of Evidence, but
17 not unduly restricted by technical application of those rules in circumstances where the evidence
18 offered appears to be reasonably reliable based upon the "reasonably prudent person" standard
19 referred to at RCW 34.05.452. Certainly, nothing in the above referenced sections of the
20 Administrative Procedures Act, or the Washington Rules of Evidence would, on its face, bar the
21 evidence sought to be admitted by Licensees, either based upon the date of occurrence of the
22 events referred to by such evidence, or on the basis of the type of the legal theory sought to be
23 supported by such evidence, in this case, the defenses of Waiver and/or Estoppel, and factors in
24 mitigation of the proposed penalty, in this case license revocation.

25 2. Mitigatory Evidence. Evidence of mitigatory acts or conduct is traditionally
admissible in the context of the determination of an appropriate penalty or sanction in criminal

MEMORANDUM CONCERNING
ADMISABILITY OF POST REVOCATION
ORDER EVIDENCE - 6

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1 proceedings, and in other types of quasi-criminal proceedings where a defendant or respondent's
2 property or property interests are subject to forfeiture. Our appellate court has ruled that an
3 administrative proceeding to revoke a professional license is a quasi-criminal proceeding.
4 *Clausing v. State*, 90 Wash. App.863, 955 P. 2nd 394 (1998). Evidence in mitigation is
5 admissible in attorney disciplinary proceeding. *In the Matter of the DISCIPLINARY*
6 *PROCEEDING AGAINST J. David SMITH, an Attorney at Law*, 170 Wash. 2nd 721, 246 P. 3rd
7 1224 (2011); *In the Matter of the DISCIPLINARY PROCEEDING AGAINST Ricardo A.*
8 *GUARNERO, Attorney at Law*, 152 Wash. 2nd 51, 93 P. 3rd 166 (2004).

9 This is a proceeding in which OIC seeks ratification of its prior order revoking Licensees'
10 licenses to act as insurance agents. If the agency's order of revocation is upheld, Licensee
11 Gholamreza Nikzad will lose an extremely valuable property interest: the means by which he has
12 earned his livelihood for the past 30 years. At his current age of 64 years, it is extremely
13 unlikely that he will be able to embark upon any replacement career or find any remotely
14 equivalent employment. Revocation of his license as insurance producer/agent is therefore an
15 extremely harsh remedy, particularly under circumstances where the essence of the alleged
16 violation is poor record-keeping, as opposed to any criminal violation of law, or personal or
17 professional misconduct. Under these circumstances, evidence of mitigating factors should
18 admissible, and should be considered by the ALJ as a matter of fundamental fairness. It should
19 be irrelevant whether or not the events or circumstances constituting mitigatory evidence
20 occurred before or after the OIC's revocation order of July 23, 2013

21
22 In this regard, counsel for the Licensees assumed that such mitigatory evidence would be
23 heard by the ALJ, and prepared to present such evidence at the evidentiary hearing of April 23,
24 2014, including, primarily, mitigatory conduct occurring after July 23, 2013. Counsel's

1 assumption in this regard was based on the Notice of Hearing and Order Following Pre-Hearing
2 Conference of December 18, 2013, entered by the ALJ on December 23, 2013 (Prehearing
3 Order). Section 3.2 of the Prehearing Order entitled "Issues for Evidentiary Hearing" states as
4 follows:

5 **3.2 Issues for Evidentiary Hearing:**

6 *3.2.1 Issue One: Did Licensees violate Washington law as stated in the*
7 *Washington OIC's Order Revoking License...*

8 *3.2.2 Issue Two: If issue One is decided against one or both Licensees, what is*
9 *the appropriate remedy or penalty (sanction) under Washington law?*

10 *3.2.3 The hearing in this matter will be limited to this issue/these issues, unless*
11 *the issues are modified at a later prehearing conference.*

12 In addition, section 6.3 of the Prehearing Order states, in boldface type, as follows:

13 ***6.3 Under WAC 10-080-130, Each Party Has 10 Days to File an Objection***
14 ***to This Order. If There Are No Timely Objections, This Order Shall Control***
15 ***the Proceedings, Unless Modified for Good Cause by Subsequent Order.***

16 Neither party to this proceeding filed an objection either to the Prehearing Order in
17 general, or to the statement of issues set forth at section 3.2 of the Prehearing Order. As such,
18 the issues to be adjudicated in this hearing are established and limited to those set forth at section
19 3.2 of the Prehearing Order. Section 3.2.2 of the prehearing order specifically states that the 2nd
20 issue to be adjudicated in this proceeding is a determination of the appropriate remedy or penalty
21 if a violation of Washington law as stated in the order of revocation is found to have occurred.

22 As such, the ALJ has determined, and confirmed by a now non-appealable order, that if a
23 violation upon which OIC's revocation order is found to have occurred on the part of the
24 Licensees, that the evidentiary hearing shall thereupon turn its attention to the issue of the
25 appropriateness of the penalty. This can only be fairly construed to mean that the question of
whether or not revocation is the appropriate penalty for the violation(s) OIC alleges to have

1 occurred is an issue to be decided in this proceeding. The issue of the appropriateness of
2 revocation as a remedy cannot fairly be considered without admitting and considering evidence
3 of mitigating factors.

4 Licensees respectfully request that the ALJ reverse his prior evidentiary ruling so as to
5 permit the admission of all otherwise competent post July 23rd, 2013 evidence.

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Respectively submitted this 23rd day of May, 2014

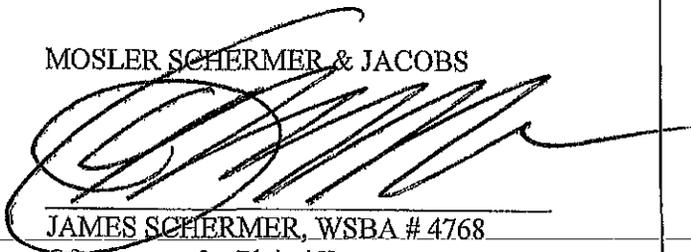
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MOSLER SCHERMER & JACOBS

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JAMES SCHERMER, WSBA # 4768

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Of attorneys for Plaintiff

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MEMORANDUM CONCERNING
ADMISABILITY OF POST REVOCATION
ORDER EVIDENCE - 9

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