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INSURANCE COMMISSIONER

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THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of Paul D. Genest, Applicant,	OIC DOCKET NO. 14-0102 APPLICANT'S RESPONSE TO OIC'S MOTION IN LIMINE

COMES NOW Applicant, Paul D. Genest, by and through his undersigned counsel, and hereby responds to the Motion in Limine filed by the the Office of the Insurance Commissioner in the above-captioned matter.

In his Motion in Limine, filed on his behalf by his designated representative, the Insurance Commissioner demonstrates that he and the Office of the Insurance Commissioner ("OIC") are more interested in punishment than in fairness. This matter was brought upon application of Paul Genest as the result of the OIC's unfair treatment of Mr. Genest. The Insurance Commissioner's Motion is submitted for no reason other than to deny fair treatment to Mr. Genest in this proceeding and, by all appearances, to prejudice the Hearing Officer against Mr. Genest.

The Insurance Commissioner states that his Motion is brought to limit the presentation of evidence regarding the reasons for the OIC's revocation of Mr. Genest's producer license. This Motion could have been stated that simply and without unnecessary embellishment, but it was not. Rather, the Insurance Commissioner proceeds to present a full page of allegations and the apparently specific "evidence" relied on by the OIC to justify the revocation of Mr. Genet's producer license, to the

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point of providing details of acts in violation of Washington law allegedly engaged in by Mr. Genest. This recitation of the OIC's own "evidence" appears to be clearly and intentionally designed to discredit Mr. Genest and to prejudice the Hearing Officer against Mr. Genest and his request for relief in this matter.[1]

By offering, in the Insurance Commissioner's Motion, the very "evidence" that he claims he wants excluded from the Hearing in this matter, the Insurance Commissioner has opened the door for Mr. Genest to offer such evidence of his own as may be reasonable and necessary to demonstrate that the Insurance Commissioner's action of revoking Mr. Genest's producer license was arbitrary and capricious, and which resulted in the OIC's deprivation of Mr. Genest's property interests and livelihood in total disregard and denial of Mr. Genest's right of due process.

By presenting, through the artifice of a Motion to the honorable Hearing Officer in this matter, the same detailed "evidence" that is relevant to the very matter the Insurance Commissioner now seeks to have excluded on the same subject, namely, the revocation of Mr. Genest's producer license, the Insurance Commissioner has, in effect, offered direct testimony of his own on that evidence.

"[W]hen a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *Ang v .Martin,* 118 Wn. App. 553, 76 P.3d 787 (2003); aff'd, 154 Wn. 2d 477, P.3d 637 (2005).

[1] Not only does the Insurance Commissioner present to the Hearing Officer the OIC's evidence of Mr. Genest's alleged offenses, the Insurance Commissioner demonstrates his contempt for Mr. Genest by referring to him in the caption of his Motion as a "Former Licensee." This also is highly prejudicial to Mr. Genest and to his fair opportunity to present his case to the Hearing Officer in this matter.

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The Court in *Ang* went on to say that, while the court has considerable discretion in administering the "open-door rule" (citing 5 Tegland, Wash. Practice: Evidence Law and Practice § 103.14), the rule is aimed at fairness and truth-seeking.

> "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths."

Ang, at 562 (Citing, *State v Gefeller,* 76 Wn. 2d 449, 458 P.2d 17 (1969)).

The Insurance Commissioner seems to say that the matter of Mr. Genest's producer license has been the subject of litigation and, therefore, the principle of res judicata should apply - to the Insurance Commissioner's sole advantage - by disallowing Mr. Genest the opportunity to defend himself against the litany of offenses that the Insurance Commissioner has seen fit to parade before the honorable Hearing Officer in this case. In fact, there has been no litigation and no hearing on the matter of the OIC's revocation of Mr. Genest's producer license. The doctrine of res judicata does not apply in this matter, and all of the case law offered in support of the Insurance Commissioner's Motion is misdirected. Rather, the "Open-Door Rule" of evidence applies, as discussed above. As the appellate courts of the State of Washington have stated, that rule applies as a simple matter of fairness to all parties.

While it is virtually impossible to "un-ring the bell" that the Insurance Commissioner has rung by, in effect, testifying in his Motion to the body of evidence the Insurance Commissioner then claims Mr. Genest should be disallowed from

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countering, it is right and proper that the Insurance Commissioner's Motion should be denied. Mr. Genest and his case have been severely prejudiced by the action of the Insurance Commissioner in bringing his Motion and it is only fair that Mr. Genest should be allowed to present his case in the full measure that he deems appropriate.

Furthermore, in the interest of fairness, Mr. Genest's inadvertent lapse in not requesting a timely hearing on the OIC's revocation of his producer license should not act as an absolute bar to his opportunity to present his side of the story to a duly authorized trier of fact at a properly convened hearing, such as is the current status of this case. Mr. Genest did, in fact, request a hearing on the revocation matter. However, to his regret, Mr. Genest was not provided guidance on the time-sensitive nature of such procedural practices and he counted the time for requesting a hearing as business days, rather than calendar days. The unanticipated and unintended consequence of Mr. Genest's lapse was that the government of the State of Washington, through the OIC, determined to take away Mr. Genest's license to pursue his profession and engage in the business of an insurance producer.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the due process clauses of the fifth and fourteenth amendments to the United States Constitution. *Mathews v. Eldridge,* 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Wolff v. McDonnell,* 418 U.S. 539, 557-58, 41 L. Ed 2d 935, 94 S. Ct. 2963 (1974). "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 168, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring). A professional license revocation proceeding has been determined to be "quasi-criminal"

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in nature and, accordingly, entitled to protections of due process. *In re Ruffalo,* 390 U.S. 544, 551, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-39, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957); *In re Kindschi,* 52 Wn.2d 8, 11-12, 319 P.2d 824 (1958)."

Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 663 P.2d 457 (1983) (quotes and brackets in original; emphasis added).

Mr. Genest was deprived of a valuable property right when the OIC revoked his license on the mere technicality that Mr. Genest did not count days in the proper way and, therefore, did not have the opportunity to present his case at hearing. On the basis of this procedural technicality, the OIC has deprived Mr. Genest of his constitutionally protected property interests and due process rights.

Professor Tegland has observed that, while the court must hear a motion in limine, whether brought for offensive or defensive purposes, the granting or denial of the motion is a matter within the court's discretion. (See, Tegland, Wash. Practice, Vol. 5D, Courtroom Handbook On Washington Evidence, 2013-2014 Edition). "The motion [in limine] may be denied if it is too vague or broad, or if the legal issues are inadequately briefed. Fenimore v. Donald M. Drake Const. Co., 87 Wash. 2d 85, 549 P.2d 483 (1976). The motion may likewise be denied if a proper ruling depends upon a factual background to be developed at trial. Amend v. Bell, 89 Wash.2d 124, 570 P.2d 138, 95 A.L.R. 3d 225 (1977)." (Tegland, *supra*, §103:8).

The Insurance Commissioner's Motion in Limine should be denied, and Mr. Genest should be given the opportunity to present any and all evidence he deems appropriate to defend himself, and to protect his property rights, namely, his right to pursue his profession as a licensed insurance producer.

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At the very least, the honorable Hearing Officer should defer ruling on the Insurance Commissioner's Motion until the Hearing on this matter has convened and sufficient factual background has been developed and presented at that Hearing.

Respectfully submitted and

DATED this 28 day of July, 2014

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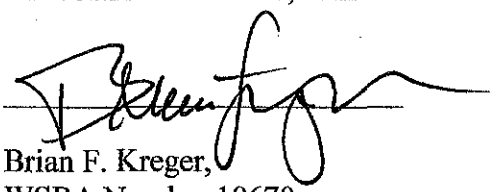

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CERTIFICATE OF SERVICE

I, Brian F. Kreger, under penalty of perjury under the laws of the State of Washington do hereby declare and certify that I personally served, and caused to be delivered by Electronic Mail Delivery, the foregoing Applicant's Response to Motion in Limine on the following parties or persons at the last known addresses given below:

By Personal Delivery to:

Hearings Unit
Office of the Insurance Commissioner
ATTENTION: Hon. George Finkle, Presiding Officer
5000 Capitol Boulevard
Tumwater, WA 98501

Ms. Marcia Stickler
Office of the Insurance Commissioner
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Tumwater, WA 98501

By Electronic Mail Delivery to:

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Attention: George Finkle, Hearing Officer
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Attention: Kelly Cairns
kellyc@oic.wa.gov

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Executed on this 30 day of July, 2014 in Tumwater, Washington.

Brian F. Kreger

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