

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

COLBY BURNETT,

MICHAEL S. STOCKWELL, LLC,

and

**R.L. YOUNG, INC., d/b/a YOUNG &
ASSOCIATES**

Respondents.

NO. 20-0321

**REPLY TO OIC RESPONSE TO
RESPONDENTS' MOTION TO
DISQUALIFY**

TO: OFFICE OF THE INSURANCE COMMISSIONER, INSURANCE
ENFORCEMENT DIVISION, LEGAL AFFAIRS DIVISION, and
COMPLIANCE COMMITTEE

AND TO: Ellen Range, Staff Attorney

COME NOW Respondents, Colby Burnett, Michael S. Stockwell, and R.L. Young, Inc.
d/b/a YOUNG & Associates (collectively, "Respondents"), by and through undersigned
counsel, and hereby submit this reply to the Office of Insurance Commissioner ("OIC")
response to Respondent's Motion to Disqualify any staff attorney or other employee of the OIC
from representing the Insurance Commissioner or the OIC in this matter.

I. SUMMARY OF ARGUMENT

The Insurance Commissioner cannot delegate a lay representative by assigning his right
to appear pro se to a staff attorney, and the Washington Attorney General is the only permissible
legal counsel for the Commissioner in legal or quasi-legal proceedings, such as this
administrative hearing. The Insurance Commissioner's delegation authority under RCW
48.02.100 is limited to his authority to appear as a lay representative in the proceedings, by GR
24 and by applicable law prohibiting transfer of *pro se* representation rights. Further, RCW
34.05.428(1) is not applicable as it does not authorize an individual, such as the Insurance
Commissioner, to be represented by an authorized representative (only "a corporation or other

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CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

1 artificial person”) and, moreover, it does not expressly reference representation of the
2 administrative agencies or officials. In light of the general applicability of RCW 34.05.428, the
3 more specific statutes and other legal authority governing the representation of the
4 governmental agency and Insurance Commissioner shall govern, which expressly require
5 representation of the Insurance Commissioner by the Attorney General.
6

7 II. ARGUMENT

8 A. The Insurance Commissioner’s Delegation Authority is Limited to Appointing 9 Staff To Act As His Lay Representatives, Not As His Legal Representatives.

10 The Insurance Commissioner’s ability to permit any employee to discharge any power
11 or duty vested in the Commissioner under RCW 48.02.100 is limited to appearing as a *lay*
12 *representative* to respresent facts disclosed by the OIC’s investigation and the agency’s
13 reasoning. The Insurance Commissioner cannot transfer to anyone else his *pro se* rights to act
14 as his own attorney. *See In re Marriage of Herridge*, 169 Wn. App.290, 279 P.3d 956, 962
15 (2012) (quoting *State v. Hunt*, 75 Wn. App.795, 880 P.2d 96, 98 (1994)). While the cases cited
16 in Respondents’ brief deal with *pro se* rights in the context of judicial proceedings, they are not
17 limited by their terms to only judicial proceedings. Further, the OIC cites no authority to
18 support their interpretation that the *pro se* restrictions are inapplicable in the quasi-judicial
19 setting of an administrative hearing. Washington courts have consistently held that the *pro se*
20 exceptions are “narrow and limited.” *State v. Hunt*, 75 Wn. App.795, 880 P.2d 96, 101 (1994).
21

22 B. The General Provisions of the APA Regarding the Appointment of Authorized 23 Representative Do Not Permit the Commissioner to be Represented by OIC 24 Counsel in These Proceedings.

25 The OIC’s reliance on the Washington Administrative Procedure Act is also misplaced.
26 RCW 34.05.428 authorizes a party to “participate personally or, if the party is a corporation or

1 other artificial person, by a duly authorized representative.” This would only permit the
2 Insurance Commissioner to represent himself individually, as he is a natural person. Also
3 consistent with pro se litigant rights not being transferable in an administrative quasi-judicial
4 setting, natural persons cannot appoint a duly authorized representative to appear for them.
5 Moreover, the statute, together with WAC 10-08-083 and 10-08-110(3) cited by the OIC are of
6 general applicability regarding parties to an administrative hearing and do not specifically refer
7 to representation of the government, administrative agency, or administrative official.
8

9 However, as cited in Respondents’ brief, there are specific provisions of the Washington
10 constitution, state statutes, and case law regarding representation of the Insurance
11 Commissioner in quasi-judicial administrative proceedings. Under Washington laws of
12 statutory construction, “[a] specific statute will supersede a general one when both apply.”
13 *Kustura v. Dept. of Labor & Indus.*, 169 Wn. 2d. 81, 88, 233 P.3d 853, 856 (2010) (en banc)
14 (citing *Waste Mgmt. of Seattle, Inc. v. Utils. & Transpo. Comm’n.*, 706 P.2d 1034 (1994).
15 Moreover, while an agency interpretation is given deference, the court is the final authority on
16 statutory construction and the court will not defer to an agency the power to determine the scope
17 of its own authority. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn. 2d 173, 157 P.3d 847, 852
18 (2007) (en banc.); *Campbell v. Dep’t. of Social & Health Services*, 150 Wn. 2d 881, 887-886,
19 83 P.3d 999, 1007-08 (2004) (en banc).
20

21 The legal authority on this issue is specific and explicit. It is legislatively mandated that
22 the Attorney General is to represent the OIC and the Insurance Commissioner in legal
23 proceedings, pursuant to several sections of the Revised Code of Washington as well as the
24 Washington State Constitution. The Insurance Commissioner and the OIC are statutorily
25 prohibited from employing any attorney “in any legal or quasi legal capacity in the exercise of
26

1 any of the powers or performance of any of the duties specified by law to be performed by the
2 attorney general . . .” RCW 43.10.067. Included among the “duties specified by law to be
3 performed by the attorney general” are to “represent the state and all state officials . . . and
4 agencies of the state . . . before all administrative tribunals or bodies of any nature, in all legal
5 or quasi legal matters.” RCW 43.10.040. Consistent with this, RCW 43.10.030 requires the
6 attorney general to “[i]nstitute and prosecute all actions and proceedings for, or for the use of
7 the state, which may be necessary in the execution of the duties of any state officer.”
8

9 Accordingly, the Insurance Commissioner and the OIC have no choice, regardless of
10 any apparent consent by the Attorney General’s office. They are required to be represented by
11 the Attorney General in these proceedings, the Attorney General is required to provide such
12 representation, and the Insurance Commissioner’s current legal representation by an OIC staff
13 attorney is a clear violation of the relevant statutory authority and contrary to the state law.
14

15 **C. In Representing the Insurance Commissioner in These Proceedings, Ellen Range
16 is Engaging in the Practice of Law.**

17 The Washington Supreme Court has the inherent power under the Washington State
18 Constitution to regulate the practice of law. See, *State v. Gresham*, 173 Wn.2d 405, 269 P.3d
19 207 (2012). The Court has made it clear that "the practice of law is within the sole province of
20 the judiciary." *Cultum v. Heritage House Realtors*, 103 Wn2d 623, 627, 630, 694 P.2d 630
21 (1985).

22 In the exercise of this power, the Supreme Court has adopted General Rule 24, defining
23 the practice of law:
24

25 **DEFINITION OF THE PRACTICE OF LAW**
26

1 (a) General Definition: The practice of law is **the application of legal**
2 **principles and judgment with regard to the circumstances or objectives of**
3 **another entity or person(s) which require the knowledge and skill of a**
4 **person trained in the law.** This includes but is not limited to:

5 (1) Giving advice or counsel to others as to their legal rights or the legal rights
6 or responsibilities of others for fees or other consideration.

7 (2) Selection, **drafting**, or completion of **legal documents** or agreements which
8 affect the legal rights of an entity or person(s).

9 (3) **Representation of another entity or person(s)** in a court, or **in a formal**
10 **administrative adjudicative proceeding** or other formal dispute resolution
11 process or in an administrative adjudicative proceeding **in which legal**
12 **pleadings are filed or a record is established as the basis for judicial review.**

13 (4) Negotiation of legal rights or responsibilities on behalf of another entity or
14 person(s).

15 (GR 24(a)(emphasis added).

16 The Supreme Court has not only promulgated this rule defining the practice of law, but
17 has also has spoken on what the practice of law entails. In *Bar Ass'n v. Great Western Federal*,
18 91Wn.2d48, 586 P.2d 870 (1978), the Court stated with emphasis added as follows:
19

20 The "practice of law" does not lend itself to precise definition. However, it is
21 generally acknowledged to include not only the doing or performing of services
22 in the courts of justice, throughout the various stages thereof, but in a larger sense
23 includes legal advice and counsel and the preparation of legal instruments by
24 which legal rights and obligations are established."

25 Id at 54 (citations omitted).

26 In actuality, the parties to these proceeds are in general agreement on most things as
they relate to this motion. They generally agree that the Insurance Commissioner has not, and
may not, authorize Ms. Range or any other OIC employee to act in the capacity of legal
representative or attorney for the Commissioner or the OIC. The fact that the Insurance
Commissioner may not delegate to OIC staff his right to represent himself in this proceeding
as a pro se litigant is not challenged. Rather, it is apparent, that Ms. Range recognizes and

1 accepts that her authority in this proceeds is limited to merely presenting the agency's position
2 as the Commissioner's lay representative, and may not engage in any activities that are, or could
3 be seen, as, falling within the definition of the practice of law as set forth in GR 24. The parties
4 agree, instead, that the legal representation of Commissioner and the OIC are reserved for
5 statutory counsel assigned by the Office of the Attorney General.

6 This is the point, however, at which the parties part ways. That is because, in these
7 proceedings, Ms. Range is representing another person (the Insurance Commissioner) in what
8 constitutes "a formal administrative adjudicative proceeding . . . in which legal pleadings are
9 filed or a record is established as the basis for judicial review." GR24(a)(3). And in doing so,
10 it is apparent that Ms. Range is operating well outside the limited authority purportedly
11 delegated to her by the Insurance Commissioner, which is restricted to only acting as the lay
12 representative of the Commissioner in these proceedings. Instead, Ms. Range is in fact acting
13 as legal counsel, and will necessarily be obliged to continue to do so in the course of these
14 proceedings. Indeed, in the very act of researching, briefing and arguing the OIC's opposition
15 this motion, Ms. Range has already "selected, drafted, and completed legal documents . . . which
16 affect the legal rights and obligations of an entity (the OIC) [and] a person (both the
17 Respondents and the Insurance Commissioner)." GR 24(a)(2).

18 Furthermore, unless and until Ms. Range is replaced by the Attorney General as legal
19 counsel, she, or any other OIC staff person, will necessarily continue to practice law on behalf
20 of the Commissioner. This will include in the near term opposing the Respondents' pending
21 Motion to Stay enforcement of the OIC's cease and desist order and its imposition of a fine.
22 And, over the course of these proceeding, Ms. Range will be engaging in discovery, including
23 witness depositions, possibly other motions practice, the direct and indirect examination of
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1 witnesses, the presentation of evidence and arguments to the tribunal. All of the forgoing are
2 well outside the proper scope of Ms. Range' limited authority, and constitute the practice of
3 law as it has be defined by the Washington Supreme Court.

4 While the Commissioner could represent himself in this proceedings *pro se*, that right
5 is non-delegable. Consequently, whenever Ms. Range drafts legal instruments, engages in
6 discovery, examines witnesses, presents argument, participates in any other activity as the
7 advocate for the Insurance Commissioner or the OIC throughout the various stages of
8 proceedings in this matter, or engages in negotiations affecting the rights of others, she is
9 engaging in the unauthorized practice of law. Furthermore, none of the exceptions or exclusions
10 to the definition of the practice of law set out in GR 24(b) apply here. All of those exceptions
11 concern specific acts or circumstances, none of which apply to Ms. Range in her role as
12 Insurance Enforcement Specialist for the OIC in this matter.

13
14 The OIC's reliance on the exemptions under GR 24 regarding the unauthorized practice
15 of law are misplaced. First, the exemption under GR 24(b)(3) only applies where one is
16 "[a]cting as *a lay representative* authorized by administrative agencies" At issue here,
17 however, is the actions of an OIC employee who is acting as the legal representative of a person,
18 the Insurance Commissioner. Further, GR 24(e) merely provides that the Rule does not "affect
19 the ability of a governmental agency to carry out responsibilities provided by law." Here, the
20 OIC's ability to carry out its responsibilities provided by law is not affected by the requirement
21 that the Insurance Commission be represent by the Attorney General's office in all judicial and
22 quasi-judicial proceedings. RCW 43.10.040; RCW 43.10.030.
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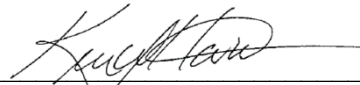
1 In short, while purported to appoint Ms. Range to act merely as his lay representative in
2 this proceedings, the Insurance Commissioner is, in fact, using Ms. Range as his legal counsel
3 in these proceedings, which is expressly prohibited under Washington law.

4 **CONCLUSION**

5 For all of the foregoing reasons, the Respondents respectfully request that an Order issue
6 disqualifying Staff Attorney Ellen Range and all other staff attorneys and employees of the OIC
7 from further representation of the OIC and the Insurance Commissioner in this matter.
8

9 DATED this 5th day of October, 2020.

10 CARNEY BADLEY SPELLMAN, P.S.

11 By: 
12 _____
13 Kenneth W. Hart, WSBA # 15511
14 Mark Rosencrantz, WSBA # 26552
15 Catherine A. Woods, WSBA # 54437

16 Attorneys for Respondents R.L. Young, Inc., d/b/a
17 YOUNG & Associates, Colby Burnett, and Michael
18 S. Stockwell, LLC
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1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury under the laws of the State of
3 Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years,
4 not a party to nor interested in the above-entitled action, and competent to be a witness herein.
On the date stated below, I caused to be served a true and correct copy of the foregoing
document on the below-listed attorney(s) of record by the method(s) noted:

5 Email
6 Rebekah Carter
7 Ellen Range
8 Office of the Insurance Commissioner
9 MS 40255
10 P.O. Box 40255
11 Olympia, WA 98504
12 RebekahC@oic.wa.gov,
13 EllenR@oic.wa.gov;
14 ChrisT@OIC.WA.GOV

15 DATED this 5th day of October, 2020.

16 S/ Rozalynne Weinberg
17 Rozalynne Weinberg, Legal Assistant