

73424.5

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No. 73424-5-I

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

PORTER LAW CENTER, ETC.
Appellant – Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF FINANCIAL
INSTITUTIONS,
Appellee - Respondent

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
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I. INTRODUCTION

The Appellant, Porter Law Center (“PLC”), has been wrongly accused of operating as an unlicensed mortgage broker. PLC challenges the April 17, 2015, King County Superior Court Order Affirming Final Decision of Department of Financial Institutions.

The administrative hearing was conducted on March 10, 2014. On June 6, 2014, an Administrative Law Judge (“ALJ”) issued an Initial Order, which was affirmed by the Department of Financial Institutions (“Department”). On July 16, 2014, the Department affirmed the ALJ and entered a Final Order finding that the Appellant violated the Mortgage Brokers Practices Act (“MBPA”), RCW 19.146.200 and 19.146.0201(2) and (3), by engaging in the business of a mortgage broker without a license and by failing to disclose to consumers that they were not licensed to provide residential mortgage loan modification services. The Final Order was affirmed by King County Superior Court Judge Beth Andrus on April 17, 2015.

PLC seeks an order reversing the King County Superior Court’s ruling because it is not supported by evidence that is substantial when viewed in light of the whole record that was before it. The Department did not communicate with six of the eight Washington consumers and it thus obtained no testimony or other evidence from them regarding any element of

its case. Moreover, the Department produced only minimally supporting evidence from the two Washington consumers with whom it did communicate. That evidence is further weakened because of the substantial evidence directly opposing it that the Department ignored and the fact that much of the evidence was undependable hearsay, irrelevant or unfairly prejudicial. As a result, the Department failed to establish how seven of the eight consumers came into contact with PLC, what services PLC provided to them, who provided those services (*e.g.*, whether it was local Washington counsel Christopher Mercado), where those services were provided, and how much PLC paid. The Department's evidence would not convince a fair minded, rational person that PLC engaged in unlicensed activity in violation of the MBPA.

The Department's order relies on the erroneous application and interpretation of the law. The Department placed the burden of proof on PLC to prove that it did not violate the law, yet that burden is Department's to show by a preponderance of the evidence. The Department found PLC was not exempt under the MBPA when, in reality, PLC qualifies for that exemption. The Department also held that it was for PLC to prove that the attorney exemption applied. Further, credibility determinations go to the weight of the testimony, and not directly to the findings of fact as Department asserted. Without such erroneous

applications and interpretations of the law, PLC would not have been regulated by the Department at all.

The Department made numerous arbitrary and capricious decisions in its order. The Department willfully and unreasonably disregarded or did not consider substantial evidence that rebutted its case in its decision that PLC violated the MBPA. The Department willfully and unreasonably disregarded proper discovery in this matter, as well as the underlying investigation. The Department also did not use reason in its decision to order restitution, or in determining the amount to be paid in fines. Further, the Department violated the constitutional separation of powers by impermissibly regulating attorneys in the practice of law.

II. ASSIGNMENTS OF ERROR

1. The Department failed to provide substantial evidence to support the elements of its case.
2. The Findings of Fact are based on multiple hearsay statements of a kind that a reasonable person would not rely on.
3. The Department and Superior Court misapplied the law when it sanctioned Appellant PLC.
4. The Department acted in an arbitrary and capricious manner in sanctioning Appellant PLC.

5. The Department employed improper procedure in violation of RCW 34.05.570(3).

6. The Department unconstitutionally regulated the practice of attorneys.

III. STATEMENT OF THE CASE

Dean Douglas Porter (“Porter”) is an attorney who was at all relevant times licensed by the South Carolina Bar Association. Administrative Record (“AR”) at 00053-54. Porter owns the law firm Porter Law Center, LLC that is an active Ohio limited liability company doing business as the Porter Law Center. AR at 00056-60. PLC provided legal services to eight consumers in Washington State. PLC at all times operated through their employee Christopher Jason Mercado (“Mercado”), an attorney licensed in the State of Washington. AR at 00045, 00101, 00104-06; Supplemental Administrative Record (“SAR”) at 0094.

On October 10, 2012, the Department issued a directive to PLC requiring it to clarify whether it provided unlicensed residential loan modification services to Washington consumers in violation of RCW 19.146. AR at 00041-46. PLC asserted that it offered “legal services.” AR at 00092. PLC offered loan modification, foreclosure defense and bankruptcy services in Washington State. SAR at 0094.

On March 25, 2014, the Department issued a statement of charges (“SOC”) alleging that PLC offered residential loan modification services to Washington consumers on property located in Washington State without obtaining or maintaining a mortgage broker license. AR at 0001-05.

IV. ARGUMENT

A. De Novo Judicial Review on Appeal

RCW 34.05.570(3) sets forth the standards for review of an agency order in an adjudicative proceeding:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(i) The order is arbitrary or capricious.

This Court reviews the findings of fact for substantial evidence in the administrative record to support them. *Smith v. Employment Security Department*, 155 Wn. App. 24, 32, 226 P.3d 263 (Div. 2 2010). A reviewing court looks for a quantity of evidence that is “substantial when viewed in light of the record as a whole.” RCW 34.05.570(3)(e). The judicial definition of “substantial evidence” is evidence sufficient to persuade a fair minded, rational person of the truth of the declared premise. RCW 34.05.461(4); see e.g., *Thurston County v. Cooper Pt. Ass’n*, 148 Wn.2d 1, 57 P.3d 1156 (2002).

Courts review legal issues de novo, including whether a decision is arbitrary and capricious. *Wash. Indep. Tel. Ass’n v. Utils. & Transp. Comm’n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). A decision is arbitrary and capricious if it is willful and unreasoning and disregards or does not consider the facts and circumstances underlying the decision. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 421, 216 P.3d 451 (Div. 3 2009). Although the “harshness of the sanctions imposed,” alone, is not the test to determine if an action is arbitrary or capricious, *id.* at 421, imposition of a sanction without honest and due consideration of mitigating factors may show that an agency action did not consider relevant facts and circumstances. See *Medical Disc. Bd. v. Johnston*, 99 Wn.2d 466, 483, 663 P.2d 457 (1983); *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App.

587, 596, 13 P.3d 1076 (Div. 1 2000) (“If there is room for two opinions, a decision is not arbitrary and capricious if it is made honestly and upon due consideration ...”); *Brown v. State of Washington, Dep’t of Dental Health*, 94 Wn. App. 7, 17, 972 P.2d 101 (Div. 3 1998) (An agency must consider the facts prior to imposing a sanction).

B. PLC Has Been Substantially Prejudiced by Department’s Order.

A reviewing court must grant relief only where the person seeking judicial relief has been substantially prejudiced by the action complained of. RCW 34.05.570. In the present case, PLC has been ordered to cease and desist from conducting business in industries regulated by Department, to pay restitution in the amount of \$28,886.87, to pay a fine in the amount of \$24,000, and to pay an investigation fee in the amount of \$648. AR at 00468, 00480-82. As a result, PLC has been substantially prejudiced by the Department’s order.

C. RCW 34.05.570(3)(e): Substantial Evidence Does Not Support Department’s Decision that PLC Violated the MBPA

PLC seeks relief from the Department’s order because the evidence cited in the ruling would not convince a fair minded, rational person that PLC was engaged in unlicensed activity in violation of the MBPA. The Department failed to provide sufficient evidence to support its decision that PLC was engaged in unlicensed activity in violation of the MBPA. The

Department failed to investigate the attorney exemption of the MBPA. The entire record needs to be examined. The Department did not communicate with six the eight Washington consumers, and it thus obtained no testimony or other evidence from them regarding any element of its case. The other two Washington consumers did not provide persuasive, admissible evidence. The Department failed to establish how seven of the eight consumers came into contact with PLC, what services PLC provided to them, who provided those services (*e.g.*, whether it was local Washington counsel Mercado), where those services were provided, and how much PLC was paid.

(1) The Department Failed to Produce Substantial Evidence: The Department Only Contacted Two of the Eight Consumers, One of Whom Later Recanted His Complaint.

A case that lacks substantial evidence is one in which the evidence is simply too bare to form a credibly persuasive argument. *Ames v. Washington State Health Dep't Medical Quality Assurance Comm'n*, 166 Wn.2d 255, 259, 208 P.3d 549 (2009). Under the substantial evidence rule the Department's factual allegations should be vacated. *Id.*

The Department produced only minimal supporting evidence from two Washington consumers involved:

[PLC] also provided the Department with a list of the eight Washington consumers it assisted with residential loan modifications In February 2013, the Department contacted each of them, and ultimately spoke with two of them: James Adney and Robert Olacio.

AR at 00474, ¶ 4.23. The Department admits that it did not communicate with six of the eight Washington consumers, and thus did not obtain any testimony or evidence from them regarding any element of its case. AR at 00474, ¶ 4.23. The evidence produced from the two Washington consumers the Department did communicate with— Robert Olacio and James Adney — was not sufficient to support the Department’s conclusion.

Mr. Olacio’s limited out-of-court hearsay statements do not support the Department’s position. Mr. Olacio never testified and later recanted his complaint in an affidavit. AR at 00464-65, 00474, ¶ 5.19. The Department alleged that Mr. Olacio complained about PLC to the Department’s representative Wilma Colwell. AR at 0336; 00679, ln. 11-13. However, neither Mr. Olacio nor Ms. Colwell appeared as witnesses. AR 00615-00833. Mr. Olacio then wrote an affidavit recanting his complaint that was admitted into evidence. AR at 00481, n. 7.

Mr. Adney’s testimony also does not support the Department’s case. His testimony is internally inconsistent and unsupported by other evidence. Mr. Adney testified that he did not see either PLC’s website or the flyer alleged to have been sent by PLC. He also testified that PLC called him on his cell phone, but he could not remember when the call occurred, his own phone number allegedly called by PLC, or the name of

the person who called him. He further testified that the call was from a location that had no connection to PLC (Spanish Forks, Utah). And, conspicuously, the Department did not have Mr. Adney produce his phone records or e-mails purportedly to and from PLC, which in theory would support Mr. Adney's testimony. See AR at 00648, ln. 13-25, 00649, ln. 1-20, ln. 11-17.

(2) The Department Failed to Investigate the MBPS's Attorney Exemption by Failing to Contact PLC's Attorney

In disciplinary proceedings, the government always bears the burden of proof. *Nguyen v. Dept. of Health*, 144 Wn.2d 516, 528 – 530, 29 P.3d 689 (2001).

The Department failed to investigate the facts that would have supported a finding that the attorney exemption to the MBPA applied to PLC's situation. The Department ignored the best evidence that would have supported a finding that the attorney exemption applied – that evidence was PLC's local counsel, Christopher Mercado. The Department knew about this attorney, but intentionally chose not to contact or interview him. In the Initial Order, the Department wrote:

PLC's business model included contracting with attorneys in other states to help PLC provide residential loan modification services to consumers outside the states of Ohio and South Carolina. . . .

AR at 00470, ¶ 4.5.

At some unknown time, PLC may have entered into a working relationship with Seattle attorney Christopher Mercado to assist in providing PLC clients with loan modification services in Washington. . . . *Mr. Mercado did not testify at the hearing in this present matter.*

AR at 00470, ¶ 4.6 (emphasis added).

[PLC] identified Mr. Mercado as the Washington attorney it used in conducting residential loan modifications for Washington consumers. . . . However, the only evidence on record of what PLC paid Mr. Mercado regarding the eight Washington consumers is a fee of \$50.00 for work dated November 15, 2012. . . . Mr. Mercado billed this same fee for work performed for six of the other seven Washington consumers at issue. . . .

AR at 00474, ¶ 4.22 (emphasis added). Indeed, the Department acknowledged that it had evidence that Mr. Mercado rendered legal services to the Washington consumers, but did not follow up to discover if those services were sufficient to support the exception to the MBPA for which PLC was qualified, as discussed below.

It is undisputed that the Department did not obtain any testimony from PLC local counsel Mercado regarding the scope of the client services that this lawyer provided to the eight Washington consumers. AR at 00474, ¶ 4.26. The Department did so despite receiving a letter from him asserting his exemption from the MBPA. The Department claims that they did not contact Mr. Mercado because he was unhelpful in an entirely separate,

previous matter.¹ Due to the attorney exemption of the MBPA, discussed below, Mr. Mercado's testimony would rebut Department's case. *See* RCW 19.146.020(c). As such, the Department's failure to investigate the scope of Mr. Mercado's services is an error that itself supports a reversal of the Superior Court ruling.

(3) The Evidence Establishes the Type of Legal Services that PLC's Local Counsel Performed

The Department erroneously attempted to dismiss the attorney exemption based on the contracts for legal services of each client that referred to residential loan modification services, and the mention of "loan modification" and the offering of legal services to clients "relating to residential mortgages" in PLC's response to the Department's Directive of October 10, 2012. AR at 00092. That evidence is not substantial.

(a) PLC's Response Should be Given Little Weight.

PLC's response to the Department's directive neither said what they purport it did, nor was it actually prepared by Appellants. PLC did not state in their response that their services were limited to residential loan modifications. *Id.* Further, PLC's former attorney completed the response to

¹ The Department further wrote in the Initial Order ". . . The Department had previous difficulty communicating with Mr. Mercado during an investigation in another matter, and reasonably concluded that it would be futile to try to communicate with him in the present matter. AR at 00475, ¶ 4.26.

the Department's directive and signed the form without PLC's input. AR at 00473-74, ¶ 4.20. The Department itself acknowledged that:

[PLC's previous attorney]... completed the Directive, signed Mr. Porter's name, set out [PLC]' address and phone number, and returned the Directive to the Department on or around November 14, 2012. Mr. Porter did not read the completed Directive before his attorney mailed it.

AR at 00473, ¶ 4.20. That evidence is insufficient to sustain the allegations.

(b) The Client Contracts Refer To The Provision of Legal Services by Local Counsel.

The Department ignored its own findings that the contracts were for legal services provided by local counsel. The Department wrote in the Initial Order:

Paragraph 9 of the Agreement entitled "Limited Scope of Services" stated, "The scope of representation provided for by this Agreement is limited to attempts to qualify Borrower's first mortgage for work-out programs that are available." Paragraph 9 then described what *this representation may entail, e.g. "preliminary legal review of the file," "ongoing legal consultation," "review by local counsel for eligibility and compliance," "attorney review for alternative legal options," "preparation and submittal of modification package," and "ongoing communication and negotiation with the lender's loss mitigation department."* . . . Mr. Porter admitted that all listed services under the heading "Limited Scope of Services" constituted legal services.

AR at 00471, ¶ 4.11 (emphasis added). It is clear that more than mortgage modifications were being offered. It is equally clear from the contract that local counsel would be utilized.

Paragraph 6 of the Agreement provided in part that “*the Firm may contract or affiliate with co-counsel attorneys in the course of representation of Borrower.*”

AR at 00472, ¶ 4.14 (emphasis added). Despite these acknowledgements, the Department did not give great weight to this evidence.

(c) The Department Completely Ignored the Testimony of Mr. Porter Regarding Services Provided.

Mr. Porter, the owner of PLC, testified that an “attorney client relationship” existed and that the contracts provided that clients received a “legal consultation,” an “attorney review for alternative legal options,” and a host of additional legal services:

A: [Mr. Porter]: [Reading from the contract] “Your application will be reviewed by an attorney in detail to make sure the best course of action will be implemented. The attorney will contact you with results of the review and will be available to advise you regarding potential legal options you may have.”

Q: [PLC’ counsel]: What exactly does that mean in terms of the services you are offering?

A: Legal services.

Q: All right. And . . . the first paragraph, there is a capitalized two sentences.

A: “The completion of this . . . packet does not create an attorney-client privilege (sic)” Is that what you are referring to?

Q: “Attorney-client relationship,” right. And then the second sentence?

A: "This office must agree to accept your request for representation."

Q: So is it fair to say that -- *what sort of relationship is developed by the signing by the co-agreement of this contract?*

A: *It's an attorney-client legal relationship.*

...

A: . . . "Upon acceptance of your request for legal representation."

Q: So, again, that -- *how would you characterize the relationship as being developed here?*

A: *Lawyer-client.*

Q: If we go to page 14, . . . and I have you look at the limited scope of services. Do you see that?

A: Right. I do.

Q: *Is that legal work that's being described there?*

A: *Absolutely.* It says, "Perform a legal review of the file, ongoing legal consultation," absolutely it is legal work.

Q: And then under, "The borrower acknowledges," . . . there is AA through N, it looks like?

A: Correct.

Q: *How would you characterize those services?*

A: *Definitely legal work.*

Q: And let's flip to page 18, under "Purpose of fees," number A.

A: Right.

Q: Starting with, "Firm will use the aforementioned"? (Multiple speaking over each other.) What does that mean to you?

A: Providing legal services.

Q: I guess it says, "Use the aforementioned fees." *So implicit in that is that they are paying for legal services;* is that a fair characterization?

A: *Absolutely.*

Q: On the same page under, "Client Consultation," . . . and "Time will be billed in 15-minute increments," and it describes legal assistant, junior legal counsel, senior legal counsel, do you see that?

A: Correct. I see that.

Q: *Are those fees what you would typically charge for legal work?*

A: *Yes, they are.*

AR at 00802, ln. 6 – 00804, ln. 20. In summary, the contracts created an attorney client relationship in which a host of legal services were offered.

(d) Rates Charged Support Contention That Various Legal Services Were Offered.

Significantly, flat fees were not charged, no client was billed the \$3,997.00 that Department found to be the rate PLC charged each consumer for a residential loan modification. AR at 00108.² That error affected not only the restitution order but also the underlying finding of a violation of the MBPA. Consumers were billed at attorney rates and the invoices for all the consumers varied because the services that PLC and their local counsel provided varied. The evidence shows Mercado billed PLC for legal services for the consumers in question. AR at 00326-27. Mr. Porter also testified that Mercado provided a range of legal services to Washington consumers, albeit he did not know the precise services offered to each.

(e) The Department Erred by Ignoring the Letter from PLC's Local Counsel Regarding the Scope of PLC Services.

The Department ignored a letter from Mercado where Mercado undeniably explains that he offered legal services and did not hold himself out as a mortgage broker or loan originator:

[A]s stated, I did not hold myself out as solely performing the services of a mortgage broker or loan originator To expand on the above, my practice . . . involves the representation of Washington clients for a wide variety of

² See also the affidavit of consumer Robert Olacio, in which he states that he contracted for and received "legal services."

reasons including bankruptcy, consumer rights, business law, estate planning and criminal defense.

AR at 00105. That letter was the Department's exhibit and admitted into evidence, but it was not mentioned or considered at all in Department's Initial Order. *See, e.g.*, AR at 00474, ¶ 4.26.

The Department also ignored the corroborating testimony from PLC's Porter regarding the legal services provided to the eight Washington consumers. Mr. Porter testified, in pertinent part, as follows:

A [Mr. Porter]: [We built] a national footprint where we provided legal services, you know, bankruptcy and foreclosure defense, debt settlement, consumer advocacy, consumer-related law, and worked through a model where we had contracted with local counsels to provide representation in the states -- in certain states where I was not licensed.

...

Q [PLC's counsel]: So what is your experience with foreclosure defense, and what exactly . . . does that mean to you?

A: Well, foreclosure defense to me is -- at the end of the day, in order to stay in one's home, at many times it requires different tactics to get there. And the law is a very strong tactic in terms of discovery they would be doing, first taking a file to look for (indiscernible) violations, (indiscernible) violations, all sorts of things to litigate on if necessary.

Now, obviously, in the states I'm licensed, I would be doing litigation; in the states I'm not licensed, the local attorney would do litigation. But the reality is that foreclosure defense really has to deal with, in many occasions these people are actually in a lawsuit, they have been filed -- foreclosure papers are filed on them, depending on the state. So the litigation is actually already commenced at times when we get involved. So, like I said,

that is how we were looking at the big picture approach of how do we protect the client in terms of their ability to stay in the home.

AR at 00795, ln. 10 – 00796 ln. 13.

Porter further testified that it was through local counsel that PLC rendered legal services to the eight Washington consumers, and that this local counsel had the knowledge regarding exactly what services were rendered to each consumer:

A [Mr. Porter]: . . . What we did is we provided administration, billing, and paralegal support to the Washington of-counsel, which was Mr. Mercado.

Q: And what were the range of legal services that you envisioned offering in Washington State?

A: Foreclosure defense, bankruptcy, consumer debt settlement.

Q: And do you know anything about -- do you have anything to do with Jefferson Consumer Law Center?

A: No, sir.

AR at 00797, ln. 15-21.

Q [PLC' counsel]: Right. So the three paralegals listed here, do they act independently or at the direction of the attorney?

A: The direction of the attorney.

Q: And is it -- wasn't it your prior testimony that the model worked, the clients went through the of-counsel in the state, and that the counsel then assigned the work to those paralegals?

A: Correct.

AR at 00809, ln. 13-20.

Q [PLC' counsel]: [Referring to local counsel Mercado's letter entered into record by Department] Could you read

the last sentence in the second paragraph beginning with, "All representation."

A: "All representation of Washington residents is done through its licensed Washington attorney, such as myself, as such legal services are outside the jurisdiction of the division."

Q: Is that your understanding of your relationship with Mr. Mercado?

A: Yes.

AR at 00810, ln. 3-13.

Q [PLC' counsel]: Sure. And I believe you testified earlier that it was Mr. Mercado who would know the precise nature of the services being provided –

A: Absolutely. Absolutely.

AR at 00813, ln. 25 – 00814, ln. 6.

Q [PLC' counsel]: All right. Now, looking at [exhibits of Mercado's billing to PLC], what assumptions did you make about what was being done by Chris Mercado out here in Washington?

A [Mr. Porter]: That he was handling all the legal aspects as a lawyer in Washington representing Mr. Adney.

Q: So when was it brought to your attention that Mr. Mercado might not have been the primary contact for Mr. Adney, or was it ever –

A: No. The only time it was even an issue was when I got the charges, when I got a letter from DFI.

Q: And what did you do when you got that letter from DFI?

A: Well, I responded -- you know, you can see that I responded. And I stopped doing any work in Washington.

Q: Wouldn't the billing notes and the progress notes from Mr. Mercado, doesn't that suggest that in fact he was involved in the case?

A: Oh, yeah. Yeah, obviously, Mr. Mercado was doing work on the file with him. But how they got to the firm, I don't know.

AR at 00807, ln. 3 – 00808, ln. 3.

(f). The Department Ignored Evidence that PLC’s Marketing Was Consistent with Porter and Mercado’s Assertions.

The Department ignored the evidence that PLC’s website, which was available to every Washington consumer with internet access, also offered a broad range of legal services:

Q [PLC’s counsel]: Can you look at . . . the screen shot [of your website].

A [Mr. Porter]: Right.

Q: And I think -- the header on the first page, that big bold, beginning with, “Talk,” what is that? Could you read that to me?

A: “Talk with a foreclosure attorney.”

Q: Defense attorney, but –

A: Defense attorney, correct.

Q: . . . [D]oes foreclosure defense involve the practice of law?

A: Absolutely.

Q: And what other services, other than residential home loan modification services, does Porter Law offer?

A: Bankruptcy, debt settlement.

Q: It looks from the website you do short sales, too?

A: Short sales, yeah. Absolutely. It’s the whole gamut. If we are dealing with real estate, that’s part of the gamut of trying to resolve the problem for the homeowner.

AR at 00800, ln. 10 – 00801 ln. 13.

The Department ignored evidence that PLC was not associated in any way with the flier allegedly connected to PLC which only offers loan modifications:

Q [PLC’ counsel]: Did you produce this [flier]?

A: No, sir.

Q: I mean, aside from the charges here and its origin here, do you have any idea about how this was produced?

A: No.

AR at 00798, ln. 10-14.

Q [PLC's counsel]: I'm producing a letter that [Mr. Porter] asked me to write on December 17th, 2013 the heading, Amended Response to Department's Interrogatories.

...

[I]t says, "Copies of all advertising used to solicit Washington consumers for residential loan modifications. [PLC] erroneously submitted a document as advertising used in Washington State. In fact, *that mailer has no connection with Porter Law Center or Dean Porter.* [PLC] have no idea where their eight cases came from in Washington State. As there was so few clients that responded, we never inquired where the leads came from." AR at 00798, ln. 15 – 00799, ln. 5 (emphasis added).

Last, the Department ignored testimony that PLC was not associated in any way with the website, www.helpmod.com, alleged to be PLC's. Mr. Porter further testified:

Q [PLC's counsel]: Did you have anything to do with maintenance and production of that website [www.helpmod.com]?

A [Mr. Porter]: No.

Q: Are you associated in it in any way, other than it is an exhibit here in the proceedings?

A: I have no association with it.

AR at 00809, ln. 3-8. As discussed below, the Department's own witness, Devon Phelps, testified that they had no evidence that PLC ever operated out of Spanish Forks, Utah, that it had no association with the flyer, the website or the "800" number that allegedly linked it to Washington.

D. The Department's Decisions Are Based in Large Part on Undependable Hearsay and Irrelevant, Unfairly Prejudicial Evidence.

The Department impermissibly relied on untrustworthy hearsay evidence in its decisions that PLC provided loan modification services to eight Washington residents and that they were not exempt from the MBPA. That evidence, even if relevant, should have been excluded as its probative value was “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” ER 403.

The Department's case is based in large part on two complaints: that of James Adney and of Robert Olacio. AR at 00482, ¶ 5.19. No reference to the complaint of Mr. Olacio should have been admitted into evidence because it was hearsay. *See* ER 801, 802. The Department alleged that Mr. Olacio complained about PLC to Department's representative Wilma Colwell. AR at 0336; 00679, ln. 11-13. However, neither Mr. Olacio nor Ms. Colwell appeared as witnesses for Department. AR 00615-00833. Mr. Olacio also recanted his complaint. All references to these out-of-court and unsworn statements regarding communications between those parties should have been excluded.

All evidence regarding the six other Washington consumers should have been excluded from evidence and not considered. It is undisputed that the Department did not contact these six Washington consumers. The

prejudicial effect of that evidence substantially outweighed any evidentiary value those statements provided. *See* ER 402, 403. The Department failed to conduct a balancing test on the record in order to determine whether that evidence was unfairly prejudicial. *See* AR 00615-00833. PLC argued that evidence relating to Nicole Sesar, Cheryl Guaker, Norman Goodale, Sheryl McClean, Israel Nunez and Dan Smith was, at best, slightly relevant, AR at 00715-16. That evidence had little probative value because it was without context and did not support any further assertions, such as who provided those services (*e.g.*, PLC's local counsel, Mercado or PLC), where they were provided (*e.g.*, in South Carolina or Washington), what services were provided, how they were provided, or what rate was charged.³ On the other hand, that evidence was highly prejudicial because it suggested a pattern of conduct on behalf of PLC.

E. RCW 34.05.570(3)(d): The Department Erroneously Interpreted and Applied the Law.

The Court should grant relief from Department's order because the Department committed errors of law in reaching its incorrect conclusion that PLC acted as unlicensed mortgage brokers. First, the Department, not PLC, had the burden to prove that PLC violated the law by a preponderance of the evidence. Second, PLC qualified for the attorney exemption under the

³ Arguably, the value of the evidence was primarily to support the assertion that PLC provided legal services to them. AR. at 00092

MBPA. Third, credibility determinations go to the weight to give testimony, and not directly to findings of fact as the Department asserted. Without such erroneous applications and interpretations of the law, PLC would not have been regulated by Department at all.

(1) The Department not PLC, has the Burden of Proof

In the Initial Order, the Department wrote:

[PLC] contend that the Department's investigation was inadequate in that the Department did not communicate with many of the eight Washington consumers with whom PLC worked, did not obtain financial, email and phone records from any of the eight Washington consumers at issue, and did not contact Mr. Mercado. *However, [PLC] have produced insufficient evidence to establish that the Department's investigative results would have been different if it had taken such measures.* The Department had previous difficulty communicating with Mr. Mercado during an investigation in another matter, and reasonably concluded that it would be futile to try to communicate with him in the present matter. *Other than providing Mr. Mercado's name and bar number, there is no evidence on record that [PLC] arranged to make Mr. Mercado available to, and cooperative with, the Department during its investigation. Nor did [PLC] present sufficient evidence that Mr. Mercado ever emailed or called any of its eight Washington consumers.*

AR at 00475, ¶ 4.26 (emphasis added). The Department erred in ruling that it was PLC's burden to establish what work Mercado had done for them, and PLC had failed to do so:

However, there is insufficient evidence on record to establish what work, if any, that Mr. Mercado performed or oversaw. Mr. Porter assumed Mr. Mercado was handling these clients, but a bill for \$50.00 and an empty computer

screenshot of work performed does not establish what services, if any, Mr. Mercado in fact provided.

AR at 00479, ¶ 5.9.

Had [PLC] established the work, if any, that Mr. Mercado did for [PLC]' Washington clients, [PLC]' comparison may have been compelling.

AR at 00479, ¶ 5.10. That conclusion erred in assigning who bears the burden of proof, as well as whether Department had provided sufficient evidence to hold that PLC were engaged in unlicensed activity. The burden of proof is on Department, which is measured by a preponderance of the evidence. *See* RCW 19.146.221, *Nguyen v. Dept. of Health*, 144 Wn.2d 516, 528 – 530, 29 P.3d 689 (2001). Thus, relief from Department's order should be granted because Department erroneously interpreted or applied the law.

(2) Attorney Exemption Applies

The Department incorrectly concluded that PLC was not exempt from the MBPA. Legal services were provided by local counsel, an attorney-client relationship was established in which a range of legal services were offered, and PLC charged a fee for legal services provided after the provision of those services. AR at 00104-06; SAR at 0361-70. Accordingly, PLC was not subject to the authority of Department and charges must be dismissed.

In Washington, an attorney licensed to practice law is exempt from the MBPA if he or she “is not principally engaged in the business of negotiating residential mortgage loans when such attorney renders services in the course of his or her practice of law.” RCW 19.146.020(c).

Further, according to the Rules of Professional Conduct,

A lawyer admitted in another United States jurisdiction . . . may provide legal services on a temporary basis in this jurisdiction that . . . are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.

RPC 5.5(c).

The plain meaning of those statutes are that PLC could offer legal services in Washington without being licensed through the Department. “If a statute’s meaning is plain on its face, then we must give effect to that plain meaning as an expression of legislative intent.” *Nationscapital Mortg. Corp. v. State DFI*, 133 Wn. App. 723, 736, 137 P.3d 78 (2006); accord *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). Courts must avoid construing a statute in a manner that results in unlikely, absurd, or strained consequences. *Nationscapital*, 133 Wn. App. at 736 (citing with approval *Glaubach v. Regence Blue Shield*, 149 Wn.2d 827, 833, 74 P.3d 1155 (2003)). Instead, courts are to “favor an interpretation consistent with the spirit or purpose of the enactment over a literal reading that renders the statute ineffective.”

Id. at 736. A court might give substantial weight to an agency's interpretation of laws within its expertise, such as regulations the agency administers. *Silverstreek, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 885 (2007). However, that deference does not extend to instances where the statutory authority was entirely absent or an absurd result would occur: agencies could exceed their statutory authority at will, rendering the principal of ultra vires meaningless. In short, all agency action would be beyond judicial oversight.

In the present case, the Department accepted the legal premise that an attorney who uses local counsel may be entitled to claim the exemption if all other elements are met. The Department acknowledged the attorney exception to the MBPA. AR at 00479, ¶ 5.7. The Department also acknowledged that PLC asserted they associated with local counsel who performed and oversaw the legal services provided. AR at 00479, ¶ 5.9; see also AR at 00479, ¶ 5.10.⁴ However, the Department dismissed PLC's claim that they were exempt based on Department's findings of fact that

⁴ “[PLC] compared PLC's relationship with Mr. Mercado to that of a national law firm with offices in different states. [PLC] claim that Mr. Mercado's services provided to its Washington clients are no different than those provided by a Washington attorney working in the Washington office of a national law firm, and that holding [PLC] liable for Mr. Mercado's work would defy the well-established practice of law firms with multiple offices.”

(1) PLC held themselves out as providing services, and (2) PLC, not local counsel, did the bulk of work. The Initial Order reads:

Given that (1) PLC held itself out, and not Mr. Mercado, as the person or entity able to provide residential loan modification services, and (2) that the weight of evidence establishes that [PLC], not Mr. Mercado, performed these services for the eight Washington consumers at issue, [PLC] were required to be licensed in Washington as loan originators or mortgage brokers despite their status as attorneys outside of Washington. Their unlicensed provision of residential loan modification services to the eight Washington consumers at issue violated RCW 19.146.200.

AR at 00479, ¶ 5.10. Department also found:

The weight of evidence in the record establishes that PLC staff outside of Washington performed most if not all of the loan modification work for the eight Washington consumers at issue.

AR at 00479, ¶ 5.9.

The Department's conclusions are erroneous in several respects. First, and most importantly, whether or not a party holds himself out as being able to provide a service directly or through local counsel is not an element of the exemption. *See* RCW 19.146.020(c). Second, even if paralegals did the bulk of the work for the PLC' clients, that is not a reasonable basis for denying that that work is legal work provided by a supervising attorney. Paralegals acting under the supervision of an attorney often do the bulk of the clerical work in numerous practice areas.

See RPC 5.3 (“Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals.”). Third, that conclusion ignores Department’s own exhibits from local counsel Mercado to it outlining in detail his services, and Department’s acknowledgement that Mercado was in fact involved in the case. AR at 00104-06.

Fourth, Department erred in holding that PLC held themselves out as providing the services directly and not through local counsel. The Department accepted the argument that local counsel could be used, but denied the exemption was met here because PLC purportedly advertised that they would provide the services without mentioning that they would provide them in association with local counsel. AR at 00479, ¶ 5.10. That conclusion ignores the facts on record that the contracts used by PLC for each Washington consumer and PLC’s website both state that local counsel will be used. Accordingly, Department should have found PLC exempt from the provisions of the MBPA.⁵

(3) The Department’s Findings Cannot Be Upheld Based on the General Premise of Credibility

The Department erroneously made credibility determinations regarding its conclusion of facts. In Washington the trier of fact

⁵ The Department also erred in placing the burden on Appellant to prove the attorney exemption. The statute does not do so, and thus neither should the Department.

determines the weight of evidence it directly observes, but the burden of proof still must be met. *See, e.g., State v. Walton*, 64 Wn. App. 410, 416, 824 P.2d 533 (1992). The trial court's credibility determinations go to the weight it gives to testimony, and not directly to its findings of fact. *Id.*

In the present case, the Department repeatedly tried to couch its findings of facts at the trial court as matters of credibility. The Initial Order reads:

Mr. Porter testified that the retainer agreement described above between PLC and Mr. Adney was not limited to the provision of residential loan modification services. However, this testimony is not credible, given the number of places throughout the Agreement, as cited above, where legal services other than those related to residential loan modification services were specifically excluded.

AR at 00472, ¶ 4.14.

At the March 10, 2014 appeal hearing, Mr. Porter testified that [PLC] did not issue marketing solicitations, and that the flyer . . . was not theirs. Mr. Porter also testified that the 1-866 number on this flyer is not PLC's number, that he is not familiar with this number, and that the www.helpmod.com website identified on the flyer is not [PLC]'. This testimony is not credible given that Mr. Porter on two occasions told the Department in the Directive that the solicitation belonged to [PLC]. In addition, [PLC]' paralegal Ms. Marszol referred to Spanish Fork, Utah when talking with Mr. Adney. Mr. Porter thus had constructive, if not actual, knowledge of the marketing solicitation issued to Washington consumers and its contents.

AR at 00476, ¶ 4.29. The Department found PLC's Porter not credible and improperly made findings of fact based on that credibility determination:

that PLC's retainer agreement with Mr. Adney was not limited to residential loan modification services, and that PLC issued advertisements to Washington consumers through a flyer, "1-866" number and www.helpmod.com website. Accepting *arguendo* that Mr. Porter was not credible, it would have been proper for Department to simply weigh PLC Porter's testimony less than the other evidence.

In addition, this Court should not defer to the Department's conclusions regarding credibility determinations regarding PLC. Courts may decline to defer to the credibility determinations of a hearing officer where the officer did not observe the witness' demeanor while testifying. *See, e.g., State v. McCabe*, 161 Wn. App. 781, 271 P.3d 264 (Div. 3 2011) (courts may decline to defer to the credibility determinations of a hearing officer where the officer did not have opportunity to observe firsthand the testimony "precisely because the hearing officer is not necessarily in a better position to judge their veracity"); *In re Disciplinary Proceeding Against Sanai*, 167 Wn.2d 740, 751, 225 P.3d. 203 (2009) (declining to defer to the credibility determination of a hearing officer where the determination was based on written submissions and a witness testifying by telephone, precisely because the hearing officer is not necessarily in a better position to judge their veracity). However, a reviewing court can review the basis for factual findings as described in the findings of facts:

As an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard. The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. It is more capable of resolving questions touching upon both weight and credibility than we are. *Our duty, on review, is to determine whether there exists the necessary quantum of proof to support the trial court's findings of fact and order of permanent deprivation.*

In re Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973) (citations omitted) (emphasis added); *see also Dillon v. Seattle Deposition Reporters, LLC*, 316 P.3d 1119, 1126 (Div. 1 2014) (credibility determination limited to witnesses testimony).

In the present case, the Department's credibility determinations regarding PLC Porter, discussed above, do not deserve deference because PLC Porter testified by telephone and the administrative law judge could not observe his demeanor while testifying. The Department does not assert PLC Porter was not credible because of his demeanor. *See* AR at 00472, ¶ 4.14., 00476, ¶ 4.29. Rather, Department's determination that PLC Porter was not credible is the result of comparing the content of what he said to the content of written documents. This court stands in the very same position from which to judge the veracity of PLC's testimony as did the administrative law judge. Thus, Department's credibility determinations regarding PLC Porter do not deserve deference.

F. RCW 34.05.570(3)(i): The Department's Order is Arbitrary and Capricious

The Court should grant relief from the Department's order because its decisions regarding whether PLC engaged in deceptive acts, the amount of restitution and the calculation of the fines imposed are arbitrary and capricious.

(1) The Department's Decision that PLC Engaged in Deceptive Acts is Arbitrary and Capricious

PLC did not engage in deceptive practices by failing to inform consumers that they were not licensed mortgage brokers. The Department failed to provide substantial evidence that PLC had ever held themselves out as providing services to Washington residents directly, as opposed to offering them through local counsel. The Department found that:

[PLC] admittedly are not licensed as mortgage brokers or loan originators in the state of Washington. Nor are [PLC] licensed to practice law in the state of Washington. Yet [PLC] held themselves out publicly to at least eight Washington consumers as being able to perform the services of a mortgage broker or loan originator. They advertised such services on the PLC website, which was accessible to, and solicitous of, Washington consumers. They also specifically solicited Washington consumers via mailer and telephone who were threatened with foreclosure. [PLC]' residential loan modification services were not held out as incidental to, or a small part of, other legal representation; rather, they were offered as the primary purpose of the representation, complete with separate fee structure and repeated exclusions of other, related legal services. PLC staff collected data from Washington

consumers for use in performing residential loan modification services. Washington consumers then paid PLC to negotiate, attempt to negotiate, arrange, or attempt to arrange a residential mortgage loan modification for them.

AR at 00478-79, ¶ 5.8.

[PLC] advertised residential loan modification services to Washington consumers via mailer, telephone, and the internet. There is no evidence on record that [PLC] disclosed to Washington consumers, during such advertising, that they were not licensed in Washington as mortgage brokers, loan originators, or attorneys. Nor is there evidence that [PLC] ever told Washington consumers that Washington attorney Christopher Mercado would represent them or provide them loan modification services. [PLC] then accepted thousands of dollars in payment from the eight Washington consumers at issue for residential loan modification services that [PLC] were not licensed to provide. Such deceptive practices toward the eight Washington consumers at issue violated RCW 19.146.0201.

AR at 00480, ¶ 5.12. These findings were deficient for several reasons.

First, these findings are deficient because the Department conducted its investigation in an arbitrary and capricious manner. The Department willfully and unreasonably conducted an insufficient investigation by disregarding crucial facts and even failing to contact or communicate with numerous key witnesses. The Department's primary witness, Mr. Adney, said he spoke with someone at PLC, but never followed up to talk with this person and fact check Mr. Adney's story. The Department's investigator, Devon Phelps, testified:

Q [PLC's counsel]: You are reading there, "[Mr. Adney] stated he worked with Jessica Marshall"?

...

And she was never contacted by you or the Department?

A [Ms. Phelps]: I never contacted her, correct

Q: Or the Department? You are the representative of the Department.

A: Yeah, not to the best of my knowledge.

AR at 00704, ln. 13 - 00705, ln. 6.

The Department never tried to contact PLC' local counsel

Mercado. Ms. Phelps further testified:

Q: . . . Did anyone at the Department interview Christopher Mercado relating to this complaint?

A: No.

AR at 00706, ln 18-20.

The Department never communicated with the entity that was identified through a flier, which Department asserted was sent to the Washington consumers by PLC. AR at 00473, ¶ 4.18,

00478-79 ¶ 5.8. Ms. Phelps testified:

Q: . . . [D]id anyone at the Department ever contact the Jefferson Consumer Law, PLLC?

A: Attempted to, yes.

Q: Did you speak to anybody there?

A: No, No one ever responded. They never returned any of the calls or responded to the directives.

Q: Can you describe Jefferson Consumer Law Center's involvement in this complaint?

A: The only thing that we know is they were the only one listed on this letter, I believe.

Q: Well, isn't actually the flier from Jefferson Consumer Law?

A: I would not be able to say it was.

Q: So it's your testimony that you're not sure what role Jefferson Consumer Law played because you were never able to reach them?

A: Correct.

Q: So then if we can look at . . . the STAR log . . . it says, "The name of the company is Porter Law Firm records, Jefferson Consumer Law Center, Consumer Law, PLLC." Do you see that?

A: I do.

Q: How was that conclusion made?

A: When they called the telephone number, when Wilma, the previous examiner, called the telephone number that's listed on this flier, the person who answered the phone said, "This is Porter Law Center, we are representing Jefferson Consumer Law PLLC."

Q: But that's actually not what that says?

A: Do you want me to read it verbatim for you?

Q: Yes.

A: "Name of the company is Porter Law Firm, representing Jefferson Consumer, PLLC, and has attorneys in all 50 states."

Q: Located in Utah; correct?

A: That's what it says.

...

Q: Clearly Jefferson -- I mean, it's the Department's -- this Spanish Fork, Utah, is being associated with Jefferson Consumer Law; is that correct?

A: It looks like it.

Q: Is there anywhere in the records that Porter Law operated out of Spanish Fork, Utah?

A: Not that I know of, no.

...

Q: Is there any evidence anywhere that Porter Law Center operated out of Spanish Fork, Utah?

A: Nope. . . .

Q: . . . [T]he flier on its face, can you show me where it says "Porter Law Center" anywhere on here?

A: No, it's not written on there.

AR at 00707, ln. 15 - 00711, ln. 21. No evidence was produced that any of the consumers involved had seen the flyer, which on its face was from another law firm, the Jefferson Law Firm in Spanish Forks, Utah.

The Department never tried to contact the entity associated with www.helpmod.com, the website indicated on the flier. Ms. Phelps testified:

Q: . . . On this exhibit it says www.helpmod.com. Are you seeing that?

A: Uh-huh

Q: Did you actually go to that website?

A: I did not personally, but the Department, yes.

...

Q: You can't actually testify whether anybody went to the website or not?

A: I talked to Wilma and she said she did.

Q: And where is that conversation that she went to the website?

A: I wasn't aware I was supposed to dictate my conversations into the STAR notes.

...

Q: And anywhere on this [screen shot of www.helpmod.com], does it indicate Porter Law?

...

A: . . . Not that I see.

...

Q: It's a simple answer, yes or no, did anybody attempt to contact them through the website?

A: No.

AR at 00711, ln. 22-00715 ln. 1. Absolutely no evidence was admitted that any consumer viewed this site that the Department attributed to PLC.

Second, these findings are deficient because Department failed to establish any facts regarding the six consumers. Despite the lack of contact with six of the consumers, the Department made erroneous assumptions and conclusions regarding all aspects of those relationships. Ms. Phelps testified:

Q: Who is Nicole Sesar?

A: She is a consumer that was identified by Mr. Porter as someone who obtained loan modification services from him.

Q: I want you to answer this question very carefully: Did anyone at the Department actually interview Nicole Sesar regarding this complaint?

A: No.

.....

Q: Thank you. In fact, if we go down through there, is it a fair summary to say from this entry there may have been voicemails left but that was it. Either no contact was made at all because the phone was disconnected or a voicemail was left; for all these people that's a fair characterization of this testimony? I'm not going to make you read it in.

A: Yeah.

AR at 00715 at ln. 3 – 00717 ln. 9.

Q: And is it fair to say that [the Department's investigator] was going to -- I'm going to read it -- "contact each to find out if they paid or obtained a contract with any of them or actually were contacted or spoke with Mercado?"

A: That's what it says.

...

Q: For any of the consumers that you did not communicate with, isn't it fair to say that *you have no idea from any of these individuals whether they were contacted by you or contacted -- were contacted by or contacted Chris Mercado?*

A: That would be correct.

Q: All right. For any of the consumers you did not communicate with isn't it fair to say that *you don't know whether Chris Mercado provided all legal advice and services or not?*

A: That would be correct.

Q: For any of the consumers you did not communicate with, *isn't it fair to say that you don't know whether Chris Mercado oversaw every aspect of their case?*

A: That's correct.

Q: For every consumer you did not communicate with, isn't it fair to say *you have no idea what sort of legal services they received, they actually received?*

A: Correct.

Q: For every consumer you did not communicate with, isn't it fair to say *you don't know whether they were successful in receiving a home loan modification or any other outcome?*

A: Correct.

Q: For any of the consumers you did not communicate with, *did you check to see if their houses had been foreclosed upon?*

A: No.

Q: For any consumers you did not communicate with, *did you check to see if Chris Mercado or Porter Law had initiated any legal action on their behalf against their lenders or any other party?*

A: No.

Q: For any consumer that you did not communicate with, isn't it fair to say that *you don't know whether they ever seeked (sic) a full refund of their money at this point?*

A: Correct.

AR at 00717, ln. 23 – 00722, ln. 5 (emphasis added). By the Department's own admissions, they failed to establish any one of the eight elements of their case that they themselves felt critical. Each piece of that missing information was crucial to determine whether PLC violated the MBPA, especially when considering the attorney exclusion addressed.

Third, these findings of fact are deficient because they ignore the undisputed evidence that PLC informed each Washington client that its services would be provided in association with local counsel through PLC's website (AR at 00048-51), and standard contract (AR at 00078-87).

Fourth, these findings of fact are deficient because Department relied in large part on hearsay testimony and other immaterial evidence in support of its contention that the Jefferson Law Firm was affiliated with the PLC. Ms. Phelps stated that she had spoken to a colleague, Wilma Colwell, who had called the number on the flyer and reached PLC. AR at 00684, ln. 18-23. The Department could have cured by calling Ms. Colwell as a witness if she had relevant evidence to recount. The Department did not bother to look at the website associated with the flyer, which was not PLC's. AR at 00711-15. Mr. Porter testified that he did not produce the flyer and was not associated with any operation in Spanish Forks, Utah. AR 00808-09. When the Department sent mail to the address on the flyer, the mail was returned to it undelivered. The Department had to re-mail its subpoenas to PLC directly in South Carolina.

(2) RCW 34.05.570(3)(i): Department's Order for Restitution Was Arbitrary and Capricious

The Department lacked a sufficient basis for determining what should be ordered in restitution. Even if PLC had violated the MBPA,

Department's calculation of restitution for the purported violations was arbitrary and capricious. The Department found, for the purposes of restitution, that:

[PLC] admitted charging each of eight Washington residents \$3,997.00 plus a monthly maintenance fee for loan modification services rendered.

AR at 00474, ¶ 4.21. There are no facts regarding seven of those consumers that support this restitution demand.⁶ Consumer James Adney, upon whom the Department relied, provided varying testimony regarding the amount of money he paid to PLC. AR at 00655-659. At hearing, he claimed he was owed a sum significantly greater than he had listed in his bankruptcy filing. *Id.* The Department's investigator, Devon Phelps, confirmed that the Department did not know the amount that any of the consumers had paid PLC or whether PLC had refunded money to any of them. AR at 00722, ln. 1-11.

There is no evidence in the record to support affirming the Department's restitution order, that all of PLC's clients paid the same sum of \$3,997 for services. There is nothing in the record that PLC provided the same services to all their clients. AR at 00474, ¶ 4.21. PLC's prior counsel erroneously wrote that PLC charged each of eight residents

⁶ One of the two consumers whom Department actually contacted, Robert Olacio, stated that he did not want to pursue his complaint, was satisfied with the legal services he received, and did not desire restitution. AR at 00464-65.

\$3,997 in response to a pre-litigation Directive without consulting their clients but corrected that in subsequent communications. AR at 00473-74, ¶ 4.20. In fact, records and testimony show that no client paid either the same amount or \$3,997. AR at 00108. Department's lone witness, James Adney, testified he paid \$3,407. AR at 00655-659. This finding of fact, and corresponding restitution order should be reversed.

(3) RCW 34.05.570(3)(c) and (i): Department's Calculation of the Fine Amount Was Arbitrary and Capricious, and Did Not Follow Prescribed Procedures

The Department's determination of the fine is arbitrary and capricious and did not follow the prescribed procedures. Testimony from Department's employee Steve Sherman indicated that Department deviated from its usual practice of using a fine matrix. Mr. Sherman testified, in pertinent part, as follows:

Q [Department's counsel]: Do you recall the language for which authority you imposed the fine?

A [Mr. Sherman]: It's the statute I just mentioned [RCW 19.146.220(e)], and it authorized that we impose fine of up to \$100 per day for the MBPA.

Q: Thank you. That's what I was looking for. And did the Department have a procedure for determining the appropriate fine?

A: *We do have a general procedure that we use in most cases.*

Q: Okay. And what is that general procedure?

A: *As a general rule, we have a fines matrix and a fines guideline that we use to consider various factors and whether there was, you know, the severity of the violation. We have different violations of the act, ranging from a 1 to*

a 4, 4 being the most severe. So we take that into consideration, whether there was gain by the respondent, whether there was loss to the consumers, along with the violations may have taken place, and several others.

Q: *Okay. Is that the procedure you followed in this case?*

A: *In this particular case, we did not do that.*

Q: Okay. How was a fine determined?

A: This was one of a number of different similar cases during what we call a sweep. And we wanted to make sure that we were essentially, since we were going out with all the charges at the same time, that we were keeping; the fines equitable. So we determined an amount of a fine per consumer that was -- that we perceived to be harmed, and we determined that \$3,000 was the appropriate fine.⁷

Q: And it is based on that previous \$100/day figure that you used?

A: It is. . .

...

Q: Okay. And that was applied to each of the consumers in this case?

A: In this case, yes.

AR at 00766, ln. 12 – 00768, ln. 12 (emphasis added).

Q [PLC' counsel]: Yeah, I'm a little confused. So normally you guys complete a matrix to determine the fine?

A [Mr. Sherman]: Correct.

...

Q: So is it your understanding of the RCWs that the Department can simply assign a fine number to a respondent?

A: Actually, the RCW doesn't say anything other than we can charge up to a hundred dollars per day.

⁷ Elsewhere, Mr. Sherman testified: "One hundred dollars (\$100.00) a day multiplied by thirty (30) days in a month equals \$3,000.00. The preponderance of the evidence establishes that [PLC] worked for at least one month on each of their eight Washington clients' residential loan modifications. Given that [PLC] worked with Mr. Adney alone for several months, the Department in its discretion could have assessed [PLC] a larger fine than just \$3,000.00 per Washington consumer. However, it chose instead to cap the fine at \$3,000.00 per Washington consumer. A fine of \$24,000.00 is within the Department's discretion under RCW 19.146.220 and WAC 208-660-530(6), and [PLC] may be held jointly and severally liable for paying it." AR at 00482, ¶ 5.21.

Q: All right.

A: It doesn't have any structure or any requirements on how to go about determining that

...

Q [Judge Dublin]: It says, "The director may impose fines or order restitution or deny or suspend." But I wanted to know how you interpreted that to be able to the Department to be able to do all of the above or one of the enumerated items.

A [Mr. Sherman]: It's the Department's interpretation of that that we can do all of those things.

...

Q [PLC' counsel]: Again, just to reiterate, the usual practice was to use a matrix?

A [Mr. Sherman]: Right.

Q: And that there is no written record of the deliberation or how you came up with this \$3,000?

A: That's right.

AR at 00770, ln. 17 – 00776, ln. 20.

Instead of using its usual method of applying a matrix, the Department arbitrarily fabricated a fine amount. *Id.* The Department did not document how it calculated fine amount in any way. AR at 00766-72. It simply applied the maximum fine for a thirty day period and applied it to the eight consumers to whom PLC had provided services. AR at 00767. PLC should be entitled to a rational manner of imposing fines that is formulaic and considers factors such as inadvertent non-compliance, results actually obtained for the consumers, and cooperation from the PLC. If such a reasonable calculation were done, a minimal fine would have been imposed.

G. RCW 34.05.570(3)(a): The Department Violated PLC's Constitutional Rights.

The MBPA is unconstitutional on its face because regulation of the practice of law is within the sole province of the judiciary. *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 453 (1981); *Seattle v. Ratliff*, 100 Wn.2d 212, 215 (1983) (court's power to regulate the practice of law in this state is not only well established but is inviolate as well). A fundamental principal of our American system is that governmental powers are divided among three separate and independent branches—legislative, executive and judicial. *State v. David*, 134 Wn. App. 470, 478, 141 P.3d 646 (Div. 2 2006). “Our Washington State constitution does not contain a formal separation-of-powers clause. Nonetheless, separation of powers is a vital doctrine, presumed throughout our state history from the division of our state government into three separate branches.” *State v. David*, 134 Wn. App. at 478. The separation-of-powers doctrine serves mainly to ensure that fundamental functions of each branch of government remain inviolate. This doctrine is violated when “the activity of one branch threatens the independence or integrity or invades the prerogative of another.” *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002).

The practice of law is exclusively regulated by the judiciary. *Graham v. State Bar Ass'n*, 86 Wn.2d 624, 631 (1976). One of the two

main concerns in separation of powers challenges to judicial action is that “no provision of law may impermissibly threaten the institutional integrity of the judicial branch.” *Carrick v. Locke*, 125 Wn.2d 129, 136, 882 P.2d 173 (1994). Under this “inherent powers doctrine,” the judiciary has authority to regulate the practice of law. *State v. Wadsworth*, 139 Wn.2d at 741; *State v. Cook*, 84 Wn.2d 342, 525 P.2d 761 (1974). *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 453 (1981) (Regulation of the practice of law is within the sole province of the judiciary); *Seattle v. Ratliff*, 100 Wn.2d 212, 215 (1983) (court’s power to regulate the practice of law in this state is not only well established but is inviolate as well).

The Washington State Bar Association’s (WSBA) activities are directly related to and in aid of the judicial branch of government. *State ex rel. Schwab v. Washington State Bar Ass’n*, 80 Wn.2d 266, 272 (1972); *see also* GR 12.1(a)(7) (The Bar Association strives to “[a]dminister admissions to the bar and discipline of its members in a manner that protects the public and respects the rights of the applicant or member.”) While the state has an interest in maintaining a competent bar and may legislatively act to protect the public interest, it may only do so in aid of the judiciary and cannot detract from the power of the courts. *Wash. State Bar Ass’n v. State*, 125 Wn.2d 901, 908, 890 P.2d 1047 (1995).

In the present case, the Department seeks to regulate attorneys in their practice of law. If loans are originated by a licensed attorney, the attorney should be exempt from the MBPA. If that exemption is challenged, it should first be within the purview of the judiciary or state bar association to administer any discipline. The Department's regulations directly contradict the Rules of Professional Conduct and thus violate the separation of powers doctrine.

Most obviously, the Department's discovery requests impinged upon the Rules of Professional Conduct and attempted to regulate the practice of attorneys. The interrogatories ask PLC to identify "each and every Washington consumer for whom you performed" legal services, and demands that PLC provide "all documents in your possession pertaining to all Washington Consumers who paid for" their legal services. AR at 00308. The RPCs require that attorneys above all act to preserve client confidences and to maintain their ability to independently represent those who come to them for legal services. *See, e.g.*, RPC 1.6(a) and Comment 2. Those same documents contain attorney work-product and should not be available to Department. *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 732, 174 P.3d 60 (2007) (holding that work-product is that material assembled in anticipation of litigation and after resolution of a controversy). The documents were assembled, not in the ordinary course

of business, but rather in anticipation that litigation, such as foreclosure defense, might occur. SAR at 0311. Finally, the Department requested material in order to determine what attorneys can and cannot do to assist clients in connection with mortgage loans, how attorneys advertise, how they obtain their leads, how they structure their law practices, and how they staff their offices. AR at 00308-11.

In analyzing a possible separation-of-powers violation, it is helpful to examine both the history of the challenged practice and the branches' tolerance of analogous practices. *Carrick*, 125 Wn.2d at 136. While deeply embedded traditional ways of governing do not supplant the Constitution or legislation, tradition does give meaning to the words of the Constitution and statutes. *Id.* at 136. Thus, a long history of cooperation between or among governmental branches in any given instance tends to militate against finding a separation-of-powers violation. *Id.*

For the present case, the judiciary, as represented by the WSBA, has not tolerated the regulation of attorneys by the Department. Recent modifications of the MBPA acknowledges that the Department cannot regulate the practice of attorneys. Attorneys have long been exempted from the operation of the MBPA, but the language of the statute was

ambiguous.⁸ The MBPA was clarified in 2013 to entirely exempt attorneys from regulation by the Department in their practice of the law. The exemption contained in the MBPA now reads that “[t]he following are exempt from all provisions under this chapter. . . An attorney licensed to practice law in this state.” RCW 19.146.020(1)(c). That clarification of the exemption eliminated the Department’s asserted authority to regulate attorneys so long as the attorneys are acting as attorneys. PLC assert that this change reflects the legal reality predating the modification of the MBPA: that the regulation of attorneys has always resided solely with the judiciary. *See, e.g., Graham v. State Bar Ass’n*, 86 Wn.2d at 631 (1976); *see also Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d at 453 (regulation of the practice of law is within the sole province of the judiciary); *Seattle v. Ratliff*, 100 Wn.2d at 215 (1983) (court’s power to regulate the practice of law in this state is not only well established but is inviolate as well). The Preamble to the 2013 MBPA supports this interpretation:

AN ACT relating to licensing residential mortgage loan services through the national mortgage licensing service and clarifying the existing authority of the department of financial institutions to regulate residential mortgage loan modification

⁸ “An attorney licensed to practice law in this state who is not principally engaged in the business of negotiating residential mortgage loans when such attorney renders services in the course of his or her practice as an attorney.” RCW 19.146.020(1)(b) (2009).

services under the consumer loan act and the mortgage broker practices act.

AR at 0108 (emphasis added). Preambles may be used in the interpretation of a regulation. *El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008).

The Department has previously attempted to regulate the law practice of attorneys. On February 13, 2012, the state senate passed SB 6218, entitled “An act relating to escrow licensing requirement exceptions.” The bill served to clarify that a person licensed to practice law in Washington need not be licensed by the director of the Department of Financial Institutions if he provides escrow services in the course of his professional duties under the same legal entity as a law practice. *See* Plaintiff’s Trial Brief at p. 53, Ex C. It specifically noted that “**DFI did not intend to regulate the practice of law and does not have that sort of authority.**” *Id* (emphasis added). The Senate Bill was promulgated because a number of lawyers had threatened to file suit against the Department for the illegal regulation of the practice of law. *See id*. Explicit in the passage of these amendments was the recognition that the Department could not regulate the practice of law.

Sound policy supports the exemption of attorneys from the operation of the MBPA. If attorneys who assist clients with disputes or

potential disputes with lenders are subject to the far-reaching scrutiny of the Department, they will experience the potential “chilling effect,” intended or not, on their ability to provide such representation. It has the potential to intrude on confidential attorney-client communications or work-product, which is protection that extends to an attorney’s staff as well as the attorney himself. Despite this history, the Department in this case insists on attempting to regulate the actions of an attorney and a bona fide law practice. The plain reading of that preamble is that the Department’s prior authority was unclear, just as it was in relation to escrow, and required clarification. The Department’s authority is now clear: the law is that the Department has not had any authority to regulate attorneys in their practice of law. As such, PLC asks this Court to enter an order dismissing the SOC as it fails to state a claim as a matter of law.

V. CONCLUSION

For the foregoing reasons, Appellant requests that this court reverse the superior court order dated April 17, 2015.

DATED THIS 23rd Day of October, 2015.

The Rosenberg Law Group, PLLC

A handwritten signature in black ink, appearing to read 'Hanni Calhoun', written over a horizontal line.

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DECLARATION OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on October 23, 2015, I hand delivered an original and one copy of the foregoing brief to the following parties:

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The brief was also sent on that date via regular U.S mail and Email to the following parties:

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DATED: October 23, 2015



Hanni Calhoun