

# Ins and Outs of Outside Counsel

For Elected County Officials

Greg Banks, Island County Prosecuting Attorney

# Agenda

- My Background With The Issue
- Lawyers' Rules of Ethics
- Structure of County Government
- Significant Supreme Court Cases
  - When can you get outside counsel
  - When will the county pay for your outside counsel
- Race to the Prosecutor
- Questions and Possibly Answers

# Who is Greg Banks, and why is he presenting?

- Island County Prosecutor since 1999
- *State ex. rel. Banks versus Drummond and Board of Island County Commissioners* (2016)
- Much like the way a person who is hit by a car is regarded as an automotive design engineer

# The Rules of Professional Responsibility (RPC)

- Apply to all attorneys in Washington
- For our purposes today, focus on two aspects:
  - Representing Organizations
  - Conflicts of Interest

# Representing Organizations

## RPC 1.13

- Lawyers represent an organization through its duly authorized constituents
- Lawyers do not represent the constituents
- Lawyers have duty to tattle on constituents if contrary to organization's interests
- Lawyers must explain to constituents who the client is

# Representing Organizations (cont.)

## RPC 1.13

- If an organization is clearly acting unlawfully *and* lawyer has tried to get highest authority to follow the law, the lawyer may disclose otherwise confidential information related to the law violation

# Who are the Prosecutor's Clients?

## RCW 36.27.020

- Legal adviser of the **legislative authority**
- Legal adviser to **all county and precinct officers** ...in all matters relating to their official business
- Appear for and represent the ... county... in all criminal and civil proceedings in which ... **the county** ... may be a party

# Who is the Prosecutor's Client?

Q: Who is "the County?"

A: Who is the final decision maker on the issue?



# Conflicts of Interest

## RPC 1.7

- One client's interest directly adverse to another
- Representing one client may infringe on lawyer's duty to another client

# Structure of the County

- WA Const. Art. 11 § 5
- WA Const. Art. 11 § 4 (Home Rule)
- Prosecutors are Special 😊
- Title 36 RCW (Duties of County Officials)

# Authority to Hire Outside Counsel

*State ex. rel. Banks v. Drummond* (2017)

- Key Terms:
  - Usurp
  - Quo warranto

# Authority to Hire Outside Counsel

*State ex. rel. Banks v. Drummond* (2017)

- If lawyer will perform a core prosecutorial function, she can only be hired with prosecutor's approval
- Unless prosecutor has a conflict or disability

# The Prosecutor's Core Functions

RCW 36.27.020

- **Legal adviser** of the legislative authority
- **Legal adviser** to all county and precinct officers ...**in all matters relating to their official business**
- **Appear for and represent the ... county...** in all criminal and civil proceedings in which ... **the county**... may be a party

# The Prosecutor's Clients

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# Take-away of *Drummond*

- You hire a lawyer without the prosecutor's authorization at your peril
- And at your expense

# Disability of the Prosecutor

RCW 36.27.030

- Where a prosecutor is unable to perform his or her duties, a judge may appoint a qualified person to perform them.



# Judges Acting Badly

## *Matter of Special Deputy Prosecuting Attorney (2019)*

- Whether the Franklin County Superior Court judges validly appointed their own special deputy prosecuting attorney to pursue a separate civil suit.
- “We hold that the order is invalid; while the judges are free to sue the clerk, they must do so at their own expense.”

-- Washington Supreme Court

# Judges Acting Badly (cont.)

*Matter of Special Deputy Prosecuting Attorney (2019)*

- “RCW 36.27.020 does not specifically compel the prosecutor to bring any civil suit.”
- Accordingly, a prosecutor's maintenance of any civil proceedings under RCW 36.27.020 is discretionary.

– Washington Supreme Court

# Commissioners Acting Badly

## *Osborn v. Grant County* (1996)

- The superior court can appoint a special prosecutor to represent a party only when two conditions are met:
  1. The prosecutor must have the authority *and the duty* to represent that party in the given matter.
  2. Some disability [i.e. conflict of interest] must prevent the prosecutor from fulfilling that duty.

# Assessor v. County Council

*Hoppe v. King County* (1980)

- “[N]othing in the duties of the prosecuting attorney requires that officer to bring an action simply because a request is made by another county officer. While RCW 36.27.020(2) does require the prosecuting attorney to ‘(be) legal adviser to all county ... officers’, this is not a requirement that the prosecuting attorney appear for or represent a county officer.”

# Assessor v. County Council (cont.)

## *Hoppe v. King County* (1980)

- The Prosecutor's refusal to advise or represent an official, where the prosecutor has no duty to do so, does not create a "disability" for purposes of RCW 37.27.030

# Prosecutor v. Coroner

*Grant County Prosecutor v. Jasman (2015)*

- “Prosecutors are required to represent county officers only when an officer is sued for money damages or when the county or State is the real party in interest. In this case, Coroner Morrison was not sued for money damages and the State or county was not the real party in interest, so he was not entitled to a special prosecutor's representation.”

# Prosecutor v. Coroner

*Grant County Prosecutor v. Jasman (2015)*

- Indemnification under RCW 4.96.041
- Only applies when sued for money damages
- BOTTOM LINE:  
Morrison and Jasman personally paid for their own attorneys

# Prosecutor v. County Commissioners

*Stevens Cty ex. rel. Rasmussen v. Three Commissioners*

- Decision about collective legislative action, and who is a custodian of public funds
- Commissioners were not entitled to county-paid attorneys to defend case under state law
- Commissioners have filed federal lawsuit v. retired prosecutor and county



# New Mediation Requirement

## RCW 36.46.010

- Before litigation between county elected officials, there is a quasi-mandatory mediation

# Race to the Prosecutor

- My practice is to resolve those disputes before opposing counsel are required
- But, Prosecutor *selects and appoints* a special DPA
- Very fact specific
- Might be first one gets prosecutor
- Might be based on facts
- Might be based on prosecutorial preference

# What are your concerns?

- When do you need outside counsel?
- When do you want outside counsel?

# Other Questions?

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