

NO. 92749-9

(Island County Superior Court Cause No. 15-2-00465-9)

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, on the Relation of Gregory M. Banks,  
Prosecuting Attorney of Island County,

Appellant,

v.

SUSAN E. DRUMMOND, and LAW OFFICES OF SUSAN  
ELIZABETH DRUMMOND, PLLC; and  
ISLAND COUNTY BOARD OF COMMISSIONERS,

Respondents.

---

RESPONDENT DRUMMOND'S  
AMENDED RESPONSE TO APPELLANT'S OPENING BRIEF

---

Robert B. Gould, WSBA No. 4353  
LAW OFFICE OF ROBERT B. GOULD  
Counsel for Respondent Drummond  
51 West Dayton Street, Suite 208  
Edmonds, WA 98020  
(206) 633-4442; [rbgould@nwlegalmal.com](mailto:rbgould@nwlegalmal.com)

## TABLE OF CONTENTS

1. INTRODUCTION .....	1
2. SUMMARY OF FACTUAL BACKGROUND .....	5
2.1. Procedural Background.....	5
2.2. Decision to Retain Outside Counsel .....	6
2.3. Appellant Banks’ Conflicting Roles as Advisor and Adversary ...	12
3. RESTATEMENT OF ISSUES .....	13
4. ARGUMENT .....	15
4.1. Standard of Review: Appellant Banks Conceded RCW 36.32.200's Implementation Was Constitutional .....	15
4.2. The County has Both Inherent and Statutory Authority to Retain Outside Counsel.....	18
4.3. The Washington Constitution and State Legislature Did Not Provide Appellant Banks the Powers He Lays Claim To.....	23
4.4. To Protect Access to Justice, the Judiciary Must be Able to Review and Approve a County Decision to Retain Outside Counsel as the Legislature Authorized through RCW 36.32.200.....	26
4.5. RCW 36.32.200 Protects Not Only the Right to Counsel, but Separation of Powers .....	31
4.6. Appellant Banks Postured the Case as a <i>Quo Warranto</i> Matter to Artificially Construct a Framework in Which He Was Not Suing His Client on a Matter He Advised On, a Prohibited Action .....	34
4.7. Appellant Banks' Complaint was Untimely.....	38
4.8. Estoppel Bars Appellant Banks' Appeal .....	40
4.9. The County Resolution Engaging Counsel is Not Ultra Vires: the Position is Contrary to State Law and Banks' Sworn Testimony .....	41
5. CONCLUSION.....	43

- Exhibit 1                    Island County Superior Court Decision Reviewing and Approving County Decision to Retain Counsel, without attachment (April 20, 2015), CP 1343-49
- Exhibit 2                    Island County Board of Commissioners Resolution C-48-15, County Decision to Engage Counsel (April 28, 2015), CP 1520-26
- Exhibit 3                    Island County Superior Court Findings of Fact and Conclusions of Law Supporting Order Denying Plaintiff's Motion for Preliminary Injunction (October 29, 2015), CP 2016-23
- Exhibit 4                    Summary Judgment and Declaratory Judgment Decisions Supporting County and Judiciary's Use of RCW 36.32.200, CP 1551-59 and 1548-50
- Exhibit 5                    Appellant Banks' Subpoena to Island County Superior Court Bench (December 22, 2015); Counsel for Ms. Drummond's Responsive Correspondence (December 24, 2015); and Court Responsive Correspondence (December 31, 2015) CP 43-46, 48-49, and 51-54
- Exhibit 6                    Discovery Excerpts Re: Concessions of Appellant Banks (Unquestioned Constitutionality of RCW 36.32.200 and Accurate Superior Court Analysis), CP 862 and 1126
- Exhibit 7                    Washington Statutory and Constitutional Excerpts

**GLOSSARY**

GMA            Growth Management Act, Ch. 36.70A RCW  
County        Island County Board of Commissioners

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>1000 Friends of Wash. v. McFarland,</u> 159 Wn.2d 165, 149 P.3d 616 (2006).....	24
<u>Durland v. San Juan County,</u> 182 Wn.2d 55, 340 P.3d 191 (2014).....	15
<u>Kessinger v. Anderson,</u> 31 Wn.2d 157, 196 P.2d 289 (1948).....	41
<u>McCleary v. State,</u> 173 Wn.2d 477, 269 P.3d 227 (2012).....	3
<u>McDevitt v. Harborview Medical Center,</u> 179 Wn.2d 59, 316 P.3d 469 (2013).....	17
<u>Northwestern Improv. Co. v. McNeil,</u> 100 Wash. 22, 170 P.338 (1918).....	21
<u>Prentice v. Franklin County,</u> 54 Wash. 587, 103 P.831 (1909).....	20, 35
<u>Putman v. Wenatchee Valley Med. Ctr., PS,</u> 166 Wn.2d 974, 216 P.3d 374 (2009).....	31
<u>Reed v. Gormley,</u> 47 Wash. 355, 91 P.1093 (1907).....	19
<u>Schreiner Farms, Inc. v. American Tower, Inc.,</u> 173 Wn. App. 154, 293 P.3d 407 (2013).....	42
<u>South Tacoma Way, LLC v. State,</u> 169 Wn.2d 118, 233 P.3d 871 (2010).....	42
<u>State v. Watson,</u> 146 Wn.2d 947, 51 P.3d 66 (2002).....	29
<u>State ex rel. Jefferson County v. Jefferson County Superior Court,</u> 142 Wash. 54, 252 Pac. 102 (1927).....	19, 35
<u>State ex rel. Johnston v. Melton,</u> 192 Wash. 379, 73 P.2d 1334 (1937).....	20
<u>Welfare of A.W.,</u> 182 Wn.2d 689, 344 P.3d 1186 (2015).....	15
<u>Yakima County (West Valley) Fire Prot. Dist. No. 12 v. Yakima,</u> 122 Wn.2d 371, 858 P.2d 245 (1993).....	33

### CASES, OTHER STATES

<u>Barnard v. Young,</u> 43 Idaho 32 382, 251 P. 1054 (Idaho 1926) .....	22
---	----

<u>Board of Supervisors of Maricopa County v. Woodall,</u> 120 Ariz. 391, 586 P.2d 640 (1978).....	23
<u>Board of Supervisors of Maricopa County v. Woodall,</u> 120 Ariz. 379, 586 P.2d 628 (1978).....	23
<u>Clough v. Wheat,</u> 8 Kan. 487 (1871) .....	22
<u>Ex parte Corliss,</u> 16 N.D. 470, 114 N.W. 962 (1907) .....	22
<u>Harvey v. County of Butte,</u> 203 Cal. App. 3d 714 (1988) .....	23
<u>In re Special Investigation No. 244,</u> 296 Md. 80, 459 A.2d 1111 (1983) .....	22
<u>Merriam v. Barnum,</u> 116 Cal. 619, 48 P.727 (1897) .....	23
<u>Murphy v. Yates,</u> 176 Md. 475, 348 A.2d 837 (1975) .....	22
<u>Meller v. Board of Commissioners,</u> 4 Idaho 44, 35 P.712 (Idaho 1894) .....	22
<u>Romley v. Daughton,</u> 252 Ariz. 521, 242 P.3d 518 (2010) .....	23
<u>Salt Lake County Comm’n v. Short,</u> 1999 UT 73, 985 P.2d 899 (Utah 1999).....	22
<u>State ex rel. Cline,</u> 12 Ohio C.C. (n.s.) 103 (1909) .....	21
<u>State ex rel. Langer v. Totten,</u> 44 N.D. 557, 175 N.W. 563 (1919) .....	22
<u>State ex rel. O’Connor v. Davis,</u> 139 Ohio App. 3d 701, 745 N.E.2d 494 (2000).....	21

#### CONSTITUTIONAL PROVISIONS

Arizona Const., Art. XII, § 3 .....	23
Maryland Const., Art. 5, § 9 .....	22
Wash. Const., Art I, § 1 .....	23
Wash. Const., Art. I, § 10 .....	26
Wash. Const., Art. XI, § 5.....	21, 23-24
Wash. Const., Art. XI, § 11.....	24

WASHINGTON STATUTES

RCW 2.48.170 ..... 28  
RCW 13.32A.160(1)(c) ..... 32  
RCW 13.32A.192(1)(c) ..... 32  
RCW 13.34.090 ..... 32  
RCW 28A.225.035(7)(b) ..... 32  
RCW 36.01.030 ..... 35  
RCW 36.27.020 ..... 35  
RCW 36.32.120(6)..... 14, 18, 20, 25, 29, 34, 35, 42  
RCW 36.32.200 ..... 1-5, 9, 12-16, 18, 20-23, 25-27, 29-32, 34, 40-44  
RCW 36.32.330 ..... 6, 14, 38

STATUTES, OTHER STATES

K.S.A. § 19-723, § 19-247 and § 19-248..... 22

COURT RULES

APR 1 ..... 28  
CR 56(c)..... 15  
GR 24 ..... 28  
GR 33(a)(1)(C)..... 32  
RAP 5.2(a) ..... 6, 14, 38  
RAP 9.12..... 42

OTHER AUTHORITIES

Confirming The Constitutional Right Of Meaningful Access  
To The Courts In Non-Criminal Cases In Washington State,  
4 Seattle J. Soc. Just 383, James A. Bamberger (2005)..... 27-28  
Justice And The Poor, Reginald Heber Smith  
Patterson Smith Publishing (3d ed. 1972, 1919)..... 28

## 1. INTRODUCTION

Respondent Drummond joins Island County in requesting that this Court respect the County's and judiciary's use of RCW 36.32.200 to approve the engagement of outside counsel. Pursuant to this 111-year-old statute, the Island County Superior Court bench unanimously approved the County's decision to retain counsel. The approval was made just as it has been over the last 18 years in Island County and consistent with state-wide practice for over a century. Despite his near complete lack of objection for almost two decades to such engagements,<sup>1</sup> Appellant Banks filed suit. A visiting judge reviewed the County Resolution and seven-page Superior Court decision approving outside counsel, and upheld the County's and Court's use of RCW 36.32.200. Appellant Banks petitioned for review by this Court.

Appellant Banks is **not** challenging RCW 36.32.200 as facially unconstitutional and concedes the statute was implemented in accordance with its procedural requirements. Privately, he has stated that he does not believe the Island County Superior Court's seven-page analysis of RCW 36.32.200 was wrong.<sup>2</sup> And, given the absence of factual context in his

---

<sup>1</sup> CP 1139-58; CP 1326, see also CP 1320-21.

<sup>2</sup> Ex. 6, CP 1126. The prosecutorial organization Banks belongs to privately stated that "for the last 22 years [its advice] has been that the statute is only constitutional if there exists a **conflict, refusal or otherwise an objective 'cause.'**" CP 1127, emphasis added.

opening brief, Appellant Banks cannot meet his heavy burden of proof to demonstrate the statute was unconstitutionally applied.

The right to counsel is a fundamental component of our justice system. Unless the judiciary has the ability to protect this right, an adversarial justice system such as that established through our state constitution cannot function as intended. Yet Appellant Banks' position is that it is not the judiciary, but he, who decides whether his client (and adversary) is entitled to representation; and, if so, who the attorney will be and even what that attorney may advise on. Yet he retains for himself, when he purports to act for the "state" or "county," the absolute and unfettered right to retain any attorney he likes. Even were such an approach constitutional, the legislature has not accorded him such far-reaching powers.

The plain language of RCW 36.32.200 does not afford Appellant Banks a prosecutorial veto. He would like to rewrite the statute, but since he concedes the statute as written is constitutional and its terms were adhered to, that is the section of law which governs this case. This case is not about whether any government official or body of officials has a right to counsel at county expense.<sup>3</sup> It is about whether Island County (through its Board of Commissioners) may retain counsel with judicial approval, as

---

<sup>3</sup> See Brief of Appellant, p. 1.

the legislature authorized through RCW 36.32.200. Here, counsel was retained to advise on GMA duties the legislature assigned to the County, a decision which was made because Appellant Banks is unable to provide the requisite legal counsel.

Three superior court judges and two superior courts have now unanimously affirmed the County's use of RCW 36.32.200 through a preliminary injunction denial supported by seven pages of findings, a summary judgment decision, a declaratory judgment decision, and the seven-page Island County Superior Court decision.<sup>4</sup> Appellant Banks does not challenge the findings in these decisions, which are "now verities on appeal,"<sup>5</sup> and failed to file a timely appeal. Appellant Banks instead simply declares that he, not the judiciary, makes these calls.

With his approach, Appellant Banks is the sole gatekeeper regarding questions of judicial access. This position remains unaltered even in situations where conflicts or other issues impair the local prosecutor's ability to fairly and impartially determine whether to appoint counsel and, if so, who to appoint. With Appellant Banks' approach, there is no check on his prosecutorial power of appointment. A power

---

<sup>4</sup> Ex. 3, CP 2016-23 (Findings of Fact and Conclusions of Law Supporting Order Denying Plaintiff's Motion for Preliminary Injunction); CP 2040-42 (order denying injunction); Ex. 4, CP 1548-59 (summary judgment decisions); Ex. 1, CP 1343-49 (Island County Superior Court decision).

<sup>5</sup> *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012).

imbalance is created if a party is at the mercy of another who is allowed to determine who may serve as their attorney, or indeed whether they may retain counsel at all, regardless of the existence of bias, prejudice, or conflicts. Here, in a government setting, the approach threatens separation of powers and erodes the judiciary's ability to protect access to the court system. Of course, these constitutional issues need not be parsed as RCW 36.32.200 does not take Appellant Banks' approach.

The suit is particularly problematic as Appellant Banks is suing his client (the County) on a matter he personally advised on. Despite the obvious conflicts of interest, he did not recuse himself or appoint outside counsel to assist his client. He advised on the decision and then appealed it, adverse to his client's interests.

Ms. Drummond, as an attorney, holds a professional contractual right, and indeed a duty, to protect her client's right to counsel. She, as with any attorney, holds the right to agree to provide legal services to a client, following the appropriate legal processes, **including here judicial approval**, without fear of defamation, suit, and financial injury as reprisal for committing to that solemn fiduciary obligation which is integral to a working system of justice: providing legal services to a client in need. For our system to work, it is imperative that the courts accord respect to

judicial decisions authorizing retention of counsel, particularly where, as here, those decisions are legislatively authorized.

Ms. Drummond joins the County, and incorporates its briefing and argument, in asking the Court to uphold the Superior Court summary judgment and declaratory judgment decisions refusing to reverse the County's decision, and the Island County Superior Court's approval of the decision, to retain outside counsel pursuant to RCW 36.32.200. Appellant Banks has not met his burden of proof to demonstrate beyond a reasonable doubt that the application of the statute was unconstitutional.

## **2. SUMMARY OF FACTUAL BACKGROUND**

### **2.1. Procedural Background**

The County requested superior court review of its proposal to retain outside counsel pursuant to RCW 36.32.200. The Island County Superior Court, in a unanimous seven-page decision, approved the retention.<sup>6</sup> This was followed by the County's approval by Resolution of the engagement, with detailed findings explaining the decision.<sup>7</sup>

Appellant Banks purported to act as the County's legal counsel over the contract approval, did not appoint independent counsel to represent the County, and then after the relevant appeal periods had run, effectively sued his client over the issue he had advised upon.<sup>8</sup>

---

<sup>6</sup> Ex. 1 (Island County Superior Court decision, without attachment), CP 1343-49.

<sup>7</sup> Ex. 2 (Island County Board of Commissioners Resolution C-48-15), CP 1520-26.

<sup>8</sup> *See e.g.*, CP 1185-88, § 3.2; CP 945-47, § 3.4.

Appellant Banks did not appeal his client's decision within 20 days as statutorily required,<sup>9</sup> or the superior court decision within 30 days,<sup>10</sup> but instead waited nearly four months before filing suit.<sup>11</sup> The County was not joined until the court ordered joinder of the County as a necessary party, nearly six months after the County adopted Resolution C-48-15.<sup>12</sup>

Following the Island County Superior Court bench's recusal, the Skagit County Superior Court visiting judge reviewed summary judgment cross-motions and other pleadings, and upheld the County's decision to retain outside counsel.<sup>13</sup> Appellant Banks' petition for review followed.

## **2.2. Decision to Retain Outside Counsel**

The County determined it required outside counsel to advise on its GMA duties. In addition to simply needing the professional expertise, the County required counsel due to Appellant Banks': (1) refusal and inability to provide strategic legal advice; (2) failure to adequately defend County GMA decisions, including missing a deadline for an appeal the County directed the Office to file; and (3) a long and troubled history representing

---

<sup>9</sup> RCW 36.32.330.

<sup>10</sup> RAP 5.2(a).

<sup>11</sup> The engagement was approved in April of 2015 (*see* Exs. 1 and 2, CP 1343-49 and 1520-26). The complaint was filed August 12, 2015, with service following several days later. CP 1468-1529. Appellant Banks takes the position that the statute of limitations does not apply to the type of action he filed (a *quo warranto*). Appellant Banks improperly framed the case in this manner to obscure the fact that he was effectively suing his client over a matter he had advised upon.

<sup>12</sup> CP 2125-26 (Order Granting Defendants' Motion to Join Island County Board of Commissioners as a Defendant, October 1, 2015).

<sup>13</sup> CP 1551-59 and 1548-50.

his client, which has included Appellant Banks' use of the media to influence client policy decisions.

These facts are documented in the unanimous Island County Superior Court bench decision and County Resolution, the denial of Appellant Banks' motion for injunctive relief, declarations from the County Commissioners, declarations from two former County Commissioners, Ms. Drummond's declarations, and Appellant Banks' deposition and discovery responses.<sup>14</sup> Resolution C-48-15 outlines the County rationale for retaining outside counsel.<sup>15</sup> The nineteen findings include the following excerpts:

[S]ince GMA's enactment, Island County has been involved in an unprecedented amount of litigation, particularly over GMA environmental and resource land use issues....<sup>16</sup>

---

<sup>14</sup> Exs. 1-3 (CP 1343-49, 1520-26, and 2016-23). For declarations, *see*:

- Comm'r H.P. Johnson Decs., CP 704-24, 977-82, 1338-49;
- Comm'r J. Johnson Dec., CP 983-88;
- Comm'r Hannold Dec., CP 21-32, 1320-37;
- Former Comm'r Shelton Dec., CP 989-96;
- Former Comm'r McDowell Dec., CP 932-34; and,
- Drummond Decs., CP 1123-72; 1200-44.

For deposition and discovery excerpts, *see* CP 2433-2509.

<sup>15</sup> Ex. 2 (Resolution C-48-15), CP 1520-26.

<sup>16</sup> CP 2453 (Banks Deposition, p. 67, "Q: As the Prosecuting Attorney of Island County from January, 1999 until the present time, do you believe there has been a significant amount of GMA litigation brought against your client, Island County? A: Yeah, significant is probably fair."); CP 2456 (Banks Deposition, p. 76, "Q: ... [reading from GMA decision] 'The Board's level of concern is heightened by the fact that fully compliant GMA fish and wildlife conservation critical area regulations have been lacking in Island County for many years,' end quote. As the primary attorney for Island County, do you agree ... with that statement as found by the Board? A: I agree.").

Island County desires an approach to GMA which, over the long term, not only results in the successful defense of County legislation, but ultimately reduces the litigious nature of such planning within the County, and serves the public's best interest....

[I]n order to achieve these objectives, the Board of County Commissioners has a need for proactive legal strategy, advice, and assistance during the GMA update process to guide decisions and actions in the development and adoption of [GMA legislation]....

[T]he County requires further assistance with proactively planning to address these challenges so that the Board of County Commissioners is fully informed as to the planning and legal challenges the County is facing....

[I]n land use matters, in which a county is planning not just for the moment but over the long term, through a twenty-year planning period, it is critical that policies and requirements be strategically developed in concert with sound legal input....

[T]he County wishes to avoid "crises-based" decision making, and instead engage in the methodical development of legislation to address future challenges....

[F]or long term policies and requirements to be soundly developed, those making the final policy decisions must be fully informed as to how proposed legislation fits within the relevant legal structure....

[D]eveloping a proactive approach, centered on the strategic development of a long range plan, will take significant up front resources and experience to address, particularly given the controversial and contested nature of the land use issues facing the County....

[T]he Board of County Commissioners has consulted extensively with the Prosecuting Attorney as to these

objectives and the need for extensive and experienced legal support....\*

[A]t present, the Prosecuting Attorney's office is unable to provide said comprehensive and proactive legal strategy, advice and assistance. There are currently conflicts, resource constraints, and communication issues to resolve, as reflected in meetings between the Prosecuting Attorney and Board of County Commissioners....\*

[I]mmediate assistance is required due to GMA's upcoming update deadline, and it is deemed necessary and advisable that legal counsel experienced in GMA and land use planning related matters be employed as special counsel....

[T]he County has identified special counsel (Law Offices of Susan Elizabeth Drummond, PLLC), a firm with significant experience in the field of GMA and with advising a variety of local jurisdictions throughout the state on the range of options available for developing a long term legal strategy on legislative land use matters....

[T]he Board of County Commissioners desires to resolve outstanding concerns and establish a cooperative working relationship with the Prosecutor's Office, the Planning and Community Development Department, along with special counsel, as that will best serve the public interest....

[T]o address its pressing need for assistance, RCW 36.32.200 authorizes the County's legislative body to employ experienced counsel on approval by the Superior Court Judge....

Other than initial confusion over what "unprecedented" meant, Appellant Banks took issue with only two of the above findings, marked above with an asterisk.<sup>17</sup> He disagreed his client has "consulted extensively" with him

---

<sup>17</sup> CP 2460-61 (Banks Deposition, pp. 112-13). Banks disputed the County had faced an "unprecedented" amount of GMA litigation, but later clarified "there's been a lot." CP

on its legal needs although that consultation is documented.<sup>18</sup> He disputed his Office's inability to meet his client's legal needs, although that too is documented,<sup>19</sup> and Appellant Banks conceded his Offices "**probably have some role**" in the County's noncompliance with GMA.<sup>20</sup>

One of the County's concerns has been that Appellant Banks was not willing and able to abide by County objectives with regard to the GMA review. The County required and requested high level GMA expertise and "strategic legal support." That was not available. In response, Appellant Banks stated "I'm not sure what that even means."<sup>21</sup> Further, he admitted "I don't have specific recollections" of ever giving the Board of County Commissioners, as it is presently constituted, "advice, recommendations or counsel based on the GMA."<sup>22</sup>

The County also required an attorney to advise on its GMA policy decisions who would not jeopardize their defensibility or influence those

---

2468 (Banks Deposition, p. 136). In questioning, counsel identified 27 separate GMA actions and Mr. Banks stated he felt "like there were more," but he did not have the number. *Id.*, see also CP 2455 (Banks Deposition, p. 69. Prosecutor concedes County has been "out of compliance with GMA for many years").

<sup>18</sup> CP 1226-44 (TR, March 18, 2015 County/Banks Work Session); CP 983-86 (Comm'r J. Johnson Dec.).

<sup>19</sup> CP 1321-23 (Comm'r Hannold Dec.); CP 983-88 (Comm'r J. Johnson Dec.); CP 1208-09 (Drummond Dec.); see generally CP 989-96 (Former Comm'r Shelton Dec.) and FN 14.

<sup>20</sup> CP 2455 (Banks Deposition, p. 69:7-11. "Q: Do you believe as chief legal officer for Island County that you and your department play any role whatsoever in noncompliance with GMA? A: Any role whatsoever? We probably have some role in that.").

<sup>21</sup> CP 1232 (TR, March 18, 2015 County/Banks Work Session).

<sup>22</sup> CP 2440-41 (Banks Deposition, pp. 50-51).

decisions by failing to vigorously defend those decisions in litigation<sup>23</sup> or, more insidiously, through use of the media. In deposition testimony, Appellant Banks admitted the following:

Q: At any time during your tenure as Island County Prosecuting Attorney, have you gone to the press to voice your complaints about actions and/or proposed actions of the Board?

A: **I would say I've gone to the press to inform them about actions or proposed actions of the Board.**

Q: **And isn't one of the purposes of your doing so to try and go through the medium of the press to put pressure on the Board to change decisions or proposed decisions?** Isn't that true, sir? Yes or no.

A: Did you say one of the purposes?

Q: Yes, I did.

A: **That was probably true in certain occasions.**<sup>24</sup>

The Office's proclivity to use the press to alter client policy decisions is documented in the submission of 3,399 pages of e-mail correspondence and 26 pages of text messages between Appellant Banks and a local newspaper reporter since 2006, with much of those communications during 2014 and 2015.<sup>25</sup>

---

<sup>23</sup> The failure to file an appeal per client direction is addressed at CP 1322 (Comm'r Hannold Dec.), ¶ 7.

<sup>24</sup> CP 2442 (Banks Deposition, p. 53), emphasis added.

<sup>25</sup> Excerpted materials are at CP 2482-2509. The materials raise issues regarding respect for the integrity of judicial process and separation of powers, a concern present throughout this proceeding, as illustrated by the subpoena submitted to the Island County

There were ample reasons for the County and judiciary to approve the engagement of outside counsel. RCW 36.32.200 does not require an RPC level impediment. However, the facts in this case do illustrate - at a constitutional level - why the safety valve in RCW 36.32.200, which provides for superior court approval of outside counsel, is so critical.

### **2.3. Appellant Banks' Conflicting Roles as Advisor and Adversary**

Appellant Banks served as legal counsel to the County and Superior Court on this matter. He submitted two separate memos with detailed legal analysis to both clients,<sup>26</sup> without copying the other.

Q: [T]he whole purpose of Exhibit 5, if I've read it correctly ... and you tell me if I'm wrong -- is for you to convince the Island County Superior Court Bench that they should not approve the contract, proposed contract with Ms. Drummond pursuant to RCW 36.32.200; is that true?

A: **My purpose was to advise them of what I thought were infirmities with the process. And yes, I would have expected that they would follow my legal advice and not approve the contract.**<sup>27</sup>

---

Superior Court bench just days before Christmas requesting production of deliberative materials on January 4, a date coinciding by date and time with the Court's regular motions calendar. *See* § 4.5 below. *See also*, documents re involvement in public defender compensation (CP 713-21); text messages re jury trial proceedings (CP 2502-09); and banter on moving a murder trial date to accommodate a reporter's vacation schedule (CP 2493).

<sup>26</sup> CP 2452-53 (Banks Deposition, p. 66:20-21, "I sent a substantially similar memo to the Board....", and p. 67:5-6, "I would have expected that they would follow my legal advice and not approve the contract."). Banks' memo is at CP 2366-72.

<sup>27</sup> CP 2452-53 (Banks Deposition, pp. 66-67); *see also* CP 2460 (Banks Deposition, p. 112:5-7. "It was contrary to my legal advice....").

The materials submitted took the position that without his approval, any use of RCW 36.32.200 was unconstitutional.<sup>28</sup> The substance of the analysis was largely cribbed from CLE materials prepared by his current attorney, not necessarily with consultation.<sup>29</sup>

Appellant Banks did not appoint independent counsel for either client despite the fact that if the decision did not go the way he desired, as he stated in his memo marked "attorney-client privileged," he intended to challenge the Court's decision and effectively sue the County.<sup>30</sup> When his client questioned him on his intent to sue the County, he reassured his client by stating he would avoid suing them directly by suing their attorney instead.<sup>31</sup>

### 3. RESTATEMENT OF ISSUES

Respondent Drummond restates the issues as follows:

**Issue One.** Did the Island County Superior Court correctly determine Appellant Banks failed to meet his burden of proof to

---

<sup>28</sup> As noted above, the memo to the Court was attached to their decision and circulated to both the County and Appellant Banks. CP 2366-72.

<sup>29</sup> CP 2447-49 (Banks Deposition, pp. 61-63. "Q: Are you the draftsman of the entirety of this document,... A: "No. ... So from the point I pointed out earlier, 'The Role and Authority of the Prosecuting Attorney,' until that point I largely cribbed a lot of that work from -- actually from some CLE materials that were prepared by Ms. Loginsky. ... Q: Did you confer with her or just pull this material from written materials she had earlier done, or both? A: ... I don't recall if I conferred with her or not.").

<sup>30</sup> The County was joined as a necessary party to this action by court order. CP 2125-26. Appellant Banks did not appeal that order.

<sup>31</sup> CP 1229-30 (TR, March 18, 2015 County/Banks Work Session). ("Q: Are you threatening to sue us? ... A: I don't know. Did I threaten to sue you? I don't think so. ... Q: I am asking for clarification. ... A: I would file a lawsuit. ... It would be against the attorney.").

demonstrate beyond a reasonable doubt that the County and Superior Court had unconstitutionally applied RCW 36.32.200, where:

(1) The County has inherent authority to retain counsel to advise on duties assigned by the legislature, such as GMA, under the state constitution and consistent with the RPC, as well as through RCW 36.32.200 and RCW 36.32.120(6);

(2) Appellant Banks does not challenge the constitutionality of RCW 36.32.200 and concedes the Superior Court and County made the decision to engage outside counsel consistent with RCW 36.32.200's procedural requirements;

(3) cause existed warranting the use of RCW 36.32.200;

(4) the inability to access independent counsel pursuant to RCW 36.32.200 in this situation would unconstitutionally impair the right of judicial access and separation of powers;

(5) Appellant Banks' complaint challenging County Resolution C-48-15 was not filed within 20 days as required by RCW 36.32.330 (or within 30 days of the Island County Superior Court decision approving the retention, pursuant to RAP 5.2(a));

(6) Appellant Banks' complaint is barred by estoppel due to his failure to object to his client's use of RCW 36.32.200 for nearly two decades; and,

(7) Appellant Banks' complaint is improper and must be dismissed because he lacks statutory authority to bring the suit and he is, in violation of the RPC, suing his client over a matter he personally advised upon.

**Issue Two.** For the reasons identified in Issue One, should the Island County Superior Court's decision issuing a declaratory judgment finding the use of RCW 36.32.200 proper be upheld?

#### **4. ARGUMENT**

##### **4.1. Standard of Review: Appellant Banks Conceded RCW 36.32.200's Implementation Was Constitutional**

The Superior Court ruled in favor of the County and Respondent Drummond on summary judgment cross motions. Summary judgment is granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>32</sup> Review on appeal is de novo,<sup>33</sup> with Appellant Banks having the burden of proof. He must show, beyond a reasonable doubt, that RCW 36.32.200 is unconstitutional as applied.<sup>34</sup>

RCW 36.32.200 is not being challenged as facially unconstitutional; its procedural implementation is not challenged; and, excepting a brief and improperly raised argument addressed in section 4.9 below, he does not challenge the County Resolution approving outside counsel. Appellant Banks has stated that he:

---

<sup>32</sup> CR 56(c).

<sup>33</sup> *Durland v. San Juan County*, 182 Wn.2d 55, 70, 340 P.3d 191 (2014).

<sup>34</sup> *Welfare of A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015).

**has not requested a declaration that Island County Resolution C-48-15 ... is ultra vires or otherwise unlawful. Relator Banks has not requested a declaration that RCW 36.32.200 is unconstitutional.**<sup>35</sup>

During Appellant Banks' deposition he confirmed this position:

Q: You've been handed a two-page document ... entitled, "Plaintiff's Response to Island County Board of Commissioners' Motion to Intervene.... It states, ... **"Relator Banks has not requested a declaration that RCW 36.32.200 is unconstitutional."** End quote. Is that accurate? ...

A: **Well, I would say I have not requested a declaration that it's facially unconstitutional. ...**

Q: **Does it say facially unconstitutional, or is the statement "is unconstitutional"?**

A: **The word facially does not appear there.**

Q: Thank you. Is it your position as a party to this litigation as we speak on Friday, December 4, ... that this statement by your speaking agent [attorney, Ms. Loginsky] is no longer valid?

A: **No. I mean, I think the meaning of it is valid and it's - It's pretty clear. ...**

Q: **-- is it your testimony under oath ... that that statement that I quoted to you verbatim is or is not accurate?**

A: **That is still our position.**<sup>36</sup>

---

<sup>35</sup> CP 2208 (Plaintiff's Response to Island County Board of Commissioners' Motion to Intervene Pursuant to CR 24, September 23, 2015, p. 2:1-3), emphasis added.

<sup>36</sup> CP 2437-39 (Banks Deposition, pp. 33-35), emphasis added.

To the extent even an as applied constitutional challenge may be made given the above, it must address the context.

An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute **in the specific context** of the party's actions or intended actions is unconstitutional.<sup>37</sup>

Appellant Banks made no attempt to meet this burden as he has not explained what aspect of implementation was problematic. The position is untenable. Without the context, there is no as applied challenge. The statute must be reviewed either facially or pursuant to the facts of the specific situation. A statute cannot be unconstitutional as applied while the context is ignored. Yet, Appellant Banks does so, even conceding under oath that the Superior Court's seven-page analysis of the statute's application here was not "wrong."

Q: I quote [from you, Mr. Banks], "Not only did they [the Island County Superior Court bench] approve the contract with outside counsel, ... **but they devoted a considerable amount of paper to analyzing why our constitutional analysis is wrong**, offered an opinion about the likelihood of success of a quo warranto lawsuit, and parroted the BOCC's claims that I am unwilling, unable to perform the work. I'm stunned. I'm interested - I'd be interested in having someone look at their legal analysis. **I don't think it's wrong.**" Are those your words...

A: ... [Y]es, I wrote it....

---

<sup>37</sup> *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 73-74, 316 P.3d 469 (2013), internal citation omitted, emphasis added.

Q: No one else ghost wrote any portion of Exhibit 13 [the exhibit the above quote is from]. These are your words; correct?

A: Yep. Correct.<sup>38</sup>

Having conceded RCW 36.32.200's constitutional application, Appellant Banks cannot meet his burden of proof.

#### **4.2. The County has Both Inherent and Statutory Authority to Retain Outside Counsel**

As Appellant Banks explained to the Superior Court, the County has inherent authority to retain outside counsel.

The board of county commissioners **may have the inherent authority to retain private counsel in discrete litigation matters pursuant to RCW 36.32.120(6)**. The power arises when the prosecuting attorney **is unwilling to abide by the board of county commissioners' decisions concerning the objectives of representation...**<sup>39</sup>

This inherent authority, according to Appellant Banks, is exercised pursuant to RCW 36.32.200,<sup>40</sup> a statute now in place for 111 years.

At the turn of the century, our Supreme Court recognized that "the almost universal law in jurisdictions where the statute is similar to ours is to the effect **that the county commissioners have authority to bind the**

---

<sup>38</sup> CP 2458-59 (Banks Deposition, pp. 94-95).

<sup>39</sup> CP 941, citing to Plaintiff Banks' Memorandum in Support of Entry of Order Ousting the Defendants, p. 9:2-15, at CP 2543.

<sup>40</sup> *Id.*

**county in the employment of special counsel.**"<sup>41</sup> In order to control "the prosecution or defense of all suits to which the county is a party ... the commissioners must in the very outset have the power to employ counsel."<sup>42</sup> The right to employ counsel was addressed again in 1927.

[B]ecause of a dispute between the prosecutor and the commissioners, they appointed a special attorney to represent them in this action. That they had the right to do so is established by our decisions and conceded by counsel.<sup>43</sup>

Absent commissioner consent, the Prosecutor has **no authority** to represent the board.

We have also held that the right of the commissioners to control the litigation extends to the point of the right to dismiss an appeal, even against the wishes of the prosecutor who has represented the county in the action. What, then, is the relation of the prosecutor to the particular case? It is no more than that of a stranger to the proceedings. He neither represents the county, controls the litigation, nor is the court bound to permit him to take any part therein. It appears that the prosecutor was present at the hearing, but, in being so present, he represented no party to the action, and was present by sufferance of the court. Manifestly, then, he is not a party to the proceeding, and as such entitled to any action from the court in connection with the certification of the record.<sup>44</sup>

It is the board of commissioners which controls the litigation. "Although the prosecuting attorney is the legal adviser of the county he is not

---

<sup>41</sup> *Reed v. Gormley*, 47 Wash. 355, 357, 91 P.1093 (1907), emphasis added.

<sup>42</sup> *Id.*

<sup>43</sup> *State ex rel. Jefferson County v. Jefferson County Superior Court*, 142 Wash. 54, 55, 252 Pac. 102 (1927).

<sup>44</sup> *Id.* at 56, internal cites omitted.

authorized to prosecute this appeal in opposition to the orders of the board of county commissioners."<sup>45</sup> These decisions rely not on RCW 36.32.200, but a separate statute, the key wording of which has remained virtually unchanged over the years.<sup>46</sup> That statute provides the commissioners with powers including,

Have the care of the county property and the management of the county funds and business and in the name of the county prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law....<sup>47</sup>

Given the statutory authorization provided to boards of county commissioners pursuant to not only RCW 36.32.200, but also RCW 36.32.120(6), coupled with a consistent line of Washington case authority, Appellant Banks misconstrues the law.

The Washington cases he relies on do not address this type of situation. One dealt with whether the local prosecutor, rather than the sheriff, could appoint people of his choosing to arrest people and put them in jail.<sup>48</sup> Because a "prosecuting attorney has no special power to make arrests" he cannot deputize people to put people of his choosing in jail.<sup>49</sup> Similarly, county commissioners do not assess property values, as that

---

<sup>45</sup> *Prentice v. Franklin County*, 54 Wash. 587, 590-591, 103 P.831 (1909).

<sup>46</sup> *Id.* at 590, which addresses the statute.

<sup>47</sup> RCW 36.32.120(6).

<sup>48</sup> *State ex rel. Johnston v. Melton*, 192 Wash. 379, 385, 73 P.2d 1334 (1937).

<sup>49</sup> *Id.* 384-85.

duty is assigned to the County Assessor, so they cannot select people to do that job for them.<sup>50</sup> These cases do not address RCW 36.32.200's explicit authorization to retain counsel to advise on duties which the legislature assigned to the County.

Lacking a Washington case supporting his views, Appellant Banks travels to other states. In doing so, Appellant Banks ignores subsequent decisions which recognize the holdings he references have been superceded. He also selects states in which there is no statute analogous to RCW 36.32.200 and/or which lack constitutional provisions analogous to Washington's, where the legislature prescribes prosecutor and county commissioner duties.<sup>51</sup> As a result, the out of state cases Appellant Banks cites may not be properly used to support his extreme views. The County's brief, which is incorporated, discusses several of the cases, but in summary:

- In Ohio, if durational and compensation requirements are met, "a board of county commissioners, acting alone, may appoint outside counsel for purposes of legal representation and advice."<sup>52</sup>

---

<sup>50</sup> *Northwestern Improv. Co. v. McNeil*, 100 Wash. 22, 170 P.338 (1918).

<sup>51</sup> Section 4.3 below addresses Wash. Const., Art. XI, § 5 ("The legislature ... shall prescribe" prosecutor and county commissioner duties.).

<sup>52</sup> *State ex rel. O'Connor v. Davis*, 139 Ohio App. 3d 701, 706, 745 N.E.2d 494, 499 (2000). Appellant Banks cites to an earlier case without explaining it does not reflect current law. Brief of Appellant, pp. 34-35, citing to *State ex rel. Cline*, 12 Ohio C.C. (n.s.) 103 (1909).

- In Kansas, the state legislature has specifically authorized county commissioners to retain outside counsel, thus superceding by statute the 1871 case Appellant Banks relies on.<sup>53</sup>
- In Idaho, county commissioners may employ counsel "when necessary."<sup>54</sup>
- The cited Utah case<sup>55</sup> does not address an RCW 36.32.200 type of statute.
- In Maryland, the State Constitution was amended to allow the legislature to prescribe prosecutor duties. The case cited prompted the amendment.<sup>56</sup>
- The North Dakota case Appellant Banks relies on did not involve an RCW 36.32.200 type situation, but a statute providing for a governor appointed temperence enforcement commissioner authorized to exercise "all of the common-law and statutory powers of state's attorneys" and sheriffs.<sup>57</sup> A subsequent decision recognizes the narrow nature of the holding.<sup>58</sup>

---

<sup>53</sup> See Brief of Appellant, p. 33, citing to *Clough v. Wheat*, 8 Kan. 487 (1871) and compare with present statutes, K.S.A. § 19-723, along with §§ 19-247 and 19-248 ("after the appointment of such county counselor, the county attorney of such counties shall not be required to represent said counties in any civil actions.").

<sup>54</sup> *Barnard v. Young*, 43 Idaho 32 382, 390, 251 P. 1054 (Idaho 1926). In the earlier *Meller v. Board of Commissioners*, 4 Idaho 44, 35 P.712 (Idaho 1894) Appellant Banks cites extensively (Brief of Appellant, pp. 31-32), it was not that the commissioners could not retain counsel, it was just that as specifically set forth in the Idaho Constitution, the retention had to be "necessary." Thus a general retention which did not identify the work needed was inconsistent with that requirement.

<sup>55</sup> See Brief of Appellant, pp. 35-37, citing to *Salt Lake County Comm'n v. Short*, 1999 UT 73, 985 P.2d 899 (Utah 1999).

<sup>56</sup> See *In re Special Investigation No. 244*, 296 Md. 80, 87, 459 A.2d 1111, 1114 (1983), and compare with earlier *Murphy v. Yates*, 176 Md. 475, 348 A.2d 837 (1975), which was superceded by constitutional amendment. See Maryland Const., Art. 5, § 9.

<sup>57</sup> Brief of Appellant, pp. 25-27; *Ex parte Corliss*, 16 N.D. 470, 472-73, 114 N.W. 962, 963 (1907).

<sup>58</sup> See *State ex rel. Langer v. Totten*, 44 N.D. 557, 565, 175 N.W. 563, 566 (1919).

- The Arizona cases cited to do not involve a statute like RCW 36.32.200.<sup>59</sup>
- California permits county retention of special counsel. Case law from both California and Arizona recognize the 1897 case Appellant Banks relies on is no longer good law.<sup>60</sup>

Lacking case support, Appellant Banks nevertheless maintains his views trump the approach the Washington judiciary has taken in implementing RCW 36.32.200 for over a century, and during his tenure in Island County for the past 18 years. With his approach, it is not the judiciary, but he and he alone who determines whether his adversary may have access to counsel. Neither the Washington Constitution nor the State Legislature accord Appellant Banks the powers he believes he holds.

#### **4.3. The Washington Constitution and State Legislature Did Not Provide Appellant Banks the Powers He Lays Claim To**

Our constitution sets forth the governmental blueprint,<sup>61</sup> leaving it to the legislature to assign specific duties to the constitutionally created elected officials.

---

<sup>59</sup> See *Board of Supervisors of Maricopa County v. Woodall*, 120 Ariz. 379, 586 P.2d 628 (1978), *Romley v. Daughton*, 252 Ariz. 521, 242 P.3d 518 (2010); compare Wash. Const., Art. XI, § 5 with Arizona Const., Art. XII, § 3.

<sup>60</sup> *Harvey v. County of Butte*, 203 Cal. App. 3d 714, 720-27 (1988); *Board of Supervisors of Maricopa County v. Woodall*, 120 Ariz. 391, 395, 586 P.2d 640, 644 (1978) ("The parties concede that since *Merriam*, California law has been altered to allow boards of supervisors to hire attorneys."). *Merriam v. Barnum*, 116 Cal. 619, 48 P.727 (1897), relied upon by Appellant Banks, is no longer good law. See Brief of Appellant, pp. 30-31.

<sup>61</sup> Wash. Const., Article I, § 1 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.").

**The legislature**, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners ... [and] prosecuting attorneys ... **and shall prescribe their duties....**<sup>62</sup>

County commissioners are elected to adopt legislation pursuant to their police power authority set forth in the Washington Constitution. "Any county ... **may make and enforce** within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."<sup>63</sup>

The County engaged legal counsel to advise on GMA. The County's GMA duties are assigned to the elected legislative branch, and are not vested elsewhere. Indeed, GMA, unlike certain other areas of the law, is not subject to referendum or initiative.

[W]hen the state legislature instructs a local governmental body to implement state policy, the power and duty is vested in the legislative (or executive entity), not the municipality as a "corporate" entity. ... GMA explicitly instructed the county *legislative* body to take that action.<sup>64</sup>

The commissioners thus determine how to legislatively implement GMA within their unincorporated borders. And, to implement GMA, a board of commissioners may determine it necessary to obtain outside legal assistance.

---

<sup>62</sup> Wash. Const., Art. XI, § 5.

<sup>63</sup> Wash. Const., Art. XI, § 11, emphasis added.

<sup>64</sup> *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 174-175, 149 P.3d 616 (2006), italics emphasis in text (referendum on an ordinance adopting procedures to develop a countywide planning policy barred, in part, as GMA explicitly instructed the county *legislative* body to take the action).

Interestingly, Appellant Banks takes the view that "[t]he core functions of the prosecuting attorney are those that were assigned to the prosecuting attorney in the years leading up to the adoption of the constitution."<sup>65</sup> Appellant Banks goes on to argue:

[i]n naming the county officers in § 5, Article 11 of the constitution, the people intended that those officers should exercise the powers and perform the duties **then recognized as appertaining to the respective offices which they were to hold.**<sup>66</sup>

GMA did not exist in the 1800's. GMA's complex suite of statutory requirements was not enacted until over a century later. In 1889, there was no GMA statute, no Department of Commerce GMA guidance, and no Growth Management Hearings Board. By his own definition of prosecutorial "core" functions, GMA is not included.<sup>67</sup> The County's brief further addresses prosecutorial core functions, which center not on GMA, but the charging power.

RCW 36.32.200 and .120(6),<sup>68</sup> which statutorily provide for a board's retention of legal counsel, are consistent with Washington's

---

<sup>65</sup> Brief of Appellant, p. 16.

<sup>66</sup> Brief of Appellant, p. 16, emphasis added.

<sup>67</sup> See also Brief of Appellant, p. 19, arguing changing core duties requires a constitutional amendment. Banks conceded "that when our State Constitution was adopted, the civil functions of prosecutors were pretty limited...." RP (January 15, 2016), p. 26:17-19.

<sup>68</sup> RCW 36.32.200 (subject to superior court approval); RCW 36.32.120(6) (County has authority to "prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law....").

constitutional structure, in which the legislature prescribes county commissioner and prosecutorial duties.

**4.4. To Protect Access to Justice, the Judiciary Must be Able to Review and Approve a County Decision to Retain Outside Counsel as the Legislature Authorized through RCW 36.32.200**

The Washington State Constitution includes a guarantee of judicial access. "Justice in all cases shall be administered openly, and without unnecessary delay."<sup>69</sup> This is not some truncated provision of little import. It is the foundation for the premise that there shall, in Washington, be established a judicial system in which justice shall be fair and impartial not to some, but in "all cases."

In its simplest characterization, it is a *right of access* to the courts established by the people through their government for the fair and proper administration of justice. ... This language descends directly from Blackstone. It plainly means that the justice available to citizens through the courts of the state must be administered openly and that it must be equally available to all.

The essential purpose of judicial administration is to ensure the fair and proper administration of justice. In the context of court proceedings, this purpose is discharged by ensuring that justice is done in those cases and controversies that are presented to the court. It follows, *a fortiori*, that access for the sake of access, without the corresponding ability to meaningfully participate in the system *to the end that justice is capable of being done* is

---

<sup>69</sup> Wash. Const., Art. I, § 10.

the antithesis of the constitutional promise and its underlying historical rationale.<sup>70</sup>

Justice is not available to "all" when one party decides when and who may represent his adversary. There is a fundamental structural impairment with such an approach. It gives to a single person - one who stands in an adversarial position to the party seeking representation - the ability to decide who is entitled to judicial access. In Appellant Banks' own words, spoken under oath in deposition, legislative direction in the form of RCW 36.32.200, and judicial oversight under the statute, are irrelevant due to his veto power. **"Well as you know, it's not applicable [RCW 36.32.200] when the Board attempts to hire counsel over the objection of the Prosecuting Attorney."**<sup>71</sup>

Structurally, the Washington Constitution was not set up to accord such power to a prosecutor. The entire point of a fair and open justice system is that there are no kings controlling the doors of justice. The doors are open to all. And for that door to be open, a party must have the right to seek advice from legal counsel.

Lawyers play a central role in our system of justice. The judicial system provides a forum for resolving private and public disputes based

---

<sup>70</sup> Confirming The Constitutional Right Of Meaningful Access To The Courts In Non-Criminal Cases In Washington State, 4 Seattle J. Soc. Just. 383, 394-95, James A. Bamberger (2005), emphasis in text, internal citations omitted.

<sup>71</sup> CP 2450 (Banks Deposition, p. 64:18-20), emphasis added.

on constitutional, statutory, and common law rights and responsibilities. It resolves these disputes following presentation of factual and legal argument, often by lawyers, given their knowledge of the area. To defend or assert important legal rights, certain core competencies are necessary, including:

- knowledge and understanding of the relevant law ...;
- knowledge and understanding of the jurisdiction and rules of practice and procedure in the court in which the proceeding is pending;
- capacity to develop and effectively present evidence to the court, both in support of the individual's position and to rebut or negate evidence offered by the opposing party;
- some understanding of legal reasoning and the process of making a legal argument; and
- ability to provide informed and objective judgment in service of the client's objectives.<sup>72</sup>

These views are well established, as expressed nearly a century ago. "With a vast body of ever changing law, ... it is apparent that the layman, in order to understand his rights, ... must have the assistance of counsel."<sup>73</sup>

Given the structural importance of access to counsel, in 1905 Washington lawmakers, recognizing that there are situations when county legislative authorities require advice from an independent attorney,

---

<sup>72</sup> 4 Seattle J. Soc. Just. at 389-90, (2005); *see e.g.*, GR 24 (definition of practice of law requires knowledge and skill of one trained in the law); APR 1 (admission to practice requirements); RCW 2.48.170 (passage of bar exam required to appear in courts of the state).

<sup>73</sup> *Id.* at n. 16, citing to Reginald Heber Smith, *Justice And The Poor*, 31-32, Patterson Smith Publishing (3d ed. 1972, 1919).

enacted RCW 36.32.200. There are limitations on the implementation of RCW 36.32.200; any such contract must have judicial approval and must be limited to two years in duration. There is, however, no requirement in the statute that the prosecuting attorney must approve the contract, as Appellant Banks insists. Appellant Banks cannot read into the statute words that are not there.<sup>74</sup> Further, the independent language in RCW 36.32.120(6) provides for commissioner retention of counsel without any of the strictures of RCW 36.32.200, including judicial authorization. Neither statute requires prosecutorial consent. These statutes cannot be unilaterally set aside simply because one person holds an elected office<sup>75</sup> established to prosecute crimes and advise the County when required. Washington case law has long recognized the County's right to engage independent counsel.

In this instance these rights were properly protected pursuant to RCW 36.32.200. RCW 36.32.200 does not require an RPC level impediment for the County to retain outside counsel. However, such concerns were considered by the Island County Superior Court bench, and

---

<sup>74</sup> *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). The County's brief addresses the rules of statutory interpretation in further detail.

<sup>75</sup> Appellant Banks earlier noted he "received the most votes in the last general election." CP 1767. However, he ran unopposed. During the last election with serious opposition, the political fealty demanded within his office resulted in his deputy prosecutors departing en masse, with one suing over the pressure exerted, resulting in a \$300,000 settlement. CP 1160-62, 81.

due to these conflict, loyalty, competence, and communication impediments, coupled with a refusal to provide the requested strategic legal advice, the judiciary authorized retention of counsel, and the County made its decision to retain counsel.<sup>76</sup> As the Superior Court reasoned,

Among other things, the board wants ongoing strategic advice in order to avoid the errors of the past. The prosecutor apparently can't or won't provide the board with such advice. This is troubling, because at their best, legal services represent, figuratively speaking, not only the ambulance providing services to someone who has fallen off a cliff, but also the guardrail preventing someone from falling off the cliff in the first place.<sup>77</sup>

Even if these statutory provisions were not present, due to the core role attorneys play in our adversarial system it is axiomatic that if there is a judiciary, then one's adversary does not have the right to determine whether any entity, be it a person or board of commissioners, has the right to consult with an attorney. This right to access an attorney cannot be stripped from the adversarial process as Prosecutor Banks proposes. However, the reach of this basic right need not be addressed here as the legislature, in its wisdom, has statutorily protected it. In this situation, as it has during the past 18 years, the County followed RCW 36.32.200 to exercise rights it holds by virtue of the Washington Constitution.

---

<sup>76</sup> Ex. 1 (Superior Court's Decision), CP 1343-49; Ex. 2, (County Resolution C-48-15), CP 1520-26.

<sup>77</sup> Ex. 1 (Superior Court Decision), CP 1349.

Given the facts, Appellant Banks has not met his heavy burden of proof to demonstrate the statute was unconstitutionally applied. If anything, the manner in which the statute was used was necessary to prevent constitutional break-downs. The well reasoned decisions of the Island County Superior Court and of the County should be deferred to.

#### **4.5. RCW 36.32.200 Protects Not Only the Right to Counsel, but Separation of Powers**

When the judiciary authorizes the retention of counsel through RCW 36.32.200 it not only acts to protect the right to counsel but also separation of powers. Under Appellant Banks' theory of the case, the judiciary has no role, as it is he who makes these decisions, thus threatening the complete erosion of both principles.

Our state constitution is founded on certain core principles. Among those principles stands the idea that there shall be no single unit of government power. This is not necessarily articulated in so many words, but it is inherent in our constitutional structure, which creates distinct governmental entities to take up certain tasks.<sup>78</sup> Power is allocated to dilute it and avoid its abuse. There are those who make laws, those who enforce laws, and those who interpret laws. But this structural separation

---

<sup>78</sup>*Putman v. Wenatchee Valley Med. Ctr.*, PS, 166 Wn.2d 974, 980, 216 P.3d 374 (Wash. 2009) (statutory "certificate of merit" requirement hindered "right of access to courts" and due to interference with judiciary's substantive rule making authority, violated separation of powers).

alone is insufficient to ensure each branch functions as intended. There are also certain key mechanisms, which if disabled will undercut the "fundamental functions"<sup>79</sup> of that branch and breach the separation.

With regard to the judiciary, it is accepted that a central piece to its functioning is judicial access. This requires allowing litigants the ability to obtain legal representation. The right at stake here takes place in the civil arena. It centers on whether a board of county commissioners may retain outside legal counsel, subject to review and approval by the superior court pursuant to RCW 36.32.200.<sup>80</sup> Because the statute itself is not being constitutionally challenged, the answer to that question is, of course, yes.

Belatedly, Appellant Banks shifted course in this litigation, taking the view that the statute is unconstitutional as applied. But, he provides no context to meet his burden of proof. In contrast, dating back to its deliberations and decision on the matter, the County and Island County Superior Court set forth, in comprehensive detail, the context and necessity for the retention as summarized in sections 2.2 and 2.3 above. Yet, in Appellant Banks' response, despite his burden of proof, there is nothing to support the contention that the statute should be found

---

<sup>79</sup> *Id.*

<sup>80</sup> The legislature and judiciary recognize it is an appropriate function of the judiciary to determine when to approve counsel. That duty is never assigned to the parties to the adjudication, given the inherent conflicts present. *See e.g.*, RCW 13.34.090; RCW 13.32A.160(1)(c) and .192(1)(c); RCW 28A.225.035(7)(b); GR 33(a)(1)(C) (recognition of potential need to appoint counsel to accommodate persons with disabilities).

unconstitutional in this situation. This lack of context explaining precisely how the statute, as applied, is unconstitutional, requires suit dismissal.<sup>81</sup>

With Appellant Banks' view, the judiciary's role in protecting separation of powers and the right to counsel is irrelevant, as he decides these issues. This view of the negated role of the judiciary was exemplified through a subpoena Appellant Banks served on the Island County Superior Court judges three days before Christmas, with a records deposition set just after a return from the holidays, on January 4, 2016, coinciding by date and time with the Court's motions calendar. The subpoena requested all deliberative process documents.<sup>82</sup>

Separation of powers and the right to counsel are designed to protect against over-reaching by one branch. The branches must work cooperatively and not attempt to deprive another of the means to ensure they function as intended. All the County and Respondent Drummond ask is that a simple check, designed to not only protect the right to counsel but also the constitutional structuring of a separated government, be protected.

---

<sup>81</sup> The deficiency may not be rectified on reply. *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 397, 858 P.2d 245 (1993).

<sup>82</sup> Ex. 5 (CP 43-46, 48-49, and 51-54).

**4.6. Appellant Banks Postured the Case as a *Quo Warranto* Matter to Artificially Construct a Framework in Which He Was Not Suing His Client on a Matter He Advised On, a Prohibited Action**

A *quo warranto* proceeding is premised on a challenge to the entitlement or legitimacy of a person to hold some type of public office. In his *quo warranto* complaint, Appellant Banks asserts Ms. Drummond holds public office in Island County; that she is “unlawfully exercising the public office of Island County Prosecuting Attorney.”<sup>83</sup> However, not only is she not a public officer, as Appellant Banks asserted in superior court,<sup>84</sup> she is a lawfully hired legal adviser under the terms of a judicially-approved contract between herself and the County commissioners.

Ms. Drummond’s authority to advise the county commissioners derives not only from commissioner consent given pursuant to the RPCs and RCW 36.32.120(6), but also from an express grant of power to the County commissioners by the state legislature, RCW 36.32.200. In fact, judicial approval means that Ms. Drummond **must** continue to advise the county commissioners. The court has authorized her to provide legal advice to the county commissioners, and she must fulfill the terms of the

---

<sup>83</sup> CP 1468.

<sup>84</sup> CP 946, citing to Memorandum in Opposition to Request for the Appointment of a Special Prosecutor (August 27, 2015), p. 4:5-6 (“Ms. Drummond, while possibly a county employee, is not a county officer.”) CP 2513. Under the doctrine of judicial estoppel, Appellant Banks cannot simultaneously argue that Drummond both is and is not a county officer, according to the convenience of the moment.

contract, with withdrawal permitted only with 60 days advance notice and RPC consistency. She is not authorized to withdraw her services at whim.

This situation is the opposite of, but analogous to, a court order to **prevent** someone from doing something, such as a restraining order, an order of abatement, or an order of injunction. In this case, the court's approval of the contract **permits** someone to do something; specifically, it permits Ms. Drummond to advise the county commissioners.

Plaintiff Bank's *quo warranto* complaint is an attempt to thwart or terminate a judicially approved contract. This is significant because the parties to the contract and thus necessary to the case include not only Ms. Drummond but also the County, acting through the Board of County Commissioners. As a result, Appellant Banks is suing his own client although he lacks authority to do so.<sup>85</sup> Appellant Banks, as a public officer, may not take actions which are inconsistent with his statutory authority. A prosecutor owes allegiance to his or her board of commissioners, as they exercise county powers, RCW 36.01.030, and are responsible for the official county position on legal issues, RCW 36.32.120(6).

---

<sup>85</sup> RCW 36.27.020; *State ex rel. Jefferson County v. Jefferson County Superior Court*, 142 Wash. 54, 252 Pac. 102 (1927); *Prentice v. Franklin County*, 54 Wash. 587, 103 P.831 (1909).

As Appellant Banks has no authority to sue his client, he artificially structured the suit as a *quo warranto*. To avoid his lack of authority and pretend he was not suing his client, Appellant Banks, in effect, argued in superior court when opposing his client's joinder as a necessary party (despite privately conceding the motion would likely be lost);<sup>86</sup> “Pretend the judicial approval does not exist; the County is not a necessary party to this suit. This is a mere *quo warranto* matter which has nothing to do with my client. It is not me filing suit. I bring this *quo warranto* ‘in the name of the State of Washington.’”<sup>87</sup> The lens he selected was a fiction created to avoid the fact that he has sued his client over a contract he advised on. It is one thing to sue to enforce specific legal requirements. It is quite another to advise a client on a matter and then, even when the action is judicially authorized, to sue the client.<sup>88</sup>

Appellant Banks authorized this litigation, sought outside legal resources to instigate the suit, and drafted pleadings.<sup>89</sup> This is the prosecutor's personal suit against his client.

- Appellant Banks' attorney explains, "My client(s) in this case are State of Washington and Greg Banks."
- The organization supplying the legal resources makes clear to Appellant Banks, "Greg - all fine, but you do need to be

---

<sup>86</sup> CP 1137.

<sup>87</sup> CP 1615.

<sup>88</sup> CP 2457 (Banks Deposition, p. 77).

<sup>89</sup> CP 1130.

careful not to communicate that the decision to sue was the WAPA Board's (they support you, but you brought this suit.").

- Appellant Banks explains, "I'm worried about being the plaintiff and the plaintiff's attorney though, so Pam could be very useful as a special DPA."
- "[W]e approved Greg Banks' request to have Pam (as an Island County Special Deputy) handle this *quo warranto* against the private land use attorney retained by the Board of County Commissioners over Greg's objection."<sup>90</sup>

Although Appellant Banks freely appointed counsel to represent him without first securing judicial approval, he strictly limited his client's access to counsel. He authorized counsel only for the very limited purpose of advising on the contract's indemnification clause **after** he filed suit. He asked a county prosecutor who is a member of the organization providing the legal resources for his suit (and who later provided a declaration in support of the suit) to select the County's attorney, a deputy working under that elected prosecutor.<sup>91</sup> Appellant Banks did not consult with his client on the appointment. He unilaterally determined: (1) whether his client could have counsel; (2) what that attorney would be allowed to advise on; and (3) who that attorney would be. He concluded, without client consultation and consent, that it would be entirely appropriate for him to have a member of the organization funding his suit

---

<sup>90</sup> CP 1125-38 (e-mails between Appellant Banks and WAPA dated August 20, August 17, May 20, and August 13, 2015).

<sup>91</sup> CP 1133-36.

and who later supported it by declaration,<sup>92</sup> to make the selection and to choose an attorney working under him.<sup>93</sup>

This is not some obscure cause of action with a Latin name. This is a contract dispute improperly framed as a *quo warranto* action to circumvent the RPC and statutory prohibitions preventing the suit from being filed in the first place. Having filed this suit for improper purposes, Appellant Banks had no authority to bring it and dismissal is required.

#### **4.7. Appellant Banks' Complaint was Untimely**

Appellant Banks' complaint was untimely. A unanimous Island County Superior Court authorized the engagement, which was then approved by Resolution of the Island County Board of Commissioners on April 28, 2015. Superior Court decisions must be appealed within 30 days<sup>94</sup> and Board of County Commissioner decisions within 20 days.

Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within twenty days after the decision or order, and the appellant shall within that time serve notice of appeal on the county commissioners. The notice shall be in writing and shall be delivered to at least one of the county commissioners personally, or left with the county auditor.<sup>95</sup>

---

<sup>92</sup> CP 1672-73.

<sup>93</sup> CP 1133-36 (e-mail correspondence between Island County Chair and Appellant Banks, dated August 19 and 20, 2015, and attaching the appointment).

<sup>94</sup> RAP 5.2(a).

<sup>95</sup> RCW 36.32.330.

Instead of promptly appealing the County's April 28, 2015 decision, Prosecutor Banks filed the complaint 106 days later on August 12, 2015, served Ms. Drummond 111 days later (on August 17, 2015), and failed to join the County (a necessary party) for 187 days, until the Court joined the County by order signed on October 1, 2015. The delay did not result from a lack of notice. Appellant Banks required a pool of public funds to draw from to bring what is in actuality a private contract suit against his client, filed for personal motivations. He did not promptly file because it took several months to gain access to those public dollars.<sup>96</sup>

The duty to appeal is not just imposed on the signatories to a contract, but on any party to a dispute over that contract. For purposes of the requirement to timely appeal, whether or not Appellant Banks signed the contract is irrelevant. He was at the outset, and remains, a party to the dispute. He submitted argument to both his clients (his words) the County Board of Commissioners and the Island County Superior Court.<sup>97</sup> Appellant Banks cannot serve as attorney to those entities to more forcefully argue his case and then, at a date of his choosing, magically appear as the state to challenge those very same client actions.

---

<sup>96</sup> CP 2462-67 (Banks Deposition, pp. 124-29. The Washington Association of Prosecuting Attorneys, which is publicly funded, is providing legal counsel to Appellant Banks. The Board voted online via e-mail, but did not schedule a meeting to approve counsel for several months.).

<sup>97</sup> CP 2447-53 (Banks Deposition, pp. 61-67).

Appellant Banks was, by definition, a party to the earlier proceeding. It was contested. He submitted briefing. **He represented everyone, including the County, the Court, his Office, and himself.** A final decision was rendered and he did not timely appeal.

#### **4.8. Estoppel Bars Appellant Banks' Appeal**

Appellant Banks acquiesced for 18 years to the County's use of RCW 36.32.200.<sup>98</sup> This action was the first in which Appellant Banks filed suit over implementation of the statute. And even before filing suit, in discussing the case with prosecutor colleagues, Appellant Banks privately told them he does not disagree with the superior court analysis approving the use of outside counsel pursuant to RCW 36.32.200.

**I'd be interested in having someone look at their legal analysis. I don't think it's wrong.** I just think the constitutional infirmity of the statute is more obvious than they do, especially since the statute can be construed to be constitutional if you consider that there must be a disability.<sup>99</sup>

His prosecutorial organization, in private, stated an objective cause would warrant use of the statute. For "22 years" WAPA has taken the position

---

<sup>98</sup> CP 1139-58 (example appointments); CP 1814-15; CP 1326 (list of 19 prior examples; those examples further described at CP 1320-21); *see also* CP 678-97 (Comm'r H.P. Johnson Dec., providing examples of other counties' use of the statute).

<sup>99</sup> Ex, 6, CP 1126, emphasis added.

that the statute may be used where there is a "**conflict, refusal or otherwise objective 'cause.'**"<sup>100</sup>

These admissions, which explain the 18 years of acquiescence in the retention of outside counsel pursuant to RCW 36.32.200, and the County's reliance on this acquiescence from its attorney, should bar the present litigation through equitable estoppel.<sup>101</sup> When one's own attorney has stood by for nearly two decades, under both estoppel and RPC duties of loyalty, he should not be able to reverse position and sue his own client over a matter he effectively authorized - by his silence - for 18 years.

**4.9. The County Resolution Engaging Counsel is Not Ultra Vires: the Position is Contrary to State Law and Banks' Sworn Testimony**

Appellant Banks, for the first time in this litigation, and contrary to sworn testimony and earlier pleadings (Appellant Banks "**has not requested a declaration that Island County Resolution C-48-15 ... is ultra vires or otherwise unlawful,**"<sup>102</sup>) now belatedly takes the view that County Resolution C-48-15 is ultra vires. Even if not barred by judicial

---

<sup>100</sup> CP 1127, emphasis added (Drummond Dec., attaching May 7, 2015 WAPA e-mail).

<sup>101</sup> *Kessinger v. Anderson*, 31 Wn.2d 157, 170, 196 P.2d 289 (1948).

<sup>102</sup> CP 2208 (Banks' response to County's intervention motion), emphasis added.

estoppel, it is too late to raise this new argument.<sup>103</sup> The position also conflicts with established Washington law.

Ultra vires acts are void because no power to act existed. In contrast, acts performed without procedural or statutory compliance are not ultra vires.<sup>104</sup> As this Court reasoned in *South Tacoma Way*, "[i]f in this case the State was generally authorized to sell the surplus property, its act of doing so was not ultra vires."<sup>105</sup>

A 111-year-old statute (along with RCW 36.32.120(6) and the Washington Constitution's right of judicial access and its protection of separated powers) provided the County authority to engage counsel with superior court approval. As the constitutionality of RCW 36.32.200 is not challenged, it cannot be questioned that the judiciary has the power to approve the retention of counsel under it. Indeed, removal of such authority would conflict with our basic constitutional structure. As addressed in sections 4.4 and 4.5 above, without such authority, the judiciary cannot ensure judicial access; and, in litigation involving governmental entities, protect our constitution's structure of separated powers.

---

<sup>103</sup> RAP 9.12; *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407 (2013) (on appeal of summary judgment decision, only issues "called to the trial court's attention" may be addressed).

<sup>104</sup> *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 122-124, 233 P.3d 871 (2010) (contract to surplus property was not void).

<sup>105</sup> *Id.*, at 123.

## **5. CONCLUSION**

Our system of justice is jeopardized when one person (here an elected prosecutor) can retain any attorney he likes but is allowed to decide whether his client and adversary (the also elected board of county commissioners) may access counsel. Such a patronage structure demanding absolute fealty to the prosecutor threatens our tripartite government and begins a march back to pre Magna Carta days where justice could be bought depending on a king's ever changing moods and political ambitions. But, such large systemic issues need not be sorted today as the legislature provided us with a safety valve.

This safety valve, embodied in RCW 36.32.200, provides a mechanism to the County for seeking judicial authorization to retain outside counsel. The County exercised its right pursuant to this statute and a century of supporting case law. For its decision to be valid, the judicial bench, a body wholly independent of the prosecutor, need not first secure prosecutorial consent.

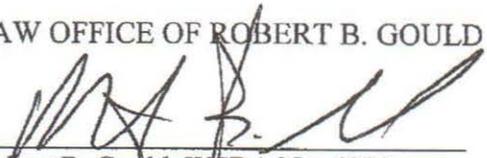
Once the judicial decision was made, and the County approved the retention, Ms. Drummond then held both a right and duty to advise her client without fear of reprisal. As an attorney, she is an integral component of our constitutionally established court system.

To sue an attorney for exercising her duty to advocate on her client's behalf within this system will inevitably erode the ability of the judiciary to administer justice in "all cases" and is inconsistent with RCW 36.32.200. The two superior courts below agreed, and properly determined that Appellant Banks failed to meet his heavy burden of proof to demonstrate beyond a reasonable doubt that RCW 36.32.200 was somehow unconstitutionally applied.

Respondent Drummond joins the County in requesting that this Court respect the judiciary's implementation of RCW 36.32.200 exactly as the legislature intended, which in turn supports the continuing viability of our "book of rules."<sup>106</sup>

RESPECTFULLY SUBMITTED this 4 day of April, 2016.

LAW OFFICE OF ROBERT B. GOULD

  
Robert B. Gould, WSBA No. 4353  
Counsel for Respondent Drummond

---

<sup>106</sup> *Bridge of Spies*, 2015. "I'm Irish, you're German. But what makes us both Americans? Just one thing. One. One-one. The rule book. We call it the Constitution, and we agree to the rules. And that's what makes us Americans. It's all that makes us Americans."

**CERTIFICATE OF SERVICE**

I, Allyson Adamson, on the date and in the manner indicated below, caused to be served RESPONDENT DRUMMOND'S AMENDED RESPONSE TO APPELLANT'S OPENING BRIEF, on:

Pamela B. Loginsky Island County Special Deputy Prosecuting Attorney 206 10 <sup>th</sup> Ave. SE Olympia, WA 98501 <i>Attorney for Appellant</i>	_____ VIA LEGAL MESSENGER <u>  X  </u> VIA EMAIL (Per Agreement of Counsel) _____ VIA FACSIMILE _____ VIA U.S. MAIL _____ VIA PROCESS SERVER
Scott M. Missall Athan E. Tramountanas Short Cressman & Burgess PLLC 999 Third Avenue, Suite 3000 Seattle, WA 98104-4088 <i>Attorneys for Respondent Island                  County Board of Commissioners</i>	_____ VIA LEGAL MESSENGER <u>  X  </u> VIA EMAIL (Per Agreement of Counsel) _____ VIA FACSIMILE _____ VIA U.S. MAIL _____ VIA PROCESS SERVER

Signed this 7th day of April, 2016 at Kirkland, Washington.

  
 \_\_\_\_\_  
 Allyson Adamson  
 Paralegal to Susan Drummond