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NO. 95945-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE APPOINTMENT OF A SPECIAL DEPUTY  
PROSECUTING ATTORNEY

Shawn P. Sant and Franklin County,

Petitioners,

vs.

The Judges of the Benton and Franklin County Superior  
Court: Judge Joe Burrowes, Judge Alex Ekstrom, Judge  
Cameron Mitchell, Judge Carrie Runge, Judge Jacqueline  
Shea-Brown, Judge Bruce Spanner and Judge Sam Swanberg,

Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR FRANKLIN

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BRIEF OF PETITIONER

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## I. INTRODUCTION

The Washington Constitution serves as bulwark against any one official or branch gaining too much power by diffusing power and prohibiting any one branch or official from exercising the powers of another official or branch. This case represents a failure of our tripartite system of government.

Franklin County's legislative authority understood that taxpayer money should be expended on solutions, not on lawyer fees. This is why they rejected the request to underwrite a lawsuit against the county clerk, electing instead to finance any technological, equipment, or supply issues related to access to court files. Their budgeting decision cannot be lightly cast aside.

Franklin County's executive branch, as represented by the Franklin County Prosecuting Attorney, recognized the impropriety of suing one county officer at the request of another county officer. He refused to sanction a lawsuit filed by his special deputy prosecuting attorney, favoring mediation and joint-problem solving instead. Prosecutor Sant's legal judgment may not be second guessed at public expense.

## II. ASSIGNMENTS OF ERROR

1. The Judges of the Benton and Franklin Counties Superior Court (hereinafter "Judges") erred by entering the Order of Appointment in *In re the Appointment of a Special Deputy Prosecuting Attorney*. CP 2-4.

2. The Judges erred and violated due process and Code of Judicial Conduct Canon 2.11(A)(2)(a) by entering the Order of Appointment to impact a case to which they were parties. CP 2, FOF 1 and CP 3, ¶ 1.

3. The Judges erred and violated due process by entering the Order of Appointment without providing the Franklin County Prosecuting Attorney and Franklin County notice and an opportunity to be heard.

4. The Judges erred and violated article I, section 10 of the Washington Constitution by entering the Order of Appointment in chambers.

5. The Judges erred in finding that the Franklin County Prosecuting Attorney was unable to discharge the mandatory duties of his office due to an ethical disability. *See* CP 2, FOF 1.

6. The Judges erred by appointing W. Dale Kamerrer a Special Deputy Prosecuting Attorney for Franklin County. CP 3, ¶ 1.

7. The Judges erred by invoking RCW 36.27.030 to appoint W. Dale Kamerrer to perform duties that the prosecuting attorney is not required to perform. CP 2 and CP 3, ¶ 1.

8. The Judges erred and violated separation of powers by ordering Franklin County to pay W. Dale Kamerrer for work performed pursuant to the Order of Appointment without demonstrating by clear, cogent and convincing evidence that the Franklin County Prosecuting Attorney would not perform the mandatory duties after the Board of County Commissioners refused to appropriate money for this purpose. CP 3, FOF 4 and ¶ 2.

### **III. STATEMENT OF ISSUES**

1. Judges may not enter orders that personally benefit themselves. Did the Judges' entry of an order appointing a special deputy prosecuting attorney to represent them in an action to which they are parties violate this prohibition?

2. Article I, section 10 of the Washington Constitution requires court proceedings to be open to the public. Chapter 36.40 RCW requires that budgets and supplemental appropriations be considered in public proceedings. Did the entry of the Order of Appointment in chambers violate the public's rights?

3. Due process requires that persons who will be impacted by a court order be provided with notice that entry of the order is under consideration and with an opportunity to be heard. Did the Judges violate due process by failing to provide both the Franklin County Prosecuting Attorney and the Board of County Commissioners an opportunity to be heard regarding entry of the Order of Appointment?

4. The prosecuting attorney is responsible for the acts of his deputies and special deputies and may revoke their appointments at will. May the Judges appoint a lawyer to serve as a "special deputy prosecuting attorney," when the prosecuting attorney revoked his appointment of the lawyer?

5. The prosecuting attorney's client is the county, not each individual county officer. May a prosecuting attorney provide legal advice to multiple county officers on the same matter even though the various officers' positions on the matter are antagonistic?

6. An independent prosecuting attorney may be appointed pursuant to RCW 36.27.030 only when the prosecuting attorney refuses to or is otherwise unable to perform a mandatory duty of his office. May judges appoint a lawyer to serve as an independent prosecutor to file a lawsuit against another county officer when the prosecuting attorney is not required to file a lawsuit at the request of a county officer?

7. The county legislative authority is responsible for determining how taxpayer funds will be allocated. Do judges violate separation of powers by ordering the expenditure of public funds to underwrite their lawsuit against the clerk where the judges have not proven by clear, cogent and convincing evidence that they cannot fulfill their duties if their lawsuit against the clerk was not funded?

#### IV. STATEMENT OF FACTS

In June of 2015, Administrative Office of the Courts began to implement a new superior court case management system, known as Odyssey, in counties around the state of Washington. As of June 5, 2018, 35 of 37 counties are now using the Odyssey system, with the final two counties to be added in November of 2018. Wendy K. Ferrell, Washington Courts: Press Release Detail, *Twelve Eastern Washington Counties Launch Modern Court Case Management System* (June 5, 2018).<sup>1</sup> Many counties that utilize Odyssey or their own modern case management system have migrated to a “paperless” court record. ACP 87<sup>2</sup> (a third of the State’s clerks’ offices are completely paperless). *See also* King County Superior Court Clerk, ECR Project Library.<sup>3</sup>

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<sup>1</sup>Available at <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=16003> (last visited Oct. 10, 2018).

<sup>2</sup>To distinguish the record created in this Court pursuant to RAP 9.11 from the superior court records, the appellate documents will be cited as “ACP” followed by the page number that was assigned to the record in the index to the RAP 9.11 submissions that was filed with this Court on September 11, 2018.

<sup>3</sup>Available at <https://www.kingcounty.gov/courts/clerk/ECR-library.aspx> (last visited Oct. 10, 2018).

Franklin County was an early adopter of the Odyssey record system. ACP 76. From the start, the county clerk and the superior court judges cooperated with the transition to Odyssey. As early as 2015, it was anticipated that the court files would be paperless by 2018. ACP 82, 88-89. To facilitate this transition, the clerk gave the superior court wireless access devices and expressed his willingness to accommodate other requests. ACP 79-82. The transition to Odyssey progressed to the point where both the superior court administrator and the clerk “signed off” that the system was fully operational in Franklin County. ACP 89-90.

Shortly after the clerk’s transition to a paperless file system was fully implemented, the Judges ordered the Franklin County Clerk to continue making and maintaining paper files. ACP 177-78 ¶ 6, 179. The clerk declined to do so as his budget was insufficient to allow him to maintain duplicate paper files. The clerk also deemed it unnecessary to maintain duplicate paper files as no one had accessed the existing paper files for over a year. ACP 81-82, 89, 179.

Declaring an emergency and invoking GR 7(e), the Judges adopted LGR 3. *See* ACP 179-183. LGR 3 orders the clerks of Benton and Franklin Counties to “keep and maintain paper files for all cases and file types, by forthwith filing all pleadings and papers in paper files, except as may be otherwise authorized in writing by the Court.” ACP 183. The Judges provided no period for comment prior to adopting LGR 3, and no determination was made as to whether a supplemental appropriation would be required in order for the clerks to comply with its edict.

When Franklin County Clerk Michael Killian maintained his refusal to create duplicate paper files, the Judges threatened legal action. ACP 5, 9. The Franklin County Prosecuting Attorney, Shawn Sant, appointed a special deputy prosecuting attorney pursuant to RCW 36.27.040 to represent Clerk Killian with respect to any contempt or other legal action that the Judges threatened to pursue. ACP 9, 36-37, 39, 133 ¶ 11.

Although Prosecutor Sant could discharge his mandatory duty of providing legal advice to both the Judges and Clerk Killian with respect to paper court files, he offered to appoint an RCW 36.27.040 special deputy prosecuting attorney to advise the Judges. ACP 9, 39, 133 ¶ 11. After soliciting input from the Judges, W. Dale Kamerrer was ultimately appointed. ACP 33, 145, 147. It was Prosecutor Sant's intent that Mr. Kamerrer would assist the Judges to reach a negotiated resolution of the paper records dispute with Clerk Killian. ACP 9-10, 133 ¶ 11. Prosecutor Sant did not contemplate that Mr. Kamerrer would file suit against Clerk Killian. ACP 44. Prosecutor Sant remained responsible for the acts of Mr. Kamerrer. ACP 45-46, 133 ¶ 11; RCW 36.27.040.

Instead of engaging in discussions regarding how best to go "paperless" and what steps might be taken in the near term to address the bench's concerns, Mr. Kamerrer immediately initiated a suit against the Franklin County Clerk. ACP 133 ¶ 13, 149. Mr. Kamerrer filed this lawsuit without prior permission from Prosecutor Sant. ACP 184. Immediately upon receiving notice of the filing of the suit, Prosecutor Sant directed Mr.

Kamerrer to cease further work on the lawsuit.<sup>4</sup> ACP 184. Prosecutor Sant issued this order because he viewed the action as a lawsuit against the county. *See* ACP 5, 8, 10. Prosecutor Sant also halted the lawsuit due to a lack of funds, as neither his budget nor the Judges' budget included an appropriation for the purpose of filing lawsuits against a county official at the request of another county official. ACP 184. *See also* ACP 6, 8, 38, 133-34 ¶ 14.

Mr. Kamerrer, on behalf of the Judges, sought to remove the financial barrier to the lawsuit against Clerk Killian by asking the Board of County Commissioners (hereinafter "BOCC") to appropriate funds to pay for the action. ACP 23-59. Prosecutor Sant opposed the request on the grounds that he is not required to initiate suit on behalf of one county officer against another county officer, that if the Judges' action is funded the county would be required to expend a similar amount of money to defend the clerk, that mediation is a better option, and that the legal question may be resolved in a cost-effective manner by requesting an opinion from the attorney general's office. ACP 36-48, 93-101.

After hearing from Mr. Kamerrer, Prosecutor Sant, Clerk Killian and others in public meetings, the BOCC declined to appropriate the \$14,000 to \$75,000 needed to litigate the Judges' lawsuit in the trial and appellate courts. ACP 28-31, 77-78, 119-120. The BOCC's final decision on funding the lawsuit was made after Clerk Killian agreed to provide paper files, upon request, to the judges for another 3 to 12 months so that any remaining problems could be worked out. ACP 102-05, 113-19. The BOCC's decision

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<sup>4</sup>A similar directive was issued to the attorney appointed to represent Clerk Killian. ACP 186, 189.

was supported by the Judges' stated willingness to resolve any technical issues related to Odyssey and the BOCC's belief that the public would be better served by expending funds on any necessary technological upgrades than on litigation. ACP 118-122. In light of the BOCC's decision, Prosecutor Sant revoked Mr. Kamerrer's special deputy appointment in a letter that repeated his availability to provide legal advice to the Judges. ACP 134 ¶¶ 15 and 17, 197.

The Judges disagreed with the BOCC's decision. The Judges communicated their dissatisfaction with the BOCC, indicating that the BOCC did not sufficiently appreciate "the magnitude of the disagreement between the Court and the Clerk." ACP 192. The penultimate paragraph of the letter to the BOCC state that:

The Prosecuting Attorney cannot represent the Court in this matter. He has acknowledged that by appointing outside counsel for both the Court and the Clerk. This brings RCW 36.27.030 into play, and that statute authorizes the Court to appoint an attorney to stand in for the Prosecutor and compel the County to compensate that attorney for his or her services. We prefer that appointment and compensation be initiated by the Prosecutor and supported by the Board of County Commissioners, but that has not happened. Accordingly, the Court will exercise its authority to appoint counsel and compel compensation, with the amount of the compensation being subject to review and approval by the Court.

ACP 194.

On May 21, 2018, the Judges signed an Order of Appointment in a matter they entitled "*In re the Appointment of a Special Deputy Prosecuting Attorney.*" CP 2-4. The Order of Appointment, which was filed with the Franklin County Clerk's Office on May 22, 2018, was entered in chambers. See ACP 203, 209, 215, 222, 228, 235, 243, 249, 256, 262, 268, 274, 281.

Neither the BOCC nor Prosecutor Sant were provided with notice that the Order of Appointment would be considered by the Judges on May 21, 2018. ACP 134 ¶ 19, 287-289. Nor were they provided with an opportunity to tender legal arguments in opposition to the entry of the Order of Appointment. *See* ACP 134 ¶¶18-19. The Judges did not serve a copy of the signed Order of Appointment on either Prosecutor Sant or the BOCC. They only learned about the order when Clerk Killian delivered a copy to Prosecutor Sant's office. ACP 134 ¶ 18, 228 ¶ 6, 249-50 ¶ 6.

The Order of Appointment appoints W. Dale Kamerrer "as a Special Deputy Prosecuting Attorney to represent the plaintiffs in [*The Judges of Benton and Franklin Counties Superior Court: Judge Joe Burrowes, Judge Alex Ekstrom, Judge Cameron Mitchell, Judge Carrie Runge, Judge Jacqueline Shea-[B]rown, Judge Bruce Spanner and Judge Sam Swanberg, Plaintiffs, vs. Michael Killian, Franklin County Clerk and Clerk of the Superior Court, Defendants, Franklin County Superior Court No. 18-2-50285-11*]. CP 3, ¶ 1 and CP 2, FOF 1. The Order of Appointment identifies RCW 36.27.030 as the authority for the appointment, indicating that "the Prosecuting Attorney of Franklin County is unable to discharge the duties of his office due to a disability arising from the requirements and limitations of Rules of Professional Conduct, Rule 1.7." CP 2, FOF 1. The Order of Appointment directs that Mr. Kamerrer shall be compensated for the professional services he provides to the Judges by Franklin County. CP 3, FOF 4 and ¶ 2.

Both Prosecutor Sant and Franklin County sought review in this Court of the Order of Appointment. CP 1. Ultimately, this Court granted

discretionary review and granted a RAP 9.11 motion to create a record for review.

## V. ARGUMENT

To protect individuals against centralized authority and abuses of power, governmental authority is divided by the Washington Constitution into three branches—legislative, executive, and judicial. *State v. Rice*, 174 Wn.2d 884, 900-01, 279 P.3d 849 (2012); *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). While the branches are not hermetically sealed from each other, separation of powers is violated when the judicial branch performs tasks more properly accomplished by other branches. *State v. Moreno*, 147 Wn.2d 500, 506, 58 P.3d 265 (2002). The legislative branch generally has control over appropriations and a court may not substitute its judgment for theirs simply because it does not think the BOCC acted wisely. *Hillis v. Department of Ecology*, 131 Wn.2d 373, 390, 932 P.2d 139 (1997). The executive branch prosecuting attorney has discretion to refuse to bring a civil lawsuit, and a court may not overrule his judgment solely because it believes the fruits of the litigation is desirable. *Fisher v. Clem*, 25 Wn. App. 303, 607 P.2d 326 (1980), *overruled on other grounds by Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 793-94, 791 P.2d 526 (1990).

The Washington Constitution also provides for open court proceedings, due process, expenditure of public funds solely upon a proper appropriation, and an unbundled government in which each elected officer's duties may not be transferred to another. *See generally State ex rel Banks v. Drummond*, 187 Wn.2d 157, 385 P.3d 769 (2016); Wash. Const. art. I, §§ 3 and 10; Wash. Const. art. VIII, § 4; Wash. Const. art. XI, § 4 and 5. All of

these principles were violated by the Franklin County Superior Court Judges' entry of the Order of Appointment.

**A. No Man Can Be a Judge in His Own Case and No Man is Permitted to Try Cases Where He Has an Interest in the Outcome.**

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955). "Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). Even an appearance of impartiality may violate a litigant's right to due process. *See State v. Romano*, 34 Wn. App. 567, 662 P.2d 406 (1983); *see also Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) ("any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.").

Due process prohibits any judge from acting in a case in which the judge has a personal interest. *See Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1926) (the Due Process Clause of the Fourteenth Amendment incorporated the common law rule that bars a judge from presiding over a case in which he has a personal interest); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (the Due Process Clause rule announced in *Tumey* reflected the common law maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p 59 (J. Cooke ed.

1961) (J. Madison)”). See also Comment, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 Temp. L. Rev. 225 (2010). This prohibition has been incorporated into the Code of Judicial Conduct. See *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995) (“The CJC recognizes that where a trial judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public’s confidence in our judicial system can be debilitating”); CJC Canon 2.11(A)(2)(a) (“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including” when the judge is “a party to the proceeding”). When an order is entered by a judge whose impartiality may be questioned, the order must be reversed. *Caperton*, 556 U.S. at 890; *Tumey*, 273 U.S. at 535; *Tatham v. Rogers*, 170 Wn. App. 76, 108, 283 P.3d 583 (2012).

The Order of Appointment in the instant case appointed Mr. Kamerrer to represent the Judges in *The Judges of Benton and Franklin Counties Superior Court: Judge Joe Burrowes, Judge Alex Ekstrom, Judge Cameron Mitchell, Judge Carrie Runge, Judge Jacqueline Shea-[B]rown, Judge Bruce Spanner and Judge Sam Swanberg, Plaintiffs, vs. Michael Killian, Franklin County Clerk and Clerk of the Superior Court, Defendants*, Franklin County Superior Court No. 18-2-50285-11. CP 3, ¶ 1 and CP 2, FOF 1. The litigation identified in the Order of Appointment can proceed without the order, just at the Judges’ own expense. See Section V. E. The sole effect of the order was to relieve the Judges of the burden of personally paying for the lawsuit.

Since a reasonably objective person would believe that the Judges could not impartially decide whether they were lawfully entitled to publicly funded counsel to represent themselves in a pending lawsuit, the Order of Appointment must be vacated. *See, e.g., State ex rel. Lambert v. King*, 538 S.E.2d 385, 387 (W.Va. 2000) (it is improper for a judge to decide whether to appoint someone to perform the duties of the prosecuting attorney where the judge, himself, initiated the proceeding to replace the prosecuting attorney); *Committee for Marion County Bar Ass'n v. County of Marion*, 123 N.E.2d 521, 524 (Ohio 1954) (because of the interest which a court would necessarily have with respect to an action to compel funds for court services, the remedy should be sought in another court). *Accord In re Salary of Juvenile Director*, 87 Wn.2d 232, 249, 552 P.2d 163 (1976) (extreme care must be taken with respect to actions to compel funding to maintain the judiciary's image of impartiality).

**B. Justice Must Be Conducted Openly to Foster the Public's Understanding and Trust in Our Judicial System and to Give Judges the Check of Public Scrutiny.**

Article I, section 10 of our state constitution requires that "[j]ustice in all cases shall be administered openly." This mandate "guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). The open operation of our courts is of utmost importance, assuring the structural fairness of the proceedings. *In re Detention of D.F.F.*, 172 Wn.2d 37, 40, 256 P.3d 357 (2011). "Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the

ultimate protector of liberty, property, and constitutional integrity.” *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

A court may proceed outside of the public’s view only under the most unusual circumstances. *D.F.F.*, 172 Wn.2d at 41. The right of public access may be limited only to protect significant interests, and any limitations must be carefully considered and specifically justified. *Dreiling*, 151 Wn.2d at 904. Before retiring to chambers to consider entry of an order, the trial court must conduct an individualized inquiry into whether a sufficient countervailing interest exists to override the public’s constitutional right to the open administration of justice. *D.F.F.* 172 Wn.2d at 44. The individualized inquiry must follow the steps outlined in *Ishikawa*<sup>5</sup> and must include notice to opposing parties. *In re Dependency of M.H.P.*, 184 Wn.2d 741, 364 P.3d 94 (2015). A failure to conduct the required inquiry prior to closure requires the vacation of any order or verdict that is not separable from the violation of the public right of access. *In re Detention of Reyes*, 184 Wn.2d 340, 348, 358 P.3d 394 (2015).

The Judges provided no one with notice or an opportunity to be heard before retiring to chambers to consider entry of the Order of Appointment. As a result, neither the BOCC, Prosecutor Sant, nor the public was able to learn the basis for considering the issue in private. This violated the second *Ishikawa* factor. *Dependency of M.H.P.*, 184 Wn.2d at 768.

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<sup>5</sup>*Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982). The five *Ishikawa* factors are essentially identical to the five factors of the test adopted in *State v. Bone-Club*, 128 Wn.2d 254, 261, 906 P.2d 325 (1995), to assess the propriety of sealing and closures in criminal cases.

The first *Ishikawa* requirement is that the party seeking to have a matter heard behind closed doors must show a serious and imminent threat to some important interest to demonstrate necessity. *Ishikawa*, 97 Wn.2d at 37-38. The Judges have never identified what serious or imminent threat would arise from considering the Order of Appointment in public. This is not surprising; when there is a legislative policy to conduct a particular type of hearing openly, the proponent of closure is doomed to failure. *See Hundtofte v. Encarnación*, 169 Wn. App. 498, 517-19, 289 P.3d 513 (2012), *aff'd*, 181 Wn.2d 1, 330 P.3d 168 (2014). The public's interest in open proceedings is heightened when the matter in question calls for the expenditure of public funds, generally outweighing the countervailing interests of the proponent of closure. *See Dependency of M.H.P.*, 184 Wn.2d at 770-71 (discussing the fourth *Ishikawa* factor).

The Order of Appointment provides for the expenditure of funds for which there is no appropriation. Legislative policy requires that county budgets be adopted only after public hearings. *See, e.g.*, RCW 36.40.060, .070, .071. Supplemental appropriations require even greater scrutiny, with a public hearing that may only take place after publication of a notice for two consecutive weeks in the official newspaper of the county of the time and date of the meeting at which the supplemental appropriations resolution will be adopted and the amount of the appropriation. RCW 36.40.100. When a court orders the expenditure of public funds without an appropriation, it is incumbent upon it "to do so in a manner which clearly communicates and demonstrates to the public the grounds of the court's action." *In re Juvenile Director*, 87 Wn.2d at 251. This injunction is violated when, as here, the

order which directs the expenditure of funds is entered in chambers.

The Order of Appointment bestows the title of “special deputy prosecuting attorney” upon a private attorney. Selection of the county’s attorney occurs in public elections that are scrutinized at every step. *See generally* Const. art. XI, sec. 5; RCW 36.16.030; Title 29A RCW. Surely article I, section 10 of the Washington Constitution requires that the electorate’s decision not be cast aside behind closed doors. The Order of Appointment must be vacated.

**C. Procedural Due Process Demanded that the BOCC and Prosecutor Sant Be Given A Meaningful Opportunity to Be Heard Prior to the Entry of the Order of Appointment.**

The Order of Appointment was entered without prior notice to the BOCC or Prosecutor Sant. No motion was filed, no summons issued, and no hearing noted. The entry of this order without providing the BOCC and Prosecutor Sant an opportunity to be heard in opposition to the entry of the order violates the constitution and is void.

For more than 150 years it has been recognized that parties whose rights are to be affected are entitled to heard.<sup>6</sup> In order to enjoy that right, a party must first be notified of the pendency of the action. This notice and opportunity to be heard must be appropriate to the nature of the case. But, regardless of the nature of the case, the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Matter of Deming*,

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<sup>6</sup>The Code of Judicial Conduct requires judges to honor each person’s right to be heard. *See* CJC Canon 2, Rule 2.6(A) (“A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”). As noted in the comment to this rule, “The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights to litigants can be protected only if procedure protecting the right to be heard are observed.” CJC Canon 2, Comment 1 to Rule 2.6(A).

108 Wn.2d 82, 96-97, 736 P.2d 639 (1987). The due process right to notice and to be heard exists apart from any statutory provisions. *See, e.g., Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 386, 868 P.2d 861 (1994) (noting that due process notice requirements for zoning actions extend beyond formal statutory notice requirements); *Watson v. Wash. Preferred Life Ins. Co.*, 81 Wn.2d 403, 502 P.2d 1016 (1972) (notice provided by statute insufficient to satisfy the constitutional test of due process). An order issued without adequate notice or opportunity to be heard, including a court's order to compel funds pursuant to its inherent powers or to replace a prosecuting attorney due to a disqualification,<sup>7</sup> is void. *See generally In re Alamance County Court Facilities*, 405 S.E.2d 125, 137-38 (N.C. 1991) (order requiring the county commissioners to ameliorate inadequate facilities and to provide certain specified facilities reversed because the trial court refused to hear from the county commissioners); *King*, 538 S.E.2d at 388-89 (before a prosecuting attorney may be disqualified from acting in a particular case, the prosecuting attorney must be afforded notice

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<sup>7</sup>In *State v. Tracer*, 173 Wn.2d 708, 717 n. 7, 272 P.3d 199 (2012), this Court noted that RCW 36.27.030, unlike similar foreign statutes, did not include a requirement that the prosecuting attorney receive notice and an opportunity to be heard prior to the superior court appointing someone to perform her duties. The Court did not, however, render a ruling as to whether procedural due process required notice and opportunity to be heard.

This Court need not overrule *Tracer* in order to vacate the Order of Appointment. *Tracer* involved a failure to attend a session of the court, which is governed by the second paragraph of RCW 36.27.030. *Tracer*, 173 Wn.2d at 717-18. The Order of Appointment in this case rests solely upon the first paragraph. *See infra* at section V. E. It is consistent with this state's contempt jurisprudence to require a pre-deprivation hearing when the facts necessary to satisfy RCW 36.27.030 occur outside of the courtroom, while allowing for summary appointment of an independent prosecutor when the facts that trigger RCW 36.27.030 occurs in the court's presence. *Compare State v. Hobble*, 126 Wn.2d 283, 892 P.2d 85 (1995) (a person may be summarily found in contempt where the judge saw or heard the contempt), with *In re Marriage of Maxfield*, 47 Wn. App. 699, 737 P.2d 671 (1987) (a person may not be found in contempt without adequate notice and opportunity to be heard when the problematic behavior occurred outside of the court's presence).

and the opportunity to be heard on the factual question of the propriety of his acting in the case); *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977) (any order issued without adequate notice is void).

It is beyond question that both the BOCC and Prosecutor Sant's rights were impacted by the Order of Appointment. The three members of the BOCC and Prosecutor Sant, by virtue of their election to their current offices by the voters, have a defensible interest in performing the duties of their offices throughout their term. *See Drummond*, 187 Wn.2d at 169. *See also State ex rel. Johnston v. Melton*, 192 Wash. 379, 385-86, 73 P.2d 1334 (1937). The Order of Appointment usurps the BOCC's responsibility to establish budgets and control the expenditure of taxpayer money. The Order of Appointment supplants Prosecutor Sant's exercise of prosecutorial discretion. Both the BOCC and Prosecutor Sant enjoy standing to defend against the assumption of their responsibilities by another government branch. *See Drummond*, 187 Wn.2d at 179-80.

Providing notice and extending an opportunity to be heard to interested persons prior to the entry of an order is also prudential. A court that receives legal argument in a timely manner has the opportunity to avoid error. *Cf. State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988) (requirement that issues be raised in the trial court is to encourage the efficient use of judicial resources and to provide the trial court with the opportunity to correct and error so as to avoid an appeal). Providing the BOCC and Prosecutor Sant with an opportunity to present the legal arguments that follow might have prevented this appeal.

**D. The Prosecuting Attorney is Solely Responsible for Selecting his Deputies and for Deciding Who Will Perform the Duties of his Office.**

The Order of Appointment states that “W. Dale Kramerrer is hereby appointed as a Special Deputy Prosecuting Attorney to represent the plaintiffs in the action identified above.” CP 3, ¶ 1. A court, however, lacks the power to appoint anyone to serve as a special deputy prosecuting attorney or to countermand the prosecuting attorney’s termination of his appointment. The Order of Appointment finds that “the Prosecuting Attorney is unable to discharge the duties of his office due to a disability arising from the requirements and limitations of Rules of Professional Conduct, Rule 1.7.” CP 2, FOF 1. This finding is legally inaccurate with respect to Prosecutor Sant’s mandatory functions. Both of these errors require the vacation of the Order of Appointment.

A prosecuting attorney is an elected officer, whose core functions are those assigned to the office when the Washington constitution was adopted. *See generally Drummond*, 187 Wn.2d at 180; Const. art. XI, §§ 4, 5. The core functions rendered the prosecuting attorney a dual state and county officer; representing the State of Washington in criminal cases and the county in civil matters. *See Drummond*, 187 Wn.2d at 181; Laws of 2008, ch. 309, sec. 1. Today, many of the duties assigned to the prosecuting attorney may be found in statutes.

In RCW 36.27.020, the mandatory duties of the prosecuting attorney are set forth. Those duties include (1) providing legal advice to the legislative authority, (2) providing legal advice to all county officers; (3) “appear[ing] for and represent[ing] the ... county ... in all ... civil proceedings

in which the ... county ... may be a party”; and (4) “defend[ing] all suits brought against the state or the *county*.” RCW 36.27.020(1)-(4) (emphasis added). A prosecuting attorney may not receive any fee or reward for performing any of the official services listed in RCW 36.27.020. RCW 36.27.050.

A prosecuting attorney may, but is not required to perform other services. Specifically, RCW 36.27.020 does not require a prosecuting attorney to bring a legal action at the request of a county officer. *Hoppe*, 95 Wn.2d at 339-40 (“nothing in the duties of the prosecuting attorney (RCW 36.27.020) requires that officer to bring an action simply because a request is made by another county officer or to provide legal representation”); *Fisher*, 25 Wn. App. at 307 (“the prosecutor’s maintenance of any civil proceedings under RCW 36.27.020 is discretionary”). Additionally, the obligation to provide legal advice to county officers, RCW 36.27.020(2), does not include a duty to defend such officers in lawsuits wherein the county officer is not a proxy for the county itself.<sup>8</sup> See *Grant County Prosecuting Attorney v. Jasman*, 183 Wn.2d 633, 646-48, 354 P.3d 846 (2015) (prosecuting attorneys only have a duty to advise county officers and to represent county officers in suits against them for money damages and suits in which the State or county is the real party in interest); *Bates v. School Dist. 10*, 45 Wash. 498, 88 P. 944 (1907) (prosecuting attorney had no duty to defend litigation on behalf of the

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<sup>8</sup>The appointment of the special deputy prosecuting attorney representing Clerk Killian in the mandamus action has not been terminated because Franklin County is an interested party in that action. See, e.g., ACP 81-82, 89 (clerk’s current budget insufficient to maintain the paper files being requested by the judges); ACP 36-39 (Judges’ action against the Clerk is an action against the county); ACP 107-08 (cost to county based upon shifting court rules regarding paper or electronic files).

school district when the school district was sued; duty to give legal advice to school directors did not include a duty to defend).

In performing his duties, a prosecuting attorney is bound by the Rules of Professional Conduct. *State v. Stenger*, 111 Wn.2d 516, 520-21, 760 P.2d 357 (1988). These rules establish that the county as a whole is the prosecuting attorney's client in civil matters.<sup>9</sup> See RPC 1.13. *Accord Salt Lake County Commission v. Short*, 985 P.2d 899, 903-905 (Utah 1999) (Utah RPC 1.13 establishes the identity of the client for the county attorney); *Humphrey v. McLaren*, 402 N.W.2d 535 (Minn. 1987) (Minnesota RPC 1.13 establishes the identity of the client for a government attorney). The individual county officers are not separate clients of the prosecuting attorney. See *Short*, 985 P.2d at 905 ("The County Attorney has an attorney-client relationship only with the County as an entity, not with the Commission or the individual Commissioners apart from the entity on behalf of which they act."); *Humphrey*, 402 N.W.2d at 540 (government bureau or the government as a whole is the public attorney's client, not each officer or employee).

The separately elected county officers have the same relationship to the prosecuting attorney as officers have to a private corporation's general counsel. *Ward v. Superior Court*, 138 Cal. Rptr. 532, 537, 70 Cal. App. 3d 23 (1977). A disagreement between various county officers, such as the judges and the clerk on a point of law, does not give rise to a disqualifying conflict of interest. The prosecuting attorney is fully able to discharge his

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<sup>9</sup>The legislature, by statute, has assigned other discrete clients to the prosecuting attorney. See, e.g., RCW 41.14.170 (the civil service commission for sheriff's office shall be represented in "all civil suits which may be necessary for the proper enforcement of [chapter 41.14] and rules of the commission. . . by the prosecuting attorney of the county"). None of these statutes, however, are relevant to this matter.

mandatory function of providing legal advice to both officers. *See generally* State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2001-156 (2002)<sup>10</sup> (a conflict of interest does not arise when various officials of a city seek legal advice on the same matter and the officials' positions on the matter are antagonistic). One or both of the officers may find the prosecuting attorney's advice to be disagreeable, but that does not create a disqualifying conflict of interest. *See Drummond*, 187 Wn.2d at 177 n. 7 (a disagreement between a prosecuting attorney and the BOCC on a question of law does not create a disability under RCW 36.27.030); *Hoppe*, 95 Wn.2d at 340 (a disagreement on the law between the prosecuting attorney and a county officer does not constitute a disability under RCW 36.27.030). Prosecutor Sant recognized that there was no impediment to his performing his mandatory duties vis-a-vis Clerk Killian and the Judges. ACP 133 ¶ 11 ("I was at all times and continue to be able to discharge my mandatory duties under RCW 36.27.020(2) and continue to provide both the Clerk and the Judge with legal advice.").

In most counties, the duties assigned to the prosecuting attorney cannot be completed by one person. The prosecuting attorney, with the consent of the board of county commissioners, may employ deputies and other necessary employees. RCW 36.16.070. The selection of employees and deputies rest solely with the prosecuting attorney. *See Osborn v. Grant County*, 130 Wn.2d 615, 926 P.2d 911 (1996) (BOCC had no authority to interfere with the clerk's hiring decision); *Thomas v. Whatcom County*, 82

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<sup>10</sup>Formal Opinion No. 2001-156 is available at <http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2001-156.htm> (last visited Oct. 23, 2018).

Wash. 113, 143 P. 881 (1914) (sheriff has absolute right to determine who to appoint as a deputy to fill positions authorized by the board of county commissioners); 1955 Attorney General Opinion No. 48 (the BOCC may not participate in the selection or removal of deputy prosecuting attorneys). The prosecuting attorney is solely responsible for the actions of his deputies, and he retains the right to countermand their discretionary decisions. RCW 36.27.040; RCW 36.16.070. *See also* ACP 45-46.

A prosecuting attorney may confer different types of appointments upon his deputies. An attorney may be appointed a “deputy prosecuting attorney.” *See* RCW 36.27.040. An attorney so appointed has the same power and the same clients as the prosecuting attorney, with the prosecuting attorney responsible for all acts performed by the deputy. *Id.* The term of a deputy prosecuting attorney is co-extensive with the term of the appointing prosecutor. *Spokane County v. State*, 136 Wn.2d 644, 655, 966 P.2d 305 (1998). An elected prosecuting attorney may, however, revoke a deputy’s appointment at will. RCW 36.16.070; RCW 36.27.040.

A prosecuting may appoint an attorney to serve as a “special deputy prosecuting attorney.” RCW 36.27.040. A special deputy prosecuting attorney serves upon a contract or fee basis. The duties of a special deputy prosecuting attorney are limited to specific cases or specific tasks. *Id.* A special deputy prosecuting attorney has no greater power than the prosecuting attorney. *Id.* A special deputy prosecuting attorney has the same clients as the prosecuting attorney.

While a prosecuting attorney may appoint someone a special deputy

prosecuting attorney as a means of addressing a disabling conflict of interest,<sup>11</sup> a conflict of interest is not a condition precedent to a special deputy prosecuting attorney appointment. *See* RCW 36.27.040. A prosecuting attorney may appoint someone a special deputy prosecuting attorney in order to obtain special talents that may not exist among his other deputies. *See State v. Carroll*, 81 Wn.2d 95, 106-07, 500 P.2d 115 (1972). One or more special deputy prosecuting attorneys may be appointed to deal with an unexpected surge in work or in the hope of defusing an intra-client disagreement. A prosecuting attorney is responsible for all acts performed by the special deputy prosecuting attorney. RCW 36.27.040. An appointment as a special deputy prosecuting attorney may be revoked by the elected prosecuting attorney at any time. RCW 36.16.070; RCW 36.27.040.

The elected prosecuting attorney has the sole discretion to determine whether specific legal services will be provided by him personally, by a deputy prosecuting attorney, or by a special deputy prosecuting attorney. *Cf. Drummond*, 187 Wn.2d at 164-65 (BOCC could not retain private attorney to provide legal advice regarding the Growth Management Act due to its dissatisfaction with the deputy prosecuting attorney who was assigned the duty); *Herron v. McClanahan*, 28 Wn. App. 552, 561, 625 P.2d 707 (1981) (prosecuting attorney not subject to recall for appointing a deputy to advise the county planning commission). A prosecuting attorney has discretion to reassign duties between his deputies, even against the wishes of the consumer of legal services. *Id.* (prosecuting attorney transferred a deputy prosecuting

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<sup>11</sup>*See Herron v. McClanahan*, 28 Wn. App. 552, 625 P.2d 707 (1981) (Pierce County Prosecuting Attorney acted within the scope of his authority by appointing the Mason County Prosecuting Attorney to review the recall charges filed against him).

attorney from criminal duties to advising the County Planning Commission). A county official who is displeased with the prosecuting attorney's choice is free to take his grievances to the voters, but he may not insist that legal advice be tendered by a specific deputy or attorney. See *In re Recall of Sandhaus*, 134 Wn.2d 662, 670, 953 P.2d 82 (1998) ("whether [the prosecuting attorney] is doing a satisfactory job of managing his office is a quintessential political issue which is properly brought before the voters at a regular election"); *Osborn*, 130 Wn.2d at 624 ("If an official makes a poor hiring decision, the official is accountable not to the board of commissioners, but to the public. If the public dislikes [the hiring decision], the ballot is its recourse.").

In the instant case no disability prevented Prosecutor Sant from advising both Clerk Killian and the Judges regarding the law related to the maintenance of superior court records. ACP 133, ¶ 11. Prosecutor Sant only chose to appoint outside attorneys as special deputy prosecuting attorneys to advise the Clerk and the Judges as a means of defusing their conflict. ACP 133, ¶¶ 11 and 12. Prosecutor Sant remained responsible for the work performed by both special deputy prosecuting attorneys. RCW 36.27.040; RCW 36.16.070. Prosecutor Sant retained the sole discretion as to when to terminate the appointment of either special deputy prosecuting attorney. RCW 36.27.040; RCW 36.16.070.

Prosecutor Sant terminated his appointment of Mr. Kamerrer after the clerk agreed to provide a paper record to the Judges upon request. Prosecutor Sant also rescinded his appointment because Mr. Kamerrer filed the lawsuit against the clerk without prior authorization and the BOCC refused to

sanction its continued prosecution at public expense. See ACP 133-134, ¶¶ 14, 15, and 17; 197. The termination of Mr. Kamerrer's special deputy appointment did not leave the Judges adrift. Prosecutor Sant reassigned his RCW 36.27.020(2) mandatory duty to provide legal advice to the judges to his office. ACP 197.

**E. An Independent Prosecuting Attorney and Public Funds to Pay Such an Attorney are Only Authorized When the Prosecuting Attorney is Unable to Perform a Mandatory Duty.**

Although the electorate's right to choose who will provide legal services to the county is thwarted when someone else is appointed to perform the prosecutor's duties, there are times when a prosecuting attorney cannot act. On such occasions, a superior court judge may appoint someone else to serve as an independent<sup>12</sup> prosecuting attorney. This appointment authority is strictly limited because a superior court judge's power derives from the same constitution as the prosecuting attorney. *State v. Heaton*, 21 Wash. 59, 62-63, 56 P. 843 (1899). A mere disagreement with the prosecuting attorney's exercise of independent judgment will not allow a court to select a replacement. *Id.* Instead, a court's power to appoint a substitute for the duly elected prosecuting attorney is strictly limited to the grounds set out in

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<sup>12</sup>A number of court cases refer to an attorney appointed pursuant to RCW 36.27.030 as a "special prosecuting attorney." See, e.g., *Westerman v. Carey*, 125 Wn.2d 277, 301, 892 P.2d 1067 (1994) ("RCW 36.27.030 enables a superior court to appoint a special prosecutor. . ."); *In re Lewis*, 51 Wash. 2d 193, 202, 316 P.2d 907 (1957) ("the court was authorized to appoint a special prosecutor, under RCW 36.27.030"). The word "special," however, does not appear in RCW 36.27.030. The word "special" in Chapter 36.27 RCW refers to deputy prosecuting attorneys who are under the direct supervision of the county prosecuting attorney. See RCW 36.27.040; RCW 36.27.130. Attorneys appointed pursuant to RCW 36.27.030 are not subordinate to the prosecuting attorney. They are only answerable to the court that appointed them. For this reason, and to avoid confusion with RCW 36.27.040 special deputy prosecuting attorneys, the word "independent" will be used when referring to an RCW 36.27.030 court appointed prosecuting attorney.

statute. *Hoppe v. King County*, 95 Wn.2d 332, 339, 622 P.2d 845 (1980); *Heaton*, 21 Wash. at 61-62.

The statutory authority for the appointment of an independent prosecuting attorney may be found in RCW 36.27.030. This statute authorizes a court to act

When from illness or other cause the prosecuting attorney is temporarily unable to perform his or her duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

RCW 36.27.030. The phrase "other cause" refers to a conflict of interest. See generally *Westerman v. Carey*, 125 Wn.2d 277, 892 P.2d 1067 (1994) (prosecutor disagreed with his client's position in a case in which the client was sued); *State v. Stenger, supra* (defendant was prosecutor's former client); *State v. Tolias*, 84 Wn. App. 696, 929 P.2d 1178 (1997), *rev'd on other grounds*, 135 Wn.2d 133, 954 P.2d 907 (1998) (prosecutor had mediated dispute that gave rise to criminal charges).

A court may appoint an independent prosecutor to represent a party only when two conditions are met

First, the prosecutor must have the authority and the duty to represent that party in the given matter. Second, some disability must prevent the prosecutor from fulfilling the duty. If the prosecutor has no duty or authority to represent a party, the trial court cannot appoint special counsel.

*Osborn*, 130 Wn.2d at 624-25. *Accord Jasman*, 183 Wn.2d at 647. Neither condition is met in the instant case.

First, the prosecuting attorney does not have a duty to initiate a lawsuit at the request of a county official. In *Fisher v. Clem* a district court judge brought a mandamus action to compel the prosecuting attorney to file

suit on behalf of the judge. Alternatively, the district court judge requested the appointment of an independent prosecuting attorney to bring a mandamus action to compel the county commissioners to provide funds for the probation department of the district court. The appellate court rejected both requests, holding that “the prosecutor’s maintenance of any civil proceedings under RCW 36.27.020 is discretionary.” *Fisher*, 25 Wn. App. at 307.

Eleven months after *Fisher v. Clem* was decided, this Court ratified its holding in *Hoppe v. King County*. In *Hoppe*, the King County Assessor moved for the appointment of an independent prosecuting attorney to represent him in an action against King County, the State Department of Revenue, and certain King County and state officials. This Court held that the motion must be denied, stating that “nothing in the duties of the prosecuting attorney (RCW 36.27.020) requires that officer to bring an action simply because a request is made by another county officer or to provide legal representation.” *Hoppe*, 95 Wn.2d at 339-40.

More recently this Court reversed a superior court’s \$19,000 award of attorney fees to an attorney the superior court appointed as an independent prosecutor to represent the clerk in her lawsuit against the county. While this Court acknowledged that the Grant County Prosecuting Attorney was unable to provide legal advice to the clerk due to a conflict of interest, the appointment of a special prosecutor was only proper with respect to the mandatory duty of providing legal advice to the clerk. The appointment could not be extended to the filing of an action on behalf of the clerk. *Osborn*, 130 Wn.2d at 629.

In the instant case, Prosecutor Sant carefully considered the Judges’

request, which was conveyed to him through his special deputy prosecuting attorney, to maintain a mandamus against the Franklin County Clerk. Prosecutor Sant declined to pursue the action at public expense for budgetary reasons,<sup>13</sup> and because the cost of the law suit was unreasonable where the clerk was amenable to fixing any glitches in the paperless record system. *Cf. Osborn*, 130 Wn.2d at 629 (rejecting claimed legal fees of \$19,000 where the complained of action by the Board “caused no serious disruption in the operation of the county clerk’s office”). Prosecutor Sant, moreover, was of the opinion that the county is always the loser in intra-client litigation and that the legal question posed in the mandamus action could be answered by requesting an opinion from the attorney general’s office.

While the Judges are free to disagree with Prosecutor Sant’s conclusions, their disapprobation does not create a disqualifying conflict of interest. *See Drummond*, 187 Wn.2d at 178 (“mere disagreement is insufficient to find a public official unavailable or disabled”); *Hoppe*, 95 Wn.2d at 340 (disagreement between the prosecuting attorney and a county officer over whether the county officer is entitled to representation does not create a disability under RCW 36.27.030 nor is it a conflict of interest). Thus the second condition precedent to an appointment of an independent prosecuting attorney is also not met.

The Judges may pursue their mandamus action against the clerk, but not with an independent prosecutor at taxpayers’ expense. *Hoppe*, 95 Wn.2d at 340. The Order of Appointment must be vacated.

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<sup>13</sup>The prosecuting attorney, like all county officers, faces consequences if he exceeds his budget. *See* RCW 36.40.130 (a county officer is personally responsible for expenditures made or liabilities incurred in excess of the budget).

**F. Judges May Expend Public Funds Over the Objection of the County's Legislative Body Only Upon a Showing that the Judges Cannot Fulfill Their Duties Without the Additional Funds.**

As a general rule, public funds may not be expended except as authorized by law. *Moore v. Snohomish County*, 112 Wn.2d 915, 919-920, 774 P.2d 1218 (1989) (citing Wash. Const. art. VIII, sec. 4<sup>14</sup>). A limited exception to this rule is that a court has the inherent power to dictate its own survival when insufficient funds are provided by other branches. *In re Salary of Juvenile Director*, 87 Wn.2d 232, 245, 552 P.2d 163 (1976). The exercise of this inherent power by a superior court requires a hearing before a disinterested judge from another county, *id.* at 233, and clear, cogent, and convincing proof by the superior court that it cannot fulfill its duties without the increased funding. *Id.*, at 252. This demanding standard was set in recognition that litigation based on inherent judicial power to finance court functions ignores the political allocation of available resources by the legislative branch and can harm the judiciary's image of impartiality and the public's willingness to accept the courts' decisions as those of a fair and disinterested tribunal. *Id.*, at 248-49.

*In re Juvenile Director* involved a dispute over the salary to be paid

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<sup>14</sup>Const. art. VIII, sec. 4 provides:

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law. . . .

The expenditure of public funds without the necessary appropriation is a felony. See Const. art. XI, sec. 14 ("using [public funds] for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.").

to the juvenile director. The Lincoln County Board of Commissioners (hereinafter "Board") rejected the superior court's budget request for funds to increase the director's salary by \$125 a month. *Id.* at 234. Undeterred, the court ordered the county auditor to set up the salary for the director at the court's desired rate to be paid out of the county treasury. *Id.* The Board resisted the order and a show cause hearing was set before a disinterested judge from a neighboring county. *Id.*, at 233-34.

During the show cause hearing, the court justified its order by comparing the current salary of the juvenile director to the salaries of other juvenile officers in other counties. Based upon its comparison, the court determined that its desired salary was "fair and reasonable compensation for the position." *In re Juvenile Director*, 87 Wn.2d at 234. The court, however, made no showing that qualified employees could not be obtained at the salary established by the county commissioners or the extent to which the functioning of the superior court would be impaired if the director's salary were not increased. *Id.*

This Court upon review of the record, determined that

there is a fundamental failure of proof by respondent Superior Court. No evidence in the record supports by a preponderance of the evidence -- let alone by a clear, cogent, and convincing showing -- respondent's determination that the salary paid to the Director of Juvenile Services was so inadequate that the court could not fulfill its duties. Neither does the record show that an increase in salary was reasonably necessary for the efficient administration of justice. *See In re Haberstroh*, 20 Pa. Cmwlth. 1, 340 A.2d 603 (1975). Lacking such proof, there is no basis for the exercise of inherent power in the circumstances of this case, and respondent's attempt to do so imposed an improper check on the function of the legislative branch of government.

*In re Juvenile Director*, 87 Wn.2d at 252.

The showing made in support of compelling funds to finance the mandamus action in the instant case is virtually indistinguishable from that in *In re Juvenile Director*. The Judges claim that it is premature for the clerk to only maintain paper files until more work flow and work queues are adopted.<sup>15</sup> They are of the opinion that work flows and work queues cannot be effectively implemented without the Clerk's acknowledgment of their omnipotence over anything related to court records.<sup>16</sup> The Judges, however, produced no evidence that the Clerk's current system of maintaining records and processing court documents was so inadequate that the superior court could not perform its duties. To the contrary, the record establishes that the

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<sup>15</sup>Judge Spanner explained in his declaration to this Court that

12. Among the issues with achieving a paperless environment for court records is the management of work flow and work queue processes, including having the ability for filers and courts to affix electronic signatures to documents. "Work flows" are the electronic movement of documents within the Odyssey system that will replace the physical movement of documents within the Clerk's office, including between the Court to the Clerk and between the Clerk's office and other parties such as jails, police agencies, attorneys, probation offices and many others. Odyssey can be configured so that every document created or scanned into it can have its own unique work flow that occurs automatically. "Work queues" are electronic document repositories where documents are held until some action, such as the affixing of an electronic signature or other approval happens. Many work flows include work queues. The content and mapping of work flows and work queues are essential to effective working in a paperless environment. The content and mapping of work flows and work queues are essential to effective working in a paperless environment. The work to establish these work flows and work queues requires collaboration between the Clerk and the Court. In 2017, the judges of the Superior Court authorized me to work with the Clerk to develop work flows and work queues as a precursor to the pending paperless environment. It is notable that, although Odyssey was implemented in November 2015, the Clerk had declined to create work flows, except a very few. A plethora of work flows will be needed in Franklin County before transition to a fully electronic environment can occur successfully.

Declaration and Exhibits of Judge Bruce A. Spanner in Response to Petition/Motions for Supreme Court Review Including Motion to Stay and Motion for Accelerated Consideration of Stay at 9-10.

<sup>16</sup>See ACP 24-25, 50-51, 64-66, 179-180, 192-94.

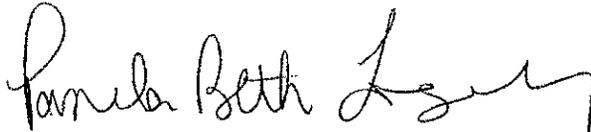
Clerk provides access to electronic files via tablets and monitors, paper files when requested by the court, access to all court records to both citizens and attorneys, and delivery of various court orders to the jail or the sheriff's office.<sup>17</sup> See ACP 79-82, 192-95. The Order of Appointment's provision for payment of attorney fees from public funds must, therefore, be vacated.

## VI. CONCLUSION

A prosecuting attorney has a duty to advise county officials, but no duty to initiate a lawsuit at an official's request. A county has no duty to fund a lawsuit against itself when officers fail to communicate and refuse to mediate. The Order of Appointment, which appoints a special deputy prosecuting attorney to pursue a lawsuit at public expense against the county, must be vacated.

Respectfully submitted this 26th day of October, 2018.

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Prosecuting Attorney



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<sup>17</sup>The Judges complain that some court orders were not transmitted electronically to the jail or sheriff's office in a timely manner. See ACP 66, 193. The record, however, contains no evidence of the length of the interval between delivery of the order to the clerk and its transmission to the jail. The record also produces no evidence that any order failed to reach the sheriff or the jail, that the sheriff or the jail is willing to accept the orders electronically, or that these entities have the ability to process the electronic orders.

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 26th day of October, 2018, pursuant to the agreement of the parties, I e-mailed a copy of the document to which this proof of service is attached to

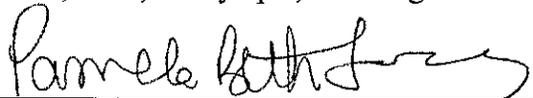
Teresa Chen at tchen@co.franklin.wa.us

Shawn Sant at ssant@co.franklin.wa.us

Jennifer Johnson at jjohnson@co.franklin.wa.us

Dale Kamerrer at dkamerrer@lldkb.com and at marry@lldkb.com

Signed under the penalty of perjury under the laws of the state of Washington this 26th day of October, 2018, at Olympia, Washington.



PAMELA B. LOGINSKY  
WSBA No. 18096  
Special Deputy Prosecuting Attorney

**WASHINGTON ASSOC OF PROSECUTING ATTY**

**October 26, 2018 - 11:16 AM**

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