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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE JUDGES OF THE BENTON AND FRANKLIN COUNTIES OF THE SUPERIOR COURT: Judge Joe Burrows, Judge Alex Ekstrom, Judge Cameron Mitchell, Judge Carrie Runge, Judge Jacqueline Shea-Brown, Judge Bruce Spanner and Judge Sam Swanberg,

Respondents,

vs.

MICHAEL J. KILLIAN, FRANKLIN COUNTY CLERK AND CLERK OF THE SUPERIOR COURT,

Appellant.

RESPONDENTS' ANSWER TO BRIEF OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF COUNTY CLERKS

W. Dale Kamerrer, WSBA No. 8218
Attorney for the Judges of the Benton and Franklin Counties Superior Court

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH, P.S.
P.O. Box 11880
Olympia, WA 98508
Phone: (360) 754-3480
Email: dkamerrer@lldkb.com

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I. INTRODUCTION

The Judges of the Benton and Franklin Counties Superior Court, plaintiffs below and respondents herein, respond to the Brief of *Amicus Curiae* Washington State Association of County Clerks (WSACC), as follows.

Many of the arguments presented by WSACC have been addressed in the Brief of Respondents, and we rely primarily on that brief in response to those arguments.

A. WSACC's "Cooperation" Theme is Misdirected When Applied to the Superior Court.

The opening theme of WSACC's brief is that it would be better if the parties hereto cooperated with respect to developing and transitioning to the Odyssey paperless court case file system in Franklin County. The Superior Court agrees. However, the Court was faced with the unilateral action of the Franklin County Clerk <u>before</u> Local General Rule (LGR) 3 was adopted, and his refusal to comply with it thereafter. This made the current lawsuit necessary. WSACC makes its contentions without recognizing the Superior Court's record of attempted cooperation in this case and the Clerk's refusal to do the same.

The Clerk's unilateral action occurred after he had been informed in October 2017, that because development of workflow and work queue processes had not been completed, the Superior Court was not ready to transition to a fully paperless case file

environment.[1] Also, electronic access to case files was not available in all of the places in the courthouse where judicial officers conducted proceedings. Specifically, settlement conferences in domestic relations cases were regularly conducted in jury rooms where computers (thus electronic access to files) were not available.[2] This is undisputed, but not acknowledged by WSACC.

Moreover, when the Superior Court initially directed the Clerk to continue maintaining paper files, and "attempted (but) failed to reach a short-term compromise by limiting the types of files that would be retained as complete and sequential paper files during a transition period", the Clerk refused.[3] LGR 3 became necessary.

The Resolution adopting LGR 3 was supported by citations to authorities recognizing the Superior Court's right to prescribe the forms and procedures to be followed by the Clerk in connection with

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[1] CP 27, Judge Spanner declaration at ¶ 6; CP 29, Benton & Franklin Counties Superior Court Judicial Resolution 18-001, ¶ 4; CP 168-69, Response to Amicus Curiae Memorandum of Washington State Association of Counties (to the Superior Court), lines 4-11, relating, in part, Judge Spanner's letter to the President of the Washington State Association of County Clerks (CP 174-75), concerning the Clerk's failure to adopt work flows and work queues, and failure to timely transmit felony judgment and sentences to the jail.

[2] CP 28, Spanner declaration at ¶ 7; and CP 166, Declaration of Judge Bruce Spanner in Response to Amicus Curiae Brief of Washington State Association of Counties (to the Superior Court), at ¶¶ 4 and 5.

[3] CP 27, Spanner declaration, ¶ 6, ll. 16-21.

the duties of that office in its *ex officio* Superior Court Clerk role. The Clerk simply refused to comply with the rule.[4]

Accordingly, the record shows that the Superior Court sought nothing more than adequate development of the paperless system before dispensing with the paper case files that were the long-standing means by which judicial officers learned of the facts, claims and arguments made by parties in litigation. The Court did not seek "total control of the Clerk's actions to the judiciary." (Brief of WSACC at 8.) Moreover, the Superior Court sought cooperation and considered compromise, and only when the Clerk's cooperation was refused did the Court act to maintain control of the form of its case files.

Far from having a record of attempted autocratic control by the Superior Court over the Clerk, the record shows the opposite. It is the Clerk's conduct that raises the central question: when it comes to the records which the Superior Court uses to adjudicate cases, who should control their form, the Court or the Clerk? Under the authorities directly applicable to the parties' relations, respondents believe the question largely answers itself. The Court should control the form of the records it relies on to adjudicate case. WSACC's

[4] CP 29-30, Resolution 18-001, ¶¶ 5-13; and CP 27-28, Spanner declaration, ¶ 6.

paeans to cooperation should be directed to the Franklin County Clerk. When directed to the respondents, they are without merit.

B. The Requirements and Limits of Clerks' Duties are Defined by Statute, not their Elected Status or "Inherent Authority."

WSACC contends that the Clerk's elected executive status and undefined "inherent authority" provide a barrier to the Superior Court's direction of Clerk duties which affect performance of the court's adjudicatory functions. WSACC bases these arguments on the Washington Constitution's development and the historical (but unspecified) duties of court clerks. WSACC Brief at 2-11.

The existence of such a barrier is not supported by the Constitution, which identifies clerks as county officers (in Art. IV, § 26 and Art. XI, § 5), but does nothing to define their duties except assign that function to the legislature. Art. XI, § 5 ("The legislature, by general and uniform laws, shall provide for the election in the several counties of …county clerks…, and shall prescribe their duties…"). Nor do judicial interpretations suggest that clerks hold sway over courts' directions to them with respect to matters affecting the manner in which courts perform judicial functions. *See Swanson v. Olympic Peninsula Motor Coach Co.*, 190 Wash. 35, 38 & 39, 66 P.2d 842 (1937) ("The duties of a county clerk as clerk of the superior court are defined both by statute and court rules. Generally speaking, a clerk of court is an officer of a court of justice,

who attends to the clerical portion of its business, and who has custody of its records and files and of its seal. Such an office is essentially ministerial in its nature, and the clerk is neither the court nor a judicial officer" and "The clerk is a mere custodian of files; he has no 'dominion' over an action pending before the court of which he is clerk."); and *Matter of Recall of Riddle*, 189 Wn.2d 565, 583 & 584, 403 P.3d 849, *as amended* (2017) ("The superior court "has power ...[t]o control, in furtherance of justice, the conduct of its ministerial officers," such as county clerks. Therefore, when acting as the clerk of the superior court, the county clerk has always been required "[i]n the performance of his or her duties to conform to the direction of the court"; and "a court *does* have the authority to direct the functions of the clerk when he or she is acting in his or her capacity as clerk of the superior court. Moreover, the attorney general has opined that a court's rule-making authority in regard to court clerks is subject to the same restrictions as any other rules: '[T]o the extent that the court rule relates to practice and procedure rather than to the creation of substantive law, the rule is within the authority of the court.'") (internal citations omitted).

Arguments for the barrier urged by WSACC ignore the primacy and clarity of RCW 2.32.050, particularly its subsections 3, 4, 6, 7 and 9. These provisions prescribe clerks' duties that relate to the Superior Court's judicial functions, and they are separate from

descriptions of clerks' duties that relate to non-adjudicatory functions, such as keeping a docket, records of proceedings, and filing wills and bonds. *See* RCW 36.23.030. With respect to the case file record-keeping duties described in RCW 2.32.050(3), (4), (6) and (7), subsection 9 concretely imposes the duty to "conform to the direction of the court." No inherent authority of the ministerial Clerk supersedes this mandate.

RCW 2.32.050 demonstrates the error of WSACC's argument that "the judiciary may not, as a separate branch of government, intrude upon the powers and duties of County Clerks" (WSACC brief at 7). Instead, with respect to the matters listed in that statute, including "keep(ing) the records, files, and other books and papers appertaining to the court", the clerk must "conform to the direction of the court". RCW 2.32.050(3) & (9). With respect to managing court case files, the judiciary is explicitly authorized to direct the clerk, and the clerk is explicitly required to "conform to the direction of the court."

WSACC's reliance on *State ex rel. Banks v. Drummond,* 187 Wn.2d 157, 385 P.3d 769 (2016), is also misplaced. *Banks* involved a county commission's attempt to substitute an outside attorney hired by the commission for the elected prosecuting attorney. A prosecuting attorney is statutorily described as the legal advisor and legal representative of his or her county and county officers. RCW

36.27.030(1) & (3). The prosecutor is not in any sense an *ex officio* subordinate of the legislative body of the county served by that prosecutor. A prosecuting attorney is not required by express statute to 'conform to the direction of the county commission' in the performance of duties assigned to the prosecutor by statute. Absent the prosecutor's absence, disability, or agreement, the elected prosecutor is a county's sole and independent legal representative.

LGR 3 applies only to case files of the Superior Court, and does not affect the Clerk's functions described in RCW 36.23.030, or his more general duties as a county elected official. Nor does LGR 3 affect the Clerk's non-judicial functions catalogued by WSACC at pages 9 and 10 of its *amicus curiae* brief. LGR 3 is a "direction of the court" pertaining to the Court's records, to which the Clerk is required to conform.

C. The Superior Court is Expressly Authorized to Direct the Clerk's Functions Relating to Services Provided to the Court.

WSACC does not deny, and there is no doubt that superior courts possess both inherent, constitutional, statutory and court rule-based authority to prescribe rules of procedure and practice applicable in the local court. *See* Art. IV, Sec. 24, Wash. Const. (judges of superior courts may establish local rules); RCW 2.08.230 (same); RCW 2.04.210 (superior court supplementary rules are authorized); CR 83(a) (local superior court rules are authorized);

and *State v. Gresham*, 173 Wn.2d 405, 428, 269 P.3d 207 (2012) ("'[T]he power to prescribe rules for procedure and practice' is an inherent power of the judicial branch, *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974), and flows from article IV, section 1 of the Washington Constitution, *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).").

GR 7 and CR 83(b) provide minimal procedural requirements for the adoption of local rules, particularly, as here, where a rule is adopted on an emergency basis. *See* GR 7(e), and CP 30-31, ¶ 14, Judicial Resolution adopting LGR 3. Those procedures were complied with by the Superior Court in adopting LGR 3, and that compliance fully satisfies the minimal due process necessary for such a rule. *See* CP 211-12 (Declaration of Court Administrator, Patricia Austin).

LGR 3 provides:

> **(a)** The clerks of Benton and Franklin Counties <u>shall keep and maintain paper files for all cases and file types</u>, by forthwith filing all pleadings and papers in paper files, except as may be otherwise authorized in writing by the Court.
> **(b)** The clerks of Benton and Franklin Counties <u>shall make up-to-date paper files for all cases and case types available to the Court</u>, as directed by its judicial officers.
> **(c)** While paperless courts are preferable, they should only be implemented after careful consideration of the impacts upon the Court, the legal community and the public, and only after case management systems have been configured so all of their capabilities are realized. Accordingly, neither clerk shall attempt or purport to operate with "paperless" processes unless and until the same has been approved in writing by the court. Permission will not be granted unless

> the Court is satisfied that appropriate workflows and work queues have been implemented, that equipment and processes have been acquired and developed to facilitate electronic signatures, and that the paperless processes do not adversely affect the Court's ability to conduct court proceedings and other court functions. As directed by the Court, the Clerks shall work diligently, collaboratively and harmoniously with the Court to satisfy all of the conditions precedent to "paperless" court, as set forth above. In so doing, the clerks shall conform to the direction of the Court.
> **(d)** Pursuant to GR7(e) this rule shall become effective immediately upon filing the same with the Washington Administrative Office of the Courts.

Adopted effective January 16, 2018. (Emphasis added.)

LGR 3 merely defines the form of the case files to be kept and made available to the Court to administer justice at the fundamental level where judicial officers learn what the parties to a case contend and the law they urge in support of those contentions. The rule does not introduce a new or unusual method to provide for that form – it merely requires continuation of the familiar and long-used paper case file form.

Other court rules that apply state-wide or in particular counties prescribe the form of court case documents maintained by superior court clerks. For example, CR 10 provides detailed requirements for the form of pleadings and other papers. GR 14 specifies such detail as paper size, margin size, color, and other forms.[5] Other

[5] Prior to 1990, pleadings and papers filed with clerks were permitted on 8½" by 14" paper. When that changed by amendment of CR 10(d), the court rule thereafter (continued)

counties have local rules specifying the form of records filed with the superior court clerk. For example, Spokane County Local Civil Rule 10(e)(2), specifies that the paper used for filings must be suitable for scanning, and it directs the clerk to stamp unreadable papers with a notation that it was of poor quality for scanning. Clark County Civil Rule 10(e)(3)(C) requires self-represented parties to follow formatting requirements and authorizes the clerk to reject non-conforming papers. Thus, local rules specifying the form of papers filed in court case files and providing directions to clerks for their handling are not unprecedented. These, like LGR 3, are within the scope of valid "direction(s) of the court" to which the clerk must conform. RCW 2.32.050(9). Misguidedly, WSACC would have clerks decide the form of court filings, not the courts whose judicial officers use those papers.

LGR 3 does not require the Clerk to alter the form of case file-related papers that come into his office. Paper originals of pleadings and related papers are filed with the Franklin County Clerk. CP 165, l. 26 & CP 166, ll. 1-5 (Judge Spanner declaration). The Benton and Franklin Counties Superior Court does not yet permit electronic filing of such papers, as contemplated by GR 30(b)(4), which authorizes a local court rule providing for electronic filing.

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mandated 8½" by 11" paper, and clerks' file folders, file cabinets and related facilities also changed, without challenge.

Accordingly, under LGR 3, the Clerk merely has to file and store court case documents in the same form that they come into his office, as has long been the practice of that office.

LGR 3 does not affect parties or practitioners before the Court. It does not affect public access to court case files. For example, it does not order the Clerk to make paper copies of case files available to the public, attorneys, or other users of the court system. It does not impair the ongoing development of a paperless court file system, but only delays that part of the paperless system which would eliminate paper case files. It does not affect the Clerk's ability to make and store electronic duplicates of the paper files, or to destroy records of completed cases in accordance with law. *See* RCW 36.23.065.

In AGO 2001, No. 6, the Attorney General recognized that a local court rule requiring the Superior Court Clerk to place original pleadings and other records in case files within three days after filing was a lawful procedural requirement. The court rule that the Attorney General addressed compelled <u>action</u> by the clerk within a specified time. Such an obligation has obvious implications for scheduling and physical activities of the clerk and that office's employees. If such a rule is procedural and lawful, then a rule such as LGR 3, that merely requires continuing to perform functions already performed by the Clerk, is also lawful.

LGR 3 does not compel an expenditure by the Clerk in a particular, unbudgeted amount, as was the infirmity of the Lincoln County Superior Court's action in *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 552 P.2d 163 (1976). Nor does it require work or supplies of a new type or increased amount.

An incidental (but here, unproven) cost due to a lawful court rule is not sufficient to invalidate the rule, as amply demonstrated by *City of Seattle, et al. v. State,* 100 Wn.2d 16, 22, 666 P.2d 359 (1983) (cited in AGO 2001, No. 6). There, a Supreme Court rule had the effect of requiring cities to purchase recording equipment for municipal courts, and, necessarily, imposed that cost on cities. The rule was recognized as related to judicial procedure, which did not require reimbursement from the State. *Id.*

D. The Elected-Official Status of the Clerk does not Define his Duties.

There is no doubt that county clerks are elected officials, except in counties that have adopted home rule charters and dispensed with elected clerks, such as King and Pierce counties. *See* Brief of Respondents at 11-12. But that elected status means only that the voters choose the clerk. It has no meaning for the duties of the clerk, which are defined by statute and court rules relating to practice and procedure. *See* Wash. Const. Art. XI, § 5, Art. IV, § 24; RCW 2.08.230; RCW 2.04.210; and CR 83(a). LGR 3 does not impair the voters' ability to choose the clerk in any manner.

E. Arguments of WSACC are Unsupported and Contrary to the Record.

WSACC makes several unsupported arguments. First, in its brief at 24, WSACC states that in Franklin County, the paperless Odyssey system had advanced to a point where judicial officers "…no longer relied on paper files". This is belied by evidence supplied in support of the Judges' motion for summary judgment, where Judge Bruce Spanner's declaration points out that electronic versions of court case files are not accessible in jury rooms, where settlement conferences in domestic relations cases are conducted. CP 27, ¶ 6; CP 28, ¶ 7; and CP 166-67, ¶¶ 4 & 5. This evidence shows that paper files are necessary and relied on by the judicial officers who conduct those conferences.

Moreover, no one but the judges who use court case files to review cases has the personal knowledge necessary to provide competent evidence of whether paper files are needed or not. *See* ER 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Therefore, assertions by the Clerk that paper files are "no longer relied on" is not competent evidence, and should be disregarded in the Supreme Court's *de novo* review of the summary judgment order.

Matter of Salary of Juvenile Director, supra, 87 Wn.2d 232, does not support WSACC's arguments because it concerned a

significantly different situation. There, the trial court issued a writ of mandamus directing Lincoln County to pay a specific salary increase to the superior court's juvenile probation department director, despite the county commission's appropriation of a lesser amount for that salary. 87 Wn.2d at 234. The *Juvenile Director* court recognized that the judiciary has inherent authority to direct the expenditure of public funds to support judicial functions, and recognized that a limited 'power of the purse' was within the scope of "certain ancillary functions such as rule-making and judicial administration, which are essential if the courts are to carry out their constitutional mandate." 87 Wn.2d at 242 (quoting *O'Coin's Inc. v. Treasurer*, 362 Mass. 507, 287 N.E.2d 608, 611 (1972).). But the Court ruled only that the superior court had not carried its burden to show that absent the salary increase it ordered, the juvenile director's salary would be "so inadequate that the court could not fulfill its duties." *See Juvenile Director*, 87 Wn.2d at 245-47.

Here, LGR 3 does not order the payment of any sum for continuing to maintain paper court case files. The rule does not demand new or additional funding or personnel for the Superior Court or the Clerk. Indeed, the Superior Court only learned of the Clerk's unilateral decision to stop maintaining traditional paper case files <u>after</u> the Franklin County budgeting process was completed for the 2018 budget year. *See* CP 27-28, ¶ 6, Declaration of Judge Bruce

Spanner (stating that Clerk informed Court on December 18, 2017, that he would end maintaining paper files at the beginning of 2018); and RCW 36.40.071 & 36.40.080 (budget hearing for adoption of final county budget to be on first Monday of December). The Clerk has made no showing that the budget he was given for 2018 (which was nearly identical to his budget in 2016 and 2017 (as well as 2019) – *see* CP 178-190), had anticipated his termination of the practice of maintaining paper court case files. Nor has the Clerk shown that he had to request a budget extension from the Board of County Commissioners of Franklin County for the 2018 budget year after LGR 3 was adopted.

The Superior Court could not have known whether the Clerk received an appropriation by the county commission that would be insufficient to discharge the same paper-file-maintaining functions he performed in previous years.[6] Accordingly, the adoption of LGR 3 could not have been indirectly intended to require an additional appropriation, if in fact one would have been necessary.

There has been no demonstration of either an intended or a resulting effect on the budget of the Clerk or Franklin County from

[6] It is not conceded that the Clerk did not have a sufficient budget to continue maintaining and providing paper case files, as his budget remained essentially the same for the two years preceding adoption of LGR 3 in January of 2018, when he was keeping paper files as well as developing the paperless file system. And the Clerk's budget remained largely unchanged in 2019. *See* CP 178-190.

the Superior Court's adoption of LGR 3. The rule does not run afoul of *Matter of Juvenile Director*.

F. The Court's Purpose in Adopting LGR 3 was not Improper.

WSACC purports to divine the purpose of the Superior Court in adopting LGR 3, as one of seeking to "intrude upon local legislative appropriations authority and the functions of a constitutional executive branch officer of county government." WSACC *amicus curiae* brief at 15. This notion is belied by the practical realities, discussed above at pages 1 & 2, showing the Judges' belief that the electronic records systems in Benton and Franklin counties had not progressed to the point where it would "…ensure a paperless system (that) will allow it to effectively serve the community," due in part to the need for "…implementation of work flow and work queue functionality of the case management system."[7] The further practical reality was that electronic access to

[7] CP 29, ¶¶ 2 and 4, Judicial Resolution No. 18-001, Adoption of Local General Rule 3; and CP 33 (LGR 3), subsection (c) (in pertinent part): "Permission (to operate a paperless system) will not be granted unless the Court is satisfied that appropriate workflows and work queues have been implemented, that equipment and processes have been acquired and developed to facilitate electronic signatures, and that the paperless processes do not adversely affect the Court's ability to conduct court proceedings and other court functions." *And see* CP 168-69, & 174-75, relating to inadequate electronic procedures and untimely delivery of orders.

case files was not available in all places within the Franklin County courthouse where judicial officers conducted proceedings.[8]

The Judges' purpose in adopting LGR 3 was to assure functionality and accuracy for the paperless system they would use to adjudicate cases, and, until that was done, to preserve the traditional paper file system. No evidence disputes this purpose.

WSACC also argues (at p. 17, *et seq*.) that LGR 3 "treads upon the authority of this Court, expressed through its JIS Committee and the Court User Work Group…" However, neither the Supreme Court nor its committees devoted to development of a paperless court file system have mandated the conversion of the long-standing paper file system for court case files to a fully paperless system. Instead, as discussed above at Pages 1-3, the Supreme Court established user workgroups for the purpose of

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[8] CP 27, ¶ 5, Declaration of Judge Bruce Spanner: "Full access includes the ability to retrieve and use court data and records wherever and whenever judicial officers and staff need access to those records." See also CP 28, ¶ 7, Spanner declaration: "Paper copies of case files, pleadings and other materials are needed by the Court because computerized systems for retrieval and reading of such materials have not yet evolved to the point where they are readily accessible at all of the places where they are needed for review by the judges and court commissioners conducting proceedings with litigants, attorneys and other members of the court. For example, settlement conferences in domestic relations cases are conducted injury rooms. They are not scheduled to be conducted in a judge's chambers because these areas contain confidential material of others. There are no computers in the jury rooms, so it is necessary for the Judge to have a paper file there in order to review briefs, declarations and exhibits which are relevant to the issues in the settlement conference."

working cooperatively toward the development of paperless systems. That cooperative work was proceeding when the Franklin County Clerk unilaterally imposed an unsatisfactory paperless system on the Superior Court. No law, regulation, court rule, agreement or committee decision authorized the Clerk's action. As shown above, the Clerk's authority to keep and maintain court files is outranked by the Court's authority to require the Clerk to "conform to the direction of the Court." RCW 2.32.050(9). No authority of the Supreme Court has been impaired by LGR 3.

II. CONCLUSION

In granting the Superior Court's motion for summary judgment in this case, Kittitas County Judge, Scott R. Sparks, recognized, *inter alia*, that legislative assignment of court clerks to positions subordinate to the court they serve fosters "one, uniform system of justice operating under the direction and supervision of the Supreme Court." CP 234. WSACC and the Franklin County Clerk would upset that uniform system in favor of one that elevates the ministerial officer who makes no use of court case filings over the judicial officers who rely on those case records for their crucial decision-making functions, and who are expressly empowered to give directions to which the Clerk is required to conform. The arguments of *amicus curiae*, WSACC, should be rejected, and Judge Sparks' summary judgment order should be affirmed.

Respectfully submitted this 27th day of September, 2019.

LAW LYMAN DANIEL, KAMERRER
& BOGDANOVICH, P.S.

By: *_/s/ W. Dale Kamerrer_*

W. Dale Kamerrer, WSBA No. 8218
Attorney for the Judges of the Benton and Franklin
Counties Superior Court
P.O. Box 11880, Olympia, WA 98501
Phone: (360) 754-3480
Email: dkamerrer@lldkb.com

CERTIFICATE OF SERVICE

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/s/ Lisa Gates
Legal Assistant to W. Dale Kamerrer

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

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