# COUNTY COMMISSIONERS, ELECTED OFFICIALS and PROSECUTING ATTORNEYS

## "Clients by Statute, Not by Choice"

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**"Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." - Comments to Rules of Professional Conduct, RPC 1.7**

## I. Scope of this Segment

### A. Board of Commissioners as Civil Clients

1. Other elected officials and their deputies are covered later in course.

2. Defense of individual commissioners is covered later under "Liability".

3. Outline does not include other bodies on which commissioners serve.

    a. Sometimes one or two commissioners serve ex officio on another board (e.g. RCW 35.58.120 (Metropolitan municipal corporation)).

    b. Sometimes whole board sits in another capacity (e.g. RCW 84.48.010 (Board of Equalization)).

    c. These other bodies are not our clients, unless specific statute says they are (e.g., RCW 84.48.010 (Board of Equalization), RCW 85.08.670 (Diking and drainage district), RCW 41.14.170 (Sheriffs Civil Service Board)).

### B. Charter Counties May Be Different

1. General principles of representation apply, but ....

2. Each charter county has its own idiosyncratic roles for legislative and executive branch officers. Consult Constitution Amend. XXI and keep a Charter handy.

## II. Prosecutor's Duties to Commissioners

### A. Three Basic Aspects - - RCW 36.27.020

1. Advice and problem solving.

a. We like to deal only with commissioners and direct appointees (both verbally and in writing).

i. Assures efficient use of our time.

ii. Avoids getting tangled in internal client squabbles.

iii. Larger, more specialized offices can respond to client inquires from senior staff in departments.

b. Verbal requests/verbal answers.

Can be troublesome - - encourages imprecise requests and reliance on (or misquoting of) top-of-thehead advice.

ii. Can be indispensable once we know our clients well, if they are over-worked, articulate, and trustworthy, or if sensitive advice cannot be committed to paper.

c. Confidential written advice (informal).

i. Recommended where feasible.

ii. Writing request helps our clients clarify questions; writing response helps us and our deputies clarify law, builds precedent and library.

iii. Don't distribute or reference without client consent.

d. Sometimes there is no clear answer. We will say so, help you assess risks, let client choose action.

e. Often we will rephrase the question to answer what we can or are comfortable with, or what we think our client intended to ask or should have asked.

f. Document drafting and review.

i. Approve as to form.

ii. It is impossible to approve ***legality*** of contracts because we cannot know of the presence or absence of impermissible conduct tainting the bid process, for example.

2. Formal written opinions.

a. Issued for public consumption, like AGO. If issued we make sure client intends to waive confidentiality.

b. We usually write only for elected officials, when they request in writing. (Required by statute only for commissioners.)

c. Ideally we should formulate the request with our client, and both we and client should have a reasonably clear idea of the answer (or be willing to abide any answer) before deciding to request/write a formal opinion.

d. We may rephrase the question, if necessary, to answer only what we believe is for public consumption; client may force our hand contrary to our view of best interests of county. Remember the attorney-client privilege belongs to the <u>client.</u>

e. When formal opinion may be appropriate.

i. To back our client in a dispute with another entity, esp. another public body.

ii. To point out a shortcoming in legislation which client wants legislature to resolve.

iii. When client is truly seeking guidance on issue of public concern.

iv. When client wants protection from liability for carrying out statutory duties.

3. Litigation - - the Prosecutor's duty to Board of Commissioners differs from duty to other civil clients.

a. *Duty is to* represent *County in* all *lawsuits against it (RCW* 36.27.020(4); Harter *v.* King *County,* 11 *Wn.2d 583, 119* P.2d 919 (1941); Commissioners defend all actions in name of county (RCW 36.32.120(6)).

b. No duty to defend officers.

Duty to advise is Not duty to defend; See Bates v. School District 10, 45 Wash. 498, 88 P. 944 (1907);
Osborn v. Grant County, 130 Wn.2d 615, 926 P.2d 911 (1996).

ii. County usually named at same time anyway.

Ili. Tort *defense and* indemnification *of* individual commissioners and officials will be discussed later.

c. No duty to bring lawsuits for other officers.

See Hoppe v. King County, 95 Wn.2d 332, 622 P.2d 845 (1980).

Discretionary with prosecutor - Fisher v. Clem, 25 Wn. App. 303, 607 P.2d 326 (1980); Rev'd on other grounds (Brouillet vs. Cowles),114 Wn.2d 788(1990) Courts won't second-guess unless you arbitrarily or without reason (abuse of discretion) refuse to pursue a "clear case." Id.

d. Duty to bring lawsuits at request of board commissioners? Not litigated.

Language in Hoppe and Clem leaves unclear whether board of commissioners can force a prosecutor to bring a nonfrivolous lawsuit.

e. Special deputy appointment by Superior Court RCW 36.27.030. Disability may be "conflict". See Osborn, Id.

f. The commissioners lack statutory authority to appoint outside counsel over objection of a prosecutor who is able and willing to perform duties. State ex rel. Banks v. Drummond, 187 Wash. 2d 157, 385 P.3d 769 (2016).

## B. Structuring Relationship with Commissioners

1. The Commissioners have the power of the purse, and power over number and salaries of staff in most county offices. They deserve attentive, knowledgeable advisor(s).

2. In larger counties, the prosecutor may assign a single deputy to commissioners (though deputy may also handle some less active other clients). Prosecutor has final authority over which deputy works with which clients.

3. Potential Conflicts Within Prosecutor's Office Because of Variety of Civil Clients.

   a. Should be no problems in giving advice, because we are really the attorney for the county (see Ward v. Superior Court, 138 Cal. Rptr. 532, 70 Cal. App. 3rd. 23 (1977) ), and thus our role as everyone's attorney in their official capacity is automatically disclosed and consented to.

   b. Problems more often arise when one client appears before another acting in quasi-judicial capacity. E.g. assessor appearing before commissioners sitting as board of equalization.

      i. Remember there is no duty to represent county officers other than board of commissioners.

      ii. If the prosecutor wishes to represent seemingly conflicting clients, then can:

         (a) Build "Chinese Wall" within office,

         (b) Hire special deputy (RCW 36.27.040).

         (c) Bring in deputy from another county (see Green Mountain School District vs. R.S Durkee 56 Wn.2d 154, (1960)).

      iii. We must *Beware of the* appearance *of fairness doctrine when* advising commissioners on a decision where one position is advocated by another of your office's clients. (application of Appearance of Fairness to attorneys and other staff of decision-makers is a grey area.)

## III. Questions of Style

### A. Legal v. Policy Questions

1. Except in truly exceptional situations, it is best for the prosecutor to avoid our clients' policy entanglements. (we have enough of your own.) Clients may be seeking our policy guidance because:

    a. Clients may not understand the nature of the question facing them.

    b. Clients may not want to be responsible for the policy question facing them.

    c. Clients may like the prosecutor and trust his or her judgment on a difficult issue.

2. The best approach for the prosecutor is to help the client define and separate problems, suggest resources for assistance on policy questions, resist the urge to answer policy questions, and be firm and consistent as to what our involvement will be.

3. As a corollary, we don't undermine our client on policy matters. When we receive an outside complaint or inquiry about commissioners or other departments heads action/non-action/policy, refer it to the client directly. If an outside attorney questions legality of our client's activity, we ask them to put concerns in writing to our client. We let our client know we are available if he/she asks for our involvement. Unless requested, we stay out. (Obvious exceptions occur when we see a major liability situation brewing; remedial action must come from client, after we've raised the concern.)

4. We are not hurt if we give you advice and you refuse to follow it. Remember it is your decision, and we let you live or die with your decisions.

### B. Proactive Rather than Reactive

1. This does not mean meddling in client policy decisions.

2. We become involved in legal issues in early stages of departmental problem solving.

3. Minimizes later difficulties and getting trapped between clients

after positions have solidified.

**C. Public Hearings and Quasi-Judicial Hearings**

1. Give clear advice or utilize the executive session tool. See Mission Springs v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998).

**D. We Are Part of The Team**

1. We recognize our role and the commissioners' role as different but complementary.

2. We take care to avoid being identified so strongly with one client or group of clients that we become ineffective as attorney for other clients.

## IV. Tort Defense and Liability

**A. Prosecutor Shall Defend All Suits Brought Against the County (RCW 36.27.020(4).**

**B. County Shall Indemnify and Defend employees Acting Within the Scope of Their Duties (punitive damages are optional). (RCW 36.16.136 and RCW 4.96.041)**

**C. Members of Washington Counties Risk Pool (see attached policy). 28 Counties including Yakima.**

1. All inclusive policy.

   a. Includes defense against Bar complaints for Prosecutors.

2. Washington County Risk Pool

   a. Website Address: http:I/www.wa.counties.org/wcrp/

   b. E-Mail Address: info@wcrp.wa.gov

**D. Claims Against Counties Statute (RCW 4.96)**

RCW 4.96.041 Action or proceeding against officer, employee, or volunteer of local governmental entity — Payment of damages and expenses of defense.

(1) Whenever an action or proceeding for damages is brought against any

past or present officer, employee, or volunteer of a local governmental entity of this state, arising from acts or omissions while performing or in good faith purporting to perform his or her official duties, such officer, employee, or volunteer may request the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity.

(2) If the legislative authority of the local governmental entity, or the local governmental entity using a procedure created by ordinance or resolution, finds that the acts or omissions of the officer, employee, or volunteer were, or in good faith purported to be, within the scope of his or her official duties, the request shall be granted. If the request is granted, the necessary expenses of defending the action or proceeding shall be paid by the local governmental entity. Any monetary judgment against the officer, employee, or volunteer shall be paid on approval of the legislative authority of the local governmental entity or by a procedure for approval created by ordinance or resolution.

(3) The necessary expenses of defending an elective officer of the local governmental entity in a judicial hearing to determine the sufficiency of a recall charge as provided in *RCW 29.82.023 shall be paid by the local governmental entity if the officer requests such defense and approval is granted by both the legislative authority of the local governmental entity and the attorney representing the local governmental entity. The expenses paid by the local governmental entity may include costs associated with an appeal of the decision rendered by the superior court concerning the sufficiency of the recall charge.

(4) When an officer, employee, or volunteer of the local governmental entity has been represented at the expense of the local governmental entity under subsection (1) of this section and the court hearing the action has found that the officer, employee, or volunteer was acting within the scope of his or her official duties, and a judgment has been entered against the officer, employee, or volunteer under chapter 4.96 RCW or 42 U.S.C. Sec. 1981 et seq., thereafter the judgment creditor shall seek satisfaction for nonpunitive damages only from the local governmental entity, and judgment for nonpunitive damages shall not become a lien upon any property of such officer, employee, or volunteer. The legislative authority of a local governmental entity may, pursuant to a procedure created by ordinance or resolution, agree to pay an award for punitive damages.

[1993 c 449 § 4; 1989 c 250 § 1; 1979 ex.s. c 72 § 1. Formerly RCW 36.16.134.]

**Cases to Keep In Mind (referred to above) when considering the relationship between the County Commissioners, Elected Officials, and the Prosecuting Attorney:**

In ***Hoppe v. King County***, 95 Wash.2d 332, 622 P.2d 845 (1980), Harley Hoppe, the King County assessor brought action against the county, the State Department of Revenue, and certain named county and state officials, challenging the validity of an ordinance levying 1979 property taxes. The Superior Court, after ordering appointment of special prosecuting attorneys to represent the assessor, granted the County's motion for summary judgment, and the assessor appealed. The County cross appealed from orders allowing the assessor standing to bring an action, appointing special deputy prosecuting attorneys and fixing compensation for special deputy prosecuting attorneys. The Supreme Court, Dolliver, J., held that: (1) the county assessor did not have standing to challenge, in his official capacity, the action of county council in setting amount of property tax levy allegedly in excess of 106% statutory limitation; (2) the determination by the prosecuting attorney that the assessor was not entitled to representation was not a "disability" allowing the superior court to appoint a special prosecutor to represent the assessor; and (3) the special prosecutors were not entitled to attorney fees paid from public funds. The Court in *Hoppe* stated:

> The power of the court to appoint a special prosecuting attorney is limited to cases where such an appointment is provided by statute. *State v. Heaton*, 21 Wash. 59, 62, 56 P. 843 (1899); Const. art. 11, s 5. In order for a special prosecutor to be appointed, the prosecuting attorney must be unable to perform a duty of that office. Hoppe had no standing to bring this action in his capacity as assessor, therefore, the King County Prosecuting Attorney had no duty to bring this action on behalf of Hoppe. Furthermore, 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. While RCW 36.27.020(2) does require the prosecuting attorney to "(be) legal adviser to all county ... officers", this is not a requirement that the prosecuting attorney appear for or represent a county officer. *Bates v. School Dist. No. 10 of Pierce County*, 45 Wash. 498, 88 P. 944 (1907). It is certainly true that the King County prosecuting attorney and Hoppe disagreed. It is also true the prosecuting attorney determined Hoppe was not entitled to representation. This is hardly, however, a disability under RCW 36.27.030 nor is it a conflict of interest as claimed by Hoppe. The disagreement did not give Hoppe a warrant to obtain a special prosecutor and bring a lawsuit to assert his particular view of the law. Hoppe was entitled to second-guess the judgment of the prosecuting attorney. He was not entitled to do so with a special prosecutor at taxpayers' expense.

95 Wn.2d 332, at 339-340.

In ***Osborn v. Grant County By and Through Grant County Com'rs***, 130 Wn.2d 615, 626, 926 P.2d 911, 917 (1996), Debra Osborn, the County clerk, brought action against the county board of commissioners, seeking declaration of her right to hire whomever she wanted as temporary clerk, and requesting that the law firm she had hired be appointed as special prosecutor. The Superior Court appointed a special prosecutor and granted the requested relief. The Board appealed. The Court of Appeals affirmed, and the Board appealed. The Supreme Court held that: (1) the county commissioners lacked authority to interfere with hiring decisions of the clerk; (2) the appointment of a special prosecutor was improper; but (3) the clerk was entitled to award of fees for work performed by the private law firm she hired, insofar as the firm's work consisted of giving her advice about her conflict with the Board (which amounted to much less than the $19,000 sought). The Court stated:

> When looking at the statutorily created office of prosecuting attorney, we think it is clear the Legislature did not authorize nor contemplate the prosecutor representing a party in a lawsuit against the county. Even though prosecuting attorneys are independently elected county officers, RCW 36.16.030, their powers are limited to those expressly granted by statute. *Bates v. School Dist. 10*, 45 Wash. 498, 501, 88 P. 944 (1907). The Grant County Prosecutor cannot represent a party in a lawsuit against the county unless statutorily authorized to do so. We find no statute allowing for such representation.

In **State ex rel Bank v. Drummond**, 187 Wash.2d 157, 385 P.3d 769 (2016), Prosecutor Greg Banks of Island County filed a quo warranto action to remove Susan Drummond, a private attorney appointed as outside counsel for land use advice by the Island County Board of Commissioners. The Board intervened and filed a counterclaim, seeking to have the appointment contract declared valid. The Island County Superior Court granted summary judgment for the Board and the attorney and dismissed action in an oral opinion and written order. Prosecutor Banks appealed, and direct review was granted by the State Supreme Court. The State Supreme Court held that the Board lacked statutory authority to appoint outside counsel over the objection of the county prosecutor who was able and willing to perform his duties.

As Prosecutor Banks dryly summarized, “We have professional disagreements about policy and about budgets from time to time.” He had asked for additional funding for his office, which was partially denied. The Board complained that they were not getting adequate representation on land use and GMA matters.

The Board instead allocated approximately $200,000 to $250,000 to hire specialized GMA counsel. At the time of the appointment, the Board did not describe

Ms. Drummond's retention as the result of any refusal or failure of Prosecutor Banks, but rather as a way of "augment[ing]" his office: "[T]hey've ... got their ... acts together[;] this is just to supplement them because they're busy[;] they're shorthanded." At the same time, the Board anticipated that they would "pick and choose some of the issues" to leave with the prosecuting attorney's office "on a case by case basis," in order to "leverage [the] resources" of both Prosecutor Banks's and Ms. Drummond's offices.

The Drummond contract was subsequently reviewed and approved by letter from the Island County Superior Court according to procedures laid out in RCW 36.32.200. One "whereas" clause noted that "the Prosecuting Attorney's office is unable to provide ... comprehensive and proactive legal strategy, advice and assistance" on GMA issues. Judges Churchill and Hancock gave "due deference" to these listed reasons and accepted that Prosecutor Banks "is apparently unwilling or unable to provide some of the legal advice and services that the board is requesting." Judges Churchill and Hancock rejected Prosecutor Banks's argument that RCW 36.32.200 failed to provide independent authority for the Board's retention of outside counsel and, finding that the proposed employment was for "a proper purpose," approved the contract.

The Supreme Court did not like the fact that the Commissioners reduced the prosecutor's budget and then hired outside counsel.

"The prosecuting attorney provides legal advice; this service has been the responsibility of the prosecuting attorney's office since well before the constitution was adopted. Prosecutor Banks seeks to perform his duty as the official chosen by Island County's electors. Even if a board of commissioners had statutory authority to hire outside counsel over the objection of an able and willing prosecuting attorney—which it does not—the appointment would unconstitutionally deny the electorate's right to choose who provides the services of an elected office."

The Supreme Court reversed the Superior Court, found the Commissioners' actions and the contract void, and entered a judgment of ouster against Ms. Drummond.

"We hold that county boards of commissioners do not possess statutory authority to appoint outside counsel over the objection of an able and willing prosecuting attorney. RCW 36.32.200 does not provide county boards of commissioners with an affirmative grant of authority to hire outside counsel, but instead requires compliance with additional procedures as a check on any authority otherwise granted. Nor do county boards of commissioners' general powers statutes, particularly RCW 36.32.120 and RCW 36.01.010, authorize paying outside counsel from the public purse where the county's prosecuting attorney is available. Allowing a county board of commissioners to unilaterally contract with outside counsel over the objection of an able and willing prosecuting attorney would unconstitutionally curtail the right of the county's voters to choose their elected official."

In ***Matter of Special Deputy Prosecuting Attorney*, 193 Wash. 2d 777, 779, 446 P.3d 160, 161 (2019),** the Franklin County Prosecuting Attorney and Franklin County sought discretionary review of appointment of a special deputy prosecuting attorney by county's superior-court judges to represent them in a mandamus action regarding a dispute about the judges' desire to have the county clerk maintain paper court records despite an electronic records system being put in place.

> ¶ 1 This case has its genesis in a dispute between the Franklin County Superior Court judges and the Franklin County clerk concerning the move to electronic court files. At issue is whether the Franklin County Superior Court judges validly issued an order of appointment under RCW 36.27.030, thereby securing their own special deputy prosecuting attorney to pursue a separate civil suit. For the reasons discussed below, we hold that the order is invalid; while the judges are free to sue the clerk, they must do so at their own expense.

193 Wash. 2d at 779.

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 a special deputy prosecuting attorney to advise the judges as well. After soliciting input from the judges, W. Dale Kamerrer, a private attorney, was ultimately appointed. It was Prosecutor Sant's purported intent that Kamerrer would assist the judges to reach a negotiated resolution of the paper records dispute with Clerk Killian.

Instead of engaging in discussions regarding how best to move to a paperless system and what steps might be taken to address the bench's concerns, Mr. Kamerrer initiated a suit against the Franklin County clerk. Mr. Kamerrer filed this lawsuit without prior permission from Prosecutor Sant. Upon receiving notice of the filing of the suit, and viewing the action as a lawsuit against the county, Prosecutor Sant directed Mr. Kamerrer to cease further work on the lawsuit. Prosecutor Sant halted the lawsuit in part 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.

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 (Board) to appropriate funds to pay for the action. 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.

After hearing from Mr. Kamerrer, Prosecutor Sant, Clerk Killian, and others in public meetings, the Board declined to appropriate the funds needed to litigate the judges' lawsuit in the trial and appellate courts. The Board'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 transition problems could be worked out. The Board's decision was in accord with the judges' stated willingness to resolve any technical issues related to the Odyssey court records program and the Board's belief that the public would be better served by expending funds on any necessary technological upgrades than on litigation. In light of the Board'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.

The judges disagreed with the Board's decision. The judges communicated their dissatisfaction with the Board, indicating that the Board did not sufficiently appreciate "[t]he magnitude of the disagreement between the Court and the Clerk." The judge's proceeded with their lawsuit against the Clerk.

Prosecutor Sant and the County sought review by the Supreme Court

The Supreme Court held as follows:

> ¶ 28 The primary issue in the present matter before this court is the validity of the order by which the respondent judges appointed their own special deputy prosecuting attorney under RCW 36.27.030 for use in a separate proceeding. Because the prosecutor had no duty to initiate a civil suit at the request of the respondents under the precedent as discussed, the appointment order is invalid. Accordingly, we vacate the order of appointment. We also deny respondents' request for attorney fees.

193 Wash. 2d at 791.

So the judges couldn't appoint their own attorney, and they had to pay the cost of the private attorney, estimated at $17,000 to $75,000. Eventually the judges lost their lawsuit against the Clerk over who controls how the files are kept too. In the suit between the judges and the Clerk, the Supreme Court ruled in a separate decision:

> II. The county clerk, not the superior court, gets to decide whether to maintain paper files
>
> ¶18 Even if it were appropriate for the judges to seek a writ of mandamus here, they would still lose. The maintenance of court documents is not an in-court duty of the superior court clerk. It is an out-of-court duty of the county clerk. Thus, the county clerk, not the superior court judges, gets to determine the format in which those documents are maintained, and LGR 3 is an impermissible attempt to usurp the county clerk's discretion.

*Burrowes v. Killian*, 195 Wn. 2d 350, 357–58, 459 P.3d 1082, 1086 (2020).

**Bonds? What Bonds?**

The requirement that elected county officials post a "Bond" is statutorily required.

"Every county official before he or she enters upon the duties of his or her office shall furnish a bond conditioned that he or she will faithfully perform the duties of his or her office and account for and pay over all money which may come into his or her hands by virtue of his or her office, and that he or she, or his or her executors or administrators, will deliver to his or her successor safe and undefaced all books, records, papers, seals, equipment, and furniture belonging to his or her office."

1) The amount of the Bond that is required depends on the office to which you are elected and the population of your county. (RCW 36.16.050)

2) However because some offices perform roles that may require additional bonds.

i) Auditor "Every county auditor shall, before entering upon his or her duties as registrar of titles, give a bond with sufficient sureties, to be approved by a judge of the superior court of the state of Washington in and for his or her county, payable to the state of Washington, in such sum as shall be fixed by the said judge of the superior court…said bond shall be filed in the office of the secretary of state, and a copy thereof shall be filed and entered upon the records of the superior court in the county wherein the county auditor shall hold office". (RCW 65.12.055)

ii) Clerk. When the judge or judges of any court, or a majority of them, believe that the clerk of the court does not have a good and sufficient bond on file, or that the bond is not large enough in amount, such judge or judges shall enter an order requiring him or her, within such time as may be specified in the order, to execute and present to them a good and sufficient bond, in such sum as may be fixed by the order. In case of his or her failure to file the bond within ten days from the expiration of the date fixed the judge or judges shall declare the office vacant. (RCW 36.23.020) (see, Briefing in Riddle v.Judges for Yakima County Superior Court, Supreme Court number:95959-5)

iii) Sheriff. Whenever the company acting as surety on the official bond of a sheriff is disqualified, insolvent, or the penalty of the bond becomes insufficient on account of recovery had thereon, or otherwise, the sheriff shall submit a new or additional bond for approval to the board of county commissioners, if in session, or, if not in session, for the approval of the chair of such board, and file the same, when approved, in the office of the county clerk of his or her

county, and such new or additional bond shall be in a penal sum sufficient in amount to equal the sum specified in the original bond when added to the penalty of any existing bond, so that under one or more bonds there shall always be an enforceable obligation of the surety on the official bond or bonds of the sheriff in a penal sum of not less than the amount of the bond as originally approved.

## Who Pays For The Bond?

The premium for bonds given by such surety insurers for appointive or elective public officers and for such of their deputies or employees as are required to give bond shall be paid by the state, political subdivision, or public body so served. (RCW 48.28.040)

## To Whom are Bonds Payable?

The official bond of a public officer, to the state, or to any county, city, town or other municipal or public corporation of like character therein, shall be deemed a security to the state, or to such county, city, town or other municipal or public corporation, as the case may be, and also to all persons severally, for the official delinquencies against which it is intended to provide. (RCW 42.08.010)

## Who Can Bring an Action Against the Bond?

When a public officer by official misconduct or neglect of duty, shall forfeit his or her official bond or render his or her sureties therein liable upon such bond, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his or her own name against the officer and his or her sureties to recover the amount to which he or she may by reason thereof be entitled. (RCW 42.08.020)

1) Action can be brought against county auditor and their bond for negligence in failing to properly index a mortgage. (Inashima v. Wardall, 128 Wash. 617)

2) Action on official bond may be maintained against official and sureties without first obtaining judgment against principal.

3) County treasurer and bondsmen may be liable for loss of public moneys through failure of bank. Kittitas County v. Travers, 16 Wash. 528 (1897)

For What Actions Can a Claim Against the Bond Be Made?

Every official bond executed by any officer pursuant to law, shall be in force and obligatory upon the principal and sureties therein, to and for the state of Washington, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer, in his official capacity, and any person so injured or aggrieved may bring suit on such bond in his or her own name without an assignment thereof.(RCW 42.08.080)

1) Sureties on sheriff's bond assume responsibility for all sheriff's official acts. Sabin v. Barnett, 79 F. 947, (1897)

2) Sureties are not liable for acts of officer performed outside of official duties. Greenius v. American Surety Co., (1916)

3) Surety on bond of chief of police is not liable for improper arrest by subordinate officer. Pavish v. Meyers, 129 Wash. 605 (1924)

4) Bondsman liable for conversion of public funds by auditor, when conversion is result of an official act which could not have been accomplished by private citizen. Skagit County v. American Bonding Co., 59 Wash. 1 (1910)

5) County treasurer and bondsmen may be liable for loss of public moneys through failure of bank. Kittitas County v. Travers, 16 Wash. 528 (1897)

**Leave of Court May be Required Before Proceeding Against the Bond**

Before an action can be commenced by a plaintiff, other than the state, or the municipal or public corporation named in the bond, leave shall be obtained of the court or judge thereof where the action is triable. Such leave shall be granted upon the production of a certified copy of the bond and an affidavit of the plaintiff, or some person in his or her behalf, showing the delinquency. But if the matter set forth in his or her affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his or her favor, judgment shall be given accordingly. (RCW 42.08.030)

## Amount Recoverable Against the Bond

The surety is liable for only the face value of the bond, or a portion of it that is not otherwise encumbered. (RCW 42.08.050)

## Bond Approval and Filing

The official bonds of all county and township officers, except the county superintendent of schools, shall be approved by the board of county commissioners, if in session, and if not in session, by the chair of such board, and filed and recorded in the office of the county clerk of their respective counties: PROVIDED, That the bond of the county clerk shall be recorded in the office of the county auditor and filed in the office of the county treasurer. (RCW 42.08.100)

## County Officials Have the Responsibility to maintain a Bond that Meets the Statutory Minimum Amount

Whenever the sureties, or any one of them, in the official bond of any county or township officer shall die, remove from the state, become insolvent or insufficient, or the penalty of such bond shall become insufficient, on account of recoveries had thereon, or otherwise, it shall be the duty of the board of county commissioners of the proper county, of their own motion, or on the showing of any person, supported by affidavit, to summon any such officer to appear before them at a stated time, not less than five days after service of such summons, and show cause why he or she should not execute an additional official bond with good and sufficient sureties. (RCW 42.08.110).

## If A County Official Fails to Appear Before the County Commissioners or Fail To Secure an Additional Bond, Their Office May Be Declared Vacant

Should such officer, after due notice, fail to appear at the time appointed, the matter may be heard and determined in his or her absence; if after examination the board of county commissioners shall be of opinion that the bond of such officer has become insufficient from any cause whatever, they shall require an additional bond with such security as may be deemed necessary, which said additional bond shall be executed and filed within such time as the board of county commissioners may order; and if any such officer shall fail to execute and file such additional bond within the time prescribed by such order, his or her office shall become vacant. (RCW 42.08.120)

## Can an Elected Official Be Required To Post An Additional Bond?

That question as it pertains to the County Clerk was brought before the Washington State Supreme Court. In *Riddle v. Elofson*, case no. 959595, on May 4, 2018, the Yakima County Superior Court judges issued an order requiring the Clerk, Janet Riddle, to post an additional $200,000 surety bond by June 6, 2018, or else they would declare her office vacant. Riddle brought an action in the State Supreme Court challenging the Suprerior Court Judges' authority to order the Clerk to post a bond exceeding that required by statute, and exceeding the maximum amount required by the County Treasurer (which is $250,000 for a county the size of Yakima). That limit is set forth in RCW 36.16.050(3). The judges argue that their authority to set any limit with unfettered discretion is in RCW 36.23.020, which states:

> "When the judge or judges of any court, or a majority of them, believe that the clerk of the court does not have a good and sufficient bond on file, or that the bond is not large enough in amount, such judge or judges shall enter an order requiring him or her, within such time as may be specified in the order, to execute and present to them a good and sufficient bond, in such sum as may be fixed by the order. In case of his or her failure to file the bond within ten days from the expiration of the date fixed the judge or judges shall declare the office vacant."

So the real riddle in this case was, does the Judge's statute render the main statute meaningless? Well, in April of 2019 the Supreme Court found in favor of the judges and against Riddle. The court held in part:

> ¶22 RCW 36.23.020 does not limit a court's authority to issue a bond order during a specific time period. This provision broadly states that "[w]hen the judge or judges ... believe that the clerk ... does not have a good and sufficient bond on file," they may order the clerk to "execute and present to them a good and sufficient bond." (Emphasis added.) Simply put, a judge may order a clerk to *433 obtain additional bond coverage at any point in time if that judge subjectively believes a bond to be insufficient. By its plain language, RCW 36.23.020 applies to all county clerk bonds, irrespective of when they were executed.

*Riddle v. Elofson*, 193 Wn. 2d 423, 432–33, 439 P.3d 647, 652 (2019).

What about other elected officials? Can their bond limits be increased? There is no statutory authority to do so except that provided in RCW 36.16.050 for the specified officials. The Auditor might have to as a registrar of titles for the

Torrens Act, but the question then becomes whether RCW 36.16.050(2) or RCW 65.12.055 controls.