



STEVENS COUNTY PROSECUTING  
ATTORNEY

RECEIVED  
PRCS

JUN 15 2018

ATTORNEY GENERAL  
OF WASHINGTON

RECEIVED  
JUN 15 2018

ATTORNEY GENERAL'S OFFICE  
Solicitor General's Division

June 11, 2018

Attorney General Bob Ferguson  
Office of the Attorney General  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100

Re: Opinion regarding County's insurance company appointment of attorneys.

I am seeking clarification of the roles of attorneys hired by the insurance company taking into consideration the decision of State ex rel. Banks v. Drummond 187 Wash.2d 157 (2016). I have listed some questions below raised by the current facts. I ask that your office provide an opinion to clarify these issues.

In 1999 our County entered into an inter-local agreement with other counties to form an insurance pool to provide insurance for Stevens County. County Commissioners pay the insurance company to settle claims and provide defense and consultation for the County. The elected Prosecutor is not a signatory to the contract. The insurance company takes the position that the contractual relationship between the County Commissioners gives the insurance company authority to appoint attorneys to represent the county and county officials without the elected Prosecutor's knowledge or consent. The Drummond decision gives rise to questions about this practice.

The insurance company holds the position; 1) State ex rel. Banks v. Drummond does not reach or apply to the rights and obligations of the insurance company relative to county government. 2) The insurance company has contractual rights to defend County officials and does not need to have the Prosecutor's approval. 3) When defense counsel is appointed by the insurance company, because there is no contract of employment between the insured covered party and the attorney appointed and no County funds are expended, RCW 36.32.200 does not prohibit the County from accepting the defense. 4) The insurance company can defend the County when they deem the elected Prosecutor has a conflict, without discussing it with the elected Prosecutor or following the steps laid out in RCW 36.32.200.

We take the position that (1) Drummond does apply to attorneys hired by the insurance company who undertake representation of county interests. 2) any attorney who prosecutes criminal or civil actions in which the state or the County is a party and/or defends suits brought against the state or the County, or any attorney who provides legal advice to the legislative authority, must have the consent of the Prosecutor's office. RCW 36.27.020. 3) The consent of the Prosecutor's office means an appointment pursuant to RCW 36.27.040. 4) We also take the position that if the Prosecutor's office has a conflict, the County Commissioners may petition the superior court judge and specify in writing the contract of employment of such counsel and explain to the court the disability of the Prosecutor. Upon approval, the Commissioners may then contract with an insurance company attorney. The Prosecutor's office does not have any issue with the concept that County Commissioners are empowered by statute to provide liability insurance for the county and its many employees.

Prior to asking you for an opinion, we researched this issue and contacted MRSC for their opinion. Attached please find the MRSC analysis regarding several questions we asked MRSC relative to this issue.

There are several questions which are raised by Drummond as applied to the facts facing Stevens County. Among them are:

- 1) **After Drummond, except when an individual expends private funds, is the prosecutors consent necessary for an attorney to represent the county or a County official in a civil matter.**
- 2) **Do attorneys appointed by the insurance company for the County need to be approved by the Prosecutor's office pursuant to RCW 36.27.040?**
- 3) **Can the insurance company provide legal advice for any County official without the Prosecutor's knowledge and consent?**
- 4) **Can a memorandum of coverage approved by the County Commissioners give any County employee the right to be represented by counsel in a matter involving county interests, without the Prosecutor's knowledge and consent?**

We are hoping for an opinion to clarify these issues. We believe this affects many countys similarly.

Sincerely,

Tim Rasmussen



Prosecuting Attorney  
Stevens County Prosecutors Office

## Brandi C. Long

---

**From:** Nicholas Force  
**Sent:** Monday, June 11, 2018 2:20 PM  
**To:** Brandi C. Long  
**Subject:** FW: Questions regarding representation by insurance company attorneys

**From:** Paul Sullivan [mailto:psullivan@mrsc.org]  
**Sent:** Wednesday, February 28, 2018 9:29 AM  
**To:** Nicholas Force <NForce@stevenscountywa.gov>  
**Subject:** Questions regarding representation by insurance company attorneys

You have asked me a series of questions regarding the relationship between the county prosecuting attorney and the insurance company that is handling litigation on the county's behalf. As I indicated to you during our conversation, I/we are currently unable to go into much depth in responding to the issues you raise. However, for what it is worth, here are my thoughts. (You indicated that these questions really have simple answers and I agree. I think that there are a few basic concepts that apply and because of those concepts the answers are relatively easy.)

The first concept, statutory in nature, is that the county prosecuting attorney by RCW 36.27.020 is the legal adviser for the commissioners and other county officials and is to, among other things, prosecute all criminal and *civil actions* in which the county is a party. The second concept, as we discussed last week, is provided by the holding in the the case State ex rel. Banks v. Drummond, 187 Wn.2d 157, 182, 385 P.3d 769, 783 (2016):

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.

You ask whether an attorney working for the insurance company can offer legal advice to the county without the prosecutor consenting. I think not. To do so would violate the thrust of RCW 36.27.020 since it is the prosecuting attorney who is the legal adviser for the county. There would not be a problem, I think, if the prosecuting attorney were to delegate authority to the insurance attorney but, without a delegation, in my opinion, advice should not be given to commissioners or other public officers of the county.

Is the legal advice and work product of an insurance company, produced pursuant to a claim against the county, part of the county prosecutor's advice and work product? I think it probably would be, if the prosecuting attorney has consented to having the insurance company attorneys represent the county. Without such consent, I do not see how the insurance company attorneys should be providing any advice and work product.

May the insurance company hire attorneys to represent the county's interest without the prosecuting attorney's consent? Unless the prosecutor has consented to this, it is my opinion that the prosecuting attorney must approve of the attorneys who will be working on the county's behalf. To do otherwise would diminish or eliminate the prosecutor's responsibility to provide advice to the county and to handle civil actions filed against the county.

May the prosecuting attorney limit the scope of work to be performed by insurance company attorneys? I think so. If you begin with the idea that it is the prosecutor who is to handle civil actions against the county, for anyone else to do so would require the consent of the prosecutor. I believe that in giving consent, if it is given, the county can craft the scope of the insurance company's authority and limit it as the prosecutor concludes is in the best interests of the county.

May the prosecuting attorney terminate its relationship with the insurance company's attorney? I think so. If prosecutor consent is required to have the insurance company attorney handle a case, then the prosecutor should be able to withdraw the consent so that the prosecutor can fully perform its statutory obligation to handle civil actions on the county's behalf. If the appointed attorney is not qualified to perform the required work, or if the work being performed is injurious to the county's interest, the prosecutor, in my opinion, must be able to sever the relationship in order to fully perform the prosecutor's statutory duties.

Are the claims and files of the insurance company attorneys' county records for Public Disclosure Act purposes? I think so. I believe the case *Cedar Grove Composting v. City of Marysville*, 188 Wn. App. 695 (2015), answers the question. In that decision the court concluded that records maintained by a public relations firm, under contract with the city, were public records. The court found that the firm was the functional equivalent of the city and the records were prepared and maintained on behalf of the city. In my opinion, the records of the insurance company attorney would have the same properties as the records maintained by the public relations firm in the Cedar Grove case. I believe that they are records of the county and potentially subject to disclosure.

You indicated that in a memorandum you are preparing for the county you might indicate that you have discussed your conclusions with MRSC. You have done so. I agree with your preliminary responses as indicated by my cryptic answers above.

**Paul Sullivan**

Legal Consultant

206.625.1300 | [MRSC.org](http://MRSC.org) | Local Government Success