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<input type="checkbox"/> EXPEDITE
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Honorable Erik D. Price
Calendar: Friday, December 4, 2015
at 9:00 a.m.

7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 GLENDA NISSEN,  
9 Plaintiff,  
10 v.  
11 PIERCE COUNTY, a Public Agency; PIERCE  
12 COUNTY PROSECUTOR'S OFFICE, a Public  
13 Agency,  
14 Defendants.

NO. 11-2-02312-2

DEFENDANT PIERCE COUNTY'S  
MOTION FOR APPOINTMENT OF  
DEPUTY PROSECUTOR

15 **I. INTRODUCTION**

16 Defendant Pierce County ("County") seeks appointment of a special deputy prosecutor  
17 to independently advise it on this case and another closely-related matter pending in the Court  
18 of Appeals. The Washington Supreme Court's ruling of August 27, 2015 imposes affirmative  
19 duties on both Pierce County Prosecutor Mark Lindquist and the County. These duties create  
20 an apparent or actual conflict between the County and its chief legal advisor under the  
21 Washington Rules of Professional Conduct ("RPCs"). As a result, Pierce County Executive  
22 Pat McCarthy recently requested that Prosecutor Lindquist voluntarily appoint a special deputy  
23 prosecutor to advise the County on how to fully comply with the Washington Supreme Court's  
24 ruling. As detailed more fully herein, Prosecutor Lindquist initially declined to do so, then  
25 abruptly appointed another attorney with extensive prior involvement in the current case

DEFENDANT PIERCE COUNTY'S MOTION FOR APPOINTMENT  
OF DEPUTY PROSECUTOR - I

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1 directly supporting Prosecutor Lindquist's litigation efforts. As a result, the County remains  
2 without conflict-free representation. Consequently, the County now seeks judicial intervention  
3 in order to ensure independent representation and to fully and promptly comply with the  
4 Washington Supreme Court's order.

## 5 **II. RELIEF REQUESTED**

6 Pursuant to RCW 36.27.030 and RCW 36.27.040, the County moves this Court to  
7 appoint Williams, Kastner & Gibbs, PLLC, as a special deputy prosecutor to represent the  
8 County in this case and the related matter pending in the Court of Appeals (No. 45039-9 Wash.  
9 Ct. App. 2015).

## 10 **III. STATEMENT OF FACTS**

11 The facts underlying this case are well known to the Court. The procedural history is  
12 recounted at length in the Supreme Court's ruling of August 27, 2015. *See Nissen v. Pierce*  
13 *County, et al*, 183 Wn.2d 863, 869-73 (2015). In brief, this matter originates with two Public  
14 Records Act ("PRA") requests submitted by Plaintiff Glenda Nissen. *Id.* at 869. Both requests  
15 sought records related to Prosecutor Lindquist's cellular telephone records. *Id.* at 869-70. The  
16 requests resulted in litigation originating in this Court, proceeding to the Court of Appeals, and  
17 ultimately being appealed to the Washington Supreme Court. At all relevant times in the  
18 litigation, the County has been represented either by Prosecutor Lindquist, his deputies, and/or  
19 private attorneys Michael Patterson and Philip Talmadge. *See Decl. of P. McCarthy*, at ¶4.

20 On August 27, 2015, the Washington Supreme Court issued a ruling requiring a two-  
21 part document review process to be undertaken in response to the PRA request by Plaintiff.  
22 Specifically, the order stated the following:  
23  
24  
25

1 [Pierce County Prosecutor Mark] Lindquist must obtain a transcript of the content of all  
2 text messages at issue, review them, and produce to the County any that are public  
3 records consistent with our opinion. The County must then review those messages –  
4 just as it would with any other public record – and apply any applicable exemptions,  
5 redact information if necessary, and produce the records and any exemption log to  
6 [Petitioner Glenda] Nissen. As to text messages that Lindquist in good faith determines  
7 are not public records, he must submit an affidavit to the County attesting to the  
8 personal character of the messages. The County must also produce that affidavit to  
9 Nissen.

10 *Id.* at 888.

11 On November 10, 2015, County Executive Pat McCarthy submitted a letter to  
12 Prosecutor Lindquist. *See* Decl. of Pat McCarthy, at ¶5. The letter summarized the  
13 requirements of the August 27, 2015 order and observed that the terms appeared to create a  
14 conflict between Prosecutor Lindquist and the County. *Id.*, Exh. A. As a result, the letter  
15 requested that Prosecutor Lindquist undertake three actions:

- 16 1) Cease all representation in this case and the related case pending in the Court of  
17 Appeals (No. 45039-9 Wash. Ct. App. 2015);
- 18 2) Appoint Jessie Harris of Williams, Kastner & Gibbs, PLLC, as a special deputy  
19 prosecutor pursuant to RCW 36.27.040 to represent the County in this and the  
20 related case in the Court of Appeals; and
- 21 3) Inform the County Executive of his progress in complying with the Supreme  
22 Court’s order of August 27, 2015.

23 *Id.* The letter requested a response by close of business on November 13, 2015. *Id.*, at ¶5. On  
24 November 13, 2015, the County Executive received a response from Daniel Hamilton, Tort  
25 Section Lead for the County Prosecutor’s Office. *Id.*, at ¶6, Exh. B. The letter from Mr.  
Hamilton did not provide an update on the progress in complying with the Supreme Court’s  
order and declined to appoint a special deputy prosecutor to represent the County. *Id.*  
Specifically, the letter stated that “Every position taken by the County in the *Nissen* litigation

1 has been asserted exclusively in pursuit of the County's interests." *Id.*, Exh. B., at 2.  
2 Moreover, the letter quoted RPC 1.7, but provided no substantive analysis. *Id.* Instead, it  
3 stated the following:

4           Similarly, under RPC 1.7(a)(2), there is no risk (let alone the required "significant risk")  
5           that the representation of the County "will be materially limited" by Prosecutor  
6           Lindquist's intervention in *Nissen I*. Throughout the litigation, the legal positions of the  
7           County and the Intervenor have been consistently complimentary, and if anything the  
8           Supreme Court's directive makes those legal positions even more compatible.

9 *Id.*, at 4. The letter also stated that any request for change of counsel is untimely in light of the  
10 case status in the related Court of Appeals matter. *Id.*

11           Despite the assertions in the letter of November 13, 2015, Prosecutor Lindquist  
12 subsequently appointed Ramsey Ramerman as a deputy prosecutor on or around November 20,  
13 2015. *See Decl. of Mark Maenhout*, at ¶2. Mr. Ramerman is an assistant city attorney for the  
14 City of Everett, WA and has extensive personal involvement in this case and related matters.  
15 Specifically, Mr. Ramerman filed at least two prior legal briefs with the Washington Supreme  
16 Court in support of Prosecutor Lindquist's legal assertions and conclusions. *Id.*, at ¶3. The  
17 first was an amicus brief filed on December 5, 2014 on behalf of the Washington State  
18 Association of Municipal Attorneys ("WSAMA") encouraging the Washington Supreme Court  
19 to accept review of the Court of Appeals decision in this matter. *Id.*, at ¶3, Exh. A. In it, Mr.  
20 Ramerman argues the following:

21           The application of the PRA to the personal records of the elected Prosecuting Attorney  
22 would represent a massive invasion of the Prosecutor's personal privacy (protected by  
23 Article 1, Section 7) and associational privacy (protected by Article 1, Section 5). This  
24 Court should accept review for all of the reasons set forth by the County and  
25 Prosecuting Attorney.

26 *Id.* at 2-3. The second was an amicus brief filed by Mr. Ramerman with the Washington  
27 Supreme Court on May 4, 2015 arguing the fundamental issue presented by this case:  
28 "Individual elected officials, like courts, are not agencies, and therefore the Court should rule  
29 records maintained by elected officials in private locations are not 'public records.'" *Id.*, Exh.

1 B, at 5. Moreover, he opines that use of a private cell phone provides a complete exemption to  
2 the disclosure requirements of the PRA: “This does not mean Lindquist did anything wrong in  
3 posing the question about Nissen’s political support – as long as Lindquist used his private  
4 phone.” *Id.*, Exh. B., at 2. Finally, Mr. Ramerman was also previously retained by the County  
5 to review records of Detective Nissen, the Plaintiff in this matter, requested by a third-party to  
6 this litigation. *Id.*, at ¶4.

7 The appointment of Mr. Ramerman occurred without input or consultation from the  
8 County Executive’s office, the Director of Judicial Services, or the County Risk Manager. *Id.*,  
9 at ¶5. To date, no update has been provided to the County regarding the status in complying  
10 with the Supreme Court’s order. *Id.*, at ¶6.

#### 11 **IV. STATEMENT OF ISSUES**

12 Should the Court appoint Williams, Kastner & Gibbs, PLLC, as a special deputy  
13 prosecutor to represent the County in this and the related matter pending before the Court of  
14 Appeals, when an actual or apparent conflict exists between the County and Prosecutor  
15 Lindquist under the RPCs, and when Prosecutor Lindquist appointed another attorney to  
16 represent the County who has extensive prior involvement supporting Prosecutor Lindquist’s  
17 legal arguments and conclusions in this matter? **Yes.**

#### 18 **V. EVIDENCE RELIED UPON**

19 Defendant relies upon the Declaration of Pierce County Executive Pat McCarthy, the  
20 Declaration of Mark Maenhout, the Declaration of Jessie Harris, and the briefs and evidence  
21 filed in this matter to date.

#### 22 **VI. AUTHORITY**

23 The right to counsel is a closely-guarded and important right. An integral component of  
24 that right is the right to receive conflict-free advice. Prosecutor Lindquist’s refusal to appoint  
25 an independent special deputy prosecutor places the County in the unacceptable position of

1 being a captive litigant, subject to the decisions of Prosecutor Lindquist and an attorney  
2 appointed by Prosecutor Lindquist with an extensive prior history of directly supporting the  
3 current litigation strategy and legal arguments. No independence is accorded by the  
4 appointment of Mr. Ramerman.<sup>1</sup> The Court has the power to rectify the situation, and should  
5 do so.

6 A. Prosecutor Lindquist and Mr. Ramerman are Conflicted From Representing the County  
7 in this Matter and the Related Matter Before the Court of Appeals Under RPC 1.7.

8 Prosecutor Lindquist is the duly-elected Prosecutor for the County with all the duties  
9 and powers outlined in RCW 36.27.020. These include the following duties:

- 10 1) To be “legal advisor of the [County] legislative authority” (RCW 36.27.020(1));
- 11 2) To be “legal advisor to all county and precinct officers...in all matters relating to  
12 their official business...” (RCW 36.27.020(2); and
- 13 3) To “Appear for and represent the state, county, and all school districts...in all  
14 criminal and civil proceedings in which the state or the county or any school district  
15 in the county may be a party.” (RCW 36.27.020(3)).

16 These powers, however, are not absolute. Among other requirements, RPC 1.7  
17 provides the following:

- 18 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the  
19 representation involves a concurrent conflict of interest. A concurrent conflict  
20 of interest exists if:  
21 ...  
22 (2) there is a significant risk that the representation of one or more clients  
23 will be materially limited by the lawyer’s responsibilities to another client, a  
24 former client or a third person *or by a personal interest of the lawyer.*

25 <sup>1</sup> This motion should not be construed as adverse comment regarding Mr. Ramerman’s professional capabilities.  
It is solely based upon the conflicts presented by Prosecutor Lindquist’s representation in this matter and the prior  
direct involvement in the case by Mr. Ramerman on behalf of WSAMA and his role in reviewing Detective  
Nissen’s communications.

1 (emphasis added). The concern of representation in instances involving a “personal interest of  
2 the lawyer” is reflected in Comment 10 to RPC 1.7 which observes that “if the probity of a  
3 lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible  
4 for the lawyer to give a client detached advice.”<sup>2</sup> Finally, as noted in Comment 1 to RPC 1.11,  
5 “A lawyer who has served or is currently serving as a public officer or employee is personally  
6 subject to the Rules of Professional Conduct, including the prohibition against concurrent  
7 conflicts of interest stated in Rule 1.7.” As a result, Prosecutor Lindquist remains subject to  
8 the RPCs in his service as Pierce County Prosecutor.

9 Mr. Hamilton’s letter of November 13, 2015 stated that no conflict exists under RPC  
10 1.7. *See* Decl. of P. McCarthy, Exh. B. Specifically, he contended that “under RPC 1.7(a)(2),  
11 there is no risk (let alone the required ‘significant risk’) that the representation of the County  
12 ‘will be materially limited’ by Prosecutor Lindquist’s intervention in *Nissen I.*” *Id.*, at 4. In  
13 support of this proposition, he states that the County’s and Prosecutor Lindquist’s positions  
14 have been “consistently complimentary” throughout the litigation. *Id.*

15 Despite the letter of November 13, 2015, Prosecutor Lindquist abruptly changed course  
16 late last week, appointing Ramsey Ramerman as a deputy prosecutor to represent the County in  
17 this matter. *See* Decl. of M. Maenhout, at ¶2. Mr. Ramerman has direct, extensive, and  
18 personal involvement in this case, including filing two briefs with the Washington Supreme  
19 Court supporting Prosecutor Lindquist’s legal arguments and conclusions. *Id.*, at ¶3, Exhs A-  
20 B. Additionally, Mr. Ramerman was previously retained by the County to review records of  
21 Detective Nissen requested under the PRA. *Id.*, at ¶4.

22  
23  
24 <sup>2</sup> RPC 1.7(b) contains, of course, a provision permitting the concurrent conflict of interest to be waived, provided  
25 the attorney “reasonably believes the lawyer will be able to provide competent and diligent representation to each  
affected client,” “the representation is not prohibited by law,” The representation does not involve the assertion of  
a claim by one client against another...” and “each affected client gives informed consent, confirmed in writing  
(following authorization from the other client to make any informed disclosures).” No such informed consent has  
been requested by Prosecutor Lindquist from the County. *See* Decl. of Pat McCarthy, at ¶7.

1           The letter of November 13, 2015 and the subsequent appointment of Mr. Ramerman  
2 illustrates the problem. Despite a request by the County Executive for an update on Prosecutor  
3 Lindquist's progress in complying with the Supreme Court's order of August 27, 2015, no  
4 update is provided, thereby leaving the County in the dark regarding the status of a case of  
5 significant import. Moreover, the letter provides no analysis of the underlying facts of the  
6 case, and how the nature of the allegations and the required disclosures under the August 27,  
7 2015 order place the County and Prosecutor Lindquist in an actual or apparent conflict.  
8 Finally, in an apparent belated recognition of the conflict, Prosecutor Lindquist appoints an  
9 attorney who, far from being an independent advisor to the County, has already filed briefs in  
10 this matter directly supporting Prosecutor Lindquist's legal theories. Indeed, Mr. Ramerman  
11 has already argued before the Washington Supreme Court that the matter should have been  
12 accepted on appeal, and that Prosecutor Lindquist's actions were appropriate "as long as  
13 Lindquist used his private phone." *Id.*, Exh. B, at 2. Moreover, he has already directly  
14 supported Prosecutor Lindquist's position before the Washington Supreme Court (subsequently  
15 rejected by the Court) that individual elected officials are not agencies, "and therefore the  
16 Court should rule records maintained by elected officials in private locations are not 'public  
17 records.'" *Id.*, at 5.

18           Here, the conflict is obvious. The case at issue, and the related case in the Court of  
19 Appeals, pertains to records on Prosecutor Lindquist's personal cellular phone and direct  
20 allegations against him. The Washington Supreme Court's order of August 27, 2015 requires  
21 Prosecutor Lindquist to take specific steps to produce the records and requires the County to  
22 review and redact, as necessary. *See Nissen*, at 888. The produced documents may  
23 substantiate or undermine allegations of misconduct against Prosecutor Lindquist. If  
24 substantiated, the allegations may have adverse legal, political, and professional consequences.  
25 Not knowing what records exist on Prosecutor Lindquist's cellular phone, the County is in the



1 untenable position of being in litigation where the County Prosecutor has a personal stake in  
2 the outcome, while he is also the primary source of legal advice for the County. Regrettably,  
3 Prosecutor Lindquist's personal interest in this litigation creates a concurrent conflict of  
4 interest under RPC 1.7 and potentially other RPCs.

5 Mr. Ramerman's belated appointment as a deputy prosecutor in this matter does not  
6 obviate the conflict. Mr. Ramerman has already argued to the Washington Supreme Court that  
7 1) The Washington Supreme Court should accept review of the Court of Appeals decision in  
8 this case; 2) Prosecutor Lindquist did not violate the PRA disclosure requirements "as long as  
9 Lindquist used his private phone"; and 3) Individual elected officials are not agencies, and the  
10 Court should rule "records maintained by elected officials in private locations are not 'public  
11 records.'" Decl. of M. Maenhout, Exh. B, at 2, 5. Given these clear assertions, it is not  
12 possible for Mr. Ramerman to subsequently provide differing legal opinion to the County, even  
13 if appropriate, as to do so requires disavowing his previous assertions on behalf of WSAMA.  
14 As a result, Mr. Ramerman is similarly conflicted under RPC 1.7 and his appointment does not  
15 provide the independent legal advice required by the County. Finally, Mr. Ramerman's  
16 previous service reviewing Detective Nissen's communications requested under the PRA only  
17 reinforces his extensive prior and personal involvement in this case.

18 B. The Court Should Appoint a Special Deputy Prosecutor Under RCW 36.27.030 and  
19 RCW 36.27.040.

20 Fortunately, the County is not without recourse: an independent special deputy  
21 prosecutor may be appointed by this Court to represent the County under RCW 36.27.030 and  
22 RCW 36.27.040. Washington case law contains various examples of elected county  
23 prosecutors being removed (or removing themselves) from cases due to ethical conflicts. In  
24 *State v. Stenger*, 111 Wn.2d 516 (1988), for example, the Washington Supreme Court  
25 addressed a situation where the Clark County Prosecutor declined to disqualify himself from a

1 case where he previously advised the defendant while in private practice prior to his election as  
2 prosecutor. The Washington Supreme Court observed that RPC 1.9 prohibited representation  
3 in that case. *Id.* at 520. As a result, the Court noted that “We need go no further in this capital  
4 case to conclude that it is appropriate that a special prosecuting attorney be appointed to handle  
5 and control the case.” *Id.* at 523. Importantly, the Court cited both RCW 36.27.030 and RCW  
6 36.27.040 as authority to do so. *Id.*

7 In *Herron v. McClanahan*, 28 Wn. App. 552 (1981), the Pierce County Prosecutor  
8 appointed a special deputy under RCW 36.27.040 to address a recall petition against the  
9 elected prosecutor. When the appointment was challenged, the Court noted that “To satisfy the  
10 statute, and at the same time avoid the obvious conflict of interest,” the county prosecutor  
11 appointed another attorney to serve as a special deputy prosecuting attorney for Pierce County  
12 to review the recall charges. *Id.* at 556. Further, in response to a party’s claim that the Court  
13 should have appointed someone else under RCW 36.27.030, the Court noted that “we find it  
14 would have applied only if [Pierce County Prosecutor] Herron had refused to appoint an  
15 independent party to review the charges. Since a suitable person was appointed, there was no  
16 need for the trial court to invoke RCW 36.27.030.” *Id.* at 557.

17 Finally, in *Grant County Prosecuting Attorney v. Jasman*, 183 Wn.2d 633 (2015), the  
18 Washington Supreme Court clarified the circumstances under which the judiciary may appoint  
19 a special prosecutor: “A court may appoint a special prosecutor for a party only if (1) the  
20 prosecutor has ‘the authority and the duty to represent that party in the given matter’; and (2)  
21 ‘some disability...prevent[s] the prosecutor from fulfilling that duty.’” *Id.* at 647 (quoting  
22 *Osborn v. Grant County*, 130 Wn.2d 615, 624-25 (1996)); *See also Westerman v. Cary*, 125  
23 Wn.2d 277, 298-300 (1994).

24 *Stenger, Herron, and Jasman* all clarify that judicial action under RCW 36.27.030 and  
25 RCW 36.27.040 is permissible when a prosecutor refuses to withdraw from ethically-conflicted

1 representation. RCW 36.27.040 is the voluntary mechanism. As in *Herron*, it permits a county  
2 prosecutor to appoint “one or more deputies who shall have the same power in all respects as  
3 their principal.” RCW 36.27.030 is the involuntary mechanism. As in *Stenger*, it provides that  
4 “When from illness or other cause the prosecuting attorney is temporarily unable to perform his  
5 or her duties, the court or judge may appoint some qualified person to discharge the duties of  
6 such officer in court until the disability is removed.” RCW 36.27.030. As noted previously,  
7 *Herron* addressed the interplay between these two statutory provisions. *Herron* noted that  
8 action under RCW 36.27.030 was necessary only if the prosecutor refused to appoint an  
9 independent party to review the charges. *Herron*, at 557. *Jasman*, meanwhile, confirms that  
10 appointment is appropriate if there is both the authority and duty for the prosecutor to represent  
11 the party in a given matter, and there is the requisite “disability” under RCW 36.27.030. In this  
12 case, both requirements are satisfied. Prosecutor Lindquist has a duty to represent the County  
13 in this matter as the County is the real party in interest in this case. *See Osborn*, 130 Wn. 2d at  
14 625. Additionally, Prosecutor Lindquist labors under a “disability” due to the conflicts  
15 presented under the circumstances of this case.

16 Here, the County faces the precise situation envisioned in *Herron*: Prosecutor Lindquist  
17 refuses to appoint an independent party to advise the County in a matter that presents conflicts  
18 under the RPCs. Instead, he appointed someone who has already made legal assertions in this  
19 case directly supportive of Prosecutor Lindquist’s legal positions in this matter. In this case,  
20 however, the situation is arguably even more dire than that in *Herron*. In *Herron*, the conflict  
21 pertained to a recall election against the Prosecutor with no obvious court-imposed actions or  
22 deadlines pending. *Herron*, at 708-09. Here, however, the County and Prosecutor Lindquist  
23 each have affirmative obligations imposed on them by the Washington Supreme Court’s  
24 August 27, 2015 ruling. The County wishes to ensure full and prompt compliance with the  
25 order and is in the untenable position of relying on an attorney whose action is at issue (or his


1 hand-picked successor), and whose records are subject to the order, for guidance regarding  
2 how to comply and pursue resolution of this case. As Prosecutor Lindquist refuses to  
3 voluntarily appoint an independent special deputy under RCW 36.27.040, the Court should  
4 take action under RCW 36.27.030.

5 **VII. CONCLUSION**

6 For all the reasons above, Defendant requests that the below-signed attorney be  
7 appointed as a special deputy prosecutor in this case and the related case pending in the Court  
8 of Appeals. The credentials of the below-signed attorney are outlined in the Declaration of  
9 Jessie Harris filed contemporaneously with this motion. A proposed order is similarly filed.

10 DATED this 24<sup>th</sup> day of November, 2015.

11  
12 WILLIAMS, KASTNER & GIBBS PLLC

13  
14 By   
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23  
24 Attorneys for Defendant  
25

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 24<sup>th</sup> day of November, 2015, I caused a true and correct copy of the foregoing document, "Defendant Pierce County's Motion for Appointment of Deputy Prosecutor" to be delivered in the manner indicated below to the following counsel of record:

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Dated this 24<sup>th</sup> day of November, 2015.



Dena Levitin, Legal Assistant  
on behalf of Hunter M. Abell, WSBA #37223  
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Attorneys for Defendant Pierce County

DEFENDANT PIERCE COUNTY'S MOTION FOR APPOINTMENT  
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