

CHAPTER 8

THE OFFICE OF COUNTY PROSECUTING ATTORNEY

The Idaho Constitution states that a prosecuting attorney will be elected in each county and hold office for a term of four years (Article V, Section 18). Prosecutors must be duly licensed and practicing attorneys at law at the time they take office and be residents and electors of the county from which they are elected (Article V, Section 18, 31-2601 and 34-623). However, if a county chooses an optional form of county government, the structure of the office of the prosecuting attorney could change. Possible changes include the term of office; appointment rather than election to the position; or the office could be eliminated with the duties and responsibilities provided by other elected or appointed individuals or by an individual on a contractual basis. Regardless of any change, the person exercising the functions of prosecuting attorney still must be licensed to practice law in the state of Idaho. The duties of the office may not be combined with those of the sheriff or the clerk of the district court (Title 31, Chapters 52-56).

The salary of the county prosecuting attorney is set by the county commissioners through the county budget process (31-3106). In some counties there is not a sufficient case load to justify a full-time prosecuting attorney. In those counties, the prosecutors may have private law practices in addition to their official duties. Also, with unanimous approval of the board of county commissioners, the prosecuting attorney may contract with any city within the county to prosecute non-conflicting misdemeanors and infractions (31-3113).

The prosecuting attorney must be provided an office, when necessary, by the board of county commissioners (31-1001), in counties having a population of over 7,500. The prosecuting attorneys must have their offices at the county seats and keep them open for business on such days and during such hours as prescribed by the county commissioners. The commissioners and prosecutor prescribe such rules and hours as are necessary for those counties having a population of 7,500 or less (31-2009).

State law imposes certain restrictions on prosecuting attorneys to prevent a conflict of interest between their official duties and their private law practices. They are prohibited from receiving private fees for services performed in their official capacity (31-2606). They are not permitted to act as attorneys in civil suits depending on the same facts arising from a criminal prosecution which is not completed (31-2606). A prosecuting attorney cannot hold any other county or state office while he or she is county prosecuting attorney. However, a prosecutor may be appointed by the Idaho attorney general as a special deputy attorney general in another county (31-2601).

Whenever prosecuting attorneys receive any money for fines, forfeitures, penalties, or costs, they must give the payee a duplicate receipt (31-2605). One copy of this receipt must be filed in the office of the county auditor (31-2605). For further information on procedures for the handling of this money, *see* 31-2604 and 31-2605.

The prosecuting attorney may be empowered by the board of county commissioners to appoint one or more deputies if the board believes this to be necessary (31-2602). A deputy prosecuting

attorney receives a salary fixed by the board of county commissioners (31-2602). Each deputy must possess the qualifications required of prosecuting attorneys except that of residency (31-2602).

Legal Advisor and Defender of Public Officials

One of the most important duties of the prosecuting attorney is to give legal advice to the board of county commissioners and other elected officials of the county in all public matters arising in the conduct of the public business entrusted to the care of such officers (31-2604). As legal advisor to the commissioners, the prosecutor must attend their meetings when required (31-2607). The prosecutor must also oppose all claims and accounts against the county when he or she deems them unjust or illegal (31-2607). The prosecuting attorney represents the county treasurer when the treasurer serves as public administrator (14-118).

The prosecuting attorney represents the county on issues such as indigency, planning and zoning decisions and appeals, valuation disputes, and other civil related issues. As county government becomes more and more complex, the prosecuting attorney has more and more responsibility for civil actions, applications or motions that the county has an interest in or is party to. Prosecuting Attorneys must be aware that if the court finds that a state agency, city, county, or other taxing district has acted without a reasonable basis in fact or law, the prevailing party can be awarded attorney's fees and other expenses, which are paid out of the regular operating budget of the state, county, city, or district (12-117).

Prosecution of Criminal Cases

State law vests the primary responsibility for enforcing the penal laws of the state in the sheriff and prosecuting attorney, and authorizes them to call on local officers for assistance when needed. The county prosecutor is responsible for prosecuting all felonies that occur within the county regardless of the investigating agency (31-2604). Additionally, the county prosecutor is responsible for all misdemeanors and infractions occurring within the county when the arresting or charging peace officer is a state or county employee. Note that the city attorney or contract counsel for any city is responsible for prosecuting misdemeanors and infractions occurring within a city's municipal limits when the arresting or charging officer is a city employee (50-208A). However, 31-3113 allows a prosecuting attorney, with the unanimous approval of the board of county commissioners, to contract with any city located within the county to prosecute non-conflicting misdemeanors and infractions, including violations of city ordinances.

In addition to the direct prosecution responsibilities outlined above, the county prosecuting attorney is responsible for any state grand jury empanelled within a county, including attending the grand jury proceedings, subpoenaing and examining witnesses on behalf of the grand jury, and drafting indictments or other legal accusations on behalf of the grand jury.

In 1998, the "supervisory powers" of the attorney general over prosecuting attorneys were eliminated (67-1401). In the case of Newman v. Lance, 129 Idaho 98, 922 P.2d 395 (1996), the Idaho Supreme Court held that the duty to prosecute state penal laws is vested with the prosecuting attorney and the Attorney General could not assume or otherwise take away those duties without the

prosecuting attorney's consent. However, in cases where the governor determines that the penal laws of the state of Idaho are not being enforced as written, the state police are able to act independently and the attorney general exercises "all duties, rights, and responsibilities of the prosecuting attorney" for that case. (31-2227).

Duties With Regard to Licensing and Regulatory Laws

The prosecuting attorney has the responsibility for prosecuting violators of a number of specific licensing and regulatory laws. For example, the prosecutor is responsible for prosecuting violators of laws on imported food products (37-1528). The prosecutor institutes proceedings when violations of laws relating to commercial feed stuffs are reported to him or her (25-2713).

Of particular importance, the county prosecuting attorney has the responsibility for enforcing the Idaho Open Meeting Law in relation to any local public agencies within the county (67-2347(5)). As the Open Meeting Law may apply to county commissioners (who, of course, are the prosecutor's primary civil clients), the law authorizes the prosecutor or the commissioners to seek appointment of a special prosecutor (see below).

Temporary Prosecuting Attorney

Upon a petition by the prosecuting attorney or board of county commissioners, the district court may appoint another person to act temporarily as prosecuting attorney (31-2603). This may occur when the prosecuting attorney is out of the county, ill or unable to attend to his or her duties, when the prosecutor has been private attorney of the accused person, when the prosecutor is related to the person to be tried on a criminal charge, or when the prosecutor has business connections or kinship with either party in the action (31-2603). The prosecuting attorney may also petition the district judge of his or her county for the appointment of a special deputy attorney general to assist in the prosecution of any criminal case pending in the county which involves state law (31-2603). If it appears to the district judge that there is good reason for granting such a petition, the district judge may, with the approval of the Attorney General, make such an appointment, and fix the compensation to be paid to the deputy attorney general, and the salary paid the deputy attorney general is charged against the appropriations of the office of the state attorney general (31-2603).

Miscellaneous Responsibilities

The prosecuting attorney has a number of miscellaneous responsibilities related to criminal law. These include initiating the process with the governor to return a fugitive to Idaho (19-4523), and prosecuting violations of laws relating to the retail sale of liquor by the drink (23-936). A prosecuting attorney may, in cooperation with the coroner or on his or her own, order an autopsy if it is deemed necessary (19-4301B), and may request the coroner to subpoena witnesses for inquests at the coroner's jury (19-4303).

County prosecutors also have certain important duties in the enforcement of the Child Protective Act (16-1601 through (16-1629), and the Juvenile Corrections Act (20-501 through 20-548).

NOTES