

THE ROLE OF THE PROSECUTOR AND YOU (Care, Feeding and Proper Use of Your Prosecutor)

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LATAH COUNTY PROSECUTING ATTORNEY
IAC Past President



STATUTES

- I.C. 59-401. LOYALTY OATH -- FORM. Before any officer elected or appointed to fill any office created by the laws of the state of Idaho enters upon the duties of his office, he must take and subscribe an oath, to be known as the official oath, which is as follows: "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Idaho, and that I will faithfully discharge the duties of (insert office) according to the best of my ability."

- Presumption: We always act legally and properly



STATUTES

- 31-2604. DUTIES OF PROSECUTING ATTORNEY. It is the duty of the prosecuting attorney:

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- 31-2604. DUTIES OF PROSECUTING ATTORNEY. It is the duty of the prosecuting attorney:
 3. To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers.

STATUTES

- 31-2001. COUNTY OFFICERS ENUMERATED. The officers of a county are:
 1. A sheriff.
 2. A clerk of the district court, who shall be ex officio auditor and recorder, and ex officio clerk of the board of county commissioners.
 3. An assessor.
 4. A prosecuting attorney.
 5. A county treasurer, who shall be ex officio public administrator and ex officio tax collector.
 6. A coroner.
 7. Three (3) members of the board of county commissioners.

STATUTES

- 31-2227. ENFORCEMENT OF PENAL LAWS – PRIMARY RESPONSIBILITY
 1. Irrespective of police powers vested by statute in state, county and municipal officers, and except where otherwise provided in Idaho Code, it is hereby declared to be the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties. When, in the judgment of such county officers, they need assistance from municipal peace officers within the county, they are authorized and directed to call for such assistance and local officers shall render assistance.



STATUTES

- 31-2607. ADVISER OF COUNTY COMMISSIONERS.

The prosecuting attorney is the legal adviser of the board of commissioners; he must attend their meetings when required, and must attend and oppose all claims and accounts against the county when he deems them unjust or illegal.

STATUTES

- 31-2607. ADVISER OF COUNTY COMMISSIONERS.

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The Board of County Commissioners is the prosecutor's primary client.

ADVICE

- Legal advice and policy advice are not necessarily the same.

ADVICE

- All policy decisions have potential legal consequences

ADVICE

- Legal advice should be the foundation for all policy decisions.

ADVICE

- Legal advice is the Prosecutor's responsibility.

ADVICE

- Legal advice is the Prosecutor's responsibility.
- Policy decisions are your responsibility.

LEGAL vs. POLICY

- Easy = “the law says you can/cannot do _____”

LEGAL vs. POLICY

- Easy = “the law says you can/cannot do _____”
- More difficult (challenging) = “maybe,” “more likely _____ than _____,” “it’s not clear” . . .

ATTORNEY/CLIENT PRIVILEGE



ATTORNEY/CLIENT PRIVILEGE

- Idaho Rule of Evidence 502(b) – A client or a lawyer (for a client) “has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services”



ATTORNEY/CLIENT PRIVILEGE

- Idaho Code 9-203(2) - An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. The word client used herein shall be deemed to include a person, a corporation or an association.

ATTORNEY/CLIENT PRIVILEGE

- Idaho Rules of Evidence 502(d) exceptions:
 - (1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
 - (3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer;



ATTORNEY/CLIENT PRIVILEGE

- Idaho Rules of Professional Conduct

1.6(a) A lawyer may not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ATTORNEY/CLIENT PRIVILEGE

- Idaho Rules of Professional Conduct 1.6(b) exceptions:
 - (1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime;
 - (2) to prevent reasonably certain death or substantial bodily harm;



ATTORNEY/CLIENT PRIVILEGE

- Idaho Rules of Professional Conduct 1.6(b) exceptions:

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime in furtherance of which the client has used the lawyer's services;

ATTORNEY/CLIENT PRIVILEGE

- Idaho Rules of Professional Conduct 1.6(b) exceptions:

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client;

ATTORNEY/CLIENT PRIVILEGE

- Idaho Rules of Professional Conduct 1.13: Organization as Client
 - Organizations cannot act except through “constituents” meaning those with authority.
 - “Constituents” are not personally clients.
 - This pertains to the BOCC, statutorily, other individually elected county officials are clients of the Prosecutor’s Office.
 - Lawyers are required to balance confidentiality and ensuring that any legally wrongful acts are prevented or cured.

ATTORNEY/CLIENT PRIVILEGE

- If there is conflict between clients (“constituents”), lawyers should advise the individual client to seek independent representation.
- Since BOCC is the primary client (as the legal representative of the county), this typically involves the individual elected official having to seek private counsel.

ATTORNEY/CLIENT PRIVILEGE

- Consent

PURPOSE OF ATTORNEY/CLIENT PRIVILEGE

- Allows open, honest conversation.

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- Helps insure well-considered decisions.



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- Allows open, honest conversation.
- Helps insure well-considered decisions.
- Protects work product (thoughts/analysis/ weighing of pros and cons/etc.).

EXECUTIVE SESSION

- 74-206. EXECUTIVE SESSIONS -- WHEN AUTHORIZED.
 - (d) To consider records that are exempt from disclosure as provided in chapter 3, title 9, Idaho Code;



EXECUTIVE SESSION

- 74-206. EXECUTIVE SESSIONS -- WHEN AUTHORIZED.
 - (d) To consider records that are exempt from disclosure as provided in chapter 1, title 74, Idaho Code;
- I.C. 74-104. RECORDS EXEMPT FROM DISCLOSURE -- EXEMPTIONS IN FEDERAL OR STATE LAW -- COURT FILES OF JUDICIAL PROCEEDINGS.
 - (1) Any public record exempt from disclosure by . . . state law . . .

EXECUTIVE SESSION

- I.C. 9-203(2) – STATUTORY ATTORNEY/CLIENT PRIVILEGE. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. The word client used herein shall be deemed to include a person, a corporation or an association.



EXECUTIVE SESSION

- I.C. 74-107(11) – RECORDS EXEMPT FROM DISCLOSURE -- (11) Records of any risk retention or self-insurance program prepared in anticipation of litigation or for analysis of or settlement of potential or actual money damage claims against a public entity and its employees or against the industrial special indemnity fund except as otherwise discoverable under the Idaho or federal rules of civil procedure. These records shall include, but are not limited to, claims evaluations, investigatory records, computerized reports of losses, case reserves, internal documents and correspondence relating thereto. At the time any claim is concluded, only statistical data and actual amounts paid in settlement shall be deemed a public record unless otherwise ordered to be sealed by a court of competent jurisdiction. Provided however, nothing in this subsection is intended to limit the attorney client privilege or attorney work product privilege otherwise available to any public agency or independent public body corporate and politic.

EXECUTIVE SESSION

- I.C. 74-206(1) - EXECUTIVE SESSIONS -- WHEN AUTHORIZED. - (f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement;

BEST PRACTICE

- Have something in writing.



BEST PRACTICE

REQUEST FOR LEGAL ADVICE

DATE: _____
TO: _____
FROM: _____
DEPARTMENT: _____
SUBJECT: _____
NATURE OF REQUEST: _____

Requested due date: _____ (If less than ten days, please briefly explain the urgency): _____

Does this request involve any known or reasonably anticipated conflict of interest between the requesting party and the Board of Latah County Commissioners: _____ Y _____ N

Signature: _____

Title: _____

For Prosecutor's Office Use:	
Request # _____	Date Received: _____
Response # _____	Date Response: _____
Prosecutor _____	Due Date: _____
Reference File # _____	

Revised 3/23/15



BEST PRACTICE

OFFICE OF THE PROSECUTING ATTORNEY
Latah County Courthouse

ATTORNEY-CLIENT PRIVILEGE

LEGAL MEMORANDUM NO.

DATE:

TO:

SUBJECT:

REQUEST:

Question Presented:

Analysis:

Conclusion(s):

??
Deputy / Prosecuting Attorney

(initials)

PA File No.

LEGAL MEMORANDUM NO. ??

-1-



3RD PARTIES

- Prosecutors should not give legal advice to private citizens

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 - May provide information

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 - May provide information
 - May refer (to a private attorney, law enforcement, etc.)

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- Prosecutors should not give legal advice to private citizens
 - May provide information
 - May refer (to a private attorney, law enforcement, etc.)
- Exception: part-time prosecutors may represent and advise 3rd parties so long as there is no conflict with his/her public duties

3RD PARTIES

- Prosecutor's duty is to BOCC and elected officials

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- Avoid potential conflicts of interest

3RD PARTIES

- Prosecutor's duty is to BOCC and elected officials
- Avoid potential conflicts of interest
- Avoid potentially lending the county's credibility to a private dispute

3RD PARTIES

- If referring a third party to the prosecutor's office, give us a heads up.

SPECIALIZED SERVICES



SPECIALIZED SERVICES

Would you

- hire a divorce lawyer in a DUI case?

SPECIALIZED SERVICES

Would you

- hire a divorce lawyer in a DUI case?
- hire a DUI lawyer for a real estate transaction?



SPECIALIZED SERVICES

Would you

- hire a divorce lawyer in a DUI case?
- hire a DUI lawyer for a real estate transaction?
- hire a real estate lawyer for a personal injury lawsuit?

SPECIALIZED SERVICES

Prosecutors are generally most experienced in

- Criminal law
- General government/civil law

SPECIALTY AREAS

- Bond attorneys
- Water law attorneys
- Insurance defense attorneys
- Deferred compensation plan specialists
- Etc.



SPECIALTY AREAS

Can outside counsel be hired?



SPECIALTY AREAS

Can outside counsel be hired?

- Yes, but only on a case-by-case basis and with a specific finding of "necessity"

Idaho Const. Article 18, § 6; Attorney General Opinion 93-8

SPECIALTY AREAS

To hire outside counsel



SPECIALTY AREAS

To hire outside counsel

- Motion and Order specifying case and “necessity”

SPECIALTY AREAS

To hire outside counsel

- Motion and Order specifying case and “necessity”
- Best practice – get your prosecutor’s concurrence

SPECIALTY AREAS

If no documented case-specific finding of “necessity”

- Risk = Declared void and all fees subject to repayment

DISAGREEMENTS



DISAGREEMENTS

- Will happen

DISAGREEMENTS

- Will happen
- Talk it out – “What’s the problem”

DISAGREEMENTS

- Will happen
- Talk it out – “What’s the problem”
 - Legal or policy disagreement?

OPINION SHOPPING

- Who is your favorite?

ATTORNEY GENERAL?



ICRMP?



IAC



- Be up front



- Be up front
- We call them, too



- Be up front
- We call them, too
- Agree to consult with attorneys experienced in the area



- Agree to disagree

IF ALL ELSE FAILS

- Case specific motion and order listing “necessity”

CONFLICTS BETWEEN ELECTED OFFICIALS



CONFLICTS BETWEEN ELECTED OFFICIALS

- Prosecutor's primary duty is to the Board of County Commissioners

CONFLICTS BETWEEN ELECTED OFFICIALS

- 31-2014. CERTAIN OFFICERS NOT TO PRACTICE LAW. Sheriffs, clerks of courts and their deputies are prohibited from practicing law or acting as attorneys or counselors-at-law, or having as a partner a lawyer or any one who acts as such. Provided, however, any county elected official, with the approval of the board of county commissioners, may hire an attorney to act as his legal advisor.



WARRANTY:

- With the proper care, feeding and use, your prosecutor can:
 - Help insure that the policy decisions you make are legal
 - Can even give you “immunity” in certain situations (i.e. Idaho Code 74-704 regarding potential conflicts of interests).

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QUESTIONS?

