


THE ROLE AND FUNCTION OF THE COUNTY PROSECUTING ATTORNEY

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PROSECUTING ATTORNEY – ORGANIC AUTHORITY

- ❑ Constitutionally mandated. WA Const. Article XI, § 4.
- ❑ Statutory duties. Revised Code of Washington (RCW) 36.27
- ❑ County home rule charter (in home rule counties)
- ❑ County code
- ❑ County policy
- ❑ Case law
- ❑ Ethical Rules of Professional Conduct (RPC)

PROSECUTING ATTORNEY – ROLE AND FUNCTION

- ❑ Ch. 36.27 RCW outlines the general duties and authority of the prosecuting attorney.
 - ❑ Appears for and represents the state and the county in all criminal and civil proceedings in which the state or the county may be a party.
 - ❑ Acts as general legal advisor to all county officers (elected and appointed).
 - ❑ Note: In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. RPC 2.1, “Advisor.”
- ❑ Other statutory responsibilities, such as election administration (including preparation of ballot titles for county measures under RCW 29A.36.071), and canvassing election returns.

PROSECUTING ATTORNEY – ETHICS

- ❑ Prosecutors have a law license and are required to abide by ethical rules known as the Rules of Professional Conduct (RPC). These rules help guide prosecutors in the discharge of their duties. For example . . .
 - ❑ Conflicts of Interest. RPC 1.7, 1.8.
 - ❑ Organization as Client. RPC 1.13.
 - ❑ Declining or Terminating Representation. RPC 1.16.
 - ❑ Advisor. RPC 2.1.
 - ❑ Trial Publicity. RPC 3.6.
 - ❑ Special Responsibilities of a Prosecutor. RPC 3.8.

CLIENTS – COUNTY ORGANIZATION

- ❑ The prosecutor has a duty to represent the county. RCW 36.27.020(4).
- ❑ Washington courts have reinforced this duty. See, e.g. *Harter v. King County*, 11 Wn.2d 583, 119 P.2d 919 (1941).
- ❑ The RPC's further clarify the scope of this duty.
 - ❑ “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” RPC 1.3, “Organization as Client.”

CLIENTS – COUNTY COMMISSIONERS

- ❑ The prosecuting attorney's duty to the board of county commissioners differs from that of other civil clients.
 - ❑ “Be legal adviser of the legislative authority, giving it his or her written opinion when required by the legislative authority or the chairperson thereof touching any subject which the legislative authority may be called or required to act upon relating to the management of county affairs[]” RCW 36.27.020 (1).
- ❑ The board of county commissioners is the decision maker in litigation involving the county.
 - ❑ “Have the care of the county property and the management of the county funds and business and in the name of the county prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law[]” RCW 36.32.120 (6).

CLIENTS – COUNTY COMMISSIONERS

- ❑ The state legislature has restricted the ability of the board of commissioners to contract with any other attorney to perform any of the functions of the prosecuting attorney, and any contract must be approved by the presiding judge of the county superior court (RCW 36.32.200).
- ❑ When from illness or other cause the prosecuting attorney is temporarily unable to perform his or her duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed. RCW 36.27.030
- ❑ The prosecutor/board of commissioners' relationship requires close communication, cooperation and collaboration.

CLIENTS – OTHER ELECTED, APPOINTED OFFICIALS, BOARDS AND COMMISSIONS

- ❑ The prosecuting attorney is the legal advisor and attorney for all county elected and appointed officials.
- ❑ “Be legal adviser to all county . . . officers . . . in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers[]” RCW 36.27.020 (2).
 - ❑ Important to distinguish between the prosecutor's duty to represent versus their duty to advise.
 - ❑ Important to distinguish personal business and official business as acts need to fall within scope of duties to trigger prosecutor's advisory function.
- ❑ Also serves as legal advisor for statutorily specified boards and commissions (e.g. board of equalization under RCW 84.48.038, civil service commission under RCW 41.14.170, etc.)

CONFLICTS OF INTEREST

- ❑ Conflict is normal, especially when one considers the structure of county government which is designed to operate according to a series of checks and balances.
- ❑ True conflicts of interest should be somewhat rare, because the prosecutor is the attorney for the county (see, e.g. *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.
- ❑ Conflicts can develop in a variety of ways and for different reasons. For example, when one client appears before another acting in a quasi-judicial capacity. E.g. assessor appearing before commissioners sitting as board of equalization.

CONFLICTS OF INTEREST

- ❑ Prosecutors can resolve conflicts in different ways:
 - ❑ Obtain informed consent (with concurrent conflicts). RPC 1.7.
 - ❑ Build a firewall within the prosecuting attorneys office and assign separate counsel.
 - ❑ Confer a special deputy prosecuting attorney appointment.
 - ❑ Recommend mediation. (Note that mediation is required by statute as a precondition to litigation between county elected officials, including judges, under RCW 36.46.)
- ❑ Important to note that not all conflicts are of a legal or ethical nature. Can be situational or even interpersonal.
- ❑ Further that a mere disagreement does not a conflict of interest make.

TORTIOUS LIABILITY COVERAGE DETERMINATION

- ❑ A claim for damage is required to be filed with the county 60 days before a lawsuit claiming damages may be filed. RCW 4.96.010. Notifies the county of the allegation(s).
- ❑ Following receipt of the claim, or upon the filing of a lawsuit, a determination will be made regarding whether the acts or omissions complained of are covered (*i.e.* were, or in good faith purported to be, within the scope of official duties). Coverage determinations can be made at the county level and/or insurance provider level (*e.g.* Washington Counties Risk Pool).
- ❑ Counties are required by law to defend and indemnify any past or present officer, employee, or volunteer whose acts or omissions were, or in good faith purported to be, within the scope of their official duties (punitive damages are optional). RCW 4.96.041.

SPECIAL PROCEEDING COVERAGE DETERMINATION

- ❑ Special proceeding lawsuits where no damages are claimed (e.g. mandamus, declaratory judgment actions, writs of prohibition, etc.) will require the prosecuting attorney to exercise discretion in deciding how to proceed.
- ❑ Prosecuting attorney has no duty to defend suits brought against individual county officers. See, e.g. *Bates v. School District 10*, 45 Wash. 498, 88 P. 944 (1907) (duty to advise is not a duty to defend).
- ❑ Prosecuting attorney has no duty to bring lawsuits for other officers. See *Hoppe v. King County*, 95 Wn.2d 332, 622 P.2d 845 (1980). Instead, decision is 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).
- ❑ Language in *Hoppe v. King Co.* and *Fisher v. Clem* leaves unclear whether a board of commissioners can require a prosecutor to bring a nonfrivolous lawsuit.

SPECIAL PROCEEDING COVERAGE DETERMINATION

- ❑ Discretionary considerations include, but are not limited to:
 - ❑ Sufficient nexus to official duties and/or county business
 - ❑ “Gift of Public Funds Doctrine”
 - ❑ Ethical rules
 - ❑ Precedent
 - ❑ Availability of in-house legal expertise
 - ❑ Resource toll
 - ❑ Policy implications

BONDS

- ❑ The requirement that elected county officials post a bond is statutorily required. RCW 36.16.050.
- ❑ 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.
- ❑ Some offices perform roles that may require additional bonds (e.g. Auditor under RCW 65.12.055, Clerk under RCW 36.23.020).
- ❑ 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 [county] so served. RCW 48.28.040.

BONDS

- ❑ The official bonds of all county . . . officers . . . 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.
- ❑ Refusal or neglect to give or renew an official bond can create a vacancy in office. RCW 42.12.010 (6), RCW 42.08.120.
- ❑ Action on official bond may be maintained against official and sureties without first obtaining judgment against principal.

HYPOTHETICALS

- ❑ A county officer is stopped driving their personally owned vehicle and issued a ticket for speeding while on their way to a Seahawks game on a weekend. They decide to challenge the ticket in court. Can the prosecutor advise or represent them?
- ❑ A county officer is stopped and arrested on suspicion of driving under the influence while driving a county owned vehicle on the way to a county sponsored training. Can the prosecutor advise or represent them?
- ❑ A county Auditor is concerned over the legality of an expenditure that has been approved for payment by the board of commissioners. The Auditor asks the prosecutor for legal advice and/or representation. Can the prosecutor advise or represent the Auditor? What about the board of commissioners?

HYPOTHETICALS

- ❑ A county elected official refuses to take the oath of office. A citizen learns of this and demands that the office be declared vacant and that the board of commissioners appoint a replacement. The elected official asks the prosecutor for legal advice and/or representation. Can the prosecutor advise and/or represent the elected official? What about the board of commissioners?

ADDITIONAL RESOURCES

- ❑ Washington Association of County Officials: <http://countyofficials.org>
- ❑ Washington State Association of Counties: <https://www.wsac.org/>
- ❑ National Association of Counties: <https://www.naco.org/>
- ❑ Municipal Research and Services Center (MRSC):
<https://mrsc.org/Home.aspx>
- ❑ Washington Attorney General Opinions:
<https://www.atg.wa.gov/AGOopinions/opinion>
- ❑ Washington Courts : <https://www.courts.wa.gov/>

PROSECUTOR DUTIES

RCW 36.27.020

Duties.

The prosecuting attorney shall:

- (1) Be legal adviser of the legislative authority, giving it his or her written opinion when required by the legislative authority or the chairperson thereof touching any subject which the legislative authority may be called or required to act upon relating to the management of county affairs;
- (2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;
- (3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;
- (4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;
- (5) Attend and appear before and give advice to the grand jury when cases are presented to it for consideration and draw all indictments when required by the grand jury;
- (6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;
- (7) Carefully tax all cost bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by law;
- (8) Receive all cost bills in criminal cases before district judges at the trial of which the prosecuting attorney was not present, before they are lodged with the legislative authority for payment, whereupon the prosecuting attorney may retax the same and the prosecuting attorney must do so if the legislative authority deems any bill exorbitant or improperly taxed;
- (9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge to the special consideration of the proper jury;
- (10) Examine once in each year the official bonds of all county and precinct officers and report to the legislative authority any defect in the bonds of any such officer;
- (11) Seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law;
- (12) Participate in the statewide sexual assault kit tracking system established in RCW 43.43.545 for the purpose of tracking the status of all sexual assault kits connected to criminal investigations and prosecutions within the county. Prosecuting attorneys shall begin full participation in the system according to the implementation schedule established by the Washington state patrol.

PROSECUTOR DISABILITY

RCW 36.27.030

Disability of prosecuting attorney.

When from illness or other cause the prosecuting attorney is temporarily unable to perform his or her duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his or her county, or is unable to perform his or her duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of the prosecuting attorney: PROVIDED, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court shall appoint some suitable person, a duly admitted and practicing attorney-at-law and resident of the state to perform the duties of prosecuting attorney for such county, and he or she shall receive such reasonable compensation for his or her services as shall be fixed and ordered by the court, to be paid by the county for which the services are performed.

OFFICIAL BONDS

RCW 36.16.050

Official bonds.

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. Bonds of elective county officers shall be as follows:

- (1) Assessor: Amount to be fixed and sureties to be approved by proper county legislative authority;
- (2) Auditor: Amount to be fixed at not less than ten thousand dollars and sureties to be approved by the proper county legislative authority;
- (3) Clerk: Amount to be fixed in a penal sum not less than double the amount of money liable to come into his or her hands and sureties to be approved by the judge or a majority of the judges presiding over the court of which he or she is clerk: PROVIDED, That the maximum bond fixed for the clerk shall not exceed in amount that required for the treasurer in the same county;
- (4) Coroner: Amount to be fixed at not less than five thousand dollars with sureties to be approved by the proper county legislative authority;
- (5) Members of the proper county legislative authority: Sureties to be approved by the county clerk and the amounts to be:
 - (a) In each county with a population of one hundred twenty-five thousand or more, twenty-five thousand dollars;
 - (b) In each county with a population of from seventy thousand to less than one hundred twenty-five thousand, twenty-two thousand five hundred dollars;
 - (c) In each county with a population of from forty thousand to less than seventy thousand, twenty thousand dollars;
 - (d) In each county with a population of from eighteen thousand to less than forty thousand, fifteen thousand dollars;
 - (e) In each county with a population of from twelve thousand to less than eighteen thousand, ten thousand dollars;
 - (f) In each county with a population of from eight thousand to less than twelve thousand, seven thousand five hundred dollars;
 - (g) In all other counties, five thousand dollars;
- (6) Prosecuting attorney: In the amount of five thousand dollars with sureties to be approved by the proper county legislative authority;
- (7) Sheriff: Amount to be fixed and bond approved by the proper county legislative authority at not less than five thousand nor more than fifty thousand dollars; surety to be a surety company authorized to do business in this state;
- (8) Treasurer: Sureties to be approved by the proper county legislative authority and the amounts to be fixed by the proper county legislative authority at double the amount liable to come into the treasurer's hands during his or her term, the maximum amount of the bond, however, not to exceed:
 - (a) In each county with a population of two hundred ten thousand or more, two hundred fifty thousand dollars;
 - (b) In each county with a population of from one hundred twenty-five thousand to less than two hundred ten thousand, two hundred thousand dollars;
 - (c) In each county with a population of from eighteen thousand to less than one hundred twenty-five thousand, one hundred fifty thousand dollars;
 - (d) In all other counties, one hundred thousand dollars.

The treasurer's bond shall be conditioned that all moneys received by him or her for the use of the county shall be paid as the proper county legislative authority shall from time to time direct, except where special provision is made by law for the payment of such moneys, by order of any court, or otherwise, and for the faithful discharge of his or her duties.

Bonds for other than elective officials, if deemed necessary by the proper county legislative authority, shall be in such amount and form as such legislative authority shall determine.

In the approval of official bonds, the chair may act for the county legislative authority if it is not in session.