



STATE OF IDAHO

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May 21, 1990

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Issuance of Subpoenas By Prosecuting Attorneys

Dear Mr. Andersen:

I am responding to your letter of March 16, 1990, concerning the issuance of subpoenas by prosecuting attorneys. As I understand the situation, you have issued subpoenas, signed by yourself, in criminal cases. The sheriff's office in Canyon County has informed you that such subpoenas must be sealed by the clerk of the court. Your question is whether you, as prosecuting attorney, have the authority to issue subpoenas on your own in criminal cases.

After an examination of the applicable statutes and rules, our conclusion is that prosecuting attorneys can issue their own subpoenas in criminal cases. The approval, signature, or seal of the judge or clerk of the court is not required.

Express authority for the issuance of subpoenas by a prosecuting attorney in criminal matters is found in two statutes. Idaho Code § 19-3004 provides as follows:

Compelling attendance of witness -- Subpoena and how issued. -- The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by:

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1. A magistrate before whom an information is laid, for witnesses in the state, either on behalf of the people or of the defendant.

2. The prosecuting attorney, for witnesses in the state in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.

3. The prosecuting attorney, for witnesses in the state in support of an indictment or information, to appear before the court in which it is to be tried.

4. The clerk of the court in which an indictment or information is to be tried; and he must, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the state or without the state as provided in section 19-3005, as the defendant may require.

Idaho Code § 31-2604 sets forth the duties of the prosecuting attorney. In pertinent part, it provides:

It is the duty of the prosecuting attorney:

\* \* \*

4. To attend, when requested by any grand jury for the purpose of examining witnesses before them; to draw bills of indictments, informations and accusations; to issue subpoenas and other process requiring the attendance of witnesses.

While the latter statute might arguably be regarded as pertaining only to subpoenaing witnesses to appear before the grand jury, the former statute clearly gives authority to the prosecuting attorney to subpoena witnesses in all criminal proceedings.

The rule that was cited to you in support of a contrary position is Idaho Rule of Civil Procedure 45(a), which states in part, "Every subpoena shall be issued by the clerk of the district court under the seal of the court . . . ." This rule, of course, is applicable only in civil proceedings and has no application in criminal proceedings. Idaho Rule of Civil Procedure 1(a). The relevant provision of the Idaho Criminal Rules is contained in Rule 17(a), which states:

A subpoena shall be issued by the clerk of the court or the judge thereof, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk may issue a subpoena, signed and sealed, but

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otherwise in blank to a party requesting it who shall fill in the blanks before it is served.

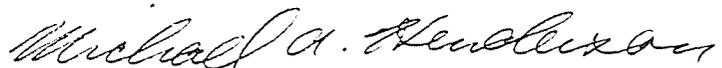
This section does not explicitly provide for the issuance of subpoenas by the prosecuting attorney; neither does it disapprove of or exclude the possibility of such issuance. Rule 17(a) does not state, as does Idaho Rule of Civil Procedure 45(a), that "[e]very subpoena shall be issued by the clerk of the district court under the seal of the court. . . ." (Emphasis added.) If Rule 17(a) and the statutes cited above were actually in conflict as to the procedural question of the issuance of subpoenas, it could be argued that the provisions of the rule would prevail. See, State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985). However, it does not appear that there is any actual conflict. The statutes provide for an alternative method of issuing subpoenas that is not precluded by the Idaho Criminal Rules.

Further, a separate constitutional basis for the statutory provisions assigning the power of issuing subpoenas to the prosecuting attorneys may be found in article 5, section 18, of the Idaho Constitution. That section provides that a prosecuting attorney "shall perform such duties as may be prescribed by law." As noted earlier, Idaho Code § 31-2604 prescribes those duties; listed among them is the issuing of subpoenas.

Finally, it should be noted that a deputy prosecuting attorney would have the same power as a prosecuting attorney to issue subpoenas in criminal proceedings. See, Idaho Code § 31-2008; State v. Jaramillo, 113 Idaho 862, 749 P.2d 1 (Ct. App. 1987), review denied, 116 Idaho 467, 776 P.2d 829 (1988).

I trust that this answers your question. Please contact us if you have any further concerns in this area.

Sincerely,



MICHAEL A. HENDERSON  
Deputy Attorney General  
Criminal Law Division