

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-07

Date Issued: March 2, 1998

Requested by: Wayne P. Jones, Ransom County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether N.D.C.C. § 11-15-07(5) authorizes a sheriff to charge a twenty-five dollar fee for serving an arrest warrant.

II.

Whether a sheriff can charge the district court a fee under N.D.C.C. §§ 11-15-07 and 11-15-13 for serving a search warrant, bench warrant, citation, order to show cause, notice of hearing, or other court order on behalf of the district court.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a sheriff is not authorized to charge a fee for serving an arrest warrant under N.D.C.C. § 11-15-07.

II.

It is my opinion that when a district court issues an order or writ on its own initiative, rather than at the request of a party in a criminal or civil action, the court shall pay any fees charged under N.D.C.C. § 11-15-07 for service of that order or writ.

- ANALYSES -

I.

A sheriff can only charge the fees that are specifically authorized by law. 1955 N.D. Op. Att'y Gen. 75. As amended in 1991, N.D.C.C. § 11-15-07 currently provides:

The sheriff shall charge and collect the following fees on behalf of the county:

1. For serving a summons, writ of attachment, writ of execution, subpoena, notice of motion, or other notice or order of the court, order of replevin, injunctional order, citation, or any other mesne process and making a return thereon, in addition to the actual incurred costs of postage and long distance telephone calls a total of ten dollars for each person served.
2. For making a return of not-found, ten dollars.
3. For taking and filing a bond in claim and delivery or any other undertaking to be furnished and approved by the sheriff, ten dollars.
4. For making a copy of any process, bond, or paper, other than as is herein provided, two dollars per page.
5. For levying or executing any writ, twenty-five dollars.
6. For calling an inquest to appraise any goods and chattels that the sheriff may be required to have appraised, ten dollars, and each appraiser shall receive fifty dollars to be taxed as costs.
7. For advertising a sale by means of a sheriff's notice of sale, in addition to any publishing fees, ten dollars.
8. For making a deed to land sold on execution or pursuant to an order of sale, ten dollars.
9. For issuing a certificate of redemption when property has been redeemed from a sale under execution or upon the foreclosure of a mortgage, ten dollars.
10. For selling real or personal property under foreclosure of any lien or mortgage, fifty dollars.
11. For boarding prisoners, a sum to be determined by the county commissioners, by resolution in advance, which sum must be per meal for meals actually served, and must be not less than two dollars for breakfast, two

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dollars and fifty cents for dinner, and three dollars and fifty cents for supper.

Before this section was rewritten in 1991, a sheriff was authorized to charge twenty-five dollars "[f]or serving a *capias* with commitment of bail and return." 1991 N.D. Sess. Laws ch. 110, § 1. A "*capias* with commitment" is defined as an arrest warrant. The American Heritage Dictionary 236 (2d coll. ed. 1991). Thus, the specific statutory authority for a sheriff to charge a fee for serving an arrest warrant was repealed in 1991.

Both before and after the 1991 amendments, N.D.C.C. § 11-15-07 authorized separate fees for executing a writ or serving an order of the court. Generally, an arrest warrant would be considered a court order. See Black's Law Dictionary 1585 (6th ed. 1990). However, the Legislature is presumed not to perform idle acts. N.D.C.C. § 31-11-05(23); Koch Hydrocarbon Co. v. State, 454 N.W.2d 508 (N.D. 1990). In addition, one witness testifying in support of the legislation indicated the bill was intended to remove the charge for serving an arrest warrant. Hearing on S.2454 Before the Senate Comm. on the Judiciary 52nd N.D. Leg. (January 28, 1991) (Testimony of Glenn Ellingsburg, Cass County Sheriff's Department). Therefore, although language authorizing a fee for service of any writ or order of the court remains in N.D.C.C. § 11-15-07, it is my opinion that as a result of the 1991 repeal of the specific statutory authority to charge a fee for serving an arrest warrant, a sheriff is not authorized to charge a fee for serving an arrest warrant under N.D.C.C. § 11-15-07.

## II.

N.D.C.C. § 11-15-07 requires a sheriff to charge the specified fees. 1969 N.D. Op. Att'y Gen. 258. However, the statute does not indicate who must pay those fees. I understand the practice in this state has been for fees for service of a court order to be paid by the party at whose request the order was issued and served. This practice is consistent with N.D.C.C. § 11-15-13, which indicates by implication that the county is responsible for service fees when the state or the county is a party. N.D.C.C. § 11-15-07 does not distinguish between criminal cases and civil cases, and other provisions in N.D.C.C. ch. 11-15 indicate that a fee for service in a criminal case is authorized. See N.D.C.C. §§ 11-15-13 (fee when the state or county is a party), 11-15-14 (record of fees in criminal cases submitted monthly). Thus, the fees authorized in N.D.C.C. § 11-15-07 will

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generally be paid by the plaintiff or defendant in civil actions, and by the defendant in non-indigent criminal cases.<sup>1</sup>

The question presented is whether, when a sheriff is serving papers for a district court, the court must pay the fees charged by the sheriff under N.D.C.C. § 11-15-07. As discussed above, service fees for a court order will generally be paid by the party requesting that the order be issued. An argument could be made that serving papers on behalf of the district court is a core function of the sheriff as a law enforcement officer, distinct from service on behalf of a party in a criminal or civil action, and must be done without charge. However, the statutory duty of a sheriff in N.D.C.C. § 11-15-03(8) to serve all legal process and notices does not make that distinction. Therefore, it is my opinion that when a district court issues an order or writ on its own initiative, rather than at the request of a party in a criminal or civil action, the court shall pay any fees charged under N.D.C.C. § 11-15-07 for service of that order or writ.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Heidi Heitkamp  
ATTORNEY GENERAL

Assisted by: James C. Fleming  
Assistant Attorney General

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<sup>1</sup> Fees under N.D.C.C. § 11-15-07 are collected by the sheriff on behalf of the county, and are county funds which must be turned over to the county. Letter from Attorney General Nicholas Spaeth to Daniel Diemart (February 14, 1990). Therefore, because the law does not require idle acts, a sheriff need not charge the county as plaintiff or defendant in a civil action, or as prosecutor in a criminal action, unless required by the county for budget purposes.