

N.D.A.G. Letter to Renner (March 5, 1992)

March 5, 1992

Mr. Jerry Renner
Kidder County State's Attorney
P.O. Box 229
Steele, ND 58482

Dear Mr. Renner:

Thank you for your February 22, 1992, letter in which you asked whether a state's attorney is required by law to bring and file misdemeanor criminal complaints in all situations when that state's attorney is requested to do so.

You have enclosed with your letter a memorandum prepared by County Judge Donavin Grenz in which he concluded that the state's attorney and law enforcement officials have an affirmative duty to cause the filing of a criminal complaint whenever another person requests that the complaint be filed. Judge Grenz further stated that the complainant could appear before the county court to make a complaint and the judge would then be required to report the state's attorney and law enforcement officials to the appropriate disciplinary boards upon refusal to submit the complaint. Judge Grenz also states that a refusal to authorize a complaint could "easily lead to criminal and civil charges being filed against" the state's attorney or law enforcement officers and "imposition of other sanctions such as dismissal, removal from office or loss of license to practice law."

After reviewing the applicable law and North Dakota Supreme Court cases, it is my opinion that a state's attorney is vested with considerable discretion in determining whether criminal charges will be brought. It is my further opinion that the state's attorney has no absolute duty to initiate the filing of a complaint or the prosecution of individuals for all alleged criminal violations regardless of whether an adequate basis exists for initiating a prosecution upon those allegations of criminal conduct. The state's attorney does, however, have a responsibility to review allegations of misconduct to determine whether those allegations have a sufficient basis to warrant further investigation or prosecution.

Other than the Attorney General and the Attorney General's assistants, the state's attorney is the only public prosecutor when the state is a party to the action. State v. Stepp, 178 N.W. 951 (N.D. 1920); N.D.C.C. § 11-16-01.

N.D.C.C. § 11-16-01(1) and (2) provide:

11-16-01. Duties of the state's attorney. The state's attorney is the public prosecutor, and shall:

1. Attend the district court and conduct on behalf of the state all prosecutions for public offenses.
2. Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed, and for that purpose, when he is not engaged in criminal proceedings in the district court, he shall attend upon the magistrates in cases of arrests when required by them except in cases of assault and battery and petit larceny.

Other North Dakota statutory provisions provide for specific instances when other persons may act in the place of a state's attorney if the statutory conditions are met. N.D.C.C. § 11-16-02 authorizes a state's attorney to appoint assistant state's attorneys who shall have the same powers as, and shall perform any and all duties required of, the state's attorney. N.D.C.C. § 11-16-06 permits a judge of the district court to request the Attorney General, an assistant attorney general to take charge of the prosecution, or appoint another attorney to act as state's attorney in cases in which the county has no state's attorney, the state's attorney is absent or unable to attend to his duties, the state's attorney has refused or neglected to perform certain duties prescribed by N.D.C.C. § 11-16-01, or the state's attorney has not instituted a civil suit to which the state or county is a party after the matter has been properly brought to the attention of the state's attorney. N.D.C.C. § 29-21-36 also authorizes a court to appoint an attorney to perform the duties of a state's attorney at a trial if the state's attorney fails or is unable to attend the trial.

N.D.C.C. §§ 11-16-07 and 11-16-08 authorize a district judge or county commission respectively to appoint special counsel to assist, but not supplant, a state's attorney in cases of public importance.

Only those persons who have been properly appointed or vested with the authority of a state's attorney by court order can assume the role as a public prosecutor.

A state's attorney possesses considerable discretion in the decision to institute criminal charges. North Dakota Supreme Court decisions have recognized the wide discretionary latitude of a state's attorney in making charging decisions.

In Hennebry v. Hoy, 343 N.W.2d 87 (N.D. 1983), the court rejected Hennebry's claim that the state's attorney had a duty to prosecute a police officer upon Hennebry's complaint. The court stated, at 90:

Hennebry has misconceived the duties and responsibilities of a State's Attorney. It is clear from past decisions of this Court that a State's Attorney's "duty" to initiate a prosecution does not arise upon the mere submission of a sworn complaint by a person who feels personally aggrieved by an act of another, but, rather, only upon the State's Attorney's decision, after due inquiry and consideration, that a criminal charge is proper under the

circumstances. In arriving at the decision whether or not to initiate a criminal prosecution, the State's Attorney must consider the situation not only from the eyes of a complainant, but in view of the requirement of probable cause and the reasonable probability of obtaining a conviction by a jury of citizens from the community.

The court found that State's Attorney Hoy performed his duty to make inquiry into the facts and circumstances of the complaint and had no "duty" to initiate a prosecution when he decided, in the exercise of his discretion and professional judgment, that a criminal prosecution would be inappropriate.

Hennebry v. Hoy was reaffirmed in Keidel v. Mehrer, 464 N.W.2d 815 (N.D. 1991). In this case, Keidel sought a writ of mandamus directing the Stark County state's attorney to prosecute one of Keidel's neighbors. In affirming the dismissal of the writ request, the court reviewed prior North Dakota cases and stated, at 816:

This Court has long recognized the necessity for the exercise of discretion by the State's Attorney in the charging process.

Citing Hennebry v. Hoy, the court concluded that the Stark County state's attorney did make inquiry into the allegations and gave the case full consideration in reaching a decision not to prosecute. The court held that the exercise of the state's attorney's prosecutorial discretion could not be controlled by mandamus.

The fact that the state's attorney is the public prosecutor in cases in which the state of North Dakota is a party and that our Supreme Court has recognized that the prosecutor is vested with considerable discretion in the decision to initiate criminal charges makes it clear that a state's attorney has no absolute duty or obligation to initiate criminal charges in all cases in which a complaint is made to the state's attorney or law enforcement officer. The validity of those complaints and the probability of success of the prosecution may be considered. In exercising this discretion, additional facts which a prosecutor may take into consideration are whether the complaints are being initiated for revenge or other ulterior motives other than to bring the offender to justice, the relationship between the complainant and the proposed defendant, and the credibility of the complainant and potential witnesses in any court proceeding.

You have also inquired as to whether a state's attorney and law enforcement officials may be criminally liable and subject to disciplinary action for failure to bring and file all requested complaints.

It is difficult to provide a specific answer to this question which will be applicable to all cases. A refusal to prosecute allegations of criminal conduct in some instances may impose liability upon law enforcement officials or state's attorneys if something more is present than just the bare refusal to prosecute. If complaints are not pursued due to personal, financial, or other reasons unrelated to the merits of the case, it is possible that

proceedings could be initiated against the specific state's attorney or law enforcement officials for legal or disciplinary action. However, refusal to prosecute after having reviewed a matter would not ordinarily impose criminal liability upon a prosecutor. This conclusion is evidenced by the Supreme Court's holdings and statements in both Hennebry v. Hoy and Keidel v. Mehrer in which the Court concluded that neither state's attorney violated any duty to prosecute and could not be compelled to initiate a criminal complaint after the exercise of that state's attorney's discretion.

If a state's attorney prosecuted every allegation of misconduct regardless of its validity, that state's attorney could very well face disciplinary action not for refusing to prosecute an individual but for initiating that prosecution. North Dakota Rule of Professional Responsibility 3.8 imposes special responsibilities upon a prosecutor. The prosecutor in a criminal case cannot prosecute a charge that the prosecutor knows is not supported by probable cause. The comment to rule 3.8 states, in part:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

In addition, North Dakota Rule of Professional Conduct 3.1 prohibits a lawyer from bringing a proceeding, or asserting or controverting an issue in that proceeding, unless there is a basis for doing so that is not frivolous. The failure of the state's attorney to exercise the discretion vested upon him or her by law could result in greater problems under the Rules of Professional Responsibility than if the state's attorney had exercised discretion and not initiated a criminal prosecution.

It has been recognized that a state's attorney is engaged in a quasi-judicial function in making a decision to charge. Kittler v. Kelsch, 216 N.W. 898 (N.D. 1927). In addition, the state's attorney, in making the charging decision, is engaged in discretionary acts which may provide protection from civil liability. As I have stated, I cannot provide an absolute assurance that, in all cases, state's attorneys or law enforcement officers will be able to avoid liability for decisions they make. The extent of the liability of each official will be governed by the law applicable to the action brought against the official and the specific conduct of that official.

You may wish to review N.D.C.C. ch. 32-12.1, specifically N.D.C.C. § 32-12.1-04, relating to liability of political subdivision employees for acts performed in the employee's official capacity. This North Dakota Century Code chapter generally recognizes statutory defenses to liability for discretionary or quasi-judicial acts. In addition, court decisions may also recognize, in specific types of actions, qualified or absolute immunity defenses to actions brought against public prosecutors. (See, Imbler v. Pachtman, 424 U.S. 409 (1976) pertaining to absolute immunity for a prosecutor within the judicial phase of the criminal process). Whether a prosecutor or law enforcement official will be entitled to

statutory or other recognized immunities will be dependent upon the facts and circumstances of each case and the actions and motivations of the public official.

I hope that I have adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

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