

## **N.D.A.G. Letter to Isakson (Sep. 11, 1991)**

September 11, 1991

Mr. Charles R. Isakson  
Mercer County State's Attorney  
PO Box 39  
Stanton, ND 58571

RE: N.D.C.C. § 40-18-01(4)

Dear Mr. Isakson:

Thank you for your August 21, 1991, letter in which you have requested my opinion as to the application of N.D.C.C. § 40-18-01(4) to the duties of state's attorneys and city attorneys and to the distribution of fees, fines, costs, forfeitures, or other monetary consideration imposed as a result of a prosecution for a violation of N.D.C.C. § 39-08-01 or an equivalent ordinance.

N.D.C.C. § 40-18-01(4) was adopted by the 1991 Legislative Assembly. That section provides:

4. Notwithstanding any other provision of law, a municipal court in which the judge is not a person licensed to practice law in this state has no jurisdiction to hear, try, and determine an offense that would be a violation of section 39-08-01 or equivalent ordinance.

N.D.C.C. § 40-05-06 generally limits ordinance penalties to those equivalent to a class B misdemeanor. N.D.C.C. § 39-08-01(2) classifies a third or subsequent N.D.C.C. § 39-08-01 offense as a class A misdemeanor. Regardless of whether the municipal judge is licensed to practice law, this proceeding must be dismissed and refiled in the county court. Thus, N.D.C.C. § 40-18-01(4) will have no impact upon a municipal court proceeding involving a defendant who is being charged with a third or subsequent N.D.C.C. § 39-08-01 offense. The third or subsequent offense would be refiled in the county court as a class A misdemeanor and prosecuted by the state's attorney under state law and not by the city attorney pursuant to a municipal ordinance.

However, N.D.C.C. § 40-18-01(4) will have an impact upon those N.D.C.C. § 39-08-01 prosecutions which involve first or second offenses of an equivalent ordinance to that section. First or second N.D.C.C. § 39-08-01 offenses continue to be classified as class B misdemeanors. N.D.C.C. § 39-08-01(2). Pursuant to N.D.C.C. § 40-18-01(4), a municipal judge not licensed to practice law in the state of North Dakota has no jurisdiction to hear, try, or determine these first or second offenses.

These offenses, however, may be charged in the county court. A county court has jurisdiction concurrent with a municipal court over municipal ordinance violations.

N.D.C.C. § 27-07.1-17. When a municipal judge is not licensed to practice law in this state, a municipal ordinance violation for an offense equivalent to N.D.C.C. § 39-08-01 may be prosecuted in the county court by the city attorney on behalf of the city. However, this offense could also be charged under N.D.C.C. § 39-08-01 and prosecuted by the state's attorney.

In addition to DUI offenses, it is common that many acts of criminal conduct are prohibited by both state law and municipal ordinance. Since first and second DUI offenses may be prohibited both under state law and municipal ordinance, prosecution of these offenses may be determined by agreement between the prosecuting authorities. In those municipalities which do not have a municipal judge licensed to practice law, it may be imperative that an agreement be reached between the city and county prosecutors. The agreement should address whether the state's attorney will assume first and second offense DUI prosecutions occurring within a municipality under state law or whether the city attorney will prosecute those offenses in county court in enforcement of the municipal ordinances.

You have also inquired as to the manner in which any fees, fines, costs, forfeitures, or other monetary consideration obtained as a result of a DUI prosecution are to be disbursed. You make reference to the provisions of N.D.C.C. § 40-18-15.1 which sets forth authority of the city and county to agree on the division of moneys collected from city DUI cases transferred to the county court.

N.D.C.C. § 40-18-15.1 applies only to those proceedings in which a municipal court prosecution has been transferred to the county court as the result of the failure of a defendant to waive in writing the defendant's right to a jury trial within 28 days after arraignment in the municipal court. Since N.D.C.C. § 40-18-01(4) declares that a municipal judge not licensed to practice law has no jurisdiction to hear, try, or determine DUI offenses, there is no municipal court prosecution which can be transferred to the county court to invoke the provisions of N.D.C.C. § 40-18-15.1.

The legislative history to N.D.C.C. § 40-18-01(4) does not disclose any discussion or determination by the Legislative Assembly of an intent to extend N.D.C.C. § 40-18-15.1 to cases initiated in county court because of the lack of jurisdiction of a municipal judge to hear such cases pursuant to N.D.C.C. § 40-18-01(4).

Any distribution of moneys collected as a result of a successful DUI prosecution will be dependent upon whether such proceeding is initiated in county court under state law or municipal ordinance. If the state's attorney initiates a prosecution under N.D.C.C. § 39-08-01, any moneys collected as a result of that prosecution will be disbursed or deposited in the same manner as in all other county court prosecutions based upon state law. However, a different result will occur if the prosecution is initiated by the city attorney in county court pursuant to the applicable municipal ordinance.

N.D.C.C. § 40-11-13 requires that all fines, penalties, and forfeitures collected for offenses against ordinances of a city be paid into the city's treasury. N.D.C.C. § 40-11-13 provides:

Fines and forfeitures for violation of ordinances paid into treasury. All fines, penalties, and forfeitures collected for offenses against the ordinances of a city, including those fines, penalties, and forfeitures collected as a result of a judgment of a county court rendered pursuant to section 40-18-19, shall be paid into the city's treasury at such time and in such manner as may be prescribed by ordinance.

It should be noted that this section includes fines, penalties, and forfeitures collected as a result of a judgment pursuant to N.D.C.C. § 40-18-19 relating to appeals from a decision of a municipal judge as a part of the funds to be deposited in the city treasury. I do not believe that the term "including" is a limitation upon the receipt of moneys collected for violations of ordinances of a city prosecuted in the county courts when the moneys were collected not as a result of a transfer under N.D.C.C. § 40-18-15.1 or an appeal under N.D.C.C. § 40-18-19. Moneys collected as a result of a municipal ordinance prosecution initiated in county court due to the absence of a jurisdiction of a municipal judge to hear the case are to be paid to the city's treasury in accordance with the ordinances of that city.

I realize that some conflict may arise between the city and county authorities concerning the enforcement of DUI laws within a city when the city has a municipal judge not licensed to practice law in this state. As I have stated previously, whether a prosecution for a first or second DUI offense will be initiated in a county court by a city attorney under municipal ordinance or by the state's attorney under state law may require some form of understanding between the prosecuting authorities. Although N.D.C.C. § 40-18-15.1, pertaining to the division of moneys collected as a result of a case transfer from municipal court to county court, will not apply to the initiation of prosecution because of lack of municipal court jurisdiction, it is possible that a corollary agreement could be entered into between the governing bodies of the city and county pursuant to N.D.C.C. § 54-40-08(1) which would resolve any potential disputes. This section authorizes the municipality and county to engage in agreements for joint or cooperative action on a cost-sharing basis to carry on functions or duties which may be authorized by law or assigned to one or both of the government units.

Regardless of the manner in which these issues are resolved locally, I do believe it is imperative that an understanding or agreement be reached to ensure due enforcement of violations of N.D.C.C. § 39-08-01 or an equivalent municipal ordinance.

I hope that I have adequately responded to your inquiries. Should you have further questions or comments concerning my response, please do not hesitate to contact this office at your convenience.

Sincerely,

Nicholas J. Spaeth

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