

**OPINION  
72-78**

February 23, 1972        (OPINION)

Mr. Robert Eckert  
State's Attorney of Richland County and  
President of State's Attorney's Association

RE: Coroners - State's Attorney's Inquest - Open to Public

This is in response to your request for an opinion whether or not a state's attorney's inquiry under section 11-19A-09 of the North Dakota Century Code is or is not a public hearing.

This question involves the confrontation between two contentious theories - the one is the so-called right to know and the other is the protection of the individual. Both positions are well meaning and highly respected even though occasionally one of the other will resort to circuitous argument in the support of its position and at times appear to be inconsistent. On the one side, it may be validly argued that by having such inquiries open to the public, the individual will be safeguarded from false accusations or from the abhorred "star chamber atmosphere." With equal validity it may be argued that making everything public, the individual may be irreparably damaged and in some instances may not be in a position to have a fair trial in the community if he should be charged with having committed homicide. We would also recognize that in any particular instance one would serve a better purpose than the other.

However, we do not believe it is necessary for us to evaluate the two positions, but are basically concerned with the statutory provisions relating to inquests by the state's attorney under chapter 11-19A.

The state's Attorney's inquest is actually apart of the coroner's proceedings. The inquest authorized relates only to deaths which have been caused by a criminal act. The provisions of section 11-19A-09 provide as follows:

11-19A-09. STATE'S ATTORNEY MAY SUBPOENA WITNESSES. If the state's attorney of the county shall be notified by any officer or other persons, or be cognizant himself of any violation or criminal act causing such death, or in any manner connected therewith he may inquire into the facts of such violation or criminal act, and for such purpose he shall issue his subpoena for any person who he has reason to believe has any information or knowledge of such violation, to appear before him at a time and place in such subpoena, then and there to testify concerning any such violation. The subpoena shall be directed to the sheriff or any constable of the county and shall be served and returned to the state's attorney in the same manner as subpoenas are served and returned in criminal cases. Each witness shall be sworn by the state's attorney to testify under oath, and to make true answer to all questions which may be propounded to him by such state's attorney touching any such violation or criminal act. The testimony of every witness shall be reduced to writing, and shall become a part of the

coroner's files in such case. For all purposes in this section the state's attorney may:

1. Administer oaths or affirmations to all witnesses;
2. Apply to the district court for the punishment of any witness for contempt for or on account of any disobedience of a subpoena, a refusal to be sworn, or to answer as a witness, or a refusal to sign his testimony; and
3. Compel the attendance of witnesses by attachment in the manner and with the effect provided in the title Judicial Branch of Government. Any witness compelled to testify under the provisions of this section shall be entitled to counsel and all other constitutional rights."

It should be noted that the testimony of every witness shall be reduced to writing and shall become a part of the coroner's files in such case. The last sentence in section 11-19A-08 provides that "All records of said office of coroner shall become and remain the property of the county, and shall be considered public record."

The foregoing provisions clearly indicate that the records of the coroner are considered public records.

Section 44-04-18 provides as follows:

44-04-19. OPEN GOVERNMENTAL MEETINGS. Except as otherwise specifically provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public."

The coroner's office is a governmental body.

In the absence of any further description of a state's attorney's inquest, or statutory or constitutional provisions relating thereto, and because the inquest is authorized under chapter 11-19A, concerning coroner's duties and functions, and in most instances the inquest is held in conjunction with the coroner's inquest, we are inclined to apply the principles of law pertaining to coroner's inquests to cover the state's attorney's inquest.

A coroner's inquest has been described as being quasi-judicial in nature or an investigatory process or proceedings, but in no instance has it been classified as a criminal proceedings on the merits of the case itself. We might rephrase the purpose of the inquest as being a process to determine whether or not death was caused by unlawful means and if so, who caused the death.

While a coroner's inquest is not considered a court, it has been described as being quasi-judicial, 18, C.J.S. 293. In this respect the Sixth Amendment to the United States Constitution provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, \* \* \* "

Section 13, which provides as follows:

In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; \* \*  
\* "

The North Dakota Supreme Court has had under consideration sections 44-04-18 and 44-04-19 in the cases of State ex rel. Williston Herald, Incorporated v. O'Connell, 151 N.W.2d. 758, and Grand Forks Herald v. Lyons, 101 N.W.2d. 543. The discussion in either of these cases does not indicate that a state's attorney's inquest or that a coroner's inquest are an exception to the statutory provisions. The court there recognized that the statutory provisions apply unless other statutory provisions create an exception. In examining the provisions of chapter 11-19A and its forerunner, chapter 11-19, we find no statutory provisions which would exempt the coroner's inquest or the state's attorney's inquest from the provisions of section 44-04-18 and 44-04-19.

We would also note that the North Dakota statutes pertaining to either a coroner's inquest or to a state's attorney's inquest do not provide that same shall be held in secret or that the person conducting the inquest may exclude all those not required to attend.

The most recent expression on the question of whether or not a coroner's inquest should be open is the Massachusetts case of Kennedy v. Justice of the District Court of Dukes County, 252 N.E.2d. 201. The statutes of the state of Massachusetts permitted exclusion of all those not required to attend. The jury "may order that a secret inquest be taken." The justice construed this provision to mean that he had discretion to exclude all persons other than those required to be present and during the examination of witness might include all the other witnesses and direct that they be kept separate. North Dakota does not have such provision.

We might further observe that in instances where the Legislature intended the hearing or proceedings to be secret, it has unmistakably so provided by appropriate language. Both under the old grand jury provision and under the new grand jury provision, 29-10.1-28, the Legislature has prescribed who may be present at the session and in effect has provided that only those who are required to be present may be authorized to appear while the Grand Jury is in session.

Also, under the Uniform Juvenile Court Act, section 27-20-51, the records and files of the proceedings are not made public and may be inspected only by certain persons having a legitimate interest in the subject matter. We have a similar provision pertaining to juvenile courts, section 27-16-41. The net effect of this is that juvenile proceedings are not open to the public and that the officer conducting the proceedings is required to assure that certain information is not made public. Records of probate courts are open only to those who have business therein (27-07-36).

The disclosure of the name of the accused before arrest is made is

prohibited under section 11-19-12. The testimony at a preliminary hearing is not open to the public inspection pursuant to the provisions of section 29-07-17. The disclosure of depositions taken on a criminal complaint or resulting from an examination is prohibited by section 12-12-12. The disclosure of the grand jury presentment or return including deposition before the arrest of the defendant is prohibited pursuant to section 12-12-13. Likewise, the disclosure of any evidence adduced before the grand jury or how a member of the grand jury voted is prohibited by section 12-12-11.

The foregoing are examples of the laws enacted by the legislature to declare certain matters and proceedings confidential and not open to general public inspection.

18 Am. Jur.2d. page 524 states as follows:

"It has been held that an inquest within the spirit of a constitutional provision that 'all courts shall be public' and that a coroner is not authorized to refuse the public the right of attending."

The same authority continues by saying "under some statutes, however, the coroner, if he deems proper, may hold the inquest in private." See also State v. Griffin, 82 S.E. 254 (S. C. 1914).

A similar statement is found in 18 Corpus Juris Secundum, page 298, which states that "the inquest should be public and every citizen permitted freely to attend." The only exception to this general rule is the Kennedy case cited earlier where the Court set forth general principles which should apply to all inquests and included among the general provisions that all inquests shall be closed to the public and to all news media. It enumerated several other rules pertaining to the conduct of an inquest.

In the Kennedy case, the court pursuant to its powers of general superintendence of the administration of all courts of inferior jurisdiction issued or promulgated certain principles to be followed in the inquests. The court in this respect exercised its extensive powers. Under the statute the court had the authority to issue "such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration."

We, of course, do not have such authority. Such authority, if it exists, with reference to state's attorney's inquests, rests either with the Supreme Court under section 86 of the North Dakota constitution or with the legislature.

We are aware that numerous meetings have been conducted pertaining to the fair trial and free press proposition throughout the state and that certain guidelines have been adopted to govern actions of the prosecutor and the press relating to adult criminal proceedings. We believe these guidelines are accepted and will be beneficial and in most instances will be followed.

Even though proceedings are closed, there is no effective way in

which the lips of a witness may be properly sealed. Periodically, we hear and read about testimony and evidence which was presented in a closed hearing. The information obviously is obtained from witnesses who attend and give testimony at such proceeding. This is mentioned merely to illustrate the difficulty of actually sealing the lips of a witness unless there is some specific law governing the topic coupled with penalties for violating the law. We, of course, are not advocating that such laws be enacted.

The famous Kennedy inquest was surrounded with unusual circumstances which prompted the court to act. Whether the course of action taken by the court is wise, time only will tell. Rumors resulting from closed hearings can often be more devastating than the actual testimony given.

As indicated earlier, we do not have the authority to promulgate any orders, rules or regulations to govern state's attorney's inquests. Even if we had this authority, it is doubtful that we could anticipate what would be fair in every instance and devise a rule which would meet each situation as it develops.

We are persuaded under the present situation that we must concern ourselves only with the laws that are in existence now and to interpret and construe the statutory provisions which may pertain to the subject matter.

After having examined the statutes which we believe are pertinent and specifically those dealing directly with the state's attorney's inquest, and the coroner's proceedings as set out in chapter 11-19A, and in the absence of any statute or provision authorizing the closing of such proceedings, we are inclined to accept the proposition that such hearings are open to the public specifically because of the provisions of sections 44-04-18 and 44-04-19.

It is therefore our opinion that state's attorney's inquests under the existing statutes and in the absence of any regulation promulgated by the Supreme Court are open to the public.

HELGI JOHANNESON

Attorney General