N.D.A.G. Letter to Schnell (July 8, 1985)

July 8, 1985

Mr. Richard L. Schnell
Morton County State's Attorney
210 2nd Avenue N.W.
P.O. Box 190
Mandan, North Dakota 58554

Dear Mr. Schnell:

Thank you for your letter of May 9, 1985, inquiring as to the obligation of a county to provide legal representation to county officials. Your letter also asks us to determine whether a Morton County judge was acting in his official capacity in a recent dispute with the Morton County Board of County Commissioners.

As to your first question concerning the obligation of a county to provide legal representation to county officials being sued for official acts, we should respond from two perspectives: the respective county's state's attorney and outside counsel.

With respect to the office of state's attorney, it is clear that in most circumstances there is no obligation to represent, on behalf of the county, county officials who are sued. We have enclosed copies of opinions dated July 6, 1962, and May 5, 1965. (1962-1964 N.D. Op. Att'y Gen. 252; 1964-1966 N.D. Op. Att'y Gen. 480.) The conclusion from both of these opinions is that the county, through the office of state's attorney, is not required to defend a county officer in a civil action except where statutes exist requiring such representation.

Nowhere in chapter 11-16, which prescribes the duties and powers of the state's attorney, do we find any duty imposed upon him to defend a county official in a civil action brought against said official. Furthermore, there is no statement in the chapter from which the implication could be drawn that there is such an existing duty. The responsibilities of the state's attorney appear to be pretty well spelled out in section 11-16-01 of the North Dakota Century Code and they do not include any reference to a defense of county officers. 1962-1964 N.D. Op. Att'y Gen. 252, 253.

The only exceptions to this general rule is with respect to law enforcement officers who find themselves defendants in actions brought to recover damages arising out of any acts of such officers in the performance of their official duties (N.D.C.C. §44-08-11) and county employees who are the subject of civil actions alleging negligence, wrongful acts, or omissions occurring within the scope of the employee's employment. (N.D.C.C. §32-12.1-04.)

The question remains whether the county must provide legal representation to county officers through the employment of outside counsel. There are no statutes which require a

county to provide such representation through outside counsel. One statute (N.D.C.C. §11-16-08) does allow a county to employ special counsel should it so desire. However, this statute is permissive rather than mandatory.

In summary, a county is not obligated, through the office of state's attorney or otherwise, to provide legal representation to county officials who find themselves the subject of civil litigation. The only exceptions to this rule are those statutory requirements as to legal representation stated in N.D.C.C. §§ 44-08-11 and 32-12.1-04. Of course, the county may provide legal representation to such county officials, either through the state's attorney or otherwise, if it so desires.

Your second question asks us to determine whether the actions of a Morton County judge in a dispute with the Board of County Commissioners were performed in the judge's official capacity. Such is a question of fact to which we are not able to respond. Instead, we may only advise and give opinions on questions of law.

However, it is our informal response that the fact the court took action pursuant to N.D.C.C. §11-11-12, concerning the operation and administration of the court, strongly suggests that such actions were indeed taken in the judge's official capacity.

It appears that the basic question you wish to discuss is the obligation of a county to pay for counsel retained by a judge as part of this particular dispute. This inquiry appears to have two prongs: Whether the court has the inherent authority to appoint such counsel and whether the court has the inherent authority to require the county to pay for the services rendered by such counsel. Although the specific question was not addressed in your letter, we believe that it is indeed an issue which merits this discussion.

Upon a review of cases from several jurisdictions, the general rule appears to be that courts do indeed have the inherent power and authority to incur and to order to be paid those expenses which are reasonably necessary for the holding of court and for the administration of the duties of courts of justice. Annot., 59 A.L.R.3d 569 (1974). The rationale most commonly employed in such cases is that courts by necessity must be given inherent authority to compel the payment of those expenses which it necessarily incurs in the discharge of its duties lest the courts be subject to the political and legislative whims of the legislative body in question. Id.

This general rule has been applied to cases involving the appointment of private counsel to represent courts and the attempts by the courts to have the fees of such counsel paid for by the respective political subdivision. In Alhambra Mun. Court Dist. v. Bloodgood, 186 Cal. Rptr. 807 (Cal. Ct. App. 1982), a California court of appeal upheld a lower court's attempt to require a county to pay for services rendered by a private attorney upon appointment by the lower court as its advocate in ongoing budgetary matters. This case is especially relevant to the matter described in your letter given the existence of a California statute very similar to N.D.C.C. §11-11-12. The California statute, like the North Dakota equivalent, allows the court to order a sheriff to provide the courts with materials required for the transaction of business and states that the expenses incurred by the sheriff shall

be a charge upon the county. The California appellate court held such a statute to be a non-exclusive remedy which does not prevent a court from exercising it's inherent authority to take action needed to preserve its administration should it so desire.

There is a case very close on point which does reach an opposite conclusion. In State v. Becker, 174 S.W.2d 181 (Mo. 1943), the court faced a situation where a lower court appointed counsel to represent it in a contempt proceeding. Furthermore, the lower court sought to require the payment of the fees of the privately appointed counsel to be paid for by the county.

The Missouri Supreme Court concluded that the lower court possessed the inherent power and authority to incur such an expense in the administration of its duties. However, the court stopped short of requiring payment of such fees by the county and concluded that such appointments were honorary and were matters deemed to be part of one's obligation to the court as a lawyer and counselor of law.

There may be no question but that the relators justly deserve to be compensated for their valuable services, but they are officers of the court appointing them and if the court's dignity and authority has been assaulted they were bound to accept the appointment, the honor and the challenge of defending the court and that without pay * * *. Id. at 184.

However, the theory that attorneys who are called upon to represent a court are to do so without compensation has not been repeated by other courts from various jurisdictions. Indeed, a decision of the Missouri Supreme Court would appear to ignore such language of State v. Becker, supra, and reach a conclusion similar to the general rule already described. State v. St. Louis County, 421 S.W.2d 249 (Mo. 1967).

Sincerely,

Nicholas J. Spaeth

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Enclosures