

**LETTER OPINION**  
**93-L-349**

December 10, 1993

F.C. Rohrich  
Emmons County State's Attorney  
P.O. Box 657  
Linton, ND 58552

Dear Mr. Rohrich:

Thank you for your November 16, 1993, letter asking whether N.D.R. Civ. Proc. 43 permits the state to call a defendant for cross-examination in driver's license administrative hearings.

Driver's license administrative hearings are conducted pursuant to N.D.C.C. ch. 39-20. The North Dakota Supreme Court has repeatedly explained that proceedings pursuant to chapter 39-20 are civil in nature. Williams v. North Dakota State Highway Comm'r, 417 N.W.2d 359, 360 (N.D. 1987); Pladson v. Hjellev, 368 N.W.2d 508, 511 (N.D. 1985). Accordingly, the North Dakota Rules of Civil Procedure apply.

N.D.R. Civ. Proc. 43 provides that "[a] party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects." N.D.R. Civ. P. 43(b). This rule liberalizes the old practice of calling an adverse party for cross-examination. Lindsay v. Teamsters Union, Local No. 74, 97 N.W.2d 686, 694 (N.D. 1959). "When the adverse party is called, the party calling him may ask him leading questions and may contradict him and impeach him on material matters as fully as if the witness had originally been called by his own counsel." Id.; see also Endicott Johnson Corp. v. Golde, 190 N.W.2d 752, 754 (N.D. 1971). Because driver's license administrative hearings are civil proceedings, Rule 43(b) authorizes the state to call the defendant for cross-examination.

The fact that the state can call the defendant as an adverse witness and compel him to testify does not necessarily mean the defendant will be required to

answer all questions. The Fifth Amendment privilege against compulsory self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 444-45, reh'g denied, 408 U.S. 931 (1972). Although the State may examine the defendant, the defendant's constitutional right to refuse to testify as to matters which may tend to render him liable to prosecution in a criminal action is recognized and preserved. As correctly explained by the Supreme Court of Oklahoma:

A proceeding for the revocation of a drivers license is a civil, not a criminal proceeding such as would entitle licensee to refuse to testify. However, in instances where criminal charges are pending, or could be filed, the licensee, may invoke the constitutional privilege against self-incrimination and decline to answer those questions which tend to incriminate him.

Oklahoma Dep't of Public Safety v. Robinson, 512 P.2d 128, 132 (Okla. 1973).

With regard to a witness' Fifth Amendment right against self-incrimination, it is important to note that this right is not absolute. State v. Gruchalla, 467 N.W.2d 451, 454 (N.D. 1991). "The prohibition against compelling the testimony of a witness in any setting is predicated upon there being a real danger that the testimony might be used against the witness in later criminal proceedings." Id. (quoting Andover Data Services v. Statistical Tabulating, 876 F.2d 1080, 1082 (2d Cir. 1989)). It does not allow a blanket refusal to answer any questions in a civil matter. Id. at 455. The privilege must be asserted with respect to particular questions, and in each instance it is for the court to determine the propriety of the refusal to testify. American State Bank of Dickinson v. Stoltz, 345 N.W.2d 365, 369 (N.D. 1984). Thus, only when a witness is asked a question which requires an incriminating answer, may the witness assert the privilege against self incrimination. Id. "The burden is upon the party claiming the privilege to specifically establish that a real and appreciable danger of incrimination exists

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with respect to each question." Id.

In conclusion, N.D.R. Civ. P. 43(b) authorizes the state to call and examine a defendant in a driver's license administrative hearing, provided that in such examination the constitutional right of the defendant to refuse to testify as to matters which may tend to render him liable to prosecution in a criminal action is recognized and preserved.

Sincerely,

Heidi Heitkamp  
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