

**N.D.A.G. Letter to Slorby (July 21, 1988)**

July 21, 1988

Mr. Tom P. Slorby  
Ward County State's Attorney  
Ward County Courthouse  
Minot, ND 58701

Dear Mr. Slorby:

Thank you for your letter of July 12, 1988, describing a lawsuit which has been brought against the Ward County Board of County Commissioners and your involvement in defending that lawsuit.

According to your letter, the North Dakota Insurance Reserve Fund, as the Ward County's insurance carrier, has requested that you defend the action brought against the county because of your expertise in the lawsuit's subject (farm to market roads). Although your letter does not specifically so state, we assume that Ward County is a party defendant in this action and that the legal representation requested of you involves the defense of only Ward County.

You inquire whether your participation as defense counsel in this lawsuit violates N.D.C.C. §§ 10-10(7), 11-16-05(5). The relevant portions of those statutes are as follows:

11-10-10. Salaries of county officers.

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7. State's attorneys in counties having a population exceeding thirty-five thousand, or in other counties where the board of county commissioners has determined by resolution that the state's attorney shall be full time and shall not be an attorney or counsel for any party except the state or county, . . .

11-16-05. Restriction on powers of state's attorney -- Option regarding full-time state's attorneys -- Penalty for breach of duty. The state's attorney shall not:

5. Be concerned as attorney or counsel for any party,, other than the state or county, in any action or proceeding whatsoever when employed by a county having a population exceeding thirty-five thousand or by any other county whose board of commissioners has, by resolution, determined that the state's attorney shall be restricted in this matter.

Essentially, these statutes prohibit the representation undertaken by a state's attorney on behalf of a party other than the state or county.

However, in the factual situation described in your letter and those assumed to be present for purposes of this response, the state's attorney would not be representing a party other than state or county. Instead, the state's attorney would be representing Ward County as a party defendant to the lawsuit. The fact that the county has insurance coverage which entitles it to a legal defense provided by the insurance carrier does not change the conclusion that it is the county which is being defended.

N.D.C.C. § 11-16-01(5) requires the state's attorney to "defend all suits brought against the state or against his county." The action described in your letter would be in furtherance of this statutory requirement despite the existence of insurance coverage in favor of the county. As your legal representation occurs in defense of a suit brought against a county, the prohibitions contained at N.D.C.C. §§ 11-16-05(5), 11-10-10(7) would not be applicable.

Your letter inquires whether the Insurance Reserve Fund could properly compensate you directly for representation undertaken in this lawsuit. The problem appears to be the applicability of N.D.C.C. § 11-10-14. That statute states as follows:

11-10-14. Fees received by county officers turned over to county treasurer. The salaries fixed by this chapter shall be full compensation for all county officials, deputies, clerks, and assistants, respectively, and all fees and compensation received by any official, deputy, clerk, or assistant for any act or service rendered in his official capacity shall be accounted for and paid over monthly to the county treasurer and be credited to the general fund of said county, except than such official, deputy, clerk, and assistant shall be entitled to retain such fees as now are allowed to him and permitted by law or as may be hereafter permitted and allowed.

See also N.D.C.C. § 11-16-05(3). This statute essentially states that the compensation provided by N.D.C.C. ch. 11-10 for county officials is their entire compensation for all official services rendered. The statute further states that any and all fees and other forms of compensation received by such officials for services "rendered in [their] official capacity shall be accounted for and paid over monthly to the county treasurer, and be credited to the general fund of said county."

This statute does pose a potential problem should your legal services be compensated by the Insurance Reserve Fund directly. The moneys paid by Insurance Reserve Fund to you for the legal representation offered on behalf of the county would amount to fees and compensation for an act or service rendered in your official capacity. As such, it would appear to fall within the provisions of N.D.C.C. § 11-10-14 and would be required to be paid over to the county treasurer for deposit to the general fund of the county.

Your letter mentions the possibility of the Insurance Reserve Fund paying compensation to the county which, in turn, would pay the state's attorney the sum as an additional salary. North Dakota does allow the board of county commissioners to provide additional salary to the state's attorney "if, in the judgment of such board, by reason of duties performed, the state's attorney merits the increase." N.D.C.C. § 11-10-10(7). If the Insurance Reserve Fund does enter into an agreement with the county for payment of additional fees and expenses, the board of county commissioners may determine, in its discretion, that a salary increase may be appropriate in light of the duties performed by you. This determination, however, is not dependent upon payment from the Fund for performance of these legal defense services.

If the salary of the state's attorney is increased, the prohibition found at N.D.C.C. § 11-10-10(4) may become applicable. The relevant portion of this statute states that the salary of a county official shall not be reduced during the official's term of office. If additional compensation is paid to the state's attorney, it may be viewed as salary and, as such, may not be decreased during the official's term of office. The recent dispute in Grant County concerning this statute, and the resulting district court decision, illustrates the critical importance of the facts and circumstances of each case in determining whether increased compensation should be considered as salary.

Finally, you inquire concerning restrictions upon assistant state's attorneys. On June 26, 1979, this office provided a letter opinion to Morton County State's Attorney Vogel. In that letter opinion, we concluded that the state's attorney and the board of county commissioners had broad discretion determining what restrictions, if any, would apply to assistant state's attorneys in terms of their acting as counsel for any party other than the state or county. The statutory restrictions applicable to state's attorneys do not apply directly to the assistant state's attorneys.

We hope this discussion is helpful to you in this matter.

Sincerely,

Nicholas J. Spaeth

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