

## **N.D.A.G. Letter to Keogh (Dec. 2, 1985)**

December 2, 1985

Honorable Robert A. Keogh  
Municipal Court Judge  
Dickinson Municipal Court  
P.O. Box 1037  
122 2nd Ave. W.  
Dickinson, ND 58601

Dear Judge Keogh:

Thank you for your letter of November 15, 1985. You have inquired as to whether or not the State of North Dakota must pay the costs incurred for the attendance of the state toxicologist at a trial pursuant to N.D.C.C. § 39-20-07(9).

This question has been presented to us at an earlier date concerning an interpretation of the statutory provision preceding the current N.D.C.C. §39-20-07(9). In letters to C. B. Thames, Jr., Municipal Judge for the Bismarck Municipal Court, dated February 23, 1979, and March 19, 1979, it was the opinion of this office that the state toxicologist or his employees, when subpoenaed to appear in a criminal proceeding by a defendant, are entitled to be paid witness fees "in the same manner as those of witnesses called by the prosecuting authority which intends to rely on the chemical analysis of blood, breath, saliva, or urine." (Letter of February 23, 1979.)

N.D.C.C. § 39-20-07(7) was amended as N.D.C.C. §39-20-07(9) to delete reference to the state toxicologist but to permit the defendant to subpoena the person "who conducted the chemical analysis." Other than this change, no language of that statutory section has been changed by the North Dakota Legislature which would permit an interpretation of that section in a manner different than that made in the February 23, 1979, and March 19, 1979, letters to Judge Thames. As a result, any cost of obtaining the presence of the person who conducted the chemical analysis, whether or not the state toxicologist, upon subpoena by the defendant must be borne by the city or county as a cost of the prosecution.

It should be noted that this statutory provision will apply to the state toxicologist only when the state toxicologist or one of his deputies has actually conducted the chemical analysis. If a defendant desires to subpoena the state toxicologist or one of his deputies to be a witness at the trial when such persons had not conducted the chemical analysis, N.D.C.C. § 39-20-07(9) will not apply. It also should be noted that if the defendant is indigent and such a witness is necessary for his defense, the city or county must then allow such indigent defendant to subpoena those witnesses at the city's or county's own cost. This is an issue independent of the application of N.D.C.C. § 39-20-07(9).

I have enclosed with this letter a response to an inquiry by Dr. N. G. S. Rao, dated January 31, 1984, and Attorney General's Opinion 83-48, dated December 23, 1983, requested by Vince H. Ficek, Dickinson City Attorney. This opinion and letter provide further interpretation of the scope of N.D.C.C. § 39-20-07(9).

Sincerely,

Nicholas J. Spaeth

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Enclosures