

OPINION
66-137

June 14, 1966 (OPINION)

Mr. William C. Kelsch

State's Attorney

Morton County

RE: Judicial Procedure - Change of Venue

This is in response to your letter in which you say that, after consultation with your clerk and judge of the district court, the question has arisen as to the proper procedure in filing and handling of cases where an order for a change of venue has been entered. You also express the belief that there is no uniform practice throughout the State in this regard.

You specifically ask what the proper procedure is where an action is transferred from one county to another on an order for change of venue. Under such situation, is the clerk of court of the county to which the case is transferred required to charge a filing fee and file the cause as a new action in his county? You also ask, once the action has been tried in the transferred county is it to be returned to the county from which it was transferred, or does it remain as a part of the permanent file in the county in which the action was tried? You also inquire if there would be a difference if the action was transferred as a result of change of venue or because it was improperly brought in the first county and a new action is instituted in another county?

You do not state specifically whether you have in mind civil or criminal actions. In criminal actions a filing fee as such is not involved. We are therefore assuming that you are referring to civil actions. It is, however, interesting to observe that in criminal actions we have some specific language as to what is to be done where a case is transferred. For example, Section 19-15-08 of the North Dakota Century Code states that the procedure in the county to which the action is transferred shall be the same in all respects as if the action had been commenced in such court. A similar provision is found in Section 29-15-12, which states that the trial shall be conducted in all respects as if the action had been commenced in said court and the cost accruing from the place of trial and the cost of trial shall be paid by the county where the offense was committed or as otherwise provided by law.

As to civil cases, Section 27-01-05 of the North Dakota Century Code provides, as is material here, as follows:

* * * In all actions or proceedings, including criminal actions, where a change of venue is had or made by the order of any court or of any judge pursuant to law, except in cases where such change is made because such action was not brought

in the proper county, the county in which such action was commenced shall pay to the county in which the same is tried the following expenses arising out of such change of venue:

1. The fees of the clerk which are a lawful charge against the county;

* * *

7. All other lawful costs, fees, and disbursements which are a lawful charge against the county.

* * *."

The statutory provision here pertains to the charge that can be assessed against the county from which the action was transferred. The filing fee as such is not a charge which is against the county. Section 27-01-06 of the North Dakota Century Code pertaining to the same subject matter merely sets forth the manner in which the charge is to be presented to the county from which the action was transferred.

The filing fee is a charge against the person who invokes the jurisdiction of the court. It is not a charge against the county.

Change of venue in nearly every instance is at the instigation of one of the parties, either by direct request or petition to the court, or by stipulation approved by the court. Because the filing fee is not a charge against the county, it would not be an expense which could be collected from the county from which the case is transferred.

The clerk of court, pursuant to the provisions of Section 11-17-04 of the North Dakota Century Code is required to charge a fee for filing an action, including an action transferred from another county and for all things in connection therewith, which are not hereafter provided for, the sum of \$7.50. This provision anticipates that the clerk charge a filing fee for actions transferred as a result of an order for a change of venue.

It is therefore our opinion that the clerk of court is required to charge a filing fee for an action which has been transferred to his county from another county as a result of an order for change of venue. The statute makes no distinction between transfer of actions as the result of having erroneously started the action in some other county, or as a result of change of venue. Therefore, our conclusion would be the same whether the action was improperly brought in another county or transferred by change of venue.

As to whether or not the file becomes a permanent file in the county wherein the action was tried, the statutes are silent. However, the silence gives strong support to the implication that the file becomes part of the permanent records of the county in which the action is tried. The county in which the trial takes place is the "keeper of the record." In the absence of any other statutory provision, it is our opinion that the implication is conclusive. We make no observation where trials are held at another county without the formality of change of venue. Any party of interest may have the

final judgment subscribed to another county at his expense.

Taxable costs include filing fees and if the party against whom the costs are assessed was not instrumental in bringing about a change of venue, it is conceivable the court might disallow a double filing fee in such instances and permit the prevailing party to collect only the single filing fee. However, if the party against whom costs are assessed instigated the change of venue, it is conceivable that the court might allow two filing fees of \$7.50 each.

HELGI JOHANNESON

Attorney General