

**OPINION**  
**74-94**

March 11, 1974 (OPINION)

Mr. W. R. Goulet, Jr.  
Assistant City Attorney  
P. O. Box 150  
Grafton, ND 58237

RE: Chapter 39-06.1 N.D.C.C.

Dear Mr. Goulet:

We refer to your request for a legal opinion on the question of whether a prosecutor may compel a person who has been charged with a noncriminal traffic offense to testify at a hearing to determine whether that person committed such offense, or whether such action would constitute a violation of the privilege against self-incrimination.

Our opinion is that the privilege against self-incrimination as guaranteed in Article V of the Amendments to the United States Constitution, Section 13 of the North Dakota Constitution and section 31-01-09, North Dakota Century Code is not limited to criminal actions. No court or prosecutor can inquire as to the reason or justification for a defendant exercising his privilege against self-incrimination because inquiry would destroy the very purpose of the privilege. The defendant may be called as a witness and upon his claiming the privilege he would face the consequences flowing therefrom, such as the inference the court can draw from his failure to testify or causing the "fair preponderance of the evidence" to be applied against him or to his disadvantage.

The North Dakota Legislature labelled the act cited in your letter as "non-criminal". The terminology is not determinative of the issue. *Re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 118 L. Ed. 2d 527; 58 Am. Jur. Witnesses, Section 45, p. 49, 50; C.J.S. Witnesses, Section 433 p. 244-246. We are convinced by the cited authority that the privilege against self-incrimination, although generally referred to as "in any criminal action", applies equally to civil actions such as under consideration here. In a criminal case the defendant may not be called as a witness by the prosecution and no inference can be drawn from his election not to testify on his own behalf. However, in a civil case the defendant may be called as a witness adverse to his interests and he must testify unless he asserts his privilege against self-incrimination. This basic difference is vital to an understanding of the question. Moreover, the defendant in a civil action would not have to be advised of his right to claim the privilege.

We are hesitant to place obstacles in the path of law enforcement and administration. However, our duty is to interpret the question in the light of constitutional and case precedent. Any impairment of this right would, in our opinion, be self-defeating in the long run.

In summary, it is our opinion that a person charged with a

noncriminal traffic violation can be called as a witness and compelled to testify, but upon asserting the privilege against self-incrimination in the hearing or the appeal therefrom, the defendant may not be compelled to testify.

Sincerely yours,

ALLEN I. Olson

Attorney General