

LETTER OPINION
95-L-133

May 30, 1995

Mr. John Goff
Cass County State's Attorney
PO Box 2806
Fargo, ND 58107-2806

Dear Mr. Goff:

Thank you for your April 25, 1995, letter concerning N.D.C.C. ? 11-16-15 and the refusal of certain East Central Judicial District judges to give consent and approval for the issuance of a subpoena for a state's attorney's inquiry.

You first ask whether state's attorney's inquiry subpoenas issued under N.D.C.C. ? 11-16-15 are constitutional and legal when used within the confines and limitations of that section. Your letter does not indicate what constitutional provisions you believe may apply to the issuance of these subpoenas.

The North Dakota Supreme Court in KFGO Radio Inc. v. Rothe, 298 N.W.2d 505 (N.D. 1980), concluded that a state's attorney is acting in a quasi-judicial capacity when conducting an inquiry authorized by N.D.C.C. ? 11-16-15. The court also recognized that a state's attorney when acting in such capacity may subpoena witnesses to testify concerning any felony violation. Any subpoena issued pursuant to a state's attorney's inquiry presumably would be subject to evidentiary privileges under N.D.R. Evid. 1101(c) and, as specifically set forth in N.D.C.C. ? 11-16-15, a witness's right to counsel and all other constitutional rights.

In addition to N.D.C.C. ? 11-16-15, North Dakota law authorizes numerous boards, commissions, and state agencies to issue subpoenas to assist in carrying out their regulatory responsibilities. The North Dakota Legislature has also enacted statutes permitting certain public officials to issue subpoenas to investigate possible criminal offenses. Coroners are authorized to issue subpoenas to witnesses before a coroner's jury. N.D.C.C. ? 11-19-08. Subpoenas may also be issued by an investigating committee of the Legislative Assembly. N.D.C.C. ? 54-03.2-08. The issuance of such

subpoenas has not been held unconstitutional by the North Dakota Supreme Court.

In enacting a statute, it is presumed that the Legislature intended to comply with the North Dakota and United States constitutions, and any doubt must be resolved in favor of the statute's validity. N.D.C.C. ? 1-02-38(1); State ex rel Johnson v. Baker, 21 N.W.2d 355, 357 (N.D. 1945). This presumption is conclusive unless the statute clearly contravenes the state or federal constitution. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987). Furthermore, a statute may be declared unconstitutional only upon the concurrence of four out of five justices of the North Dakota Supreme Court. N.D. Const. art VI, ? 4. The opinion of an Attorney General is not binding on the judiciary. Therefore, it has been this office's policy to refrain from questioning the constitutionality of a statute unless it is clearly and patently unconstitutional.

Issuance of a subpoena pursuant to N.D.C.C. ? 11-16-15 is within the authority granted to state's attorneys by the North Dakota Legislature. No constitutional provision clearly and patently prohibits the exercise of such authority. Therefore, it is my opinion that state's attorney's inquiry subpoenas may properly be issued under N.D.C.C. ? 11-16-15.

You also ask whether the consent and approval of a district judge for issuance of a state's attorney's inquiry subpoena is a discretionary function and, if so, what criteria, if any, should be applied.

The specific language requiring consent and approval of a district judge was inserted as an amendment to House Bill 1529 during the 1979 session of the State Legislature. As originally introduced, House Bill 1529 did not require consent or approval of the district judge. This amendment, suggested by Stutsman County State's Attorney Charles Gilje, was approved by the House Judiciary Committee and subsequently by the entire Legislative Assembly. Hearing on H.B. 1529 Before the House Comm. on the Judiciary, 46th N.D. Leg. (February 7, 1979). Adoption of this amendment anticipated district court involvement in the issuance of the state's attorney's inquiry subpoenas. Although North Dakota Rule of Criminal Procedure 17 may vest an attorney with the power to require the issuance of a subpoena for the attendance of witnesses, (see State v. Berger, 234 N.W.2d 6 (N.D. 1975)), N.D.C.C. ? 11-16-15 requires the consent and approval of the district court prior to the issuance of a state's attorney's inquiry subpoena, a

Mr. John Goff
May 30, 1995
Page 3

requirement not set forth in Rule 17.

N.D.C.C. ? 11-16-15 is silent regarding the criteria to be applied by a district judge in deciding whether to approve the issuance of state's attorney's inquiry subpoenas. However, the statutory requirement of consent and approval of a district judge does imply a discretionary function of the court in the subpoena authorization. As a result, a refusal to issue the subpoena would be subject to the abuse of discretion standard of review on appeal. A court abuses its discretion by acting arbitrarily, unconscionably, or unreasonably. In the Matter of the Ward County State's Attorney's Inquiry, 515 N.W.2d 444, 449 (N.D. 1994).

You further ask whether a subpoena requesting that records or documentary evidence be copied and provided to an investigator in lieu of a personal appearance for testimony is a proper procedure to follow under N.D.C.C. ? 11-16-15.

In conducting a state's attorney's inquiry, a state's attorney acts in a quasi-judicial capacity, but the primary purpose of the inquiry is investigatory in nature. KFGO Radio Inc., 298 N.W.2d at 510. A state's attorney's inquiry is not a trial designed to make a finding of guilt or innocence of an accused. Rather, it is a proceeding to assist in the investigation of acts resulting in death or the commission of felonies. If a witness subpoenaed to appear before the state's attorney's inquiry testifies, a written record must be made of that testimony.

There may be instances when a subpoena duces tecum is issued for the production of documents or other written materials rather than testimony. Quite often this occurs when bank or other financial records are involved. Since the records, of whatever nature, are received pursuant to a subpoena for an investigatory purpose, rather than as a part of a proceeding to determine guilt or innocence, the rules of evidence regarding admissibility and foundational requirements do not apply. N.D.R. Evid. 1101(d). If the documents or records are sought to be admitted at a later proceeding before a court after the filing of criminal charges, evidentiary requirements would apply to their admissibility.

Since the primary goal of the subpoena duces tecum would be to receive the records for investigatory review, little would be gained in relation to the time and resources expended by requiring the custodian of the records to appear at a state's attorney's inquiry, be sworn, and merely produce the records sought under the subpoena. As an example, a New Hampshire

Mr. John Goff
May 30, 1995
Page 4

bank may agree to honor a state's attorney's inquiry subpoena for the production of bank records held by that bank. To require an employee of the New Hampshire bank to travel to North Dakota to appear for a few short minutes as a witness at a state's attorney's inquiry to produce the records would neither serve the investigatory purpose of the state's attorney's inquiry nor be a proper conservation of scarce county and judicial resources.

To insure that the underlying intent of N.D.C.C. ? 11-16-15 that a record of the inquiry be kept, any documentary evidence received as part of that inquiry should be retained as is required for recorded witness testimony.

In conclusion, it is my opinion that it would be proper to allow a custodian of documentary evidence to produce such documents to an investigator pursuant to a state's attorney's inquiry subpoena duces tecum in lieu of appearing personally to testify. Since the custodian is only being required to produce documentary materials, N.D.C.C. ? 11-16-15 does not require the testimony of the custodian. If the custodian does testify, that testimony must be reduced to writing and made part of the coroner or state's attorney's files.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rpb/vkk