



RECEIVED
CASS COUNTY COMMISSION

OCT 9 2017

MEMORANDUM

TO: Cass County Commissioners

FROM: Birch P. Burdick
Cass County State's Attorney *Burdick*

DATE: October 9, 2017

RE: Resolution for State's Attorney to Act in Limited Capacity as City Attorney

The Fargo City Attorney approached me about the possibility of acting in a limited capacity as an assistant Fargo city prosecutor. This would relate to municipal cases which are handled in district court rather than municipal court. I will explain the background and offer a proposed "resolution" for your consideration.

1. People who violate city ordinances may be subject to criminal prosecution in municipal court. Most of those cases stay in municipal court in front of the municipal judge. However, in circumstances where the defendant is entitled to a jury trial and wishes one (e.g., DUI), a defendant may transfer the case to the district court to be presided over by a district judge.
2. In the past, the Fargo City Attorney has hired someone to handle those particular cases on a contract basis. He asked whether I would consider handling the miscellaneous hearings in district court that arise on those cases. This would not include related motion hearings or trials.
3. The miscellaneous hearings for municipal cases occur at the same time as we are in district court for our own hearings. We typically allow the municipal cases to go first because they are low in number compared to ours. These kind of municipal hearings often last no more than a few minutes per case.
4. The idea would be for my office to try this on as a short (maybe a month) pilot project, to determine the impact, if any, it has on our normal work and schedules. If it is too impactful, then we would stop. If not, then we would continue.
5. For the duration of the pilot project, we would not charge Fargo for this service. At the end of the pilot project we would determine if some sort of fee is appropriate, or if we could come to an accommodation about Fargo handling certain kinds of cases we currently handle but could also be handled by Fargo, like a quid pro quo. If a fee is appropriate, it would go to the county general

State's Attorney

Birch P. Burdick

Assistant State's Attorneys:

Mark R. Boening
Tracy J. Peters
Leah J. Viste
Reid A. Brady
Kara Schmitz Olson
Kimberlee J. Hegvik
Tristan J. Van de Streek
Ryan J. Younggren
Renata J. Selzer
Tanya Johnson Martinez
Katherine M. Naumann
Joshua J. Traiser
Tracy E. Hines

Victim/Witness Coordinators:

Brenda Olson-Wray
Debbie Tibiatowski
Lori Lawson

Check Division/ Restitution:

Charlotte Eversvik
Jeri Kuntz

Box 2806
211 Ninth Street South
Fargo, North Dakota 58108

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- fund, or such other fund as the Auditor may designate.
6. In order to conduct this pilot project, the Fargo City Attorney would authorize us to appear as assistant city prosecutors. I understand he is proposing this to the Fargo City Commission at their next meeting. If the Fargo City Commission does not authorize it, then this project would go no further.
 7. There is a statute governing what state's attorneys can and cannot do. N.D.C.C. §11-16-05(5). I have enclosed a highlighted copy. In order for my staff and me to act as described above, the county commission must authorize it through a resolution. I have enclosed a proposed resolution for your consideration.
 8. I believe there are very limited opportunities for liability to arise with this arrangement. However, I contacted NDIRF. NDIRF represents both Fargo and Cass County should claims arise. NDIRF was not concerned about the arrangement and no additional premium fees would be required of Cass County. Furthermore, the Fargo City Attorney is proposing to the Fargo City Commission a related indemnification agreement for us. See the enclosed letter from the Fargo City Attorney to the Fargo City Commission, dated October 5.
 9. The Fargo City Attorney and I anticipate starting this program towards the beginning of November, if authorized.
 10. If at any time either the Fargo City Attorney or I determine that we should not proceed with this arrangement, either can end it.
 11. I request the Commission approve the enclosed resolution, conditioned upon the Fargo City Commission authorizing the Fargo City Attorney to proceed with this project.
 12. If authorized, I will you keep you updated on how the project develops.

Suggested Motion: Adopt the Resolution to Authorize State's Attorney to Act as Assistant Fargo City Prosecutor for Limited Purposes, conditioned upon the Fargo City Commission authorizing the Fargo City Prosecutor to enter into this arrangement.

cc: Mike Montplaisir, Auditor
Robert Wilson, Administrator

activities. In counties in which a county office performs those activities, a county may transfer responsibility for the activities to another county office.

11-16-02. Assistant - Appointment - Duties.

The state's attorney may appoint assistant state's attorneys, who, when qualified by filing the required oath of office, shall have the same powers as, and shall perform any and all duties required of, the state's attorney. The state's attorney is responsible, under the state's attorney's official bond, for any and all acts of such assistant. The work of an assistant state's attorney must be assigned by the state's attorney.

11-16-03. Person receiving receipt from state's attorney to file the same.

Any person who shall receive duplicate receipts from the state's attorney for moneys paid to the state's attorney shall file one copy of each such receipt in the office of the county treasurer.

11-16-04. Penalty for failure to pay over moneys.

Whenever the state's attorney shall refuse or neglect to account for or pay over the public moneys received by the state's attorney, the state's attorney is guilty of an infraction.

11-16-05. Restrictions on powers of state's attorney - Option regarding full-time state's attorneys - Penalty for breach of duty.

The state's attorney shall not:

1. Present a claim, account, or other demand for allowance against the county, except for the state's attorney's own services, nor in any way advocate the relief asked for by the claim or demand of another.
2. Be eligible to or hold any state or federal judicial office except that of United States commissioner.
3. Receive a fee or reward from or on behalf of a prosecutor or other individual for services in any prosecution or business to which it is the state's attorney's official duty to attend.
4. Be concerned as attorney or counsel for any party, other than the state or county, in any civil action depending upon, or arising out of, a state of facts upon which a pending and undetermined criminal prosecution depends.
5. Be concerned as attorney or counsel for any party, other than the state or county, or other than a city within the county, when so authorized by resolution of the board of county commissioners, 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 manner. A board of county commissioners may adopt or rescind a resolution under this subsection in any year. However, in the general election year in which the state's attorney is to be elected, such action must be taken prior to June first. Such adoption or rescission shall not be effective during the state's attorney's current term of office unless agreed upon between the board and the state's attorney.



A violation of any provision of this section shall constitute an infraction, and the offender may be removed from office.

11-16-06. Failure of state's attorney to perform duty - Power of court - Appointment of acting state's attorney.

If it shall appear, by affidavit or otherwise, to the satisfaction of a judge of the district court of the judicial district in which the county is situated, that the county has no state's attorney, or that the state's attorney is absent or unable to attend to the state's attorney's duties, or that the state's attorney has refused or neglected to perform any of the duties prescribed in subsections 2 through 6 of section 11-16-01, or to institute any civil suit to which the state or the county is a party after the matter has been properly brought to the attention of such state's attorney, and that it is necessary that some act be performed, the judge shall:

RESOLUTION #2017-____
AUTHORIZE STATE'S ATTORNEY TO ACT AS
ASSISTANT FARGO CITY PROSECUTOR
LIMITED PURPOSES

WHEREAS, the Fargo City Attorney desires to authorize the Cass County State's Attorney to act as assistant city prosecutors for the purpose of making limited appearances on municipal criminal cases in district court; and

WHEREAS, the Cass County State's Attorney is willing to provide this limited prosecutorial service in district court; and

WHEREAS, either the Cass County State's Attorney or Fargo City Attorney can end this arrangement at any time in their sole discretion and without cause; and

WHEREAS, although there is no remuneration currently calculated for the Cass County State's Attorney providing this service, the Fargo City Attorney and Cass County State's Attorney may consider such a fee at some future date if both agree it seems appropriate; and

WHEREAS, N.D.C.C. §11-16-05(5) requires a county commission, in a county with a population exceeding 35,000, to adopt a resolution to authorize a state's attorney to act on a city's behalf in any proceeding; and

WHEREAS, N.D.C.C. §11-16-05(5) does not allow a county commission to adopt, or rescind, such a resolution during the state's attorney's current term unless agreed upon between the board and the state's attorney; and

WHEREAS, the State's Attorney agrees to adopt such resolution during his current term;

NOW, THEREFORE, BE IT RESOLVED, that the Cass County Commission hereby authorizes the Cass County State's Attorney and his designees to act as Fargo city prosecutors for limited appearances on municipal cases in district court and to begin doing so in 2017.

Approved and adopted this ____ day of October, 2017.

APPROVED BY:

ATTEST:

Chad M. Peterson, Chair
Cass County Commission

Mike Montplaisir
Cass County Auditor



Office of the City Attorney

City Attorney
Erik R. Johnson

Assistant City Attorney
Nancy J. Morris

October 5, 2017

City Commissioners
200 North Third Street
Fargo, ND 58102

RE: Special City Prosecutors—Cass County State's Attorney and Assistants

Dear Commissioners:

I would appreciate your approval of the appointment by me of members of the Cass County State's Attorney's Office as Special City Prosecutors.¹ The basis for this request is one of economics and scheduling convenience. As you may know, the City currently has one full-time prosecutor to handle the prosecution of City offenses in both Municipal Court and District Court. For the past 2+ years, we have managed to cover appearances in both courts with the assistance of City Prosecutors Ian McLean and Dan Phillips, who are with the Serkland and Solberg law firms, respectively, and with occasional additional coverage by Assistant City Attorney Nancy Morris and me. Every week there are two occasions, in particular, in which a very brief appearance in District Court is needed by a city prosecutor on Fargo charges—dispositional conferences and plea agreement appearances. Because members of the Cass County State's Attorney Office are typically also appearing in court at the same time and for the same purposes, State's Attorney Birch Burdick has graciously agreed to authorized the members of his office to assist by handling those appearances for the City. State law authorizes me to appoint Mr. Burdick and his assistants as city prosecutors. As such, their role will be to provide coverage for the Office of the Fargo City Prosecutor as may be needed and as arranged by agreement between Mr. Burdick and me. This arrangement will be an at-will relationship—terminable by either the City or County at any time. I have offered to Mr. Burdick that the City Prosecution Office (the City) will compensate the State's Attorney's Office (the County) for the assistance being provided and it is our intention that we will need at least a few weeks' experience before we can gauge the amount of effort involved and the appropriate level of compensation to be paid. We do not

¹ City has authority to contract with a county for municipal prosecution services and to appoint county state's attorney members as assistant city attorneys. N.D.C.C. §40-20-02. See also: City of Minot v. Rudolph, 2008 ND 231, 758 N.W.2d 731, 2008 ND LEXIS 201 (N.D. 2008)



anticipate the amount of compensation to be significant and, more importantly, by comparison to the cost of providing coverage through other means we believe there will be a worthwhile cost-avoidance by the City.

Based upon the foregoing, I hereby appoint the following members of Mr. Burdick's office as City Prosecutors for purposes of providing coverage for the City of Fargo on cases being heard in Cass County District Court as described herein and as may be further articulated between Mr. Burdick and myself:

Birch Burdick - Cass County State's Attorney
Mark Boening - Assistant State's Attorney
Tracy Peters - Assistant State's Attorney
Reid Brady - Assistant State's Attorney
Tristan Van de Streek - Assistant State's Attorney
Ryan Younggren - Assistant State's Attorney
Leah Viste - Assistant State's Attorney
Kara Schmitz Olson - Assistant State's Attorney
Renata Olafson Selzer - Assistant State's Attorney
Tanya Johnson Martinez - Assistant State's Attorney
Kimberlee Hegvik - Assistant State's Attorney
Kate Naumann- Assistant State's Attorney
Josh Traiser- Assistant State's Attorney
Tracy Hines - Assistant State's Attorney

and any other Cass County State's Attorneys and Assistant State's Attorneys, both present and future, whose appointment shall continue so long as said individuals serve in said capacity or until such time as the same is terminated in writing by the City Attorney, the Cass County State's Attorney or by agreement of the City Attorney and the Cass County State's Attorney. Request is hereby made for your consent and approval of this appointment.

In addition, I hereby request that the City agree that the City will indemnify and hold Cass County harmless if any claims, costs, judgments, liabilities and damages (including reasonable attorneys' fees) arising out of the State's Attorney's Office serving as a prosecutor on City of Fargo prosecution matters when such are the result of the act or failure to act of the City of Fargo or its prosecutors and employees.

SUGGESTED MOTION: I move to consent and approve the aforesaid appointment of the Cass County State's Attorney and his assistants by the City Attorney and to approve the indemnification and hold-harmless obligation to the County of Cass all as stated herein.

Sincerely,

A handwritten signature in black ink, appearing to read 'Erik R. Johnson', written in a cursive style.

Erik R. Johnson