

STATE BAR ASSOCIATION OF NORTH DAKOTA  
ETHICS COMMITTEE

OPINION NO. 95-2  
March 30, 1995

The Ethics Committee received a request for an opinion from [REDACTED].

[REDACTED] is the city attorney for the City of [REDACTED]. A criminal complaint was filed by an individual before the municipal court. The complaint was allowed by the municipal judge. The defendant then requested a jury trial, and the case was removed to district court. It is at this point that [REDACTED] had his first knowledge of the case. The city council of Dunseith then requested [REDACTED] to dismiss the case due to the cost of paying for court appointed counsel.

The question presented by [REDACTED] is whether he can ethically dismiss the case based upon the request of the city council, or if he must have the matter investigated in order to make a determination of whether there is a likelihood of conviction.

I. "Special Responsibility" of a Prosecutor

The North Dakota Rules of Professional Conduct provide very little guidance in responding to Mr. Gregg's question. The only rule which remotely has application is Rule 3.8, which provides in part that the prosecutor in a criminal case shall not prosecute a charge that he or she knows is not supported by probable cause. Rule 3.8(a).

The rule itself is entitled "Special Responsibilities of a Prosecutor." The comment to the rule provides that "(a) prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

This "special responsibility" appears to arise when a city attorney is performing his or her duties as a prosecutor, rather than merely an advocate in a civil case. As noted by our Supreme Court the statutory duty of a city attorney is to "conduct all business in which the city or any of its departments shall be interested," which duty is broad and general. See, State Bank of Burleigh County Trust Company v City of Bismarck, 316 N.W.2d 85 (N.D. 1982), citing N.D. Cent. Code § 40-20-01. This case was a civil action involving the appeal of a judgment vacating part of an alley. The issue was whether the city commission had specifically authorized the city attorney to appeal. The Court made clear that the city attorney's decision to appeal is reviewable and could be set aside by the governing body, or restricted by a duly enacted ordinance. Id. at 89. The Court quoted with favor a decision of the South Dakota Supreme Court which held that the power to control litigation on behalf of the interests of a municipal corporation rests solely with the governing body. Id. at 88.

However, the "special responsibilities" of a prosecutor indicate that in the criminal context the decision of whether or not to issue charges is left in the prosecutor.

## II. Discretion to Prosecute

The former ABA Ethical Consideration 7-13 recognized this special responsibility when it stated that the responsibility of a public prosecutor differs from that of the usual advocate, the duty is to seek justice and not merely to convict. This special duty exists in part because the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute. In the practice guide to Rule 3.8 of the "ABA/BNA Lawyers' Manual on Professional Conduct" it is stated that a prosecutor has wide discretion in determining whether and when to bring charges.

In addition, the American Bar Association has promulgated the Standards for Criminal Justice which provide some guidance. In the comment to Standard 3-1.2 it is stated that the prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring, as well as deciding whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Standard 3-3.4 provides in part that the decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor. Standard 3-3.9 deals directly with discretion in the charging decision and provides in part as follows:

- (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:
  - (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
  - (ii) the extent of the harm caused by the offense;
  - (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
  - (iv) possible improper motives of a complainant;
  - (v) reluctance of the victim to testify;
  - (vi) cooperation of the accused in the apprehension or conviction of others; and
  - (vii) availability and likelihood of prosecution by another jurisdiction.

It has been stated that the duty of the prosecutor to prosecute is not absolute, but qualified, requiring of the prosecuting attorney to exercise sound discretion and to refrain from prosecuting when, in good faith and without corrupt motives or influences, he or she believes that a prosecution will not serve the best interests of the state. 63A Am. Jur.2d Prosecuting Attorneys, § 24.

In United States v Cox, 342 F.2d 167 (5th Cir. 1965), the Court refused to allow enforcement of an order directing the United States attorney to issue an indictment authorized by a grand jury, stating that the discretionary power of the U.S. attorney in determining whether to prosecute may well depend upon matters of policy wholly apart from any question of probable cause. As an officer of the court and an official of the government, he exercises a discretion as to whether or not there should be a prosecution of a particular case. Id. at 171.

The North Dakota Supreme Court has on two occasions considered the extent of the discretion vested in a prosecuting attorney. The first was in Hennebry v Hoy, 343 N.W.2d 87 (N.D. 1983). An individual had filed a criminal complaint against a police officer alleging criminal coercion. The state's attorney reviewed the complaint and refused to prosecute. The individual then sought a writ of mandamus to the state's attorney directing him to authorize a criminal prosecution. The Court held that a state's attorney's "duty" to initiate prosecution does not arise by the mere submission of a sworn complaint, but only upon the state's attorney's decision, after due inquiry and consideration, that a criminal charge is proper under the circumstances. Id. at 90. It was noted that the necessity for the exercise of sound judgment and discretion by a state's attorney in the charging process has long been recognized by the Court. Quoting from an earlier case, the Court reiterated that "the law has given to the state's attorney the power to say when a warrant shall issue and when it shall not, and when he decides that the evidence is sufficient it is his duty to institute proceedings as provided for in (currently § 11-16-01, N.D. Cent. Code)". The Court recognized that because of its very nature, mandamus does not lie to compel a discretionary act. In this case, as it was evident that the state's attorney performed his duty to make inquiry into the facts and circumstances of the situation, and having decided in the exercise of his discretion and professional judgment that a criminal prosecution was inappropriate, no "duty" to initiate a prosecution arose. Id. at 91.

The second case involving prosecutorial discretion was Keidel v Mehrer, 464 N.W.2d 815 (N.D. 1991). This case also arose out of a criminal complaint initiated by an individual against his neighbor after blows were allegedly struck in a dispute over the location of a fence line. The state's attorney refused to prosecute and the individual then sought a writ of mandamus to require prosecution. The Court stated that its decision in Hennebry was dispositive of the issue. Not every alleged violation of criminal law is prosecuted even though there may be some

evidence to support the allegation. The Court felt that it must be left to the good judgment of the state's attorney as to whether or not the confrontation is elevated to the point that criminal action must be instituted. In this instance it was felt that the state's attorney did give due consideration to the grievances raised and declined to prosecute due to the weakness of the case. Thus, it was clear that the state's attorney complied with the discretionary guidelines expressed in Hennebry. Id. at 817. As a result, the decision to prosecute was a proper exercise of prosecutorial discretion and could not be controlled by mandamus.

Thus, it seems clear that the decision of whether or not to prosecute a criminal complaint lies with the prosecutor and not with the governing body. However, it is also clear that not every possible violation must be prosecuted.

### III. Conclusion

As directed by our Supreme Court, you as the city attorney and prosecutor must exercise your sound judgment and discretion in determining whether a charge shall be brought. Your actions in this regard cannot be controlled by the city council in its desire to save the cost of court appointed counsel.

We were unable to locate an ethics opinion from any jurisdiction which would give guidance as to whether a prosecutor can determine not to prosecute solely on the desire to save the time and expense of trial. However, it has been stated that prosecuting attorneys have wide latitude in the allocation of their resources, having been given discretion to investigate, initiate, prosecute and discontinue. If a prosecutor in the exercise of his or her discretion believes in good faith that a prosecution will not serve the best interests of the governing body he or she is empowered to withdraw an initial approval when such action is indicated by the circumstances. 63A Am. Jur.2d, Prosecuting Attorneys, § 24. In the only authority which we have been able to locate which is on point, the United States Supreme Court stated that "... a prosecutor may forego legitimate charges already brought in an effort to save the time and expense of trial..." United States v Goodwin, 457 U.S. 368 (1982).

Thus, the Ethics Committee is of the opinion that you must exercise your discretion as prosecuting attorney in determining whether this case shall be charged out. One of the factors you are entitled to consider are the resources available to you, as well as the best interests of the governing body, which could include consideration of the time and expense of trial. We have not been apprised of the nature of the charge and the gravity of the alleged harm. It will be for you, in consideration of all these factors, to determine whether or not to proceed.

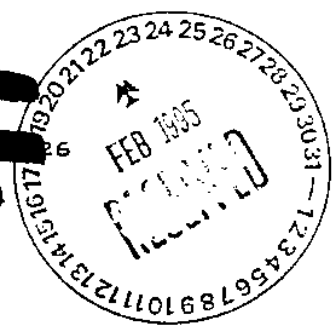
This opinion is provided pursuant to Rule 1.2(b), North Dakota Rules for Lawyer Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This Opinion was drafted by [REDACTED] and was unanimously approved by the Committee on March 30, 1995.

  
MICHAEL J. MAUS, Chair

[REDACTED]



February 21, 1995

Michael J. Maus  
Attorney at Law  
P.O. Box 370  
Dickinson, North Dakota 58602-0370

RE: Ethics Committee opinion

Dear Mr. Maus:

I request an opinion on the issue of whether a city attorney may ethically seek dismissal of a criminal proceeding at the direction of the city council.

I represent the City of [REDACTED]. A criminal complaint was filed by an individual before the Municipal Court. The Defendant requested a jury trial, and the case was moved to District Court. At this point my office had its first knowledge of the case, as a notice was sent to my office by the District Court. The Council of the City of [REDACTED] has now asked that I dismiss the case due to the cost of paying for court appointed counsel.

Enclosed is a copy of a Memorandum from Central Legal Research. Please note that a recommendation has been made for an opinion from the Ethics Committee. The Memorandum contains one error in the Statement of Facts. I did not initiate the criminal prosecution, as the initial filing of the complaint was allowed by the municipal judge.

It would be appreciated if some guidance could be given. I am uncertain as to whether I can ethically dismiss the case, or if I must have the matter investigated in order to make a determination of whether there is a likelihood of conviction.

Sincerely,

[REDACTED]