

HOUSE GOVERNMENT AND VETERANS AFFAIRS
FEBRUARY 6, 2025

TESTIMONY OF MARY KAE KELSCH
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1601

Mr. Chairman, members of the Committee.

I am Mary Kae Kelsch, the Director of the General Counsel Division in the Attorney General's Office, and I appear on behalf of the Attorney General to oppose House Bill 1601.

Powers and Responsibilities of the Attorney General

The attorney general is a constitutional officer; he is the law officer of the state and the head of its legal department. Const. Art. 5, § 2. *State v. Hagerty*, 1998, 580 N.W.2d 139. Given the duties of the attorney general, he is the chief law officer of the state. *State ex rel. Johnson v. Baker*, 21 N.W.2d 355, 364 (1945). Additionally, it is well established that the attorney general is vested with important powers and duties by common law,¹ as expressed by courts, and the North Dakota Supreme Court has recognized that the power of the Attorney General's office is established in common law. *State v. Hagerty*, 1998, 580 N.W.2d 139, 146.

Along with the authority vested in the attorney general come the solemn responsibilities to protect the state's legal interests and defend the constitutionality

¹ See also, National Association of Attorneys General, *State Attorneys Powers and Duties*, Ch. 3, 4th ed. (2018).

of the statutes passed by you, our elected legislators. These duties fall to the state's chief legal officer because he is the accountable, elected official with the necessary training and legal education to carry them out.

The responsibility of ensuring that our state is represented by competent and ethical attorneys has been the duty of the office of attorney general since the drafting of our state constitution. The law provides that the attorney general may appoint assistants or special assistant attorneys general to represent the state and that no person may act as legal counsel in any matter, action, or proceeding in which the state is a party without written appointment by the attorney general. N.D.C.C. 54-12-08(1). It would be a disservice to the state and its electors if the attorney general did not have any influence over the employment of these attorneys. After all, their authority is delegated from the attorney general to carry out his constitutional and other duties to the state.

Special Assistant Attorney General Appointment and Revocation

This legislation seems to arise from misunderstandings about the employment of special assistant attorneys general. One of the cosponsors told our office that she signed onto the bill because she was told by a legislator that the current Attorney General was revoking multiple special assistant attorney general designations around state government. This is not true. When the cosponsor was informed that it is not true, she said she changed her mind about being a cosponsor. She also said we could share that information.

I am not aware of any instance where an attorney hired by an authorized state agency was denied a special assistant designation by the attorney general. The process of obtaining the designation is straightforward. Following the process diligently is necessary to ensure the state hires attorneys with good ethics records and the credentials to provide competent legal counsel.

I am aware of only one instance where the current Attorney General revoked an appointment of a special assistant attorney general. In that case, a long-time assistant attorney general and a long-time special assistant attorney general working in another agency identified serious ethical violations by the attorney at issue. They raised their concerns through the senior leadership of the Attorney General's office and advised the head of the affected agency. After an extensive review of the facts and multiple meetings with staff attorneys, senior office leadership, and the affected agency leader, the Attorney General advised the individual of the ethical concerns about him and gave him an opportunity to respond. After reviewing and discussing the response within the office and with the affected agency leader, the Attorney General revoked the special assistant attorney general authorization from the individual.²

To be clear, this is the only revocation of a special assistant designation by the current Attorney General, and the Attorney General has never revoked a special assistant designation against the wishes of an agency head or public official. The revocation of an appointment by the attorney general is extremely rare, but the

² The attorneys agreed that, under North Dakota Rule of Professional Conduct 8.3, the office had an obligation to report the matter to the State Bar of North Dakota.

ability to do so is necessary to ensure that our state is represented by experienced, competent, and ethical attorneys.

The Attorney General's office urges a Do Not Pass on House Bill 1601.