

## STATE'S ATTORNEYS' POSITIONS IN RURAL AREAS

At the initial meeting for the 2007-08 interim of the Advisory Commission on Intergovernmental Relations, the chairman invited commission members and interested persons to suggest topics for the commission to study. One area of study suggested was of the problem of filling state's attorneys' positions in rural areas and the statutory problems that place hurdles to sharing state's attorneys. At the second meeting of the Advisory Commission on Intergovernmental Relations, the committee received testimony from the North Dakota State's Attorneys Association. The association testified that the current law provides options to share state's attorneys with adjoining counties. The main issue is those counties that do not have a resident state's attorney. In addition, the testimony supported the proposition that state's attorneys should be elected and not appointed by the county commissioners so that state's attorneys remain independent and beholden to the electorate. The committee requested more information and the result is this memorandum.

### STATUTORY PROVISIONS

Under North Dakota Century Code (NDCC) Section 11-16-01, the state's attorney is the public prosecutor of the county and institutes and defends civil actions for the county. Under Section 11-16-05, a state's attorney generally is prohibited from being an attorney for another party besides the county. A violation is an infraction and grounds for removal. Under Section 11-16-02, the state's attorney may appoint assistant state's attorneys who have the same powers as the state's attorney. The work of an assistant state's attorney is required to be assigned by the state's attorney. Under Section 11-16-06 if a county does not have a state's attorney or the state's attorney is absent or unable to attend to the duties of state's attorney or has refused or neglected to perform certain duties, a judge of district court shall request the Attorney General to take charge of such prosecution or proceeding or may appoint an attorney to take charge of the prosecution or proceeding.

The general rule under NDCC Section 11-10-02 is that each organized county must have an elected state's attorney. There are two kinds of exceptions to the requirement that the office is elective: appointment and agreement. This section provides an exception contained in Section 11-10-02.3, which provides that 10 percent or more of the qualified electors of a county may petition the board of county commissioners to require the question of appointing the state's attorney on the ballot. A majority vote at that election changes the position from elective to appointive. Under Section 11-10-04, a state's attorney must be a qualified elector of the county at the time of the election if elected and a qualified

elector in the county if appointed. However, upon the approval of the board of county commissioners of each affected county, a state's attorney may serve as an elected officer in more than one county if the state's attorney is a qualified elector of one of the counties. In addition, two or more counties may appoint a person to be state's attorney in each county if the state's attorney is a qualified elector of one of the counties. Under the same section, there are special provisions for the boards of county commissioners of two or more counties to agree by resolution to elect a multicounty jurisdiction state's attorney. In this case the state's attorney must be a qualified elector of the multicounty jurisdiction at the time of the election. In addition, the board of county commissioners of two or more counties may agree by resolution to allow any candidate for the office of state's attorney to petition for office in each county. The state's attorney may serve in both counties if the state's attorney is a qualified elector of one of the counties at the time of election and the state's attorney receives the highest number of votes for office in the county in which the state's attorney is not a resident.

Under NDCC Section 44-02-01, a vacancy in the office of state's attorney may occur for a number of reasons, including ceasing to be a resident of the county or other political subdivision in which the duties of the office are to be discharged or ceasing to possess any of the qualifications of the office. In addition under Section 44-02-02, a state's attorney may resign from office. Section 44-02-04 provides for the filling of vacancies in county offices. Under this section, generally a vacancy in the office of state's attorney must be filled by the board of county commissioners. In addition under Section 44-01-04, if a person is elected state's attorney but fails to qualify for the office, the office is deemed vacant and must be filled by appointment as provided by law. Under Section 44-02-09, the person appointed must qualify in the manner required of a person elected or appointed to the office.

North Dakota Century Code Chapter 11-10.3 allows for the multicounty combination of elective officers. Counties may share an officer if the counties follow the procedures in that chapter. Under Section 11-10.3-01, a proposal for combining county elective offices may be accomplished by a joint powers agreement subject to the right of referendum or by initiative of electors of the affected county. In the case of a joint powers agreement, this section provides for the procedures to refer the issue and procedures for the electors to submit the issue for consideration at an election. A plan adopted under this chapter may be revised or terminated through another joint powers agreement, by petition in the same manner as for

adopting a plan, or pursuant to the terms of the original joint powers agreement. Section 11-10.3-02 provides for suggested terms of the joint powers agreement and provides that the plan may not diminish the term of office, redesignate the office, or reduce the salary of the office.

### **LEGISLATIVE HISTORY AND ATTORNEY GENERAL'S OPINIONS**

Since the 1999 legislative session, there have been at least six Attorney General's opinions to relate to these statutes and state's attorneys. The year of 1999 is chosen as the beginning date because that was the year in which the last major change to these statutes occurred and is after a change in the Constitution of North Dakota.

Article VII, Section 8, of the Constitution of North Dakota was approved in 1998 and 2002. The section provides, in part:

Elective officers shall be elected by the electors in the jurisdiction in which the elected officer is to serve. A candidate for election for sheriff must be a resident in the jurisdiction in which the candidate is to serve at the time of the election. The office of sheriff shall be elected. The Legislative Assembly may provide by law for the election of any county elective officer, other than the sheriff, to serve one or more counties provided the affected counties agree to the arrangement and any candidate elected to the office is a qualified elector of one of the affected counties.

The last sentence was approved at the June 11, 2002, primary election. The other preceding language was approved November 3, 1998.

In 1999, Senate Bill No. 2390 provided that each county must have an elected state's attorney unless the question of appointing the state's attorney is placed before the county electors upon submission to the board of county commissioners of a petition signed by 10 percent or more of the total number of qualified electors in the county voting for Governor at the most recent gubernatorial election or upon resolution of the board of county commissioners. In addition, the bill made statutory changes necessary to remove references to the appointment of a county sheriff due to the change in the constitution requiring the office of sheriff to be elected.

In addition, in 2001 the Legislative Assembly passed Senate Bill No. 2244 which provided that the boards of county commissioners of two or more counties may agree by resolution to elect a multicounty jurisdiction state's attorney pursuant to the provisions of law relating to multicounty officers. In addition, the bill authorized the boards of county commissioners of two or more counties to agree by resolution to allow any candidate for office of state's attorney to petition for office in each county, and to serve if elected, if the candidate is a qualified elector of one of the counties at the time of the election.

In 2001, the Attorney General issued a letter opinion (2001-L-33) which interpreted this 2001 law. At issue was whether the Grant County commissioners could appoint a state's attorney who was not a resident of Grant County upon the resignation of the current state's attorney, who was the only licensed attorney in Grant County. The Attorney General opined that although the change in the law appeared to provide county commissioners with more options regarding the appointment of a state's attorney, Article IV, Section 8, of the North Dakota Constitution placed a limitation that all candidates for county elections must be a resident in the jurisdiction in which they are to serve at the time of the election. The opinion stated that although NDCC Section 11-10-04 purports to provide an option to a county commission when appointing a state's attorney to fill a vacancy in the elective office, the constitution limits the available options.

The opinion illuminated a provision that seemed to provide a method for addressing the dilemma in Grant County. Under NDCC Section 11-10-04(5), a state's attorney may be elected with multicounty jurisdiction pursuant to an agreement between county commissioners of two or more counties in accordance with Chapter 11-10.3.

The opinion noted two other exceptions in which a nonresident could be appointed as state's attorney, but these exceptions applied solely if the state's attorney were appointed rather than elected. First, Grant County could change the form of government to the county consolidated office form of government or the short form of county managership, thereby authorizing the appointment of a state's attorney from an adjoining county. Second, Grant County could become a home rule county and get voter approval to make the state's attorney an appointed official, thereby allowing the home rule county to establish its own qualification requirements for its appointed state's attorney.

In a letter opinion (2001-L-37), the Attorney General opined that a board of county commissioners may not hire a private attorney to represent the board without first obtaining the advice and consent of the county state's attorney. The opinion noted that the board may employ additional counsel to assist the state's attorney under limited circumstances and those circumstances require the advice and consent of the state's attorney.

In a letter opinion (2002-L-67), a state's attorney was not seeking reelection and the individual elected to the position in the November general election was not a resident of the county and had not notified the county that that person would assume the position. The opinion stated that when the new state's attorney did not take office there would be a vacancy that must be filled by an appointment by the board of county commissioners. However, the person appointed must meet the qualifications for that office as required by law. One of those qualifications is to be a resident unless there is an exception. An exception to this

requirement is when two or more counties agree that one person may serve as the state's attorney of more than one county. However, the state's attorney must be a qualified elector in one of the counties. The Attorney General opined that because an individual qualifies "in the manner required of a person elected to such office" if the individual is a qualified elector in one of the counties in which the person is elected, NDCC Section 11-10-04(2) permits the county and another county to agree that an elected and qualified state's attorney of another county may serve as the state's attorney of the county with the vacancy. In short, the board of county commissioners of the county with the vacancy has the authority to appoint an elected state's attorney from a different county to fill the vacancy, provided both counties agree.

Because the county with the vacancy could not find a state's attorney to serve or in the event an agreement could not be reached with another county, the Attorney General suggested an alternative. Under NDCC Section 11-16-02, a state's attorney may appoint assistant state's attorneys. The assistant state's attorney is not an elected county officer and no residency or qualified elector status is required for that person to perform the duties of a state's attorney. The law does not make the continued employment of an assistant state's attorney dependent upon the continued presence of the state's attorney appointing the assistant state's attorney, provided the board of county commissioners has approved the appointment by establishing compensation for the assistant state's attorney.

In a letter opinion (2002-L-68), the Attorney General opined that an individual elected in two separate counties as state's attorney may serve as state's attorney in both counties if the individual is an elector in one of the counties and the board of county commissioners in each of the counties approves as required by NDCC Section 11-10-04(2).

In a letter opinion (2006-L-33), the Attorney General opined that a person appointed to fill a vacant state's attorney position must have resided in the county for at least 30 days before the appointment in order to qualify for office. In addition, a candidate for state's attorney need not be a resident of the county at the time the candidate circulates petitions to appear on the ballot for the state's attorney position but must be a resident at least 30 days before the general election.

In a letter opinion (2006-L-38), the Attorney General was presented with the fact situation in which the Foster County state's attorney was the state's attorney of Griggs County through a joint powers agreement that was about to expire. The Attorney General opined that absent the approval of the two counties, the state's attorney in Griggs County would be vacant and the Griggs County board of commissioners would be free to appoint an attorney

who is a qualified elector as state's attorney until the next general election. An interesting fact was that the person who was the Foster and Griggs Counties state's attorney received the highest number of votes for the position of state's attorney in Griggs County for the period of time after which the joint powers agreement expired. However, in the most recent primary election, the question of whether the Griggs County state's attorney should be appointed was defeated. In addition, the Attorney General stated the runner-up in the recent general election was not entitled to assume the elective office when the high vote getter was ineligible or not qualified to serve.

There are a number of ways for a county to provide for a state's attorney, including:

1. The electorate can elect an elector of the county as state's attorney. (Section 11-10-02)
2. The electorate can vote to authorize the board of county commissioners to appoint an elector of the county as state's attorney. (Section 11-10-02.3)
3. If the office of state's attorney is vacant, the board of county commissioners can appoint an elector of the county as state's attorney until the next election. (Section 44-02-04)
4. The board of county commissioners may agree with another county for the state's attorney to serve as an elected state's attorney of the county, as long as the state's attorney is an elector of the county in which elected. (Section 11-10-04)
5. The board of county commissioners may agree with another county for appointment of the same elector as state's attorney in each county. (Sections 11-10-02.3 and 11-10-04)
6. The electorate of a county can adopt the short form of county managership government, thus allowing the state's attorney of an adjoining county to run for election in the county with the short form of county managership government. (Section 11-09-18)
7. The electorate of a county can adopt county home rule, providing for appointment of an elector as state's attorney. (Sections 11-09.1-05 and 11-10-02.3)
8. The boards of county commissioners of two or more counties may enter a multi-jurisdictional agreement to elect an elector of the multicounty jurisdiction as a multicounty jurisdiction state's attorney. (Sections 11-10-04 and 11-10.3-01)
9. The boards of county commissioners of two or more counties may enter an agreement to allow an elector of one of the counties to petition for the office of state's attorney in each county and to serve if elected. (Section 11-10-04)