

State of the Judiciary  
Chief Justice Gerald W. VandeWalle, North Dakota Supreme Court  
Message to the Legislature  
January 6, 1999

Good Afternoon. I am pleased to again be given the opportunity to appear before you and present the message on the State of the Judiciary. One of the Chief Justices from another State who does not currently have this privilege asked me if I thought it was worthwhile. I told him I thought it was but he really should ask the legislators who sit and listen what they thought.

Warren Burger in a speech several years before he became Chief Justice said "Had Rip VanWinkle gone away and come back today . . . and if he went into the courts, the principal changes he would have observed would have been the wearing apparel, the increased number of judges and the air conditioning. Most of the rest would be the same as when he began his legendary exile in the Catskill Mountains."

Last May I spoke to the finalists in the Know Your State competition at the University of Mary and reviewed briefly the history of the North Dakota Judicial System. I observed that, compared to the legislative and executive branches, the Judiciary had undergone extensive substantial change since Statehood. I told them:

"The Judiciary . . . has undergone extensive structural change; the increase of the Supreme Court bench from three to five being a minor change. This State at one time, not all that long ago, had a substantial number of judicial officers - judges who were not law trained. Although the Constitution provided for the supreme court judges and district court judges, the district court being the general trial court, to be 'learned in the law,' the Constitution authorized the legislature to create a large number of limited jurisdiction judges to handle the day-to-day kind of minor legal issues that arise. Most notable were the justices of the peace, few of whom were law trained. Every county, organized civil township, city, or village was authorized to have a justice of the peace, and most did at one time. Their jurisdiction was limited and they were paid from the fees and fines they collected, a practice later found unconstitutional by the U.S. Supreme Court. We had some very good lay justices of the peace. Unfortunately there were some who were interested only in the fees.

"In addition, every county had a county judge who handled probate matters, most of whom were also not law trained, and a few counties had county courts with increased jurisdiction who were law trained. There were also city judges and police magistrates, many of whom were not law trained.

"After a bitter debate over the use of non law-trained judges over several legislative sessions, the Legislature in 1959 abolished the justice of the peace effective July 1, 1961, and instituted a system of county justice courts which called for law trained judges. Since that time there has been a somewhat consistent reorganization and restructuring of the trial court system until today we have only one level of trial courts instead of the three that previously existed. The result was a change from a system of literally hundreds of part-time and full-time judges, to a point where, by year's end, we will have 43 full-time law trained trial judges. By law we are required to have just 42 trial judges in the entire State by January 1, 2001. This excludes only city judges whose

jurisdiction is limited to violation of city ordinances. So the third branch, the judicial branch, has undergone by far the greatest transformation since statehood."

If Chief Justice Burger were to come back today, at least to the Courts of North Dakota, he would have to retract his words. Our attire may be different, we - at least many of us - have air conditioning, but our number of judges has decreased and much of the rest is also changing. I want to discuss with you some of those recent changes and plan for future changes.

### **Public Trust and Confidence**

Standing before you two years ago, I ended this message on the State of the Judiciary by quoting the words of former Justice of the United States Supreme Court Thurgood Marshall: "We must never forget that the only real source of power that we as judges can tap is the respect of the people." The Conference of Chief Justices recognized that public trust and confidence in the integrity and responsiveness of the court system is essential to the fulfillment of the mission of the judiciary. In cooperation with the American Bar Association, the Chief Justices called for a national symposium on the subject of public trust and confidence. Each State is to form a Committee and generate topics for the national symposium. The North Dakota Committee - some 21 people from all walks of life - is chaired by Justice William Neumann. I have charged this Committee to give us its recommendations for improving the public's trust in the rule of law. We have already learned we are not doing enough to inform and educate our people as to our system of justice. Once we receive the Committee's recommendations, we will share this with you and ask your support in implementing them to the end that the public, although not necessarily agreeing with every judicial decision, will nevertheless have confidence in the system of justice which produced that decision.

### **Clerk of Court**

In 1997, in addition to an interim study you approved at my request, through provisions in the appropriations bill for the judicial branch of government, you also charged us with recommending through our budget the funding necessary to efficiently fund administration of the district courts including provisions relating to the Clerk of Court. It came at the time the State is engaged in transferring the collection and remitting of child support payments from the Clerk of Court to the State Human Services Department.

Without hesitation I tell you the Clerk of Courts issue is the most publicly contentious issue to come before the Court in the 20 years I have served on the Court. We sought a study through the National Center for State Courts. That study was a lightning rod which drew much opposition. As a result, the Court, the Bar, and the Interim Judiciary Committee sought the services of the North Dakota Consensus Council for the purpose of seeking some common ground on the matter of Clerk of Court and the delivery of services to the various counties. That process resulted in *a bill which I understand will be introduced into the Session by individual legislators*. The bill is not a perfect solution to many of us, but I believe it may be the best accommodation of the various interests which we can presently achieve. It leaves some county options, while empowering the Court to determine that adequate services are being provided. The price tag is not cheap. Although there are some one-time costs which we have budgeted for, the cost for the last six months of the 1999-2001 biennium when the bill will be effective is some three million dollars. Whatever happens with this legislation, if you determine to materially change the

direction, I ask that you do so in consultation with the Clerks of Court, the County Commissioners, the Bar, and our Court.

### **Disciplinary Board**

In the Judicial Branch appropriation bill for this biennium the Legislature substantially changed the funding for the disciplinary system to require that each lawyer licensed in this State pay a fee of \$50.00 for the discipline system in 1998 and \$75.00 for 1999 and each year thereafter and reduced the general fund appropriation. The staff for the disciplinary board also serve as the staff of the Judicial Conduct Commission. Because of the appearance that the Court could attempt to control the staff activities in the disciplining of judges, if not lawyers, the Court does not directly oversee the activities of the Disciplinary Board or the Judicial Conduct Commission. On petition of the Joint Attorneys Standards Committee, the Court created an Operations Committee composed of one member or former member of the Disciplinary Board, one member or former member of the Judicial Conduct Commission, and one member of the Board of Governors. The State Court Administrator serves ex officio as a non voting member. The Operations Committee is responsible for the fiscal management of the lawyer disciplinary system. The budget we have submitted reflects the amount expected to be paid by licensed lawyers and an amount to pay the share of operations of the Judicial Conduct Commission. We believe the shared staff is more economical and more effective than creating a separate office, including staff, for the Judicial Conduct Commission.

### **Juvenile Drug Court Planning Committee**

The Supreme Court through its Juvenile Policy Board established a Juvenile Drug Court Planning Committee in October of 1998. Chaired by Justice Mary Muehlen Maring, the committee consists of sixteen members from across the state. Each provides a unique perspective in evaluating this new and exciting project. The mission of the committee is to study juvenile drug courts already in place in other regions of the country, and to recommend whether a pilot drug court should be implemented in one of the judicial districts in North Dakota.

Topics the committee is studying to determine whether North Dakota should establish a drug court pilot project include: how juvenile drug courts operate; North Dakota juvenile drug and alcohol statistics; current processing of juvenile cases in North Dakota; public and private treatment services available in North Dakota; the role of the Department of Corrections in providing treatment to juvenile offenders; the role of the Department of Health in dealing with at risk youth; law enforcement involvement with juvenile drug abusers; and the role of North Dakota schools in the area of juvenile drug and alcohol abuse.

### **Indigent Defense**

As a result of rapidly escalating costs in bringing criminals to justice, Governor Schafer has discussed with you proposals to provide some alternatives to incarceration for certain parole violations. I applaud those efforts and I hope they foreshadow increased efforts by all of us to work together to develop sentencing alternatives.

Those increased costs of incarceration, due in part to the increased number of convictions, are reflective of the increase in costs of criminal defense. When the Legislature increases the penalty for a crime or makes mandatory a specific sentence for a person convicted of a crime, the cost to

enforce those penalties increases correspondingly. Costs for counsel for indigent defendants continue to rise in greater proportion than most other costs of the judicial branch. Our budget contains a request for a 10% increase for this purpose over last biennium. The requested increases were considerably greater but the Council of Presiding Judges, at the request of the Court, reduced the requested increase in half.

Not surprisingly, by far the greater number of people who are defendants in criminal actions are indigent. I suggested two years ago the time is coming when together we must examine whether a public defender office should be established to provide legal defense to indigent people accused of a crime. I doubt a government agency could assume the services as economically as our current contract system, but escalating costs appear to be a problem which will not abate and all alternatives should be considered so we have the most effective and most economical indigent defense system possible.

### **Legal Aid Funding**

Last session you enacted legislation which provided more funds for delivery of civil legal services to the poor. I thank you for the increase you authorized for the civil legal services fund. These are people accused of no wrongdoing; rather they are people who have legal problems – like the general public. In some instances those problems are greater and more acute because of their poverty. That increase, resulting from raising the amount of the filing fee deposited to the Civil Legal Services Fund from \$10.00 to \$15.00, has so far this biennium made an additional \$5,000 per month available. This is particularly significant since the program using Interest on Lawyer Trust Accounts (IOLTA) to fund legal services is in jeopardy under a recent ruling of the United States Supreme Court. Although no state having IOLTA has yet discontinued the program as a result of the ruling, we are aware that the final outcome of the litigation arising out of Texas could result in changes to the program.

### **Domestic Violence**

You have taken steps in past sessions to protect the victims of domestic violence through such methods as authorizing courts to require the surrender of firearms and authorizing a law enforcement officer to arrest without a warrant upon probable cause that the perpetrator is violating an order prohibiting contact between the perpetrator and victim. Unfortunately, the incidents of domestic violence continue to increase and continue to form a major portion of crimes of violence in North Dakota. Those incidents do not always involve only adults. Increasingly they include violence by children against parents or parents against children, sometimes babies. We have recommended for your consideration a bill relating to recognition and enforcement of foreign domestic violence protection orders, that is orders issued by another State, a tribal court, the District of Columbia or a commonwealth, territory, or possession of the United States. This legislation sets the statutory structure for implementing the full faith and credit requirements of federal law. I ask your favorable approval in this fight to protect the population of North Dakota from this scourge.

Important as is the need to isolate perpetrators and protect victims, I urge you to also examine the phenomenon to determine if there is something we as a government can do to prevent the abuse before it happens. Last session you approved a resolution to establish a task force to study the matter but it was not finally selected as a study project. I understand your human and financial

resources, like that of the judicial branch, are limited. However, I hope you will again consider a study. The low prices for farm commodities, the low price for oil and the threat to our lignite industry will only increase the stress many of our people face. Stress is not an excuse nor is it by any means the only factor in domestic violence, but it is a factor and we may see yet a continued level in domestic violence.

### **Family Law**

Two years ago I reported to you that a Joint Task Force on Family Law was formed following adoption of Administrative Order 5. The Task Force's charter was to review existing family law procedures, evaluate the need for changes, and make recommendations. The Task Force submitted their final report to the Supreme Court on June 10, 1998.

The Task Force recommended two statutory changes, designed to streamline divorce and child custody procedures, both of which were passed by the Fifty-Fifth Legislative Assembly. (NDCC 14-09-06.6 and 12.1-20-09) Recommendations were also made concerning expanded use of lay guardians ad litem. A mandatory training program and a draft rule are under study. The Task Force also recommended the Rules of Court be modified to provide for an eighteen month test of summary procedures in domestic relations cases. We adopted Rule 8.5 authorizing summary procedures in two districts if elected by either party and authorized by the judge. The summary procedures are designed to resolve the case in a spirit of cooperation. Unfortunately only about 25 couples consented to the summary procedures during the eighteen month test period. These cases typically involved only the husband and wife with no children. Although the participation rate was less than anticipated, the judges who participated remain enthused.

On August 26, 1998, I sent a letter to the Presiding Judges in the Northeast Central Judicial District, Southeast Judicial District and South Central Judicial District authorizing them to each develop a local rule for family law mediation. It is my belief that mediation can provide a valuable alternative in family law cases. It is my hope that we will gain valuable experience and knowledge as a result of these pilot programs.

### **Joint Dispute Resolution Study Committee**

In 1995, as a part of a health care reform bill, you appropriated money to the Supreme Court for a study of alternative dispute resolution options, including health care malpractice claims. We established a Joint Dispute Resolution Study Committee and, after numerous meetings, the Committee submitted its final report on June 30, 1998. The Committee is recommending changes to Rule 16, N.D.R.Civ.P., and the adoption of two new North Dakota Rules of Court to promote and facilitate the use of alternative dispute resolution processes.

The proposals of the Joint Dispute Resolution Study Committee have been referred to the Joint Procedure Committee for further study and recommendation to the Court.

The new provisions implement case-management techniques to encourage consideration of ADR in the early stages of litigation and to encourage attorneys and courts to educate the parties about ADR. The proposals also establish qualifications for mediators and provide for a court maintained roster of private mediators. The new provisions do not explicitly require the use of ADR, but they promote and encourage ADR and I believe we should continue to seek methods

of providing quality alternative dispute resolution mechanisms to litigants at the lowest cost available.

### **Gender Fairness**

Our program to eliminate gender bias in the judicial branch continues. A Committee to implement the recommendations of the North Dakota Commission on Gender Fairness in the Courts has been established. That Committee, chaired by Justice Mary Maring, is most active and has produced a handbook, A Judges Guide to Gender Fair Court Proceedings, as well as several educational programs. We are far from perfect in this area but I believe we have made substantial progress toward our goal of gender fairness.

### **Case Filing Trends**

In past State of the Judiciary presentations, I have carefully avoided boring you with detailed caseload statistics. I don't intend to change at this point but, since we have combined the county courts and district courts and reduced the total number of judges from 53 to 43, a few general observations may be in order.

Comparing 1995, the first year of court consolidation, to 1997, the most recent year for which we have statistics, we see a four percent increase in case filings in district court. Civil filings continue to decrease each year. The drop from 1995 to 1997 is 4.8%. Criminal filings continue to increase each year. The increase from 1995 to 1997 is 8.7%. As a general observation, the district court workload increases at about two percent per year.

It is a statistical fact that your district court judges are doing "more with less." I am very proud of how they have met the challenge to manage an increasing workload with ten fewer judges than we had in 1991. We must all watch to ensure this does not lead to shortcuts at the expense of justice or diminished service to the people of North Dakota. This is not the case at the present time.

### **Judicial Salaries**

Like other elected and appointed officials, Judges salaries are significantly behind the salaries of Judges in many States in our area. Our Judiciary budget request for the next biennium includes a request for a 5% salary increase in 1999 and in 2000 for judges and justices. This increase will return some salary compatibility with state judges in other states. In evaluating our request, I ask that you consider the savings which will be returned to the General Fund from three judgeships abolished in the 1997/99 biennium. These savings amount to \$316,000 in the current biennium alone. It seems only fair that the judges who are picking up the additional workload from the reduction in the number of judges should receive some reward for their additional workload.

### **Information Systems**

Two years ago I reported our initiative to develop programming changes that will permit criminal judgments to be entered into a computer in the courtroom with direct entry into the court's information system, UCIS. We have now developed a format that is compatible with the States Attorney Management System, SAMS. Data will soon be available for electronic transmission to the states attorney's office upon request, providing their system is on the same

AS400 as UCIS. Our next step is to find a way for AS400s to talk to each other so the data can be shared by all with a need. We are optimistic this can be accomplished. This will eliminate double entry, improve accuracy and save time. It will also assist the state in complying with federal mandates for data sharing.

All chambers are connected and have access to email, the Web and the Court's automated information system. Docket management and case scheduling are available to all judges through UCIS except Cass County, where the judges have access to a related county funded program. Several non-chambered counties have requested similar connections. We would like to provide this service, but we are unable to do so because of current staffing limitations. We do not want to expand our system beyond what we can support.

Justice Dale Sandstrom continues to receive acclaim for his Supreme Court website. This piece of technology has become a significant search engine for lawyers and an important source of court information for the public.

### **Legislation**

In addition to the bill concerning full faith and credit to be given to domestic violence protection orders issued by tribal courts and courts of other States, which I have already discussed, we ask your favorable consideration of the following legislation.

#### Intermediate Appellate Court

In 1987 you enacted legislation in accord with Article VI, section 1 and 6 of the North Dakota Constitution, establishing a temporary Court of Appeals composed of Surrogate and District Court Judges to which the Supreme Court can assign cases on appeal and whose decisions can be reviewed in the discretion of the Supreme Court. That legislation contained a sunset clause which you extended in 1989, 1993 and 1995. We ask you to extend that authority for another four years. We did not assign cases to the Court of Appeals for several years but with the advent of Justice Meschke's retirement, when four of us assumed the opinion writing until our new colleague joined the bench, and faced with an increasing caseload, we have in this past year called five panels of the Court of Appeals. This tool helps us to manage our caseload without a permanent intermediate appellate court and has proven valuable over the years when illness, resignation, retirement, or a sudden increase in appellate cases have occurred.

#### Jury Selection

We discovered during the 1997 flood in Grand Forks County that when a natural disaster occurs it may be difficult to call a jury because the populace has been displaced from their residences. We ask authority be given the Supreme Court to authorize the district court in the affected county to call qualified jurors from other counties in the district when a natural disaster impairs the selection of a sufficient number of prospective jurors in the county.

#### Disability and Survivor Benefits

Two tragic events this biennium, the accidental death of one of our judges and the onset of a debilitating illness of another judge, brought vividly to our attention the obvious fact that disability and survivor benefits under the judge's retirement program are not adequate. We

support a bill introduced at the request of the Public Employees Retirement System to improve those benefits. We also ask you to continue the past retirement adjustments for judges you authorized in the last legislative session.

### **For the Record**

Justice Herbert Meschke retired October 1, 1998. His contribution to the Supreme Court and to the legal precedents established by the Court is significant. We miss him. We welcomed to the Court on November 1, 1998, Justice Carol Ronning Kapsner, who has already established herself as a worthy replacement.

Last session you approved the submission of a Constitutional Amendment providing that an appointment to fill a vacancy in the Supreme Court or District Court must continue for at least two years and that if the term of the appointed judgeship expires before the judge has served at least two years, the judge will continue to serve until the next general election immediately following the service of two years. That Amendment was approved by a substantial margin due in large part to the efforts of members of the Bar.

I note in mourning the untimely death of Judge James Wright of Jamestown on November 4, 1997. Judge Wright was a person of quality, of intelligence, of honor and wit, and of superb judicial temperament.

Since I last spoke to you we have eliminated three more judgeships. The judgeship held by Judge Wright at the time of his death was not filled. Judge William Hodny of Mandan retired March 11, 1998, and Judge Wallace Berning of Minot retired December 31, 1998. These positions were not filled. In addition to Judges' Hodny and Berning, Judge Dennis Schneider of Bismarck retired for health reasons. Judge Robert Wefald was elected to that judgeship. Judge Laurie Fontaine replaced Judge Thomas Metelmann in the Northeast Judicial District. As of today, we have 43 trial court judges in all of North Dakota hearing cases involving non-criminal traffic violations and small claims to the most serious criminal felony cases and the most complex civil litigation. We are to be at 42 judges by January 1, 2001.

On the lighter side, as we prepare for a new century, I thought I would review a copy of the Session Laws of 1899 to see what the "hot button" topics were 100 years ago as they prepared for the 20th Century. A resolution urging Congress to provide pension for union workers of the Civil War, the establishment of a twine plant at the Penitentiary, grasshoppers, noxious weeds, education, highways, and a bill requiring a continuance of cases when an attorney in the case is a member of the Legislature or any party to the pending case is a member, were topics of the day. Interestingly, there was a bill codified as Chapter 64, of the 1889 S.L., which provided that the salaries of the Clerk of Court were to be regulated by the value of the property in the county as fixed by the Board of Equalization. The fees charged by the Clerk were to be deposited in a fund out of which the Clerk's salary was to be paid. Of even greater interest, the bill contained a clause declaring an emergency because "Whereas, by existing law the various counties of the state are not sufficiently reimbursed for the salaries paid to clerks of the District Court and it is essential that said counties be relieved as soon as practicable..." There are some matters which are constants!



In scanning the House Journal for the 1899 Session, I noted that Governor Devine, who became Governor in August 1898 on the death of Governor Briggs, gave a State of the State Message followed by an inaugural address by Governor-elect Fancher. Governor Devine had some interesting comments on finances: "The condition of the state treasury is one easily comprehended. We have awakened to the realization of the simple fact that disbursements are in excess of receipts." He went on to say that as a state we "have been somewhat reckless and careless in our appropriations of the public funds" (certainly no one will accuse the present day Legislature of that action) and that in "originating and supporting educational, charitable, reformatory and other institutions and supposed needs, have led us too far away from our resources."

Governor Devine had one other message you might find of interest. He said: "It is not the volume but the merit of the laws enacted that will measure the wisdom of your proceedings. Acts of indifferent merit that meet no public demand; introduce no reform, will work an unintentional injury. Such acts, without preserving sufficient demerit to provoke an early repeal, lower the character of our statutes and add confusion to the perplexities of our laws." Thank goodness he didn't have anything to say about opinions of the Supreme Court!

### **Conclusion**

Notwithstanding Governor Devine, in a more serious vein in closing, what you do in this legislative session will affect not only our State for the next two years, your actions in these next three months will affect the generations to come. I pledge the cooperation of the judicial branch as you chart our State's destiny.

I conclude with another statement from Warren Burger. "Like generals who have had no wars for a generation are out of practice, we judges have perhaps been sluggish in responding to the new way of trying legal and factual issues. But in time we do respond."