

State of the Judiciary  
Chief Justice Gerald W. VandeWalle, North Dakota Supreme Court  
Message to the Legislature  
January 10, 2001

### **Introduction**

Thank you for the privilege of appearing before you to present the State of the Judiciary Message at the beginning of a new century. We have just experienced a test of our constitutional form of government, and the rule of law prevailed. I share with you some words written by Martha Barnett, President of the American Bar Association, during the heat of the past election controversy

Rather than attacking the justice system, we should be thankful that we have a system of government in which disputes can be resolved in courthouses, not in the streets. It is our long-standing tradition that when the political branches of government are unable to resolve their differences, these matters are thrust upon our courts. Interpretation of often-conflicting statutory provisions and regulatory standards is the daily work of courts in this country. Our legal adversarial system – like our free enterprise system, our democratic electoral system, and our "marketplace of ideas" – provides a cauldron for the resolution of the competing and conflicting views, which characterize our democracy. Rather than resorting to name-calling and slurs of lawyers and the court, we should remember their role in ensuring that the Rule of Law is honored. Our system of government, founded on the Rule of Law, is the envy of the world. It is often complicated and messy, but it works.

After these last two months, our issues in the North Dakota Judiciary may not seem eventful. However, as our Nation and our State continue the normal operations of government, the importance of these issues will again be apparent. Let me begin.

### **State Assumption of Clerk of Court Functions**

The Fifty-Sixth Legislative Assembly enacted legislation providing for the state assumption of clerk of court functions. Large counties were given the choice of electing state funding for clerk of court operations or funding it without state assistance. Medium size counties were given the choice of electing state funding, contracting with the state to provide clerk of court services, or funding the function without state reimbursement. Small counties with less than one full-time clerk of court had the choice of contracting with the state to provide clerk of court services or fund the function without state reimbursement.

Eleven counties have asked for state funding for clerk of court offices. Three counties have opted to fund clerk of court services from county funds. One county did not respond within the statutory deadline. The remaining 38 counties have signed agreements with the state to provide clerk of court services with reimbursement from the state for court-related duties.

Six years ago we were asked what the cost would be to fund clerk of court operations. We estimated the cost to be eleven million dollars. This has been a well-known cost and one that was known to all when HB 1275 was enacted last session.

We attempted to present a budget to you this year that was less than the eleven million projected for the last six years but were unable to do so. Unfortunately inflation, salary costs, and county contract costs add up to a total clerk of court required budget of \$11,091,626.

We were given one million dollars to fund clerk of court operations for the last three months of the current biennium. This is \$228,000 short of requirements. As a result, we were not able to reimburse contract counties for operational expenses in our contracts or purchase equipment for state-funded offices. If this shortfall were to continue for more than three months, we may have to consider closing offices and shortchanging contract counties money they have a right to expect under current law.

Planning and implementation are on schedule and all identified issues raised have been resolved or are under study. With the continued cooperation of the clerks of court, we expect implementation to be smooth on April 1, 2001. This venture has been more successful than I would have believed possible under the circumstances.

### **Juvenile Court Philosophy**

The North Dakota juvenile courts continue to implement an operating philosophy known as "Balanced and Restorative Justice". This philosophy represents a shift from the traditional "treatment-based system" to one that emphasizes holding juveniles accountable to victims and to the community. As such, the juvenile courts emphasize financial restitution to victims and completion of community service hours. An innovative example of this change of philosophy has been the establishment of juvenile accountability conferences. These conferences provide the opportunity for victims to explain to youthful offenders the real consequences of their actions and allow the victim a say in what sanction will be imposed on the offender. Through continued implementation of additional accountability-based programming, such as intensive tracking, electronic monitoring, and drug and alcohol testing, the juvenile courts continued to serve the people of North Dakota well.

### **Juvenile Drug Court**

Two years ago I reported that the Juvenile Policy Board approved developing pilot juvenile drug courts in North Dakota. Over the past year, the East Central and Northeast Central Judicial Districts were chosen as pilot sites and a planning committee under the leadership of Justice Mary Muehlen Maring began meeting to plan the juvenile drug court "model". In April 2000, the committee completed its work, and the drug courts were operational as of May 1, 2000. The preliminary reaction is most positive.

The juvenile drug court model combines intense judicial supervision, incentives, sanctions, drug testing, treatment, aftercare, and community service to intervene effectively in the lives of substance-abusing youth offenders.

The planning process has been funded through grants from the Office of Justice Programs, Drug Courts Program Office. The North Dakota Supreme Court was also awarded an Edward Byrne Memorial State and Local Law Enforcement Assistance grant to begin implementation of the pilot juvenile drug courts. Our current budget request contains a modest amount of funding to continue the operation of these courts. Federal funds were provided for planning and implementation, but they are now drying up. If these pilot programs are successful, as we expect

they will be, the money we expend now will save countless dollars in the future by keeping these young people from future incarceration because of addiction.

### **Public Trust and Confidence**

As I reported to you two years ago, in November 1998, as part of a national project, a Public Trust and Confidence Committee, chaired by Justice William A. Neumann, was established to gauge the public perception of court systems in North Dakota. The members of the Committee represented a broad spectrum of interests and experiences. Their report has been completed.

The Committee considered information from many sources including self-represented and attorney-represented litigants, jurors, court observers, and interested citizens. After reviewing two national surveys, the Commission commissioned a statewide survey of public satisfaction with the Judicial system. The Judiciary did well in our state survey. We also asked about other state institutions so we could have a base of comparison. I am pleased to report the legislature also did well in the survey. Nevertheless, there is always room for improvement – for both of us.

North Dakota issues were categorized into ten broad categories: public access to the courts; education and civic literacy; system process; lawyers; civility, integrity and professionalism; impact of the media; bias in the system; caring for society; jury service; and the integrity of the judiciary and the judicial process. Strategies for addressing these issues were recommended. Methods for implementing the strategies were also recommended.

After reviewing the Committee report, the Supreme Court established a Public Trust and Confidence Implementation Committee. Administrative Order 12 has been signed, committee members identified and letters of appointment have been dispatched. Justice William A. Neumann will chair the committee.

### **Bringing Justice to the People**

The Supreme Court has resumed a practice fairly common in the 1980s, that of having oral arguments in cities other than Bismarck. During the past year, we have had the pleasure of interacting with outstanding young people from Linton High School, West Fargo High School, Des Lacs-Burlington High School, and New Rockford High School, in addition to the annual session at the UND Law School. Students from neighboring high schools and the general public were invited to the oral arguments where space allowed. We are scheduled into 2002.

One thing that is different from the '80s, we not only hear oral arguments, we visit the classrooms and engage in discussions and answer questions asked by students and teachers. If anyone questions the dedication of North Dakota teachers or the caliber and quality of our young people, I recommend they visit our schools. We are welcomed graciously and told how much the students have learned from our visit. In truth, it is we who are energized by these fine young people.

### **Implementing Gender Fairness**

The Gender Fairness Implementation Committee, chaired by Justice Maring, is charged by Administrative Order 7 with implementing the recommendations of the Final Report of the Commission on Gender Fairness in the Courts. During 1999, the Committee assisted in

coordinating several education programs concerning bias in the courts and provided articles concerning Committee activities for publication in the *Gavel*, a publication of the State Bar Association. The Committee also reviewed methods used in other jurisdictions of addressing bias-related complaints and began an assessment of an informal complaint procedure for responding to such complaints. The informal complaint procedure, which drew considerable comment, has been modified, and we will institute a pilot program beginning with the judges and employees of the judicial system.

The Committee also prepared and distributed to all judges a judge's guide on how to conduct gender-fair proceedings and recommended changes to the Code of Judicial Conduct Canons.

### **Digital Audio Recording Pilot Project**

The judiciary has implemented a project in Stark County to test the feasibility of using digital audio recording for judicial proceedings. As part of this project, all courtrooms in the courthouse are connected to the judges' chambers and the central server. Judicial proceedings are recorded in a digitized format. Using this technology, judges can enter their own personal notes on the record and have testimony available in their chambers when testimony is stored on a central server. Multiple parties can access the testimony simultaneously.

To give you an idea of where this technology could lead us, a project in the general trial courts in Tampa, Florida, allows attorneys to review portions of the digital record from their offices using the Internet. Transcripts are prepared overnight using a service bureau in Nova Scotia and the record is transmitted via the Internet. While we are not including these aspects in this pilot project, this technology provides greater accessibility to judicial proceedings and a cost effective storage format for the judicial proceeding record.

### **Interactive Television (ITV)**

In May a pilot project began in the South Central Judicial District using interactive television to supplement court proceedings in two outlying counties. The pilot project uses ITV for selected judicial proceedings between Burleigh, McLean, Mercer, and Morton counties. This project is designed to test how ITV can enhance judicial services in more rural parts of the state. The project, chaired by the Honorable James Vukelic, is the first application of this technology in the state and follows a project inaugurated in the 9th Judicial District of Minnesota about 24 months ago. Attorneys serving on the committee are: Robert W. Martin, Bismarck; Scott Porsberg, Bismarck; Merle Torkelson, Washburn; and Jim Johnson, Stanton. Scott Porsberg chaired the Procurement Subcommittee and Bob Martin chaired the Protocols Subcommittee. The cost effectiveness of the program is being evaluated. It will be based on activity through 12/31/00. We are hopeful this technology will improve the quality of access to judicial services in rural counties. In areas where such technology is too expensive for just judicial use, we hope to work with schools, government agencies, and the community to share costs and provide a service beneficial to all.

### **Data Information Exchange**

The Judicial Branch has been actively pursuing ways that will allow the information systems used by the Judicial Branch to communicate with the information systems used by other governmental entities such as the Attorney General's Office, Department of Transportation, and

some county entities. We have also begun working to give law enforcement and criminal justice agencies access to our management system for the purpose of reviewing information specific to cases. This includes personnel from police agencies, state's attorneys, Department of Corrections, and the Attorney General's Office.

We are working with several municipal courts to integrate their case management systems with that used by the Judicial Branch. These are but a few examples of ongoing projects underway to insure the most efficient and effective use of our information technology resources.

### **Supreme Court Web Page**

Two years ago I reported Justice Dale Sandstrom's website continues to receive worldwide acclaim. Since then it was voted by the American Association of Law Libraries as the best judicial website in the nation. In the fall of 1999, the Sixth International Court Technology Conference announced the North Dakota Supreme Court web page is the best on the web.

The project to make North Dakota Supreme Court opinions available on the web continues. Currently, cases dating back to 1988 are on the web and available for your research. We have scanned cases back to 1975 but they have to be formatted and proofed before they can be put on the web. This is a slow and laborious task. Our goal is to put all cases decided since 1950 on the web.

### **Judicial Leadership Conference**

On April 12-14, 2000, 38 of the 43 district judges and all of the justices of the Supreme Court met in Carrington, North Dakota, to discuss long-range planning issues.

The discussion on planning priorities was led by Dr. Dale Lefever, a nationally recognized expert in judicial leadership. The assembled group identified issues for serious discussion in each of the major sections of the Trial Court Performance Standards as follows:

- Access to Justice
- Expedition and Timeliness
- Equality, Fairness and Integrity
- Independence and Equality
- Public Trust and Confidence

"Better practices" were also discussed. The results of the leadership conference will provide the starting point and background for study by a newly reconstituted Judicial Planning Committee.

### **Case Filing Trends**

With the Unified Court Information System (UCIS) serving as the case management system, 30 counties are now able to track case filings on-line. The remaining counties, with the exception of Cass County which operates a separate system, have access to UCIS through the cooperation of their neighboring on-line counties. As the use of this system grows, we collate a more comprehensive summary of court data to analyze the workload of the judiciary.

We have gathered five years of caseload statistics since the unification of our county and district courts in 1995. Criminal filings have fluctuated in recent years with 1999 filings declining 4.1% from 1998, but remaining higher than 1995 levels. Civil case filings decreased 6.7% from 1998 and have shown a continued downward trend since 1995, registering an overall decrease of 8.2%. Case filings have decreased 4.2% overall since 1995.

### **Ralph J. Erickstad Courtroom**

On July 12, 2000, the Supreme Court Courtroom was dedicated as the Ralph J. Erickstad Courtroom. Among the out-of-state dignitaries who spoke were the Honorable Robert Miller, Chief Justice of the South Dakota Supreme Court, and the Honorable H.F. "Sparky" Gierke, Judge of the U.S. Court of Appeals for the Armed Forces and former Justice of the North Dakota Supreme Court. A dedication plaque in honor of Ralph J. Erickstad was unveiled in the courtroom. The plaque reads as follows:

Chief Justice Erickstad was a leader in the unification of the state's trial courts and in the development of the judicial wing and the Supreme Court chambers of the State Capitol, which were completed in 1981. He was nationally recognized for his leadership with the Conference of Chief Justices and the National Center for State Courts. He served through appointment by President Ronald Reagan and confirmation of the United State Senate on the Board of Directors of the State Judicial Institute.

Ralph Erickstad was recognized as "the master navigator of modernization for the courts" by Retired Justice Herbert Meschke and Supreme Court Librarian Ted Smith in their superb history entitled "The North Dakota Supreme Court: A Century of Advances". This history is published in Volume 76 Number 2 (2000) North Dakota Law Review. I have been concerned that the history of the Court was being lost and am deeply grateful and indebted to Justice Meschke and Ted Smith for their detailed research and work. For those of you interested in the history of our state, I recommend the history for your reading. It contains some interesting history of legislative-judicial cooperation.

### **Alternative Dispute Resolution**

After considerable study, prompted in part by an appropriation in the 1995 Legislative Session to develop an alternative dispute resolution option for parties in dispute, the Court on December 6, 2000, adopted Rules 8.8 and 8.9, North Dakota Rules of Court. These rules recognize the importance of alternative dispute resolution ("ADR") as a tool to assist our citizens in resolving disputes in a timely and cost-effective manner and encourage parties to civil suits to participate in ADR. The rules establish mediative court-sponsored settlement conferences and domestic relations mediation as the primary form of ADR offered by the district court and encourages parties to arrange and participate in ADR in the private market as an alternative to court-sponsored ADR. A sliding fee schedule based on participants' assets and income will be applied to court-sponsored mediation services in domestic relations cases.

Our purpose is not to compete with the private ADR market but to provide court-sponsored ADR to those who have limited finances, particularly in domestic relations cases where there is the greatest need for alternatives to the adversarial method of resolving disputes.

We also approved establishment of a roster of neutrals for civil arbitration, civil mediation, and domestic relations mediation from which parties may seek a neutral.

Finally, the Court approved the petition from the State Bar Association to establish a joint committee responsible for continuing study and review of ADR in the justice system.

### **Indigent Defense**

As most of you are aware, before a defendant can be sentenced to incarceration, the defendant must have been defended by an attorney. If the defendant is indigent and cannot afford an attorney, an attorney must be provided at state expense. North Dakota has traditionally contracted with law firms and attorneys to provide representation in each judicial district. This method of providing defense services has become more complex, difficult and costly each year. There are other methods of providing defense services such as a public defender program. It has been 26 years since the legislature last looked at alternatives to the current system. It is now time to reexamine how the required services can best be provided.

The last page of the State of the Judiciary Message book you have before you contains a draft concurrent resolution that addresses these issues. I urge your favorable consideration of this concurrent resolution.

We have struggled for some time with how to appropriately and effectively recover, or "recoup", state dollars expended in providing legal representation for indigent criminal defendants. State law requires that defendants reimburse the state, or county or city for that matter, for any funds so spent and our recoupment level traditionally is about 8 to 10 percent of the total amount spent on indigent defense. That recoupment level more or less mirrors the national average. One method of offsetting, at least in part, the cost of providing indigent defense services is to require criminal defendants to pay an application fee when they apply for indigent defense services. Approximately 15 states have now enacted legislation to implement such a fee. At the request of our Legal Counsel for Indigents Commission, the Supreme Court considered proposed legislation that would establish such a fee in North Dakota. The proposal was approved and the legislation will be before you for consideration this session.

### **Legislation**

Legislation we have prefiled for your consideration includes a bill to amend sections of the North Dakota Century Code removing now obsolete language relating to elimination of judgeships.

A bill to amend and reenact sections of the Century Code to insure temporary orders, restraining disorderly conduct, and ex parte protection orders remain in effect until terminated by the Court or a protection order is entered.

A bill to change the name of the State Bar Board to the Board of Law Examiners to remove confusion between the State Bar Association, which is the organization to which all licensed lawyers in North Dakota belong, and the Board which is established by law to examine and recommend applicants seeking a license to practice law in North Dakota.

A bill to eliminate confusion governing appeals from post-conviction relief proceedings.

## **Court Unification**

In 1991 when court unification was passed, there were 53 county and district court judges. In 1995 when unification became effective, I reported in the State of the Judiciary Address on January 4, the number of judges was 48. Today we have 42 judges, a 21% reduction in ten years. The decision to eliminate vacancies became increasingly difficult, but the decision to eliminate the chamber of a sitting judge in order to reduce to 42, the legislatively requested number by January 1, 2001, was by far the most difficult. This is the last reduction the court is required to make although the court is authorized and will continue to make transfers when vacancies occur and transfers are necessary.

## **Judicial Salaries**

When court unification was passed, district court judges pay ranked 45th out of the 50 states. On July 1, 2001, North Dakota Judges will rank 50th out of 50 unless a salary adjustment is enacted. This has occurred during the period when there was a 21% reduction of judges and a resulting 26% increase in individual caseload. This is a case in which our citizens received more for less.

Our budget proposes a plan to begin to restore balance to North Dakota judicial pay. The salary of South Dakota judges is approximately 12% greater than North Dakota judges. Our plan proposes to reach the South Dakota level through a salary increase plus a small inflation adjustment over a period of two biennia. Six percent of the difference is requested this biennium, and the remaining six percent will be requested in 2003. We ask your support for equitable compensation for judges who have been asked to do more and more over the last ten years.

## **Future Issues**

The number of self-represented persons in the judicial system continues to grow. Many, but not all, of these persons are needy. We are studying methods of accommodating these people without compromising the impartiality of the system.

The multi-jurisdictional practice of law ("MJP") is a big issue nationally. There are those who propose no barriers to the practice of law across state boundaries. The issue is multi-faceted and exceedingly complex. It will bear watching.

## **For The Record**

I note with sadness the deaths of William Paulson, retired justice of the North Dakota Supreme Court; Dennis Schneider, retired district judge from Bismarck; and Eugene Burdick, retired district judge from Williston. These judges served distinguished careers with the North Dakota Judiciary.

Judge Kirk Smith, district judge from Grand Forks, retired at the end of the year.

We welcome to the bench, Judge Karen Braaten, who was elected in November to the judgeship held by Judge Smith, and Judge Bruce Romanick who was elected to the judgeship in Bismarck previously held by Judge James Vukelic.

## **Conclusion**

In my 1999 State of the Judiciary Message I reviewed some of the statements contained in then-Governor Devine's State of the State Message in 1899 just before the turn of the century.

Since there was no State of the Judiciary Message in those days, I went back to the House Journal for 1901 to learn that ex-Governor Devine again gave the State of the State address because Governor F. B. Fancher had become ill the previous September. Ex-Governor Devine's address was followed by the address of Frank White, the incoming Governor.

Governor Devine told the legislature:

As a nation we confidently assert that our people are among the most enlightened and progressive on the face of the earth; and you have the honor to represent the people of a state having the smallest percent of illiteracy of any state in the union, and who are the peer of any people in the land, in patriotism, intelligence, integrity and love of equality; in truth and justice in the affairs of mankind.

He concluded with the observation that "Good laws are the best legacy which one generation can leave to another."

Governor Devine had great insight. All of us, in government and out, should strive to retain for our populace these qualities of which Governor Devine spoke. Although our institutions of government are criticized, we must only work harder to overcome cynicism and skepticism. As Governor Devine said, our citizens are the peers of any people in the land. I submit they will quickly reject what we do that is wrong but even more quickly defend what we do that is right. We can ask no more.

Thank you for allowing me the privilege to report on the State of the North Dakota Judiciary and to discuss with you some of the activity in the Judicial branch.

We wish you well as you discuss and debate the proposals to implement and protect the inalienable rights we all enjoy under the Rule of Law as established by the United States and North Dakota Constitutions.