

State of the Judiciary
Chief Justice Gerald W. VandeWalle, North Dakota Supreme Court
Message to the Legislature
January 5, 2005, in Bismarck, North Dakota

Introduction

Lieutenant Governor Dalrymple, Speaker Klein, members of the Legislative Assembly, State executive officials, my judicial colleagues and other friends. Thank you for the privilege of appearing before this Joint Session of the Fifty-ninth Legislative Assembly of our great state.

Over the entrance of the Yale Law School, there is a carved inscription that reads: "The law is a living growth, not a changeless code." So, in reviewing remarks from prior years, the focus has been on change. As I review activities of the past two years, that is still what we are about. In fact, because of the forces that play in our state, I foresee change being the focus for years to come. With the increasing advances in information technology and how we do the work of the courts, we will inevitably see change as a constant. It is apparent that we in the North Dakota Judiciary need to prepare for an ever-changing world. We must routinely revisit resource allocation and service delivery systems to assure we are conducting our affairs in an efficient and effective manner. I want to share with you many of the changes that have occurred in the last two years, as well as some that I believe loom on the horizon. But in talking about change, allow me, as I have done before, to reach back 100 years to when our State was very new and very young, to connect to our heritage, and to remember that change comes from what we have learned and experienced. One hundred years ago, January 4, 1905, newly elected Governor E. Y. Sarles, in addressing the Joint Session of the Legislature, discussed a variety of issues many of you would find familiar. He noted that the site of the Capitol is not far from the spot where Lewis and Clark passed a winter 100 years ago on their journey up the Missouri River. Governor Sarles in his closing remarks to the legislators, recognizing the coordinate branches of government, said in words which remain true today, "Yours is the creative power, that is charged directly by the people with the enactment of their will into laws." Respecting your mission as legislators and recognizing our role as the judicial branch of government, I make the following report and recommendations.

Administrative Reorganization

Over the last two years, we have thoroughly reviewed the administrative structure of our trial courts. Under the able leadership of Justice William Neumann, the Judicial Planning Committee submitted several planning recommendations to the court. Included in those recommendations were several provisions concerning administrative reorganization. After considerable discussion and input from lawyers, judges, and court personnel, we approved a new administrative structure, which is reflected in Administrative Rules 2, 22 and 6.1. These rules took effect, for the most part, on August 1, 2004.

The organization of administrative support services should enhance that delivery of services. Our commitment is to provide services for all citizens throughout the state in a timely and equitable fashion. We completed the reduction in the number of trial court judges a few years ago. This initiative recognizes the need to simplify our administrative processes and relieve judges from

the administrative burdens whenever possible. To that end, we have created four administrative units in the state. Administrative units are headed by professionally trained court administrators and all other personnel except those working directly for individual judges will be overseen by these court administrators. One of our objectives is to simplify the lines of authority, thus developing a system of greater accountability by which we can better measure the performance of the various offices. These changes brought about by the adoption of these rules should have a positive impact on all of the citizens of our great state.

A second objective is the improvement of the level of consistency of services of our clerk-of-court personnel, juvenile court personnel, and administrative personnel throughout the state. We seek to incorporate consistency in providing judicial services. People using the courts should be assured they do not have to confront different forms or procedures just because they have moved from one county to another. Unless there is a persuasive argument to the contrary, the forms and procedures should be the same throughout our state. We seek to improve and strengthen our administrative structure with consistency being one of the desirable outcomes.

This restructuring initiative focuses on internal operating practices and procedures to improve services available to each of our citizens. By definition, this means there will be change and the need for compromise. In the final analysis, this is not only a desirable goal; it is an administrative necessity as we strive for a cost-effective judiciary that provides judicial services in a just, equitable, and efficient manner.

Indigent Defense Services

Those of you, most of you, who have heard my previous State of the Judiciary messages know I am concerned about the administration and funding of our indigent defense system. In the 2001 Legislature, I asked for a study resolution to consider the establishment of a different method of providing legal representation for indigent criminal defendants and the feasibility and desirability of establishing a public-defender system. As a result of that study by the interim committee, a bill was introduced into the 2003 Legislative Assembly which would have transferred the indigent defense system to the Office of Administrative Hearings. Although there was not great enthusiasm for the study, there was substantial opposition to the solution proposed by the interim committee. The bill was defeated, but in its place, as also recommended by the interim committee, the 2003 Legislature adopted another study resolution which recognized the conflict arising from the administration of the indigent defense system by the judiciary as well as the fact the current system is underfunded. Although the 2001 interim study did not result in legislation to resolve the problems, it did serve to increase awareness that we are in trouble with our current system.

Subsequent to the 2003 Legislative Session, through the active leadership and involvement of the State Bar Association, a task force was created to review our indigent defense system and provide recommendations to the Interim Criminal Justice Committee on desirable changes. This task force was funded by the State Bar Association, the North Dakota Judiciary, and the North Dakota Legislative Assembly. Working together in this partnership, the task force was originally chaired by Deputy Attorney General Sandi Tabor. When she stepped down as chair of the task force, Sharon Wilson Martens, Walsh County State's Attorney, assumed the leadership of this task force. I thank each and every member of the task force for their contribution and talent. In addition to representatives appointed by the State Bar Association, district judges, and public

defenders, the Legislative Assembly was ably represented by Representative Ron Carlisle, Representative Duane DeKrey, Representative Lawrence Klemin, Representative William Kretschmar, Senator Jack Traynor, Senator Thomas Trenbeath, and Senator Constance L. Triplett.

The Spangenberg Group, a Massachusetts consulting firm that has worked for many years in numerous jurisdictions on indigent defense issues, provided technical assistance to the study. During this legislative session, you will have an opportunity to hear from those who have worked on this important initiative. In reviewing the draft legislation, I am confident you will agree this proposal has much to commend it to this body. During the committee process, you will hear from members of that task force as well as other concerned citizens. It is important that they share their views and concerns with you. This initiative is not merely a pet project of the Chief Justice. This Legislative Assembly needs to know about the deficiencies of our present system and the need for change. This new proposal will double the amount of general fund dollars necessary to deliver indigent defense services in the state. It represents the need for \$6 million new dollars to be fully and adequately implemented. I will not belabor you with all of the deficiencies of our present contract system other than to underscore that in addition to the conflict of interest resulting from judges operating the indigent defense system, we are woefully underfunded and finding it increasingly difficult to interest attorneys in providing contract services. We spend \$3.23 per capita for services in North Dakota. Idaho is at \$6.39, South Dakota is at \$8.35, and Montana is at \$10.22. Of the nine states surveyed by the Spangenberg Group, the average per capita spending is \$8.54. We lag far behind all states surveyed by an unacceptable amount. Although lack of resources is not the only problem, this lack of funding has exacerbated the flaws inherent in our current system.

With approval and implementation of this new plan, attorneys providing indigent defense services will receive a reasonable rate of compensation. The plan proposes a commission that will oversee and provide general administrative direction to an executive director for delivery of indigent defense services statewide. The legislation will allow but not require the commission to create full-time public defender offices. There are many positive aspects to this legislation. We are at a point where we need to make a change in our delivery of indigent defense services. The legislation being introduced meets all of the needs to assure quality services are provided statewide at a price we can afford.

Courthouse Improvement of Funds

During the last legislative session, House Bill 1088 was passed to establish an administrative fee structure to provide additional funds for indigent defense as well as providing funds for courthouse maintenance and minor remodeling. With 18 months of collections history, we are confident the collection of these administrative fees will exceed the original projection. Receipts to date have allowed us to provide supplemental allocations to contract counsel for the second year of this biennium. In addition, at least \$460,000 will be available for court facility maintenance and improvements. While the objective of this legislation was never to fully fund indigent defense services nor to fully compensate counties for providing judicial facilities in their respective counties, in both instances, it appears we have a mechanism in place to address, in part, indigent defense needs as well as courthouse maintenance concerns.

I take this opportunity to recognize Senator Stan Lyson for his direct involvement on the committee charged with disbursing funds to counties for maintenance and improvement initiatives.

Judicial Improvement Program

We have just inaugurated a judicial improvement initiative for our judiciary. This initiative provides for lawyers and court employees to provide feedback for all judges within two years of their election. The results are, under the rule, confidential between the reviewer and the judge. However, the final report on the first survey from the Bureau of Governmental Affairs, which was selected as the independent entity to receive and summarize the survey information and transmit it to the reviewer, is that the operation ran smoothly. This program provides an opportunity for honest and constructive criticism to improve our individual performances as judges as well as the opportunity for affirmation of those things we, as judges, do well. It does not replace the Judicial Conduct Commission nor the informal complaint procedure we also established by rule, but hopefully, it will reduce the need for those procedures.

Digital Audio Recording

We have now installed digital audio recording in three courthouses in the state. It is currently operational in Stark, Cass, and Grand Forks Counties. Before the end of this biennium, we hope to install it in three additional chambered cities. We are moving from analog recording to digital recording in the higher volume counties of the state. This equipment is not only cost-effective, but will provide for an improved record of judicial proceedings in the future. It is becoming increasingly difficult to recruit court reporters due to the number of schools that have closed across the nation which has made it incumbent upon us to enhance audio recording activities so that we can assure a verbatim record of all judicial proceedings.

Electronic Ticket Processing

We are now a partner in moving data entered electronically by highway patrol officers in their vehicles to the courts and then to the Department of Transportation. This means that for the first time, government employees touch data only once. The officer in the vehicle enters the citation information, which is transferred electronically to the courts on a daily basis to create a new case. Court personnel then add to the file when the case is disposed of and the data is sent to the Department of Transportation to update driving records. We now have a seamless process for processing traffic violations from beginning to end. We currently enter approximately 65% of all tickets through this process, resulting in a substantial reduction in data entry on the part of our personnel.

Domestic Violence Order Preparation

Despite the enviably low crime rate North Dakota enjoys, domestic violence continues to be a concern. A substantial percentage of homicides in North Dakota are related to domestic violence. Domestic violence is unacceptable. We all need to do better in confronting this scourge. To that end, we have had in place, for over a year, a system permitting the electronic preparation of domestic violence protection orders. The domestic violence petition can now be prepared by domestic violence advocates and moved electronically to the court to provide data to begin the preparation of a temporary or permanent protection order. When the order is completed, the data

is then moved electronically to the sheriff's office for service. The data also is transferred to the Bureau of Criminal Investigation to create a database that becomes part of a statewide registry on domestic violence orders. This information is also relayed to a national repository on domestic violence orders maintained by the Federal Bureau of Investigation. For the first time, officers in the field are able to obtain the full text of domestic violence protection order information 24 hours a day without any delay

Interactive Television (ITV)

We continue to explore new uses for interactive television. We have systems operational in Burleigh, Mercer, McLean, Stutsman, and Cass Counties. These systems have already proved to be cost effective. They have allowed medical professionals from the State Hospital to appear in judicial proceedings eliminating the need for these individuals to travel to the courthouse where the hearing is being held. In December, we began initial appearances and arraignments of in-custody defendants in Cass County. With the jail located a number of miles from the courthouse, using Interactive Television means that transportation of in-custody defendants has been reduced as they have been able to have initial proceedings conducted over interactive television. We are looking at expanding this technology during the coming biennium to a number of other jurisdictions in the state.

Enhanced Records Management

We have begun the process of selecting an enhanced records management system. This system will serve as the basis for storing all district court case documents electronically. This will increase the efficiency with which the judicial branch can process cases and share case related documents.

Criminal Justice Information System (CJIS)

Since its inception by the Legislature, the judicial branch has been an active participant in the CJIS project. In the coming months, we will begin sharing court case information through the CJIS web site. This will enable criminal justice and law enforcement personnel to access court case information from the single CJIS web portal. I appreciate working with Curt Wolfe and Sandi Tabor on this project to the end that our citizens will be more secure because of the information we are able to share.

Drug Court Initiative

The interest in the use of problem-solving courts in our nation continues to grow. The concept of problem-solving courts has been endorsed by the Conference of Chief Justices of the United States. As you are aware, we have juvenile drug courts in Bismarck, Fargo, and Grand Forks. There are adult drug and alcohol courts in Bismarck and Fargo. The possibility of a problem-solving court in the northwest part of our state is under consideration. For a problem-solving court to work, there must be commitment of the state's attorney, treatment providers and probation personnel beyond the involvement of the judiciary for the initiative to be successful. These discussions have begun.

We have included \$203,000 in general funds in our appropriation request to support our three existing juvenile drug courts. The results from these courts, while mixed, are promising. We

learn from our failures as well as our successes. These courts represent a different model for involving the judiciary in dealing with the very difficult problems of addiction and provides a way to more effectively address substance abuse including methamphetamines, other drugs, and alcohol.

I take this opportunity to thank Justice Mary Maring for her efforts in support of our juvenile drug courts. The programs would not succeed without the commitment of the Department of Human Services, our juvenile court staff and the Department of Corrections. Initiatives like these cannot work without the cooperation and active involvement of all the critical components.

Judicial Salaries

The number of district judges was reduced to 42 district judges effective January 1, 2001. As you may be aware, we are experiencing quite a turnover in these positions due to retirements of a number of judges. Since January 1, 2003, we have experienced a 15% turnover in our district judgeships, having had six judges retire. This is the largest turnover in recent history. We must continue to take steps to ensure that district judgeships are sought after by the best and brightest of the practicing bar to assure the caliber of judicial leadership the state of North Dakota needs and deserves. As you may recall, we withdrew a pay raise request from our 2003-05 budget submission prior to the last session commencing. Our Judicial Conference took the position that we would request whatever was awarded to state employees. As a result, our judges received no pay increase during the present biennium.

In 2001, the Fifty-seventh Legislative Assembly awarded a 14% increase for district judges. Our request in 2001 was that we needed to develop a compensation plan for North Dakota judges that would provide equity with South Dakota recognizing that this goal could not be achieved with one salary increase. We have included a 9.78% increase for the 2005-07 biennium. The increase request is 5.78% for the first year of the biennium and 4% for the second year of the biennium. Based on our best estimate of activities in South Dakota, this will move us much closer to a level of equity with our counterparts in that state. While not substantial, we do continue to have a slight increase in our caseload in the trial courts, but more importantly, the dynamics of the caseload are changing. This is a phenomenon that is being experienced throughout the United States and is one that we need to be sensitive to, assuring that we have the competencies on the bench to deal with the ever-changing problems of our society. A sound salary administration plan is critical in assuring the caliber of people that we need to provide judicial services.

Judicial Selection

Recently there have been attacks on the validity of the provisions of the Code of Judicial Conduct which govern the actions of judges and judicial candidates, particularly as applied to elections. Without going into detail, those challenges are directed at the statements judicial candidates are permitted to make concerning pending matters in the courts or those matters likely to come before the courts, the matter of political-party affiliation in North Dakota as you know judges are elected on a no-party ballot and attacks on restrictions of direct solicitations of funds by judicial candidates. Our neighboring state, Minnesota, was involved in a case which reached the United States Supreme Court. On remand, it is now pending in the 8th Circuit Court of Appeals which includes our State. Following the decision in the United States Supreme Court, cases in other jurisdictions, primarily federal courts, have called into question various restrictions

in the activities of judicial candidates contained in the Code of Judicial Conduct. To some extent these attacks are attacks on judicial independence.

Depending on the outcome of some of the litigation, I suggest the State of North Dakota may want to review the method by which we select our judges. While North Dakota judicial elections have been conducted in an exemplary way, as the bar is lowered in other States it inevitably will affect us.

I do not intend these remarks to be alarmist nor to necessarily recommend we change the method of selecting judges. I suggest only that if the outcome of the pending lawsuits is as bleak as some predict, we should review the matter of selection, taking into consideration the realities of those elections. We should consider whether or not our attempts to keep judges as free from bias, actual or perceived, can be maintained in light of the destruction of many of the rules governing judicial elections.

I have no proposals for you, not even a study resolution. I ask only that you keep it in your minds as the litigation unfolds to the end that a future session of the Legislature may be prepared to consider the issues.

For the Record

As I mentioned earlier, six of our trial court judges retired during this past biennium.

Judge Benny Graff in Bismarck, the last of the trial judges on the bench when I came to the Supreme Court, retired early in 2004. Judge Norman Backes of Fargo retired last spring, and Judges Lawrence Leclerc and Michael McGuire of Fargo, Judge Bruce Bohlman of Grand Forks and Judge Gary Holum of Minot chose to retire at the end of their terms on December 31, 2004. Governor Hoeven appointed Sonna Anderson to succeed Judge Graff, Douglas Herman to succeed Judge Backes. The electors chose Steven Marquart and Steven McCullough to succeed Judges Leclerc and McGuire, Sonja Clapp to succeed Judge Bohlman and Gary Lee to succeed Judge Holum.

Conclusion

Today, I have touched on a number of initiatives and activities that are underway in our judicial system that reflect on our continued commitment to providing a high level of judicial services for all citizens of the state. In the midst of these changes, I ask you to reflect on the values of our system of government and the critical role the judiciary plays in the lives of every citizen. As we look at the efforts being made throughout the world to establish democratic forms of government, we must be mindful and thankful for our Constitution. It provides the framework within which we can continue to make changes to improve the administration of justice. I look forward to a productive and meaningful working relationship with the legislative and executive branches as we prepare to meet the changes we must all face together in the years ahead. To that end I pledge my cooperation.

Thank you.