

State of the Judiciary
Chief Justice Gerald W. VandeWalle, North Dakota Supreme Court
Message to the North Dakota Bar
June 17, 2010, in Bismarck, North Dakota

President Dynes and members of the State Bar Association of North Dakota. I am pleased to deliver the court's annual message to the 111th meeting of the State Bar Association.

Clarence Darrow is quoted in the New York Times April 19, 1936, as saying "There is no such thing as justice, in or out of court." With all due respect to Mr. Darrow, I hope to prove him wrong at least with regard to access to justice in the courts. Nevertheless, I am also aware of the following words from the 1929 Report of the National Commission on Law Observance that "No system of justice can rise above the ethics of those who administer it." To that end, access to the court system is a matter with which we are always concerned. Who gets access and how that affects their ability to seek justice is both a societal issue and a very personal subject for litigants and their attorneys. We have been working on issues of access in a number of ways.

E-Filing and Access to Documents

This past year we began the implementation of a new case management system in the trial courts. At this time all of the counties in the East Central and Southeast Judicial Districts are using the new Odyssey system. One of the features of this system of which we are most excited is the ability to electronically file documents. Our electronic filing system requires no special licenses or software on the part of the attorney, nor are there any extra fees associated with using electronic filing.

We are also making access to electronic documents available over the web to licensed North Dakota attorneys, again at no charge. We are doing this because we believe it will assist you in working more efficiently. Like the judges, you will have fingertip access to the documents in a case and more immediate knowledge of when orders and judgments are issued.

Justice Sandstrom and the members of the Operations Group which meets on a nearly weekly basis, the members of the Court Technology Committee, our staff in Information Technology and the staff in the offices of the clerks of court have spent many, many hours to roll out this case management system. I thank them for their dedication.

Expansion of Indigent Defense Services

On rare occasions, situations arise where a defendant in a criminal case is deemed incompetent to represent himself yet refuses to hire an attorney even though he has the financial means to do so. We recognize this as a serious issue and we are exploring legislative solutions that would authorize the Commission on Legal Counsel for Indigents to provide defense services to the defendant in these instances.

Expansion of the Family Mediation Program

Our family mediation program continues to receive high marks from participants. Ninety-one percent of participants state they are satisfied with the overall mediation process while 94% indicated they prefer mediation over going to court. I cannot overemphasize that the primary purpose of this program is not simply to settle cases. Rather, the overriding purpose is to use mediation to minimize family conflicts, encourage shared decision-making, and support healthy communication among family members. We have been conducting continuing evaluations of the program since its inception and the participants continue to tell us in great numbers that they like the program. Based on this encouraging feedback, we expanded the program this past year to include the Southwest, Northwest and Northeast Judicial Districts. Beginning in July, we will bring the program to the East Central and Southeast Judicial Districts. Once this is completed, the program will be available statewide. We were able to develop this program with the advice, assistance and cooperation of the Joint Alternative Dispute Resolution Committee. I thank them for their work.

Commission to Study Racial and Ethnic Bias in the Courts

Justice Carol Kapsner and District Court Judge Donovan Foughty are co-chairing the Court's Commission to Study Racial and Ethnic Bias in the Courts. The Commission has been meeting since December 2009. In June, the Commission held its first set of public meetings to gather direct input from members of the New Americans communities in Fargo. Six more meetings are planned throughout the state and on the reservations within the state.

In addition to listening to our court users, the Commission is also looking at the make-up of the court workforce, the North Dakota bar, and the representation of minorities on jury panels. While I have been asked to have the Commission investigate areas outside the judicial system, we need to look at our own house; to that end, the Commission will be issuing an interim report at the end of the year and we will be asking the legislature for funding to continue the important work of implementing the recommendations of the Commission. I ask you to cooperate with the Commission.

Judicial Planning Committee

Justice Kapsner is also chairing our Judicial Planning Committee. This Committee is charged with studying the administration and operation of the judicial system, assessing the demands and expectations of court users and the public, and developing short and long term plans for the court to improve the administration and operation of the judicial system. The Committee began meeting in June 2009 and is expected to continue to meet throughout the coming year. The main focus of the committee is on these areas:

- The core services that must be offered in every county and how technology may impact that service;
- The interaction between the judiciary and county government;
- Standards for courtroom facilities; and
- Funding mechanisms for judicial use of space in county facilities

Uniform Bar Exam

I remember sitting for the bar examination and I'm willing to bet that most of you do, too. Although it is a fixed experience in the minds of each one of us, in reality, the bar exam and scoring standards continue to change and evolve over the years. When I wrote the exam it consisted of essay questions on 18 subjects written by the local bar examiners. Today North Dakota's bar exam consists of three components: the Multistate Bar Examination, the Multistate Essay Examination and the Multistate Performance Test prepared by the National Conference of Bar Examiners. We have not tested state specific issues since July, 1999. I tell you this not to bring back unpleasant memories of writing those essay exams, but as a preface for explaining why we are looking at adopting the Uniform Bar Examination.

The Uniform Bar Examination is comprised of these same three components that we are now using. A move to the Uniform Bar Examination, as recommended by the State Board of Law Examiners and the Joint Committee on Attorney Standards, will not require significant change in either court rules or in the way we administer the bar exam. The benefit of moving to the Uniform Bar Examination means that our North Dakota lawyers whose score meets the criteria established by other Uniform Bar Exam states will be allowed to practice law in those states. Right now, Missouri is the only other state that has signed on to the Uniform Bar Examination, but it is anticipated that within a short time several other states will also join in. As we speak, the Uniform Bar Examination Committee chaired by Becky Thiem and on which I also serve is meeting in New York with representatives of several New England States to explore their participation. The proposed amendments to the Admissions to Practice Rules are currently out for comment. That comment period ends June 21st. Please let us know your thoughts on this proposal. I warn you, however, that comments along the lines of "things were a lot harder when I sat for the bar exam" will be greeted with a certain sense of recognition but won't be counted toward the final decision.

Problem Solving Courts

Access and justice within the court system come in a variety of forms. Last month we celebrated the 10th anniversary of the juvenile drug courts in Fargo and Grand Forks, the first juvenile drug courts in North Dakota. Spearheaded by Justice Maring, juvenile drug courts are now operating in Bismarck, Minot, Williston and Devils Lake, the newest of the juvenile drug courts. The Bismarck adult drug court was the first drug court in North Dakota and was the result of the cooperative efforts between the Department of Corrections and Judge Hagerty. Adult drug courts are now operating in Fargo, Grand Forks and Minot as well. These problem-solving courts work because the people involved are using their skills and knowledge to improve the access to justice and a better life for the participants. I expect the call will continue for additional drug courts, for mental health courts, veterans' courts, reentry courts and other similar courts. We will need to examine what we can do with the human resources available within the judicial system as well as without since these courts require the efforts of a variety of agencies and service providers.

ABA Commission on Ethics 20/20

Many of you know that I serve on the ABA's 20/20 Commission on Ethics. One of the issues this Commission is reviewing is that of the admission of foreign lawyers. There are several proposals that are circulating to adopt model rules that would allow foreign lawyers to appear in court under the pro hac vice rule; to be registered as corporate counsel and to be allowed to perform legal services on a temporary basis under the protections of Rule 5.5 of the Rules of Professional

Conduct. Frankly, these are the easy issues; the more difficult issues with which the 20/20 Commission will deal in the next two and one-half years include multi-disciplinary practice, investor-owned and publicly traded law firms and, significantly for us, if and how lawyers are regulated and, if regulated, who will regulate the profession. The United Kingdom, Australia and Scotland have enacted or are considering substantial changes to how the profession is regulated in their countries. While the American Bar Association has renewed its commitment to regulation of the profession by the courts of the various states, it comes as no surprise that not everyone agrees with that position. Indeed, the United States Congress and federal agencies have become increasingly active in certain areas. With technology and the globalization of the practice of law, for many lawyers, including lawyers in North Dakota, the courts and the judicial system are irrelevant to their particular practice. These are difficult issues with which we are wrestling. The primary purpose of regulation of the profession is, of course, the protection of the client. Fortunately for me, Justice Crothers chairs the Client Protection Committee of the Center for Professional Responsibility of the ABA. I am able to draw on his expertise. Professor Stephen Gillers of New York University School of Law, also a member of the 20/20 Commission, is presenting a CLE session tomorrow morning and from the description of his topic I expect he will go into these issues in much greater detail. I will keep you informed of the work and progress of the Commission and the several other committees on which I also serve and which are also considering many of these same issues.

State of the Judiciary

Following precedent, this message was entitled "The State of the Judiciary." I consider it more of a report to you, the members of the State Bar Association, and the title has been changed to incorporate the fact this is a report to you. However, I close with my observations of the state of the judicial system in North Dakota. I am happy to be able to say that your judicial system is in good shape. We are able to handle cases efficiently; we are fortunate to live in a State which has the financial resources to adequately fund the judicial system; we have made some strides in resolving some of our problem areas. Nevertheless, there is still much to be done and access to justice remains a burning issue. I am pleased to hear that the Board of Governors has established within the State Bar Foundation a fund to which lawyers who for various reasons are unable to perform pro bono activities may contribute to support this important program of the Association.

Our judicial system is in good shape not only because we have been given adequate financial resources; rather, it is the people with whom I am privileged to work, the justices, the district court judges, our employees, our Clerk of Court Penny Miller, our State Court Administrator Sally Holewa and the other judicial and administrative personnel, the leadership of this Association, and you, the lawyers, who really make our legal system tick. I am proud of our judicial system. I hope you are too.

Thank you for the privilege of appearing before this 111th meeting of the North Dakota State Bar Association.