

State of the Judiciary
Chief Justice Gerald W. VandeWalle, North Dakota Supreme Court
Message to the Legislature
January 5, 2011, in Bismarck, North Dakota

Introduction

Lieutenant Governor Wrigley, Speaker Drovdal, Governor Dalrymple, members of the Legislative Assembly, State executive officials, my judicial colleagues – the district judges and supreme court justices – and other friends. Thank you for the privilege of appearing before this Joint Session of the Sixty-second Legislative Assembly of our great State.

Before I begin my formal remarks I invite you to attend a brief reception in the Memorial Hall immediately following this session. This reception is hosted by the Judges Association and, this year, by the State Bar Association in honor of the recipient of the State Bar Association's Distinguished Service Award. This year's recipient is well known to many of you and for those of you who, on occasion, have had the urge to hang Jack McDonald, this is your opportunity. The plaque with the names of the recipients of the award hangs in the Supreme Court atrium. The quick and dirty hanging will take place in the Supreme Court Atrium right after you have the opportunity for a cup of coffee and a goodie.

The North Dakota Constitution requires the Governor to "present information on the condition of the state, together with any recommended legislation, to every regular and special session of the legislative assembly." N.D. Const. art. V, § 7. By contrast, the Chief Justice appears before the Assembly to present the state of the Judiciary by invitation of the Legislative Assembly. I perhaps should not tell you this, but it may surprise you to learn that delivering a State of the Judiciary message is not a privilege all of my colleagues in other states share. I do not take this privilege for granted and I recognize your already heavy schedule. The invitation to speak to you today is indicative of the spirit of cooperation and respect that our three branches of government in our state share. I thank you for that.

We learned early in our civics courses about separation of powers in the United States. The matter was debated by the founding fathers and is enshrined in our form of government at the federal and state level. The opinions of the Supreme Court recognize "that the creation of three branches of government by our constitution operates as an apportionment of the different classes of power whereby there is an implied exclusion of each branch from the exercise of the functions of the others." *State ex rel. Spaeth v. Meier*, 403 N.W.2d 392, 395 (N.D. 1987). That separation of powers was implied in our State Constitution, but in 1982 the Constitution was amended to provide: "The legislative, executive, and judicial branches are co-equal branches of government." N.D. Const. art. XI, § 26.

For our government to operate as it was intended, it is necessary that each branch respect the powers of the other two branches; but it is also necessary for each branch to defend its own powers against encroachment by the other two branches. The delineation of authority among the branches is not always well defined and may cause grinding and grating among the branches as each branch exercises its powers. That grinding and grating on occasion results in dissension among two or more of the branches, another lesson we learned in our civics courses.

What we did not always appreciate in our studies was that, notwithstanding the necessity of one branch of government to defend its powers against infringement by the other branches, the branches are dependent upon one another in order to fully exercise their powers. Indeed, that is part of the genius of our government and the reason that one branch is unable to govern without the assistance of other branches. In North Dakota this is the time – when the Legislature is in session – these precepts may be most apparent.

For the Judicial Branch, the State of the Judiciary is an opportunity to pose to the Legislature and the Executive the operations and goals of the Judiciary and the opportunity for you to examine those goals and operations. But that is but a small part of the interbranch relationship. For example, during the year we have the benefit of the wisdom and advice of legislators and executive branch representatives on court committees. The advice and input we receive from representatives of the other branches are invaluable to our policy-making decisions. In turn, several judicial branch officials serve on and advise legislative and executive branch committees; and issues arise within the other two branches of government that require the attention, consideration and cooperation of the Judicial Branch to resolve.

At this time, we have several ongoing projects in the Judicial Branch that would not be possible without the aid and cooperation of the other branches of government. I am grateful for your support of these programs.

I take a few minutes now to update you on these projects and to touch upon some other areas of concern.

Task Force To Study Racial and Ethnic Bias in the Courts

Two years ago, I came to the Legislature to request funding for a task force to study racial and ethnic bias in the court system. That request was granted and our task force, chaired by Justice Carol Kapsner and Judge Donovan Foughty, has been hard at work, with perhaps the most visible part of their work being the series of community discussions that they have been holding around the state. Some of the less visible aspects of their work include research in the areas of prison population, juvenile placement, and minority representation on juries, in the legal profession and within the court's workforce.

The work the Task Force has done to date lays the foundation for understanding the areas of concern; but much work remains to be done in this area. We asked our Task Force to continue its investigation and to provide the court with recommendations for ways we can improve. I repeat what I have said before: the strength of the court relies on the respect of the people. Our state demographics are changing and now is the time to be certain that every resident of North Dakota is assured of access to a fair and impartial justice system.

Mediation Pilot Program

In 2007, with funding provided by this Assembly, we began a mediation pilot program to address the needs of families going through divorce. I am happy to report that the mediation program's initial success exceeded our expectations. Eighty-three percent (83%) of people going through mediation report that they were satisfied with the program. Fifty-five percent (55%) of the cases in mediation reach a settlement on all of their issues and an additional 17% reach settlement on at least some of the issues. Early settlement of cases is an important component of the program

because it shortens the length of time that parties are dealing with the uncertainty that accompanies any separation.

Another result of the mediation program that is perhaps more important than settlement, is the ability of mediation to improve how couples communicate during the divorce process and into the future. This is the greatest measure of success and we know that we are reaching it from comments we receive from the participants. Here are some of the things they told us about what was most helpful about the mediation:

- “the ability to speak and have my point of view listened to,”
- “we were able to hear from a third party how we spoke to each other and how we were communicating about our child's needs,”
- “we were able to hear the other point of view without all the screaming and yelling if we tried by ourselves,” and
- (the most helpful part of mediation was) “avoiding court and hurt feelings about family ties.”

This program is now in all counties in the state and is allowing rural, low-income, minority and self-represented people access to alternative dispute resolution that would not have been readily available to them without the program.

We are confident in the program and during the coming biennium we intend to study extending mediation services to contested probate cases and family law cases on appeal.

Parenting Coordinator Program

Where the Mediation Program is designed to assist parties early on in their case, the Parenting Coordinator Program is designed to assist parties after the divorce is final. This program is the result of recommendations that came from the 2007 interim committee on Judicial Process. The program is designed for those high-conflict cases where children are continually caught between parents who use parenting time as a tool in their on-going battle with each other. In those cases, the judge can order the parties to pay for a parenting coordinator who has the authority to handle parenting time disputes immediately, without either party having to hire an attorney or file a motion with the court.

Similar programs have been successfully implemented in other states and have proven effective in reducing the amount of conflict between parents. While we expect that the North Dakota program will be equally successful, it has been slow to get off the ground. We believe the two primary reasons for the slow start are lack of familiarity with the program and the costs associated with it. We continue to work with the program and expect to see its usage increase over the coming biennium.

Problem Solving Courts

In this last biennium, a new juvenile drug court was established in Devils Lake. We now have juvenile drug courts in six locations and adult drug courts in four locations in the state. We continue to be open to the establishment of drug courts in other locations. These drug courts are

prime examples of the cooperation required to achieve a goal. While the name of the program contains the word "court" the executive and legislative branches play a great role in these programs. I acknowledge the efforts of Justice Mary Maring in establishing juvenile drug courts, Judge Gail Hagerty and the Department of Corrections for their efforts in promoting and establishing adult drug courts.

While there are a number of other types of problem-solving courts around the country, not all are suitable to North Dakota. But, there is growing interest in Veterans Court because of the number of veterans returning from Iraq and Afghanistan with problems such as post-traumatic stress syndrome. Our Court Services Administration Committee, chaired by Justice Daniel Crothers, and on which some of you serve, is examining the possibility of establishing a pilot veterans court if there is a need and if there are suitable treatment alternatives available. Again, this will require the cooperation and support of the legislative and the executive branches as well as the invaluable input from the veterans organizations to make this possible. I hope we can help those veterans who have given us so much of their life.

Study Resolution on Elder Issues

Last session, we introduced a resolution to study elder issues that you adopted but it was not ultimately chosen for study. I am putting that resolution forward again because I am convinced that this is an area that North Dakota can no longer wait to confront. Within 30 years, more than thirty percent of the population of many of our rural counties is expected to be over the age of 65. Historically, North Dakota's loss of young people has created a situation in which family members who would normally be expected to provide care for their aged parents live far away. A lack of public guardians, limited funding for non-profit guardianship services, and the unsupervised use of representative payees and Power of Attorney agreements all contribute to conditions that make it easier to take advantage of the elderly. And we hear almost daily about some scam aimed at the elderly. Elder abuse, neglect, and exploitation involve complex civil and criminal issues that require a sustained and committed response by the courts and society. An aging population requires a comprehensive network of programs and services to ensure that our elderly are able to remain healthy and safe so they can live their later years in the manner they deserve. This is a big subject with many components but I know that if we take on this issue as a state, the task will be less daunting.

Supreme Court Facilities

When we moved into the Judicial Wing more than 25 years ago, it was billed as a 10-15 year solution. At that time the court was a very different organization than it is now. When the Judicial Wing was built, the entire Supreme Court operation consisted of 5 justices and 11 support staff. Since then, new programs involving the courts have been established and the Legislature has consolidated county and district courts, unified administration of the courts under the Supreme Court and transferred the clerk of court functions to the state. The function of the Supreme Court in relation to the District Courts has gone from oversight of the lower courts to management of the courts. The court system is now a large organization to manage with 285 state employees and 32 contract county employees spread across the state. We have added staff and services to carry out these administrative and management duties which the State Constitution assigns to the Chief Justice. We are in need of additional space so that we can continue to carry out our mission of providing justice to the citizens of North Dakota.

As an aside, I compliment whoever is responsible for the kiosks in the lower hall, Memorial Hall and outside the committee rooms. They provide historical as well as interpretative and current information about the Legislature and about the State. I saw a picture on one of the kiosks I had not seen before the plans for the old Capitol. Only a portion of it was built, but when I saw the proposal for the entire building on the kiosk I thought to myself that it would make an elegant court building. For those of you who do not know me, that was partially tongue-in-cheek but only partially.

Cost-Sharing for District Court Space

The Supreme Court is not the only court in the state where space is an issue. As many of you are probably aware, our courts in some of our largest cities are squeezed for space. In other areas, aging courthouses are in need of substantial repair or may even be reaching the end of their useful life. Beginning in 1995 most of the court fees were required to be deposited in the State Treasury rather than the county treasuries. With this in mind, I raise the issue of the State paying the counties rent for court space or in the alternative, the counties receiving one-time payments from the State for building or substantially expanding court space. I am aware of the history of the transfer of court functions from county obligations to state funding and of the prior discussions on paying counties for use of court space. This is an issue that is going to continue to reappear. I support the counties receiving some form of payment, but it requires a legislative solution. I am not suggesting a new courthouse in every county; rather, the solution must be equitable for all counties while still ensuring that the space provided is adequate in need, size and functionality.

Case Management System

Finally, I give you an update on our case management system. The past two years have been devoted to upgrading the case management system for the trial courts. This computer system is the backbone of our organization and is vital to the court's ability to process cases. The system we have been putting in place provides better security, better financial tracking and better detail about cases. It is with a great deal of satisfaction – and relief – that I am able to report that the project is expected to be completed within budget and nearly two months ahead of schedule. A great deal of credit goes to our Technology Committee chaired by Justice Dale Sandstrom as well as to our project manager, the director and staff of our technology department and the staff in the clerks of court offices. They have been first rate.

When we set out on this project, we said that we wanted the replacement to bring us "leaps forward" in technology. I believe we are reaching our goal. We have moved into a paper-on-demand environment where documents are electronically filed or scanned and stored as images, and financial transactions can be done over the internet or by telephone. It has been an adjustment for all of us, but one that we have happily accepted. Judges and court employees alike have found much to like about the system, as do many of our justice system partners. Our next step in the process is to develop a disaster recovery plan to protect the system and ensure that the court can continue to function in the event of an emergency.

Conclusion

In conclusion, I go back to my opening remarks. The biennial legislative session is a time when heightened attention is focused on the separate powers of the three branches of government. But it is also a time to recognize the need and the ideal opportunity for the branches to work together to produce the well-functioning government the citizens of North Dakota established and expect from the co-equal branches that form our government.

Lieutenant Governor Wrigley, Speaker Drovdal, Governor Dalrymple and members of the Legislative Assembly, I thank you for the opportunity to speak to you this afternoon and I look forward to working with you this session. Please stop for a cup of coffee in Memorial Hall, right outside of this Chamber.