

State of the Judiciary  
Chief Justice Gerald W. VandeWalle, North Dakota Supreme Court  
Message to the Legislature  
January 4, 2017, in Bismarck, North Dakota

Members of the 65th Legislative Assembly, I am pleased to present the State of the Judiciary to you. Although not delivered in its traditional format, that is more to my advantage than yours as I realize that the written page provides me greater opportunity to expound on my thoughts than does the traditional speech. Nevertheless, I hope that in the future you will, as you have in the past, extend the courtesy of an invitation to the chief justice to appear before you to deliver the message of the Judicial Branch of Government.

## I.

The judiciary's role is indispensable and is indisputably a function of government. The structure of principles and rules determining how the sovereign power of a state is exercised, is referred to as "government." Like law enforcement, fire protection and the military, our system of government provides a judicial system with the integrity, independence and credibility to resolve disagreements and disputes. An independent judiciary protects every individual, every business, and every association, regardless of the power or volume of its voice or where that voice falls in the political arena.

Everybody is affected, directly or indirectly, by court decisions. Court decisions provide certainty under the law. Courts settle personal disputes, business disputes, and criminal charges. Courts interpret administrative rules, statutory questions, and constitutional issues. The issues encompassed in the thousands of individual cases filed each year include parenting time and residential responsibility, distribution of property after death, degree of fault and compensation for personal injury and property damage, land disputes, health care disputes, review of administrative agency decisions, and issues of crime and punishment.

Courts provide the ultimate protection for the most vulnerable in society -- our neglected and abused children, our mentally ill, our developmentally, cognitively, and physically disabled adults, and, sadly, an increasing number of our abandoned, neglected and abused elders. It is the court system that decides when it is appropriate to remove children from their homes and when it is appropriate to exclude other persons from the home. It is the court system that decides when a person is no longer able to make safe decisions about their mental health. It is the court system that decides when someone is incapacitated and unable to exercise their rights to manage their own money or choose where they will live or what kind of medical care they will accept.

Courts are part of the criminal justice process from initial filing through sentencing and after sentencing when issues of compliance or challenges to the court process arise. Any pinch in the court system creates a backlog in the process. Those of you who have been involved in incarceration issues know the greatest number of persons in county jails are not sentenced offenders but those waiting to go to court. Another significant portion are those persons who are waiting to go to court because they have been accused of violating probation or not complying with conditions of sentencing. A backlog in case processing increases jail, probation and prison

costs. It affects the person accused of a crime, regardless of whether they are being held in jail or not. It affects their family and their employment as they wait and worry about the eventual outcome. Backlog keeps victims and witnesses in limbo as they wait for justice. If only the two ends of the system (law enforcement in the arrest stage and corrections in the post-sentence stage) are adequately funded and staffed, it increases costs to the county while doing little to advance the criminal justice system in North Dakota. So, too, of course if each end is not adequately funded.

Courts are not just another part of the process but also the arbiter of the system. There is a tendency when discussing criminal justice to focus on the idea of punishment of the guilty. However, it is a basic premise of our law that every person who is charged is considered innocent until proven guilty. Every person has the constitutional right to dispute the charges against them, to question the evidence and the witnesses presented by the prosecution, to present a defense, and to ask for a jury trial. Adequate funding for indigent defense, jury fees, legal research, and judicial staff is required to uphold those constitutional protections.

Courts are also charged with upholding the constitutional right to redress of grievances against the government. When there is a disagreement between a government entity and an individual it is the court's responsibility to determine whether the government can proceed or whether it will be restrained from acting.

Courts are part of the social services process. Courts are the institutions that determine issues of juvenile delinquency and punishment. They are involved in child dependency and neglect cases from initial removal of a child from the home until a safe permanent placement for the child can be found.

Courts are involved in mental health commitments from the initial hold until the person is either found competent or placed under a treatment order. Courts are involved in adult guardianship and conservatorship cases from the initial request to determine competency and for years afterward as they monitor the delivery of services by the guardian or conservator. Courts are the last option for persons who contest administrative agency decisions affecting public assistance, workers compensation, unemployment compensation, and driver's license restrictions. Real people suffer genuine hardship when court hearings are delayed.

The court system now files 33,000 more cases per year than it did in 2009. These additional cases are not only coming from oil-impact areas but reflect increases from across the state. Since 2009 you have added 9 new judgeships chambered in the east, central, and western parts of the state. The legislature created these judgeships to address the increasing caseload and to give judges more time to devote individual attention to each case. I thank you for your foresight and understanding.

While we are not requesting more judges at this time, our most recent weighted caseload study shows that even with these additions we are still 10 judges short in the state.

Since 2009, we have added 21 clerk of court staff to address the growing caseload. This number includes 11 clerk of court employees who were already providing their services to us as county clerks and became state employees when their county elected to transfer their employment under

N.D.C.C. ch. 27-05.2. Again, while we are not at this time requesting additional positions, despite the additional employees, our latest weighted workload assessment continues to show a statewide shortage of 21 clerks.

We have also added programs to directly address the needs of individuals - not the court system, not lawyers - but the needs of the actual people involved in court cases. These programs include adult and juvenile drug courts, family law mediation, guardianship monitoring, and a legal self-help center. To address the desperate shortage of attorneys in rural North Dakota which increases the costs to rural litigants and hampers the cities, school boards and other entities that regularly rely on legal advice, we worked with the UND Law School to create a rural law-clerk internship program.

Nor have we been standing still in the technology area. Since 2009 we have instituted electronic filing, electronic documents, electronic traffic citations, online credit card payments, online juror qualification and the online ability to request a deferred reporting date; email and text messaging services that send status updates regarding jury service; a public search website that allows searches for hearing dates, criminal and civil case dispositions, and judgment searches; electronic search warrants; and automated data exchanges with other state entities including CJIS (Criminal Justice Information System), SAVIN (Statewide Automated Victim Notification System), the Department of Health, the Secretary of State, and the Department of Transportation.

## **II.**

The additional staff and new programs were necessary to keep the judicial system current and responsive to today's society. If staff must be reduced and programs eliminated North Dakotans should be aware of the results of those actions.

Delay in the court system results in dissipating assets. Real estate, money, investments, and lost opportunity are implicated not just in business-to-business disputes, but also in divorces, probate cases, mineral rights cases, and land disputes.

Delay in the court system affects the stability of families. Divorce and paternity cases often involve issues of custody, visitation, school district assignment, out-of-state relocation of children, and child support payments. Adoption, guardianship, and termination of parental rights are additional cases where delay in the court system keeps families in an agonizing state of uncertainty.

While I recognize that reductions must be made, the delivery of services and the quality of justice will suffer because of the cuts. We are already feeling those effects. Deficiency Appropriation: For the first time in its history, the judicial branch is requesting a deficiency appropriation. This is to cover the costs of the high number of contested cases in the South Central Judicial District related to the Dakota Access Pipeline controversy. While I understand the desire as well as the necessity to keep "government" lean, it places all of us in the position of playing "catch up," often with negative effects on the litigants as I have already noted above.

To meet the reduction to our 2015-2017 appropriation and to maintain that amount for the 2017-2019 biennium we have been holding open an average of 20 positions per month. We have cut three referee positions in the Northeast and Northeast Central Judicial Districts and implemented

a reduction-in-force plan that will eliminate 56 other positions. This is a combination of regular full-time employees, full-time and part-time temporary employees, and contract positions. This plan also includes the forced relocation or job loss of six additional positions. These positions are not phantom vacancies that were not filled. They are positions that were filled until recently and some are vacant now only because of the hiring freeze and some are currently filled but we will be required to layoff an estimated 36 people on June 30th. The actual number of people who will lose their employment will depend on the number who are unable to find other employment between now and June 30th.

These reductions will put our clerk of court staffing level at 82% of need and our juvenile court staffing level at 98% of need. To reach this reduction, we will be shuttering the juvenile court office in Bottineau, and staffing Grafton, Jamestown and Wahpeton with only a single juvenile court officer to cover those counties and their surrounding areas.

These layoffs also include shuttering our guardianship monitoring program, eliminating the staff support for our central legal staff, the legal self-help center, eliminating the court improvement project, and reducing the technical support staff who support the more than 4,000 users of the electronic case management system. Some court recorders and court schedulers are also included in the layoffs which will have a direct impact on the ability to schedule and hold hearings. The elimination of law clerk positions in three districts will have an impact on the timeliness of judicial decisions.

On the operational side, we have eliminated all funding for equipment and capital assets, reduced funding for the minority justice program in Fargo and delayed the startup of the Devils Lake program until July 1, 2018, eliminated many of our contracts for juvenile services and reduced the remaining contracts by a minimum of 10%, and eliminated out-of-state travel, including travel for education purposes, at state expense.

None of these are choices that we would have willingly made but we recognize the need to reduce spending.

### **III.**

I do not want to end these remarks on a negative note, so let me elaborate on some of the things we have accomplished over the past 18 months and some of the things we hope to be working on in the next year.

Rural law clerk program: Although the Court has had to eliminate funding for this program, UND Law School and the State Bar Association have picked up the program and expanded its scope. Their goal is to be able to provide stipends for up to eight summer interns working with judges, indigent defense counsel, state's attorneys and small law firms in rural areas of North Dakota. We are grateful to the School of Law and the State Bar Association of North Dakota for recognizing the need to protect access to justice in these areas.

Self-Help Center: With the addition of a paralegal, our self-help center was able to work with hundreds of more litigants and to produce dozens of new forms and informational brochures. This support staff will be eliminated due to budget cuts but we have retained the staff attorney for the program so the Center will not need to be closed down completely. Guardianship

monitoring program: Although our guardianship monitoring program will be eliminated at the end of this biennium, we were able to begin some work on reviewing current guardianship cases. The guardianship program manager has developed new informational packets for guardians and easier to understand accounting forms for the required annual reports.

Guardianship Workgroup: Our Guardianship Workgroup, which is ably chaired by Judge Cynthia Feland, has been continuing its work on reviewing the guardianship and conservatorship statutes. We have submitted a bill for several changes based on the recommendations of that group. They have also created an online education program for new guardians which has become the model for several other states. The Workgroup's next projects include the development of standards for professional guardians and reviewing the juvenile court guardianship statutes.

Since I am talking about guardians, I do want to raise a note of concern about another program. This is the PASS (Public Administrators Support Services) program which is administered by the Association of Counties through money appropriated to the Office of Management and Budget. This program was created when the state took over the funding of Public Administrators from the counties.

Public administrators are appointed to serve as guardians when there is no other suitable person available. Without adequate funding the private entities who do this service may not continue to take cases.

Problem-solving courts: Problem-solving courts have been described as meeting the needs of people at the place where social, human and legal problems intersect. They are rooted in the common sense notion that certain kinds of offenders are better handled by dealing with the problems underlying their crimes rather than simple punishment. In North Dakota, they have primarily taken the form of adult and juvenile drug courts. We also have a DUI court in Wahpeton thanks to the hard work and perseverance of Judge Bradley Cruff. Although there have been efforts to create new drug courts in Dickinson, Rolla and Watford City, these efforts have been stymied by a shortage of probation staff and a lack of treatment and other community resources necessary to have an effective court. Due to the loss of judicial resources, the future of the adult drug court in Grand Forks remains up in the air. However, on a positive note, we believe there is a plan in place that will allow the Grand Forks juvenile drug court to continue for the foreseeable future.

In addition to drug courts, I am pleased the Grand Forks judges have been exploring the possibility of starting a domestic violence court. If it comes to fruition, this would be the first in our state and an important step in addressing violence in the home.

Mediation program: Our budget proposal preserves level funding for the family law mediation program. This is a mandatory program for divorcing or never-married parents that provides them assistance in negotiating an agreement on custody and visitation. In more than 70% of cases, the parties are able to reach agreement. Mediated cases reach final disposition nearly 6 months faster than non-mediated cases and have fewer post-judgment motions requiring court intervention to settle disputes between the parties. This program has been a success since its introduction and has consistently received participant satisfaction rate of more than 85%. It is important to the continued relationships parents have with their children and with one another.

It is important that the parties leave the system with less, not more, hostility than when they entered the system.

**Birchfield Decision:** The Birchfield decision (Birchfield v. North Dakota, 136 S.Ct. 2160 (2016)) is a recent U.S. Supreme Court decision reversing Birchfield's conviction for refusing to submit to a blood test and requiring law enforcement to obtain a search warrant for a blood test when they suspect a person of driving under the influence. North Dakota law requires that the blood test be done within two hours of the DUI stop. With cooperation from those within and without the judicial branch, we were able to bring together an interdisciplinary group to develop protocols and a web-based solution which will allow officers anywhere in the state to present a search-warrant request to a judge and receive a response within that time frame. This web-based solution is being piloted in the Northeast Central Judicial District.

**Juvenile Court:** Our juvenile courts have implemented the use of a tool to screen for human trafficking of youth. Although we like to think that the sexual abuse of children for profit is not occurring in North Dakota, it is. That is the primary reason we have introduced a bill that will allow our juvenile court staff to release information to other entities when they know or suspect that a child is being trafficked.

**Juvenile Court Study resolution:** It has been 30 years since the structure of the juvenile court has been reviewed. That study was narrowly focused on the delivery of probation services. We have asked for a concurrent resolution to study several aspects of the juvenile court system. These include the supervision of children by juvenile court and by the Division of Juvenile Services; the continuum of care and management of cases for children who are under the supervision of both the juvenile court and social services; and whether the age of criminal responsibility (which is currently 7 years old) should be raised. I am aware of the many study resolutions introduced each legislative session and the limited resources the legislature has to investigate every worthy issue. Nevertheless, I hope you will support this particular study.

**Review of our access, retention & preservation of records:** Our Court Services Administration Committee, under the leadership of Justice Daniel Crothers, has undertaken the herculean task of reviewing the Court's access, retention and preservation rules and policies. While computers have made many things easier and faster, they also raise new issues. The Committee will be weighing such issues as the public right to access information versus litigants' right to privacy; whether access to records should change over time; how long records can be maintained in electronic format; and how to manage records that are not paper or electronic images of documents but are solely data fields or metadata.

**Review of our time to disposition standards:** Our Caseflow Management Committee, under the leadership of Surrogate Judge Allen Schmalenberger, has undertaken the first top to bottom review of our docket currency standards since they were originally adopted in 1990. These are the standards the court has set for when a final decision on a case should be issued. We understand that when a case is filed the litigants expect a judge to make a fair and timely decision and our standards should be designed to ensure that we meet those expectations.

**Alternatives to Incarceration:** Judge Douglas Mattson, Judge Frank Racek, and I have been serving on the Incarceration Issues Committee and Justice Lisa Fair McEvers is serving on the

Commission on Alternatives to Incarceration. This has proven to be a learning experience for me and, I expect, for all of the members of the committees. Proposed legislation from these studies will be before you in this session. While our decisions were not always unanimous and some disagreement still exists, I ask you to closely look at the issues and the solutions as you consider this legislation.

Because this is a report on the place and condition of the judicial system in North Dakota, I have written at length about the operations of the judicial branch and the issues we face. The judicial branch is but one of the three co-equal branches of our government and I recognize with respect and deference the position and functions of our equal and separate partners, the legislative and executive branches, in this great enterprise we refer to as "government." I acknowledge with gratitude the cooperation and support of the legislative and executive branches of our State. I ask that you continue that cooperation and support as together we help to make the North Dakota government among the best in the nation.