

## NORTH DAKOTA DISTINCTIVES

*Gerald W. VandeWalle\**

The North Dakota court system is the only state court in the nation that has not made cuts due to budget woes, according to the November/December 2012 issue of the Council of State Governments' *Capitol Ideas*.<sup>1</sup> While part of this can be attributed to the state's diversified, and currently booming, economy,<sup>2</sup> credit must also go to actions the Court has taken over time to modernize and streamline the judicial system. The Court has relied on its dedicated personnel and has leveraged technology to efficiently and effectively provide judicial services to urban centers and sparsely populated rural areas.<sup>3</sup> Even in lean times the Court has resisted cuts and managed to deliver high-quality judicial services to the citizens of the state.

As an agrarian state, populous ideals undergird the formation of state government and influenced the Court's creation and workings. These populous underpinnings are apparent in some of our Court's distinctives, such as the supermajority requirements, the broad right to appeal, and the election of justices. Now to some of the distinctives:

Constitutional supermajority. The North Dakota Constitution requires at least four of the five members of the Court to declare a legislative enactment unconstitutional.<sup>4</sup>

Certiorari. Appeals to the North Dakota Supreme Court are of

---

\* Chief Justice, North Dakota Supreme Court. I am indebted to Ted Smith, Supreme Court Librarian, for his assistance in preparing this article.

For more on how the Court has grown and changed since its inception, see *The North Dakota Supreme Court: A Century of Advances*, 76 N.D. L. REV. 217 (2000), available at <http://www.ndcourts.gov/History/Century>.

<sup>1</sup> *Court Budget Woes*, CAPITOL IDEAS, Nov.–Dec. 2012, at 10, 10.

<sup>2</sup> See, e.g., Rosalind S. Helderman, *North Dakota, Above the Fray*, WASH. POST, July 8, 2012, at A1.

<sup>3</sup> See Herbert L. Meschke & Ted Smith, *The North Dakota Supreme Court: A Century of Advances*, 76 N.D. L. REV. 217, 306 (2000) (“[W]ith the substantial modernization and unification achieved during the last third of this century, the Supreme Court seems well positioned to maintain a just and stable legal climate in North Dakota far into the twenty-first century.”). For more on how the Court has grown and changed since its inception, see *id.*

<sup>4</sup> N.D. CONST. art. VI, § 4.

right and not by certiorari. Reflecting its populous roots, the North Dakota Constitution allows the legislature to confer on the people a broad right to appeal and it has done so by statute.<sup>5</sup>

Court Elections and Selection. Supreme Court justices and District Court judges are elected on no-party ballots. Justices serve ten-year terms and judges serve six-year terms.<sup>6</sup> The Supreme Court has five justices; all cases are decided en banc.<sup>7</sup> Forty-four judges presently comprise the District Court bench.<sup>8</sup> At statehood, judicial elections were partisan. Following a particularly nasty and bruising 1906 campaign for Supreme Court Justice, the laws were changed to provide that all judicial elections are non-partisan.<sup>9</sup> Today incumbent justices or judges are seldom challenged for re-election.

Courts and the Legislature. The judicial budget is submitted directly to the North Dakota Legislative Assembly, without review by the governor. For the last forty years, near the beginning of the session, the chief justice has been invited to deliver a “State of the Judiciary” speech to a joint session of the legislative assembly.<sup>10</sup> The Court enjoys a cooperative relationship with the assembly, as evidenced by the trust and respect each branch tenders toward the other branch.

Chief Justice. One of the early steps in modernizing the Court system was changing how the chief justice is selected. Prior to 1967, the chief justice was the justice with the shortest time left on his term; generally this resulted in a different chief justice every two years.<sup>11</sup> Now, and perhaps unique to North Dakota, the chief justice of the Supreme Court is elected by vote of the Supreme Court Justices and trial court judges.<sup>12</sup> The chief justice must be chosen from among the justices of the Supreme Court and serves for five years or until his current term as justice expires.<sup>13</sup> The chief

---

<sup>5</sup> See N.D. CONST. art. VI, § 6; N.D. CENT. CODE § 28-27-01 (2011).

<sup>6</sup> N.D. CONST. art. VI, § 7; N.D. CONST. art. IV, § 9.

<sup>7</sup> See N.D. CONST. art. VI, § 2.

<sup>8</sup> For a list of all forty-four District Court judges, see the North Dakota Supreme Court’s website at <http://www.ndcourts.gov/court/districts/judges.htm> (last visited Aug. 30, 2013). The 2013 Legislative Assembly added three more district judgeships, so by September 2013, North Dakota will be served by forty-seven district judges.

<sup>9</sup> Meschke & Smith, *supra* note 3, at 239–40.

<sup>10</sup> *Id.* at 295–96. Chief Justice VandeWalle’s most recent State of the Judiciary address, delivered on January 9, 2013, is available online at <http://www.ndcourts.gov/court/news/judiciary2013.htm>

<sup>11</sup> See Meschke & Smith, *supra* note 3, at 286, 287.

<sup>12</sup> See N.D. CENT. CODE § 27-02-01 (2011).

<sup>13</sup> *Id.*

2012/2013]

North Dakota Distinctives

2021

justice may be re-elected and has no term limits; he may resign as chief justice without giving up his role as a justice.<sup>14</sup> The current chief justice has held that position for twenty-one years and has been on the Court for thirty-five years.<sup>15</sup> In addition to judicial duties, the chief justice serves as the administrative head of the unified court system.

Continuity. Continuity is a hallmark of the Court. The Court began in 1889 as a three-member Court and was expanded to a five-member Court in 1909.<sup>16</sup> Since statehood, only fifty-one justices have served on the Court; six justices have served on the Court for twenty-five to thirty-nine years.<sup>17</sup> The current Court has sat together for over seven years and the Court has had only one new justice in the last fourteen years.<sup>18</sup> Court personnel also stay with the court system—turnover rates are low. Almost one-half of the Court's staff has been with the Court for fifteen or more years. The current clerk of the Supreme Court is the fourth Clerk of Court since statehood in 1889.<sup>19</sup> This continuity of justices and court employees has provided stability and aided the Court in the efficient administration of justice.

Civility and Cooperation. Civility and cooperation are important in the practice of law in North Dakota and in the judicial system. North Dakota has about fifteen hundred licensed attorneys residing in the state or counties adjacent to the state and about nine hundred licensed attorneys from out-of-area.<sup>20</sup> Twenty-one of the state's fifty-three counties have three or fewer attorneys, including judges and state's attorneys.<sup>21</sup> North Dakota has one law school and a majority of the attorneys in the state are graduates of that school.<sup>22</sup> Everyone knows everyone. Justices, judges, and attorneys

---

<sup>14</sup> *Id.*

<sup>15</sup> *Gerald W. Vandewalle, Chief Justice*, N.D. COURTS, <http://www.ndcourts.gov/court/bios/vandewalle.htm> (last visited Aug. 30, 2013).

<sup>16</sup> See Meschke & Smith, *supra* note 3, at 240–41.

<sup>17</sup> *Method of Attaining Office and Length of Service*, N.D. COURTS, <http://www.ndcourts.gov/court/History/Service.htm> (last visited Aug. 30, 2013).

<sup>18</sup> See *North Dakota Supreme Court since Statehood*, N.D. COURTS, <http://www.ndcourts.gov/court/History/Courts.htm> (last visited Aug. 30, 2013).

<sup>19</sup> Meschke & Smith, *supra* note 3, at 236.

<sup>20</sup> See *All North Dakota Licensed Lawyers*, N.D. COURTS, <http://www.ndcourts.gov/Lawyers/Index/ALL.HTM> (last updated June 2, 2013); *North Dakota Licensed Lawyers – Out of State*, N.D. COURTS, [http://www.ndcourts.gov/Lawyers/Index/ALL\\_OUT.HTM](http://www.ndcourts.gov/Lawyers/Index/ALL_OUT.HTM) (last updated June 2, 2013).

<sup>21</sup> See generally *All North Dakota Licensed Lawyers*, *supra* note 20 (listing the names and addresses of all licensed attorneys in North Dakota).

<sup>22</sup> See, e.g., *ABA Employment Summary for 2011 Graduates*, U. N.D. SCH. OF L. (2012) [http://law.und.edu/\\_files/docs/other/und-law-aba-placement-2011.pdf](http://law.und.edu/_files/docs/other/und-law-aba-placement-2011.pdf).

meet in law school, then practice together and oppose, or appear before, each other in court and finally rub elbows at civic, religious, and social functions.

Rules. The Court has adopted a “Rule on Procedural Rules” to provide an effective procedure for the proposal and continuing study and review of rules and orders of the Supreme Court and to provide notice and an opportunity for the expression of views regarding rules and proposed rules.<sup>23</sup> The Court has established standing committees to accomplish the purpose of this rule.

Collegiality. Collegiality is experienced within the court system and in the court system’s interactions with the bar and with other branches of government. The justices respect fellow justices and work well together. Justices join forces with judges and attorneys on many court and bar association committees and projects.

The Supreme Court is housed in the same building, and on the same floor, as the Governor, the Secretary of State, the Attorney General, and the House and Senate chambers.<sup>24</sup> Justices and elected state officials and their respective staff regularly encounter each other in the halls, cafeteria, and walking the Capitol grounds, developing the relationships which foster collegiality and a sense of collaboration.

North Dakota was one of the first states to have a mandatory bar.<sup>25</sup> The North Dakota State Bar Association and the North Dakota Supreme Court work together for the improvement of the bar and the advance of the court system in the state. Joint committees of the two have led the charge in getting desired legislation through the legislature and in modernizing the Court. The current head of the State Bar Association is a retired Supreme Court justice and the current president of the State Bar Association is a sitting District Court judge!<sup>26</sup>

---

<sup>23</sup> N.D. R. PROC. R. § 1.

<sup>24</sup> See generally *State Officials*, N.D. ST. GOV'T, <https://vip.sos.nd.gov/pdfs/Portals/Statewide%20officials.pdf> (last visited Aug. 30, 2013) (listing common addresses for state officials).

<sup>25</sup> Peter A. Martin, *A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan*, 73 MARQ. L. REV. 144, 144 n. 2 (1989).

<sup>26</sup> See *Board of Governors*, ST. B. ASS'N OF N.D., <http://sband.org/About%20the%20Bar/Governors.aspx> (last visited Aug. 30, 2013); *Gail Hagerty, Presiding Judge*, N.D. COURTS, <http://www.ndcourts.gov/court/bios/Hagerty.htm> (last visited June 2, 2013); *Staff*, ST. B. ASS'N OF N.D., <http://sband.org/About%20the%20Bar/Staff.aspx> (last visited Aug. 30, 2013); *William A. Neumann*, N.D. COURTS, <http://www.ndcourts.gov/court/bios/NEUMANN.htm> (last visited Aug. 30, 2013). Mr. Neumann retired from his Bar position in June 2013 and Judge Hagerty’s term as Bar president ended in June, 2013.

2012/2013]

North Dakota Distinctives

2023

Court of Appeals. North Dakota does not have a permanent intermediate court of appeals. The legislature, in 1987, authorized a temporary court of appeals to ease the Supreme Court's workload.<sup>27</sup> Whenever the Supreme Court decides over 250 cases in a year, the Court may establish panels of three from among District Court Judges, retired justices and judges, and lawyers to hear specific cases referred by the Court.<sup>28</sup>

The Supreme Court decides more than 250 cases annually but rarely refers cases to the intermediate court of appeals. "[Since] the inception of the court of appeals in 1987, only sixty-five cases have been referred to, heard by, and decided by panels of this temporary court of appeals."<sup>29</sup> This legislation came with a sunset clause that has been continuously extended, most recently in 2011 to expire at the end of the year 2015.<sup>30</sup> This intermediate appellate court has been carefully used by the Court, has functioned well, and has been especially beneficial when the Court has been temporarily short-handed because of illness or a vacancy.

Judicial Council/Conference. Beginning about 1924, an active State Bar Association encouraged establishment of a judicial council to be

charged with the duty of ascertaining the state of judicial business, gathering statistical information [on] the work of the courts, examining rules of procedure, suggesting changes in administration, studying work of law enforcement officials and suggesting improvement, equalizing trial work, revising rules, and considering complaints against courts and their officers.<sup>31</sup>

The judicial council, now called the judicial conference, has been instrumental through the years in upgrading and standardizing the work of the court system across the state and at all levels. Conference membership consists of the justices of the Supreme Court and the judges of the District Courts, the Attorney General, the dean of the University of North Dakota School of Law, five members of the bar who are engaged in the practice of law and are chosen by the board of governors of the state bar association, all

---

<sup>27</sup> N.D. CENT. CODE § 27-02.1-01 (2011).

<sup>28</sup> *Id.* § 27-02.1-02(1).

<sup>29</sup> Meschke & Smith, *supra* note 3, at 302-03.

<sup>30</sup> N.D. CENT. CODE §§ 27-02.1-01 to 27-02.1-02.

<sup>31</sup> Bar Brief, *Legislative Recommendations Approved by Annual Meeting*, N.D. ST. B. ASS'N, Dec 1924, at 7, reprinted in 1 Bar Briefs of State Bar Association of North Dakota 7 (photo. reprint 1962).

surrogate judges appointed by the Supreme Court, two municipal judges selected by the Municipal Judges Association, and the clerk of the North Dakota Supreme Court.<sup>32</sup>

Computers. While computers are not unique to our court, the North Dakota court system has made effective use of new technologies.

The Court was in the forefront adopting the web to disseminate information to attorneys and the public. “The Supreme Court webcasts live all its oral arguments, except mental health cases (and when the Court is hearing cases ‘on the road’).”<sup>33</sup> The Court’s award-winning webpage was developed, and for many years, populated and maintained, by one of the Supreme Court justices. The webpage serves as the starting point for accessing legal materials for the state and includes docket information—both for the Supreme Court and for District Courts—opinions, rules, archived oral arguments, directories, forms, calendars, news, and other court information.<sup>34</sup>

In 1997, the Court adopted a rule requiring the use of medium-neutral case citations in North Dakota.<sup>35</sup> This permits attorneys to cite to cases whether found in a computer database or in the traditional reporter.

The Supreme Court began accepting electronic filings in 2003.<sup>36</sup> The Court began an electronic filing pilot project in the District Courts in 2006<sup>37</sup> and “[a]fter April 1, 2013, all documents filed after the initiating pleadings must be filed electronically except for documents filed by self-represented litigants and prisoners. After June 1, 2013, initiating pleadings must be filed electronically in civil, non-juvenile, cases.”<sup>38</sup>

All courtrooms in the state have been wired, interactive television is used for arraignments and mental health hearings, and electronic court recording is available in all courtrooms. Wireless connections

---

<sup>32</sup> See *Judicial Conference*, N.D. COURTS, [http://www.ndcourts.gov/Court/committees/jud\\_conf/conference.asp](http://www.ndcourts.gov/Court/committees/jud_conf/conference.asp) (last visited Aug. 30, 2013).

<sup>33</sup> *Listen to the Supreme Court*, N.D. COURTS, <http://www.ndcourts.gov/court/webcasts.htm> (last visited Aug. 30, 2013).

<sup>34</sup> See *Overview of N.D. Supreme Court Website*, N.D. COURTS, <http://www.ndcourts.gov/court/overview.htm> (last visited Aug. 30, 2013).

<sup>35</sup> N.D. R. CT. 11.6.

<sup>36</sup> N.D. SUP. CT. ADMIN. ORDER 14.

<sup>37</sup> See N.D. SUP. CT. ADMIN. ORDER 16; see also *Proposed Amendments to North Dakota Rules–20050215*, N.D. COURTS, [http://www.ndcourts.gov/court/jp/jp\\_rules\\_12/order16.ar.htm](http://www.ndcourts.gov/court/jp/jp_rules_12/order16.ar.htm) (last visited Aug. 30, 2013) (reproducing the original administrative order language).

<sup>38</sup> N.D. R. CT. 3.5(a)(2).

2012/2013]

North Dakota Distinctives

2025

are also available in all courthouses.

Connecting with the People. The justices and court personnel are in the community, both as citizens and as court representatives.

The Court has a program entitled “Taking the Court to the Schools.”<sup>39</sup> Several times a year the Supreme Court will travel to a school in the state, meet with students, talk to classes, and eat lunch with the students in the cafeteria. The day either begins or concludes with the Court hearing a real case. After the hearing, the justices and attorneys will answer questions from students.

Annually the Court travels to the University of North Dakota Law School.<sup>40</sup> The Court hears arguments in cases and, while there, the justices judge the moot court finals and meet with students.

The Constitution and Judicial Decision-Making. A Justices Teaching Institute is held every other year for history, government, and social studies teachers from across the state.<sup>41</sup> The Supreme Court has developed this public outreach program to foster a better civic understanding of the role of the courts, how they work, and how they make decisions. With Supreme Court justices as their guides through the ensuing day-and-a-half balance of academic and clinical experiences, the teachers explore the judicial system and the criminal court process in the context of preparing for the Institute’s final application: a mock oral argument when they serve as justices and decide a Fifth Amendment constitutional question argued by the Attorney General—or one of his assistants—and a defense attorney.

The justices also serve as judges for the state finals of the “We the People” competition.<sup>42</sup>

The justices periodically team with local district, federal, tribal, and municipal judges and judicial referees to host “The Banquet” for the Bismarck-Mandan community.<sup>43</sup> The Banquet is a weekly meal served to the lonely, poor, or less fortunate members of the community. Hosting duties include set-up, greeting the guests,

---

<sup>39</sup> See *Taking the Court to the Schools*, N.D. COURTS, <http://www.ndcourts.gov/court/news/schools.htm> (last visited Aug. 30, 2013).

<sup>40</sup> *ND Supreme Court Visits UND Law*, U. N.D. SCH. OF L. (Nov. 2012), <http://law.und.edu/news/2012/11/supreme-court-visit.cfm>.

<sup>41</sup> *Justices Teaching Institute set for Oct. 19–20*, N.D. COURTS (Oct. 11, 2006), <http://www.ndcourts.gov/court/news/institute.htm>.

<sup>42</sup> See, e.g., Hannah Johnson, *Century Continues We the People Winning Streak*, BISMARCK TRIB., Jan. 17, 2013, at B1.

<sup>43</sup> See, e.g., *Area judges host The Banquet in Bismarck*, N.D. COURTS (Nov. 30, 2012), <http://www.ndcourts.gov/court/news/banquet1112/photos.htm>.

serving the food, providing dinner entertainment, bussing the tables, dish-washing, and clean-up.

Challenges. The current oil boom and population growth provide new challenges, but the North Dakota court system is positioned and ready to meet those challenges and continue to lead the state forward in the delivery of judicial services.