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THE PRESENT AD HOC COMMISSION UNIFICATION PLAN: MORE MONEY FOR LESS SERVICE

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There has been a renewed interest in trial court unification in North Dakota. The present unification plan referred to as the "Bohlman Plan" has been endorsed by the ad hoc commission on court unification established by the judicial conference. In these few pages I will examine the proposal of Judge Bohlman.

I. THE AD HOC COMMISSION UNIFICATION PLAN

Since the defeat of House Bill 1066 in the late 1970's, which called for a single state funded trial court, unification has been a recurring theme in the judiciary. Various unification plans have been discussed by the present ad hoc commission. The "Bohlman Plan" calls for an increase in district judgeships and an elimination of the county courts.

The plan as proposed would create eight judicial districts. Cass, Grand Forks, and Ward Counties would each be separate judicial districts. Morton and Burleigh Counties would make up a fourth district. The remainder of the state would be divided into four additional districts. Forty-two district judges would be disbursed to handle all judicial matters. The "Bohlman Plan" calls for a transition period of nine years during which time county court judges would be phased out. It also calls for 80 percent of the revenues received by the court which presently goes to the counties to be placed in the state treasury. The "Bohlman Plan" does not propose, but other plans before the commission have, a provision for allowing present district judges to opt out of handling cases which would have previously been county court matters.¹

Presumably the changes being proposed are to improve the judiciary and to make it more efficient. The present proposal, however, does not address a number of significant matters:

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1. N.D. CENT. CODE § 27-05-12 (proposed 1989). One unification proposal contained the following language:

Section 12. A new section to chapter 27-05 of the North Dakota Century Code is hereby created and enacted to read as follows:

A judge of district court on January 1, 1991, must be assigned only cases within the jurisdiction of that judge on December 31, 1994, if the judge exercises the option by a written request to the chief justice before January 1, 1994. Any judge exercising this option may rescind the option by written notice to the chief justice at any time.

1. The plan does not address municipal court case loads in the state of North Dakota nor the 142 municipal judges.²
2. The plan does not address the current district court practice of utilizing judicial referees to handle certain judicial work, nor does it address the future status of referees in light of new federal laws which prohibit district judges from hearing certain child support matters.³
3. In view of the possibility that things will basically be business as usual for the current 27 district court judges, while the ranks of those doing county court work will be trimmed from 27 to 15 judges, there is a genuine concern that the county court case load will not be effectively handled under the ad hoc commission's consolidation plan.
4. If there are not sufficient judges to handle the county court case load, will this necessitate implementation of an extensive system of magistrates across the state. If so, would such a system be a step backward by again involving part-time and possibly non law-trained individuals doing judicial work.
5. The plan does not address its cost. Although the ad hoc commission chairman has alluded to the proposal as being a cost savings measure there will likely be a significant cost increase both to the counties and to the state.⁴

We will not reach the optimum solution to the problems of the judiciary if we begin with the premise that any new system must start with the present district judges remaining at the status quo. When the county judges of North Dakota speak of unification they speak of a system comprised of one level of trial court and the supreme court with no courts above, below, or in between. The

2. North Dakota State Highway Department Driver's License and Traffic Safety Division, 1988 Municipal Court Traffic Violations (October 20, 1989). In 1988 the North Dakota Highway Department had 48,997 reported cases from municipal courts, 28,254 of which were from the state's four largest cities. *Id.*

3. 42 U.S.C. § 666(a)(2) provides federal procedures to improve child support enforcement. One of the requirements of this section is that "expedited process" be afforded certain cases. Under expedited judicial process, the presiding officer cannot be a judge of the court. 42 U.S.C. § 666(c)(2). It is common practice now in many rural areas to appoint county judges to hear their cases as referees.

4. A statistical report for the year 1988 was prepared by the North Dakota County Judges Association. This report was compiled from information received from 44 counties in North Dakota with 637,500 people. In 1988 over 2.5 million went into the counties general funds from county court operations. An additional \$870,000 in fines went to the State Common School fund. In 1988 total county expenditures for county courts was 3.394 million. In contrast, in the 1987-89 biennium 15.1 million was budgeted for the district courts. In addition, the clerk of district court's office is paid for by the respective counties. County Courts in North Dakota, North Dakota County Judges Association (February 27, 1990).

ad hoc commission speaks of unification in a different light, without addressing the effects of the unification plan on the counties, clerk's offices, law enforcement personnel, municipal courts, referees or magistrates.

We must carefully examine what we are trying to obtain by any change in the judiciary, and compare those improvements to the costs of the plan. Careful attention also must be paid to the good points of our present system and what effect the ad hoc commission proposal will have on them.

II. THE PRESENT SYSTEM: THE GOOD, THE NOT SO GOOD, AND THE UGLY

A. THE GOOD

There is much we can be thankful for in North Dakota. There is no significant trial delay, and all judicial decisions are the responsibility of full-time, law-trained, elected judges. The county courts dispose of over one hundred thousand cases per year, and the district courts handle over twenty thousand new filings per annum.⁵ County courts operate efficiently at less than 50 percent of the cost of a seat on the district court.⁶

B. THE NOT SO GOOD

More can be done to improve the efficient operation of our courts. Presently 14 of the state's 27 district judges are chambered in the four largest cities. By contrast, only six of the 27 county judges sit in the four largest cities. As a result, the county court system has predominantly served rural North Dakota while the district courts principally transact business in the larger counties. An elimination of county court judges will have its most dramatic impact on rural North Dakota. There are, at present, reported instances of both a county judge and a district judge traveling to a rural county seat to dispose of a small number of routine matters on the same day that could have been handled by one judge. This problem, however, could have been solved by either the district judge handling the county court cases, or the presiding district

5. In 1988 there were 20,626 district court filings and 103,013 county court filings. Annual report of the North Dakota Judicial System, 1988, p. 7.

6. In 1988 a seat on the county court cost \$130,543 to maintain. During the same period the state budgeted in excess of \$280,000 per district judge for operation of the district court. County Courts in North Dakota, North Dakota County Judges Association (February 27, 1990).

judge assigning the district court work to the county judge. However, the practice of assigning cases varies widely across the state.

There is also a great disparity in the case load of each judge in our state. In the county court system a judge stationed in the larger county in the state may handle up to eight times the cases of another county judge.⁷ These disparities also occur at the district court level.⁸ There has been a request by one judicial district for the elimination of a district judgeship because of lack of work.⁹ In addition, a number of county judges are seeing an increased amount of cases transferred from municipal courts. The problem in North Dakota is not the number of judges (excluding noncriminal traffic, if the case load was dispensed equally among the state's 54 judges each judge would handle nearly one thousand cases per year, and if the municipal court case load was considered each judge would handle substantially more). Rather the problems the judiciary faces in North Dakota are the distribution of its judges geographically, and the distribution of the case load.

Also, North Dakota has problems in the distribution of its court employees. There are vast disparities between the employees in county and district courts. The county courts have no court administrators, no law clerks, very few court reporters (most courts use tape recording equipment), and there is only one full time magistrate in the county court system. By contrast district courts by the nature of their work have most of these personnel.

C. THE UGLY

The issue that has sparked the debate on court unification is the large disparity between judges as to their salary and benefits.

At present, county judges are paid by their respective counties or multi-county areas. The district court judges are paid by the state. A district judge as of July 1, 1990, earns \$62,969. In addition, the state contributes 20 percent of the judge's salary towards the judge's pension, and supplies health insurance. In

7. In 1988 there were 5,403 case filings in Cass County (this number excludes noncriminal traffic), to be handled by two county judges. In the same year there were 345 such filings in one western county to be handled by a single judge. Annual Report of the North Dakota Judicial System 1988, p. 27.

8. In 1989 case loads ranged from 4,046 cases in the East Central District (four judges), to 1,320 cases in the Southwest District (three judges). District Court Statistical Report, Office of State Court Administrator (January 1, 1990).

9. In an article which appeared in the Fargo Forum on January 11, 1990, the presiding judge of the Southwest District was reported as recommending the elimination of the district judgeship at Hettinger, North Dakota, which was estimated would save \$250,000 per biennium.

contrast, a county judge must earn a minimum of \$47,192. This minimum salary was previously 85 percent of a district judge's salary. The 1989 legislature, however, froze this 85 percent requirement to what a district judge was earning on January 1, 1989. As a result, the county judges did not automatically share in the 13 percent raise the district judges received in the current biennium. The counties are still free to pay a county judge up to what a district judge receives. The practice, however, has been that the counties have fallen significantly behind the state. At present over two-thirds of the county judges fall below 85 percent of what a district judge receives. Also, as county judges are employees of the various counties, they are not in the same retirement program as district and supreme court judges. Some county judges have a pension paid for by their counties, but others have no such benefit. Even the best county paid pension plans are significantly less than that of the district court.¹⁰ Some county judges also have all or part of their health insurance paid while other county judges have no provision for health insurance.

One of the main issues facing the judiciary when the ad hoc commission was formed was addressing this large disparity between judges and wages and benefits. County court judges are required to have the same education as district court judges, are selected in much the same way, for the most part have larger case loads, and are the court that the vast majority of our people are more likely to be involved with. Yet there is a vast disparity between district and county judges and even a large disparity between county judges themselves as to their salaries and benefits.

III. DOES THE AD HOC COMMISSION PLAN SOLVE OUR PROBLEMS?

The first question we have to ask ourselves is; What is the motivating force behind the proposed change? It would seem that the proponents of unification advocate we should change to become more efficient. In rural North Dakota it would obviously be more prudent if there is only one judge chambered in that county to have that judge capable of handling any business that may come before the court. In the larger cities, even with unifica-

10. Most county judges that have a pension are in the NDPERS system. That system pays a pension of 1.65% x years of service x the average of the highest 36 months salary. North Dakota Public Employees Retirement System, Group Retirement Plan, July 1, 1989. A district judge's pension is based on 3% x years of service for the first 10 years, 2% x years of service for the next 10 years, and 1% thereafter. North Dakota Public Employees Retirement System, Supreme and District Court Judges Retirement Plan, July 1, 1989.

tion, things will probably remain much the same as they are today. The large county court case loads in the four largest counties would require judges to devote their full attention to that business. The proponents of unification point to the efficiency of having any judge being able to handle any case, especially in rural North Dakota. They also advocate two things that have a broad based appeal; fewer judges will mean more efficiency and with fewer judges our courts will be cheaper to operate.

As to making our courts more efficient by allowing a single judge to handle a variety of cases, those mechanisms already exist. It is already possible for a rural county judge to handle district court cases by assignment.¹¹ In many areas in North Dakota there are standing orders allowing for the transfer of district court cases to county judges. Other districts are far more restrictive in the cases that they assign.

The premise that fewer judges will be cheaper is a myth. Due to the complex way in which court administrative fees and fines are collected and disbursed in the judiciary, there will likely be a substantially higher cost to both the state and the counties from the ad hoc commission plan. The ad hoc proposal calls for the ultimate payment by the state of the salaries of 15 new district judges. This means that the cost of the salaries of the 27 county judges will be eliminated. At present those judges cost the counties approximately 1.37 million dollars in wages plus widely varying amounts for pension and health insurance. The state, however, wants something in return for picking up these wages, and that is 80 percent of the court's revenues. In 1988, 2.534 million dollars of revenue was put into county general funds through collection from county court business. Eighty percent of this figure would be slightly over two million dollars that would go to the state. This would be a substantial net loss to the individual counties, who by virtue of the ad hoc commission plan would still be liable for providing the space and personnel for operation of the former county

11. N.D. CENT. CODE § 27-07.1-17 provides:

A county court of any county of this state shall have jurisdiction in the following types of cases:

Any other cases as assigned by the presiding district judge of the judicial district in which the county is located; provided, however, that any party is entitled to have any matter assigned pursuant to this subsection heard by a district judge if a written request therefor is filed with the presiding district judge within three days after receiving notice of the assignment, and provided further, that the trial of a criminal matter may not be assigned to a county judge who presided at the preliminary hearing except where a preliminary hearing has been waived.

Id.

courts. There is also no mention in the ad hoc proposal as to who would pay for the former county judge's travel and education. Travel could be a significant item in view of the fact that there will be 12 fewer judges handling the state's case load.

Additionally, the ad hoc commission presumes that the court administrative fee, largely obtained in criminal cases, would remain the same even under a state funded plan. Those involved in the judiciary, however, realize that the collection of these fees are due in large part to the efforts of the clerk staff, sheriff, and state's attorneys office. The diligence with which these fees would be collected by these county officials, only to remit the proceeds to the state, is questionable. Also, the setting of these fees is largely discretionary upon each individual judge and could vary widely from present practice. Accordingly, the counties are assured a judiciary that would cost the counties nearly six hundred thousand dollars a year more, and the state may be assuming an obligation which would cost in excess of two million dollars more annually. Also, as all district judges in the new system would be presumed to be equal, all of these new judgeships would require the same amenities as present district judges to do that type of work. These items include: law clerks, court reporters, private secretaries, calendar control clerks, and court administrators. These costs at present are difficult to estimate, but obviously they could be substantial.

We also leave unresolved a number of the problems in the judiciary. Centralization generally would improve efficiency but would result in a loss of service. The "Bohlman Plan" has the loss of service aspect by the elimination of 12 judgeships. The biggest impact would be in rural North Dakota. However, the "Bohlman Plan" does little to provide for the efficiencies of centralization. Without addressing the clerk of court staff, which would remain under county control there is little that can be done to effectively centralize court administration. As a result, there is a **danger that** simply another level of bureaucracy will be created with state paid court personnel, in addition to the local clerk of court. Without carefully looking at district court personnel, the district and county court clerks, and court administrators, no efficiency can be obtained in any proposal to restructure the judiciary.

IV. WHERE DO WE GO FROM HERE?

Any significant change in the structure of the judiciary must be carefully planned. As a result of our economic situation people

sense the urgency of doing something quickly. However, it must be remembered that change in and of itself is not necessarily good, and going the wrong way fast is to no one's benefit. We must be convinced that any change proposed is for the better. We also must be mindful of the fact that any change in the judiciary will impact others including the local bar, clerks of court, the counties, the state, law enforcement, municipal courts, judicial referees, magistrates, and others. We must carefully assess what impact any change in the structure of our judiciary will have on these other entities so that we can determine the benefits, if any, of the ad hoc commission's proposal. We must also focus on exactly what we are trying to achieve. If we are simply trying to make our courts more efficient and more cost effective, there are a number of things that we can do now that would be much more beneficial than the "Bohlman Plan."

A. THINGS WE CAN DO NOW

These changes we should consider immediately:

1. Authorizing the judiciary to decide whether vacancies in trial court judgeships at either the district or county level should be filled. By 1995, 13 of the court's present 54 judges will reach age 65 and presumably retire. Additionally, one judgeship has been eliminated effective January 1, 1991.¹² Many of these vacancies will occur in areas where the case load no longer justifies a judge being chambered. However, as the economy changes so may be the need for these positions. The judiciary should be given the ability and the responsibility for deciding whether vacancies that occur in the judiciary should be filled.
2. We should make it easier for county judges to handle cases in rural areas. By making it easier for county judges to handle district court cases in rural North Dakota we will improve service to the people and eliminate the necessity of district judges traveling from the larger cities to these rural areas. This would also eliminate the duplication of having two judges handling cases in a given city when one judge could do so. This is the principal benefit of unification that has been advocated by its proponents. This effi-

12. The county judgeship that served Dunn, Billings, and Golden Valley Counties has been merged with McKenzie County thereby eliminating one county judgeship effective January 1, 1991.

ciency is readily obtainable at present, without the costly changes that have been proposed. Along these lines the county judges have set forth a number of proposals including modest changes in the present county court jurisdiction to handle a higher volume of cases, and also making it possible for county court judges in counties where no district judge sits to automatically be able to handle district court cases.

3. Allow for the election of presiding judges. If the trial courts are to be administered as efficiently as possible giving consideration to local needs, the presiding trial judge should be elected from the trial judges within that district both at the county and district level. This would increase the input from the local trial judges who are responsible for the administration of their local courts, and it would hopefully lead to the cooperation between county and district courts as to the delivery of judicial services and the allocation of judicial personnel.
4. The county judges should be allowed to vote for the chief justice. At present only district and supreme court judges are allowed to vote in the election of chief justice. As the chief justice is responsible for the administration of the entire judicial system in North Dakota, all full-time judges should be able to participate in the election of the chief justice.
5. We should pursue equitable treatment of all judges as to salary and benefits. This was the major issue that brought about the most recent call for trial court unification in North Dakota.

Under the "Bohlman Plan" however, this issue is left unaddressed for several years during the transition period. This issue should be addressed head-on, and the state and the counties should agree to provide an appropriate compensation for county judges. This is far more economical than a restructuring of our judiciary.

B. THINGS WE SHOULD CONSIDER

We should continue the discussion on the unification of the judiciary in North Dakota. Many of Judge Bohlman's ideas have substantial merit and could be of great benefit to our state. We should be careful, however, that ultimate unification of our courts

is exactly that, a consolidation of the trial courts into one single level of court.

We should avoid the creation of inferior judicial officers. That simply creates another level of judiciary under a different name. We must look at the impact any change will have on other government offices and entities. We should avoid creating a state level of court personnel under the guise of unification while leaving unaddressed the issue of centralization of clerks of district court and court administrator staffs. We must carefully analyze the future of the municipal court system in our state, recognizing the need to work with the various municipalities to arrive at a more efficient system of operating our courts while assuring the local cities of the service and benefits from the court that they have traditionally received.

C. THINGS WE SHOULD AVOID

We should avoid under these difficult economic times the appearance of change that brings about no benefits to our courts nor to the people they serve. We should avoid falling victims to the simple thinking that less must be better and also cheaper. In our state, quite the contrary would be true.

In these difficult times we are challenged to improve ourselves and our judicial system, however, we should be mindful of solving our problems rather than creating new ones.