

SB 2277

Senate Judiciary Committee

**Testimony Presented by Sally Holewa
State Court Administrator
January 23, 2023**

Good morning Chair Larson and members of the committee. For the record, my name is Sally Holewa and I am the state court administrator. It is the intention of the Chief Justice to provide testimony in support of SB 2277. Unfortunately, he was out-of-state when the calendar came out so he is not here today, and because of his travel schedule, he is unable to appear remotely to offer his testimony. Madam chair, we understand that today's hearing could not be rescheduled after it was posted and appreciate that you are willing to hold the bill open for him to testify in person on February 1st.

SB 2277 is a bill to complete the transfer of clerk of court staff to state-employment that was begun in 1999. It is not a new idea or a new process.

A lot of misinformation about this bill has been circulating so let me address some of that upfront.

This bill is not about shifting county funding to state funding – the state already pays for clerk of court services through contracts with the counties and has done so since 2001.

This bill is not about taking local control of court services away from the county – by statute and contract, clerk service must be delivered consistent with supreme court standards and procedures. Neither the clerk of court nor the county commission has any discretion in the manner in which clerks perform their duties.

This bill is not about closing county courts – the county courts were eliminated in 1995.

This is not a ploy to pull jobs out of the counties – it is a guarantee to keep jobs in the county regardless of how little court activity occurs there.

Again, I will be upfront with you. We don't need to have staff in every courthouse in the state to do clerk of court work. With access to case documents available through our case management system and the ability to remote into any courtroom in the state, we have the ability to have employees work from anywhere in North Dakota and beyond. In fact, it would be only slightly more expensive than what we are paying now, and a lot more efficient, to just ask for 35 new FTEs for the 14 clerk offices that are already under state employment. But we are specifically not asking for that. Instead, we are repudiating the concept of trial court centers and committing to keeping staff in all 53 counties because we believe it is important to support all areas of the state. I will let the Chief Justice talk more about that when he meets with you.

Finally, I will say that this bill did not come out of the blue. The Chief Justice was clear in his 2021 state of the judiciary address that he intended to bring a bill this session to address the clerk of court situation. Shortly after the 2021 session ended, he assigned our Court Services Committee to establish a workgroup to work through the detail of a transfer. That workgroup included the executive director of the Association of Counties and clerks of court from both contract counties and clerks from state-employed offices. The Chief Justice met with the clerks of court at their annual meeting in May to review the proposal and invite their questions. He also held regional meetings that included legislators, county commissioners and county officials to discuss the proposal.

This bill would complete the transfer of the clerks of court to state employment so the court will have control over the qualifications of the people hired into these positions and the means to ensure their work is satisfactory. It will also allow us the same flexibility to assign work to clerks that we currently have with all other court employees and the district court judges.

With that said, I'd like to give you a brief overview of where we are now and how we got in this situation.

The History

North Dakota is not a stranger to court restructuring. The judicial system has been evolving and changing since territorial days. Everything from the number of supreme court justices, number and locations of judicial districts, levels of trial court, jurisdiction of judges and the division of costs has endured change over time. There is no reason that delivery of clerk services should be exempt from the same forces that drive change in other areas of the judiciary. Nor are they the only

focus of change. We have also asked legislators to bring forth bills to convert the referee positions to judgeships and to study the municipal court.

In his annual State of the Judiciary speech to the legislature in 1975, Chief Justice Erikstad proposed a plan to transfer full funding of court operations to the state in five phases. These phases were:

- statewide trial courts (with an anticipated merger of county and district courts prior to the transfer);
- juvenile courts and juvenile court personnel;
- clerks of court;
- jury fees and expenses and indigent defense costs;¹ and
- incentives to improve trial court facilities.

Since then, each of these phases have occurred, although not in the order proposed by the former Chief Justice. Jury and indigent defense costs were transferred to the state in 1981. The juvenile courts and juvenile court personnel were transferred in 1982. In 1983, the three-tiered county court system was consolidated into a single-level county court.² The county court remained separate from the general jurisdiction district courts until 1990 when the process of merging the courts started and they were finally eliminated in 1995. Transfer of the expense of clerk of court operations occurred in 2001, although not all clerks or their staff transferred to state employment. In 2003, the Courts Facility Improvement and Maintenance Fund was created.³

So you can see, the transfer of clerks of court was not an idea that occurred in a vacuum. However, because of the way the delivery of clerk services was compromised, it has not worked as intended.

I want to be clear that the compromise that was eventually adopted by the legislature did not involve court leadership and the court actively objected to it. What was implemented was an agreement and recommendation reached between three representatives of the North Dakota Clerks Association, two representatives of the State Bar Association, three members of the interim Judiciary Committee,

¹Indigent defense was managed and paid for by the courts prior to 2005. The Commission on Legal Counsel for Indigents was established in 2005 as an executive branch agency so the court no longer has a role in providing these services.

²The office of Justice of the Peace was eliminated in 1959.

³ It is funded through a \$100 court administration fee imposed in all criminal cases except infractions [NDCC 29-26-22(2)].

one representative of the North Dakota Association of Counties, and one representative of the North Dakota County Commissioners Association. This proposal was adopted by the legislature and codified as chapter 27-05.2 of the North Dakota Century Code. As a result, while clerk of court services are entirely funded by the state, how the services are delivered varies from county to county.

Pursuant to 27-05.2, if a clerk of court office has an FTE of 5 or greater, the staff must be transferred to state employment. Staff from 11 counties were initially transferred under this provision. If a clerk of court office has an FTE need of 1 or greater, the county has the option of transferring the staff to state employment. Three counties have elected this option. Currently, there are 7 counties that have this option but have not elected to exercise it.⁴ Counties that have an FTE need of less than 1 are not eligible to transfer staff to state employment.

For those counties that are not currently eligible to transfer employees to the state we hold a contract with them for clerk of court services. Contract payments include a proportionate share of the clerk of court staff salary, a proportionate share of insurance and retirement benefits, and a 10% overhead payment. The state is also required to provide the technology and equipment necessary for staff to do clerk of court work. In addition to reimbursing the county for the cost of hardware such as computers and scanners, the state shares broadband and phone costs with the counties.

Any county, except those that are required to transfer staff to state employment, may choose to refuse a contract with the state and instead provide county funding for court services. If choosing this option, they are required to provide the services consistent with the directives and standards of the Supreme Court. Since 2007, no county has chosen this option.

Individuals performing clerk of court duties may hold multiple positions and can reach their position as clerk of court in a variety of ways. According to data collected by the Association of Counties, the state currently has:

- 2 combined elected treasurer/recorders with clerk duties assigned
- 3 separately appointed recorders with clerk duties assigned
- 20 elected recorders with clerk duties assigned
- 11 separately appointed clerks of court

⁴ Those counties are Bottineau, Dunn, McLean, Mercer, Mountrail, Pembina and Traill

- 3 separately elected clerks of court
- 14 clerks of court employed by the state

The Issues

I think Matthew 6:24 (KJV) best sums up the situation we are currently in with the clerks of court in these 39 counties, “No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.”

You will hear from the counties that the current situation is working well. Keep in mind though that the county has complete control over the method of selection for clerks (and in some cases actual selection over the individual appointed to serve as clerk), the hours the court will be open, and the rate of compensation for the clerk of court and any deputy clerks that are selected and hired by the county. The judicial branch is compelled by statute to accept these employees and the rate of compensation. At the same time, the county has no responsibility for either the quantity or quality of the work these employees perform in their duties as clerk of court. The judicial branch has that responsibility but no authority to compel compliance, institute corrective action or remove a county employee from their position. If a county cannot remove an employee (for example when the individual is elected) or is unwilling to do so, our only authority is to demand that the county select another county employee to do the work or reassign the work to staff in a state-employed clerk of court office. This is a functionally unusable option since usually there is no one else in the county who could take over clerk duties without extensive training and the state-employed offices are kept below minimum staffing standards and don't have the capacity to take on additional county work.

No business would willingly enter into this kind of arrangement, and I am not aware of any other North Dakota state agency – or any other state court system - that is bound to an arrangement that leaves the state all of the responsibility but none of the control.

You will also hear from individual clerks of court that there are not any issues with the current situation and that the separation between funding and oversight is required to allow flexibility in how they do their work. Again, they don't have a role in checkmating judges or deciding what statutes, administrative rules or supreme court policies should be followed. Furthermore, many of them don't see themselves as clerks of court for the state court system even when that is the only

position they hold and even knowing that the county is being paid for them to provide clerk of court services for the district court. Instead, those in multiple roles see themselves primarily as recorder or treasurer and only incidentally as a clerk of court. They may even have difficulty distinguishing what duties are assigned to each position, as suggested by one county resolution where the services they list as potentially losing are duties that are assigned to the county recorder. Those who serve only in the role of clerk see themselves as having a duty only to the county they are employed by and not to the state court system as a whole.

I will give you two quick examples of some of the day-to-day issues that arise out of the current situation, with the first being as recent as this past Friday. Our IT staff was compelled to make a 146-mile round-trip to a county because the clerk of court refused to move a network cable for a computer she needs to do her court work from one jack to another. This clerk, who is elected as a recorder and serving as an ex officio clerk of court, insisted it was "not her job." I will note that this same clerk has in the past refused to arrange for an interpreter for court cases and refused to print court forms for individuals who come to the courthouse because it would use "county paper".

Another example is an ongoing issue we have with a clerk of court who holds the position as an appointee of the county. This clerk refuses to follow court procedures as directed by the judges in that district. Despite numerous directives from the court and reminders that by contract and by statute she is legally required to follow the court's directives, she continues to ignore the court and do as she has been asked to do by the state's attorney. Her excuse is that she is a county employee.

Besides the occasional refusal to follow court directives or to do work that is perceived as "state work" there are bigger issues related to the breadth of work required of clerks of court that occur on a daily basis. I will preface these next remarks by saying most of the individuals performing court work are smart, hard-working people who sincerely want to do the best job they can. The problem is not them, it is the lack of work.

Eighty percent of cases are filed in the 14 counties where clerks are employed by the state. The remaining twenty percent of cases are filed in the 39 counties where clerks are employed by the county. In 2021, these contract counties had a combined annual caseload of 34,325, the majority of which (68%) were traffic tickets. The annual caseload per contract county in 2021 ranged from a low of 155 cases in Sioux County (an average of 1 case filed every 2 days) to a high of 2,798

cases (an average of 8 cases per day) in Mountrail County. Forty-eight percent of the cases in Sioux County and 71% of the cases in Mountrail County were traffic cases.

In 2021, only 6 of the 39 contract counties had more than 200 civil case filings. Civil cases include every type of family dispute (adoptions, child support, divorce, etc.), every type of probate case (guardianship, conservatorship, probate of estates, ancillary probate) and every type of civil action (collections, evictions, malpractice, injury, etc.). Each case type requires different pleadings, different court proceedings, different scheduling and unique data entry. Although very few civil cases are filed in contract counties, the clerks in those counties are expected to be fully proficient in handling each of those cases. It is no wonder then that these staff routinely need to contact staff in state-employed offices or staff at the child support office for assistance whenever these cases are filed.

Issues are not confined to just civil cases. Of the 39 contract counties, more than half routinely call our finance department with assistance in closing out the month-end financials, posting and returning bonds, and finding and correcting receipting errors.

Our yearly performance audits of clerk of court offices are limited to reviewing just a handful of cases because we don't have enough staff to do effective quality control. Despite the small number of cases reviewed, we routinely find such things as bonds not returned as directed, court ordered fines and fees not entered into the case management system, parties not entered on cases and similar issues.

A clerk recently sent me a letter suggesting that we provide better manuals and more education on how to do clerk functions. This same clerk admitted in her letter that despite having been a clerk for a number of years, she was unable to do some of the most basic clerk functions without assistance. We discontinued the clerk webinars that we were scheduling six times a year because the attendance by contract county clerks was sparse and the state-employed clerks who we were compelling to attend were already experts in those topics. We have two manuals and numerous wiki documents available for clerk use but have been informed by more than one clerk that it is easier to just call someone than look it up themselves or take their own notes on the procedure since they don't get those cases very often. We have one clerk who recently retired who had not attended a clerk of court conference or district clerks meeting in six years! I'm not sure what service she was providing to local residents since her information on most processes was undoubtedly outdated. Unlike our state-employed clerks, we cannot require these

county employees to be current in their training or institute corrective action when they refuse training. But there is more to this than simply wanting to direct the people employed to do court work on what they need to know. It is ultimately about the quality of service they are delivering to the citizens of their county. It does no good to have staff available for walk-in or phone queries if they can't provide accurate information.

We want to maintain services in all 53 counties, but we want to ensure that citizens are getting good service and that the state is getting value for its dollars. A big part of that is bringing the contract county clerks to a greater level of expertise in a few areas of work rather than requiring them to be experts in a large array of duties that they rarely perform. We can't do that now because we are artificially constrained by county boundaries. This set up made sense when each county court was a separate entity but that has not been the case in 25 years. You might ask why wait until now to address these issues? The answer is straightforward. Had we attempted to correct the problem before our only viable solution would have been to close county offices and relocate staff to where the work was. We are fortunate to be in a position now that we were not in even 10 years ago – we are able to distribute work electronically to where staff are available rather than relocating staff to where the work is generated.

The Benefits

The benefits to transferring FTEs to state-employment are many. If they become state employees it will allow the court system to:

1. Gain control over the cost of services and the selection of staff;
2. Gain flexibility over workload distribution;
3. Increase staff competence;
4. Provide more consistency in processes and procedures;
5. Ensure statewide compliance with court rules and policies;
6. Provide accountability for work product and customer service;
7. Provide meaningful court services during employee absences; and
8. Build capacity to add new services;

I believe most of these are self-explanatory, but I will expand a little on number 8. With more staff and the flexibility of moving work across county lines we could develop a few centralized units. These include things like staffing one toll-free number as the court's information desk, assisting the self-help center with phone calls and forms development, reviewing annual guardianship reports for missing or inconsistent information, adding a fines and fees collection unit, providing remote

courtroom recording services, providing remote clerk of court services to include real-time updating of the record and generating orders and notices so they are available to the litigants as they leave the courtroom, and adding a filing and redaction unit to better protect the privacy of individuals. These are not unique ideas. They are things that our neighboring states of Minnesota, Kansas, Nebraska, Iowa and South Dakota are already doing.

The entire state will benefit by maximizing the value of the dollars we are spending on clerk of court services and by allowing us to introduce new services that we have not had the resources to implement.

Individual counties will benefit because we will continue to support local court jobs.

I will make a quick aside here to address a criticism raised by one of our clerks of court who opposes the transfer. In her testimony, she mentions our use of deputy clerks who are located outside of the county for which they work. That is accurate. We have two clerks who formerly worked in Williams County. Because of life circumstances, they chose to leave that community. However, they were able to continue their employment with us since the work can be done remotely. This has worked well for us since our numerous, repeated attempts to recruit locally have been unsuccessful. Remote work is not a first option for us and it is not an option we take lightly. It is, however, sometimes the best option for a given situation.

The Cost

The bill has a \$12,267,050 price tag but if you net out what we are already paying the counties in contracts the increase in funds is only \$7,440,845.

The bill requests 63 new FTEs. That is a maximum number and the actual number may be less depending on how many individuals currently performing clerk duties elect to stay with the county. The minimum we would need transferred to maintain sufficient staff according to our weighted workload study is 24. However, transferring only 24 doesn't even allow for 1 clerk per county, and while it would improve accountability and consistency issues, it would not add capacity for new services. It would also require us to remove the proposed language on minimum staffing for each office. To maintain at least 1 FTE in each of the 39 counties plus an additional FTE in those 7 counties that have a staffing need of more than one than the minimum number to transfer is 46 FTEs.

In addition to the salary and wages for the requested FTEs, the bill includes funding for the hardware, software and data processing costs required for each FTE.

You will hear that the clerks of court will be demoted if this bill passes. I think that is a matter of semantics. We have been upfront that we believe the contract county clerk positions are equivalent to the clerk supervisor positions we have in our state-employed clerk of court offices. There is a salary difference between a clerk of court and clerk supervisor but even then most contract clerks will be getting a salary boost with the transfer. The few that exceed our pay ranges will retain their current salary but be frozen at that level, except for legislative salary adjustments, until our pay ranges catch up to them. Again, I will be upfront. There are a couple of contract county clerks whose annual salary exceeds what we pay for our most experienced clerks in our largest counties and the attorneys who work for the court system. Understandably, those three clerks of court oppose the transfer to state employment, as would anyone of us who was in their shoes.

Our eventual goal is to reduce the number of clerks of court in the state to just one per judicial district but to keep a clerk supervisor in all 53 counties to handle supervision of deputy clerks and any immediate issues that may arise in the office. This also is not a new idea. It was part of the original proposal the court brought forward in 1999. However, at that time there were only 7 judicial districts and the name change was from "clerk of court office" to "court support office" to eliminate any confusion over the absence of a county court and the duties of the staff to support the district court.

This concludes my testimony this morning. I will stand for any additional questions you have.