

State of the Judiciary
Chief Justice James R. Hannah, Supreme Court of Arkansas
Message to the Arkansas Bar Association Meeting
June 11, 2010, in Hot Springs, Arkansas

President Pettus, President-Elect Julian, Fellow Justices and Judges, Honorable Members of the Bar, and Guests;

It is a great privilege and an honor for me to have the opportunity to present this first State of the Judiciary address to the combined gathering of the Arkansas Bar Association and the Arkansas Judicial Council. I am grateful to the leaders of the Bar for their graciousness in setting aside time on the program and hosting the event.

Some of you will know that the presentation of a state of the judiciary address is a common occurrence in state judicial systems across the country. In many of our sister states the practice is enshrined in the state constitution, requiring the Chief Justice to present the annual address before a joint session of the state House and Senate. In other states the requirement has been adopted by state legislation. In a few states the practice is not legally required but occurs out of a long tradition of a formal invitation extended from the leadership of the legislative branch to the Chief Justice.

Unfortunately, our state does not share that tradition, despite overtures to the leadership of the legislative branch by the judiciary over the past 25 years to institute this practice. Why is this important?

The co-equal branches of government—the separation of powers, the checks, and balances—have served this country and our state very well. But the tension between the three branches of government that was built into our Constitution on purpose by our forefathers has a very real impact on the relationship among the three branches. I would suggest to you that our form of government, that we cherish, has lasted because of our independent judiciary. Our independent judiciary is the envy of the world, yet too often we take it for granted.

It is important to our state that we have a strong and vital judiciary.... A judiciary that *is* a co-equal branch of government. Addressing a joint session of the Legislature is a strong statement that the judiciary is a co-equal branch of government. It also allows the judiciary an opportunity to explain to the other branches of government what the judiciary's role is and its vision. However, beginning this new venture of giving a State of the Judiciary Address before the ABA and the Arkansas Judicial Council is appropriate and a good thing.

The Judiciary and the Bar Association enjoy a wonderful relationship that thrives in no small part because of the quarterly meetings we have with the bar leadership to share our mutual concerns. Everything the judiciary undertakes to strengthen and improve our judicial system is primarily dependent upon the support of both the bench and the bar. The work the court does could not be done without our committees and the time that is given by the members of the ABA and the judiciary that serve on those committees. On behalf of the Court, thank you.

First, I would like to highlight for you some of the recent and current work and accomplishments within the judicial branch of which I am quite proud. Second I would like to highlight some areas of concern which I believe demand our attention.

ELECTRONIC PUBLICATION

At the appellate court level we have taken steps to dramatically change the way that we record and report the work product of the courts. On July 1, 2009 we became the first appellate court in the United States to designate an electronic opinion as the official opinion of the court. Many states, including our own, have made electronic copies of official opinions available for many years. Until now, however no state eliminated all forms of paper opinions and designated the electronic record as the official opinion.

In taking this action and in eliminating the publication of the Arkansas Reports (a tradition that began in 1837) we have taken extraordinary steps to insure the integrity, the authentication, and the preservation of the electronic documents. In so doing we have saved Arkansas taxpayers almost \$300,000 per year in publication costs, provided free access to the opinions for the bar and the public, and greatly enhanced the capability to search and utilize the electronic opinions.

I am also pleased to announce that, as of the beginning of the fall 2010 term of court, video and audio broadcasts of all of the oral arguments of the Supreme Court will be made available via webcast to the bar and to the public. The Court of Appeals will also have the ability to video and broadcast their oral arguments.

ACCESS TO JUSTICE

Beginning with my time serving as a Chancery and Probate Judge in White & Prairie Counties, I have had an acute concern about the impediments to access to our judicial system which confront many of our state's citizens.

The work of several members of the bench and bar was enhanced in 2003 when our Supreme Court responded to a petition of your association to create the Access to Justice Commission. During the last year, prompted in part by the financial crisis being faced by our state's IOLTA program, we created and funded a new full-time position, paid with revenues from our bar license fees, to provide leadership on issues of access to justice. We have hired Ms. Amy Johnson and are proud of the work she is now doing on our behalf.

Contrary to the fear and concern expressed by a few, this work is not about encouraging or enabling members of the public who would otherwise secure the paid services of an attorney to represent themselves; rather it seeks to make available an array of tools and programs which better enable our citizens to access the legal advice and services they need.

When each of us raised our hands to take the oath to become an attorney we repeated these words: "I will not reject, from any consideration personal to myself, the cause of the impoverished, the defenseless, or the oppressed. I will endeavor always to advance the cause of

justice.”

Unfortunately, access to justice is an unfilled promise for many Arkansans. Seven of the poorest counties in the U.S. are in our state. One out of every five Arkansans qualifies for legal aid. Approximately 550,000 Arkansans live in poverty. The reality – both in Arkansas and across the country – is that a growing percentage of our population is unable to or chooses not to utilize the services of a paid attorney.

Their participation in the legal process – whether due to their indigence or the exercise of their legal right to so proceed – places a huge burden on the court system. Our support for our criminal public defender system, our civil legal services providers, the several pro bono programs, and the innovative programs and services offered by and through the Access to Justice Commission, deserve our support.

Our Code of Professional Conduct, Rule 6.1, calls upon each of us to provide at least 50 hours of pro bono service per year and to contribute our financial resources to organizations that provide legal services to the poor. The Arkansas Bar does an excellent job of providing pro bono service. The public is not aware of the pro bono service you provide. You have a great story to tell and that story needs to be told. We have the best judicial system in the world, but if a person cannot walk through those courtroom doors because of their economic status, or race, then having the best judicial system in the world means absolutely nothing to them if they are unable to access it.

We have to do better.

COURT INTERPRETERS

In the mid 1990's the Supreme Court was reviewing a 1st degree murder case on appeal in which the defendant was non-English speaking. In reviewing the record we realized that we were relying totally on the expertise of a foreign language interpreter to communicate both with and for the defendant. We also realized, however, that we had absolutely no basis upon which to judge whether the interpreter was an expert or totally incompetent. In 1999 we adopted rules requiring the use of certified interpreters and authorized the Administrative Office of the Courts to train, test and certify interpreters. Soon thereafter we became one of a handful of states to join the National Consortium for Language Access in the Courts.

You may ask why this matters.

I think the personal experience I had illustrates this probably as well as any. When I was on the trial bench I had a court reporter who had previously worked in the criminal jurisdiction. She told me that one time at plea and arraignment they had a Cuban defendant who didn't speak English. He was charged with some drug violations. The judge read off what the defendant was charged with and the court interpreter, in Spanish, turned and repeated that to the defendant. The judge then asked how the defendant would plead: guilty or not guilty.

The court interpreter turned to the defendant and asked the question in Spanish, “How do you plead?” The defendant began to respond in Spanish. The court reporter told me that he spoke for

what seemed like an eternity in Spanish—but at least five minutes. It was only when he hesitated to catch his breath that the court interpreter turned to the court and said, “He pleads guilty.” Now that’s a funny story, but it’s sad. It illustrates the fact that the people who come to our court that can’t speak or understand English need to be able to be understood by the court and they need to understand the court.

From 2001 to 2005 our state experienced the largest percentage growth in our Hispanic population of any state in the U.S. While a majority of our immigrants are from Central America, 18% are from Asia, 12% from Europe and Canada and 3% from Africa.

The obligation that every individual who appears in an Arkansas court has a right to understand and effectively participate in the proceedings creates a huge burden for our court system which we must meet. Languages called upon most often in Arkansas courts are Spanish, Marshallese and Vietnamese. The national court interpreter exam used to test in the Marshallese language was developed by the Consortium for Language Access in the Courts as a joint project with three member states: Arkansas, Oregon and Hawaii.

We now have 21 certified interpreters in our state and they have provided services in more than 5000 cases. We developed a program now being copied and used across the country of installing special telephonic systems in courthouses where there are large numbers of non-English speaking parties so that one interpreter in Little Rock can “appear” in multiple courthouses on the same day.

Right now the total state appropriation for our court interpreter services for every language needed in every court, state-wide, is less than the amount spent for interpreter services by a single Little Rock hospital. We have a long way to go to acquire and develop the resources that are needed to meet the demand. Your assistance in supporting these requests to state policy makers is greatly needed. However, I am extremely proud of the work which is being done by a small group of incredibly skilled and dedicated interpreters.

STATE DISTRICT COURTS

In 2002 the Arkansas Supreme Court published a Per Curium in which we called for substantial changes in the structure and operation of our limited jurisdiction court system. Our court was given additional authority and responsibility by Amendment 80 for the oversight of these courts but we have recognized that any changes require collaboration and shared responsibility with the General Assembly. Extraordinary work has been done since that time.

We have moved from having five separate courts of limited jurisdiction to two, with the elimination of city courts scheduled for 2012. District judges no longer exercise jurisdiction outside of the geographic area from which they are elected. The General Assembly has now created 25 full-time, state funded district court judgeships. We have already enhanced the civil jurisdiction of these courts and have provided limited ability for these judges to assist with circuit court work.

In the current pilot court locations these judges have demonstrated that they can serve multiple

communities within a county and increase the amount of bench time at each location, that they can provide a new resource for quicker access for circuit court matters, especially in counties without a resident circuit court judge, and that they can save money for the communities in which they serve.

In the coming months our court will consider the further expansion of their jurisdiction and review the possibility of enhanced service to circuit courts. If Arkansas is going to have a true three-tier judicial system with full time, state salaried district judges, we are going to have to combine some counties together to form District Court districts.

The District Court Resource Assessment Commission, chaired by Circuit Judge Marcia Hearnberger of Hot Springs, is working on developing a state-wide plan on District Court districts together with a plan for the recommendation of additional state district judgeships to the General Assembly this year. Our state has been served for many years by a large number of dedicated attorneys who have served with integrity and distinction as part-time municipal and district court judges. But it is now past time for us to elevate these courts as the true third tier of the state court system, and that means that they, like circuit and appellate judges, are full-time judges paid by the state.

COURT TECHNOLOGY

We continue to do an impressive job with the application and utilization of various forms of technology to improve the business processes of the courts and to enhance public access to the courts and to court information. After several years of planning and testing we are now implementing a statewide electronic court case management system for circuit and district courts and for our appellate courts. This is at no cost to circuit and district courts. Our automated jury program is now operating in 46 of our 75 counties. This month we will activate our e-payment system which will allow citizens to pay fines and fees online with a credit card.

And our court has just received a final report from our E-Filing Taskforce, Chaired by Attorney David Fuqua. The court has discussed this report and I anticipate the court will be handing down a per curiam in the very near future, adopting rules governing electronic filing of pleadings and documents on any court using our case management system. These proposed rule changes had been previously published for comment. Let me take this opportunity to encourage you to send in your comments. The Court wants to hear what you have to say. The court reads those comments and considers them.

This is expensive work and much of it is made possible because of the adoption of the Court Technology Act by the 2009 General Assembly. The ABA was very helpful in supporting the legislation, and we are grateful.

Now a quick word about three areas of concern.

CRIMINAL SENTENCING REFORM

Last year I attended a meeting sponsored by the National Center for State Courts and the

National Council of State Legislatures with our state court administrator, your former Bar President, Rosalind Mouser, and two of our fine attorney-legislators, Senator David Johnson and Representative Steve Harrelson. The topic of the meeting was inter-branch cooperation and, as a result of the meetings, we decided that we should focus on the issues of growth in the Arkansas prison population and possible reform of our criminal sentencing structure.

As a direct outgrowth of this meeting I was pleased to co-host a press conference last week at which Governor Beebe and I announced that our state has been chosen by the PEW Charitable Trust for work in the study of our current sentencing and corrections system and with the review of possible reforms which can both lower the staggering costs of building and operating more prisons while still maintaining public safety.

2009 marks the first year since 1977 that the number of inmates in prison in the United States declined. Unfortunately, our state was one in which the prison population continued to rise, even though our crime rate declined.

In the 1970's, I was appointed to the Parole Board by Governor Bumpers and Governor Pryor. At that time the Arkansas inmate population was about 1,800. We now have more than 15,000 in prison, growing at an annual rate of 3% per year. If we do nothing – just operate business as usual, by 2020 our current expenditures of \$336 million will have cost an additional \$1.3 billion.

As we examine our sentencing practices with the assistance of the PEW Foundation, we already know of one program that has a proven, demonstrated success in increasing public safety in our communities, in treating and rehabilitating persons with addiction, and in reducing state costs for correctional facilities.

In the last sixteen years, the number of state drug court programs has grown to forty-two. I am extremely proud of our circuit judges who have taken on this program with no additional compensation. Drug courts currently save the state about \$30 million each year, while keeping people in their communities, supporting their families by working, paying taxes, and conquering their addictions. Although not everyone makes it through, those who do have an enormously high success rate of staying out of trouble. The recidivism rate for those who complete the program is 5.7 percent. According to the Department of Correction, the recidivism rate for those paroled out of prison in 2005 was 41.4 percent.

While decisions about sentencing policy are definitely up to members of the General Assembly, judges have a unique perspective from which to view the operation and consequences of current sentencing policy and have an obligation to provide input on ways to improve the system. With that in mind, I have appointed several circuit judges to a committee that will be advising the Pew people. In fact, that group of circuit judges met with the Pew people on Wednesday.

Likewise, the willingness of members of the bar to speak out is particularly important when there are those who use political opportunism to allege that policy makers are “soft on crime” if they dare to consider alternatives to mandatory sentences or penalty enhancements. We simply cannot as a state continue to pour billions of dollars into the construction and operation of institutions to warehouse prisoners if – and I emphasize the “if” – there are less expensive and more successful

alternatives which do not jeopardize public safety. I encourage your active participation in these discussions. We cannot afford to just do nothing.

PERCEPTIONS OF DISPARITY

In March of this year the University of Arkansas at Little Rock published its Annual Report on Racial Attitudes in Pulaski County. This series of publications, while limited to surveying a single county, has done an excellent job of making us all conscious and keeping us focused on the fact that “race relations remain a barrier to social and economic progress in Arkansas”.

One very troubling finding for me in this year’s report was from a question asking, “How much trust do you have in the judicial system and courts?” Only 12% of blacks and 26% of whites in Little Rock reported that they had a “great deal” of trust in the judicial system. 37% of blacks and 17% of whites reported that they had “hardly any” trust. To put a more positive spin on the numbers, 81% of whites and 57% of blacks reported having at least “some” trust in the court system.

There are all sorts of ways that we might analyze or attempt to minimize the responses. There was, for example, no information provided about what the respondents meant by “the courts” or the “judicial system”. However, one analyzes the data it is imperative that we listen to the fact that a significant percentage of our population lacks confidence in the courts. There is also a significant gap in one’s perception of the court system based upon one’s race.

In every speech I have given since becoming Chief Justice I have made the statement that the success and viability of our court system is totally dependent upon the trust and confidence of the public. It is important that our decisions, our rules and our processes within the judicial branch are color blind in fact. But it is equally important that our system be perceived as fair and impartial. We simply must do a better job as judges and court officials and officers of the court of looking at everything that we do and asking the hard questions about whether, from the perspective of particular segments of the community in which we work, we possibly create a perception of bias.

The bar has given great leadership in this area. Attention to law school recruitment and support of minority law students, graduates and young professionals has proven successful in improving the diversity of our bench and bar. I also applaud the Judicial Council which just last year created a new Committee on Racial Gender and Ethnic Fairness in the Courts. We need to engage all of our resources at the local level and ask ourselves a very practical question – what does our court system look like to one who comes into our district courtroom or our courthouse or our clerk’s office?

What do people see? What do they hear? Are there effective programs of outreach to particular communities in which we can engage? I do not know the answers to these questions. But I do know that we must take seriously the public’s perception and do all that we can to create and sustain a system which both is fair and impartial in fact and in appearance.

Along these lines I recommend to both the bench and the bar a reading and review of a White

Paper published by the American Judges Association in 2007 on the issue of “Procedural Fairness”. The paper takes a look at the substantial volume of social science research which finds that most people care more about how they are treated in court – procedural fairness – than they do about whether they won or lost their particular case. The authors note that few judges and lawyers will believe that this is true but researcher after researcher has shown it to be the case. People value fair procedures because they believe that they will produce fair outcomes. People who receive a judicial decision which is against their personal interests are more likely to support the outcome if they perceive that the proceeding was fair.

The paper goes on to suggest ways in which members of the bench and bar can encourage policies and practices which promote procedural fairness. I warn you that they are not our usual emphasis on legal or technical rules of practice and procedure. They have to do with things like whether the person felt like they had the chance to be heard; whether the process was transparent; whether they were treated with respect and dignity; whether the outcome was explained in a way that they could understand; whether it appeared that anyone cared about their problem or their case. This is a matter of using common sense; this is a matter of treating people as you would want them to treat you. These are important issues which demand our attention.

JUDICIAL ELECTIONS

We have just finished another season of judicial elections. I applaud the appropriate restraint and dignity which was displayed in the campaigns which occurred over the last few months. For the most part, we have been spared the massive spending, horrendous campaign conduct, and targeted influence of single issue interest groups which has been present in many state judicial elections across the country.

However, with recent changes in the constitutional understanding of acceptable restrictions on campaign spending and changes in codes of judicial conduct based upon the 1st Amendment rights of judicial candidates, I fear that we will not be spared these problems forever. Many of you heard the presentation by Justice Bob Brown and Wisconsin Chief Justice Shirley Abrahamson on this topic.

We need to find ways to develop and foster an expectation and even ask for the commitment from our colleagues who seek judicial office that they will hold their conduct to a higher level, even if such conduct is not legally required. We need to develop ways to report and quickly respond to campaign conduct which is inappropriate. We need to limit, as much as we are able within the law, the influence of money and political interest groups. We need to discuss and consider public financing of judicial elections. We need to discuss and consider furnishing the voters a voter’s guide, listing the judicial candidates and their qualifications. We need to consider requiring all judicial candidates attend a course on the judicial code prior to the election campaign. We need to review and discuss recusal issues. Failure to do so not only produces bad results and potentially bad judges but also denigrates the judicial system and erodes the confidence of the public in the integrity of our courts.

A fair and impartial judiciary requires loyalty to the law and Constitution, not political influence.

CLOSING

I want to end these comments where I began, noting the difficulties and conflicts inherent in our constitutional democracy and the important links between the bench and the bar.

It is such a privilege for us to be living and doing this work in Arkansas. We are so blessed with scores of bright and committed individuals in all branches of government whose goal when they wake up in the morning is to make the world a little better place than they found it. We are blessed that our state is small enough in population that, for the most part, we can do this work with people that we know by name, and often we know who they're kin to. We are blessed that, while we may not always have all the monetary resources we might like, we have a heritage of finding the ways which are necessary to accomplish the task. We are blessed by a sense of shared obligations and common callings. So while we have problems and shortcomings and much upon which we can improve, the state of our judicial system is sound and the promise for a better system is bright.

I thank you for your kind attention and for your dedication to the rule of law and to the reality of a fair and impartial system of justice for all Arkansans.