

State of the Judiciary  
Chief Justice James R. Hannah, Supreme Court of Arkansas  
Message to the Arkansas Bar Association Meeting  
2016

Thank you very much and President Eddie, thank you.

I want to share with you, for a short time, my own personal comments on the state of the judiciary in Arkansas, and I want to begin with memories of the three Supreme Court Justices who have recently left us.

Brad Jesson from Fort Smith. He was appointed by Governor Tucker to fill the position when Chief Justice Jack Holt stepped down, and he served for two years. And then ten years later, the Arkansas Supreme Court called on him and Justice David Newbern to be masters in the Lake View School District case, and they started off by spending 60 days traveling the state of Arkansas examining the schools and seeing if the schools met Constitutional standards. He served the state in many ways, but this might have had the most significant long-term impact upon the state.

We lost Ray Thornton. Ray Thornton had, in some ways, the most unique career of any Arkansas servant. He was a congressman from South Arkansas. Later, he was a congressman from Central Arkansas. He was the President of the University of Arkansas. He was the President of Arkansas State. And then he served on the Arkansas Supreme Court. In 1974, I live in Rock Island Illinois. I had never been to Arkansas in my life. I knew two people from Arkansas, this is 1974: Orval Faubus and Frank Broyles.

And like everyone else around the country. In 1974 when there were only three TV channels, we were all watching the Watergate investigation. Ray Thornton was on the committee to determine whether Richard Nixon should be impeached. And I remember in the summer of 1974 watching on television those debates. Barbara Jordan from Texas spoke and then Ray Thornton spoke and Ray Thornton said: "There can be no national interest greater than the requirement that public servants must be bound by the law that they make and administer. There can be no public policy which should be served by substituting for the permanent ideals of the Constitution the political expediencies of the day. This is not only applied to the President's conduct of office. It applies to each member of this committee as we make our decision." And then he cast his vote.

And then we lost Chief Justice Jim Hannah. He served for 37 years on the courts of this state. He served for 15 years on the Arkansas Supreme Court. He was committed to the court system. He was committed to the independence of the courts. In one of his concurring opinions he wrote, "the independence of the judiciary is a matter that transcends the personal concerns and passions of the judges regardless of how laudable or just they may be. Independence of the judiciary must transcend these matters. Liberty is at issue. Our form of government is at issue. A judge may not simply cast aside his or her judicial mantle when he or she chooses and walk in life as all other men and women. The position of judge is a high calling. It carries with it obligations not borne by the average person. As the majority states, a judge may never divest himself or herself from being a judge. We lost these three distinguished Supreme Court Justices this year.

At this point, I want to turn to some things that are going on at the Arkansas Supreme Court. In 2014, we had a lot of litigation over attorney fees—the money that you pay each January and February to be licensed. And you remember the litigation that took place. Whether someone was eligible to be on the ballot for judge when they had failed to pay their fees. And following that litigation, the Court revised the rule. It put in some safeguards. It put in more notices. It put in a way for a hearing. April 15<sup>th</sup> of this year, there were 10,500 attorneys in Arkansas. We issued a per curiam on May 1<sup>st</sup> and on May 1<sup>st</sup> we said 889 lawyers did not pay their license fee on time and they are suspended from the practice of law. We're trying to reduce that number. Every week we have five or ten who surrender their license. What amazes me when I look at the list of those who haven't paid—how many are from Arkansas. They live in Fort Smith and Fayetteville and Little Rock and Hot Springs, and for some reason, they haven't paid. Some of them are my former students, and I'm saying, "why didn't you pay your license fees? I told you to do that!" So we're going to try to tighten up that rule a little bit so that these 889 don't continue to receive notices every year. That after perhaps two or three years they are just removed from the license list.

We are moving toward more and more electronic filing, and we issued a per curiam last June that talked about electronic filing in the appellate courts. We have an administrative order that deals with this. Starting last September, we made it optional for lawyers filing motions in the Court of Appeals and the Supreme Court to do it electronically. This September, it becomes mandatory. Starting this September, a number of motions cannot be filed with the Court of Appeals or the Supreme Court with hard copy. They're not going to be accepted, and if you want more information about that, you can go right back there [points in front of him] afterwards and talk to the Administrative Office of the Courts and they'll give you more information.

Everything doesn't have to be filed electronically. We're not yet taking briefs electronically. That day will come. So we're making this transition, and this is the next stage. Some of these motions will have to be filed in a mandatory fashion, in electronic fashion.

Next, when my term ends, I'm going back to the law school, and so I'm looking for things I can say to my students in January. And I've been making a list of creative motions that I've seen at the Supreme Court.

So here are some examples of creative motions. Here's a distinguished Little Rock lawyer who files a motion, and it says, "Minutes before he was to timely tender the appellate record in the Supreme Court on January 18<sup>th</sup> 2016, counsel stumbled and he spilled some decaffeinated coffee on several pages of the record." And then he takes this record to the Clerk of the Court and the Clerk of the Court says, "We're not taking this! You got coffee stains on it!" Turned it down. So, he has now provided what he calls "pristine" copies of the record and he wants us to accept them late, so we took them. We took them. I want to assure you that we granted that motion, but it does remind—it reminded me and it reminds you that in the Clerk's office, when you submit a brief, when you submit a record, it is carefully examined to make sure that it complies with all the rules and don't spill any coffee on it. What I don't know is why he had to tell us it was decaffeinated coffee.

Next, we receive a lot of motions from lawyers who say “I need more time to file my brief” or “file my record.” And almost always, there’s a reason that says, “I’m overworked. I’ve got a big trial.” This lawyer said, again a distinguished Little Rock lawyer, files and he had the some of those same reasons about his workload, and then he said, “In addition, this undersigned counsel is taking his wife on an anniversary trip from March 23<sup>rd</sup> to March 30<sup>th</sup> 2016.” And here’s the key line: “It’s the first time I’ve taken my wife on a vacation in 30 years.”

I want you to know this is a public servant. This is not someone in private practice. This is a public servant who’s gone 30 years without taking his wife on a vacation. We granted the motion. I saw him later. He took his wife on his vacation. They had a nice time.

We’ve had three motions, I think, that fall under this category. And they all go something like this: “The Clerk would not take my brief because it was one day late. It was one day late.” You know, in law school, we teach people, “Deadlines are important! You gotta mark your calendar! Don’t be late!” The brief is one day late. This person files a motion for a rule on the Clerk and says, “The reasons it’s one day late is because I miscalculated, and I forgot that 2016 is leap year. And I forgot that February had 29 days.” We granted those motions. There’s no rule on that. I don’t know if that works in any other setting, but it was a unique argument.

Next, we scheduled oral arguments, and we scheduled oral arguments for April 28<sup>th</sup>, and we receive a motion from one of the lawyers who says he’d like to reschedule oral arguments and his reason was that his wife was scheduled to have their first baby on April 28<sup>th</sup>, and he’d like to be there with his wife in St. Louis. We granted that motion. We rescheduled the oral argument. We had oral arguments last Thursday. At the beginning of oral arguments, he stood up and he thanked the Court for rescheduling the oral arguments, and later on he showed us a picture of his baby.

And here’s my last one. This is my nominee for the best legal writing of the year. The best legal writing of the year. And I will tell you, at the end of this, it’s neatly typed, looks very good, very professional, very well formatted. At the end of this, it does not have a Bar number. It has a number from the Arkansas Department of Corrections. And his address is “Barner Unit, Tucker, Arkansas.” This is a pro se motion. Remember, it’s my nominee for the best writing of the year. Now you remember, when you went to law school, and you were in your first semester of law school, the dean probably said, “In your first year, you’re gonna have con law and torts and property, and you’re gonna have a course called, we call it, ‘legal writing’.” And you said, “why do I need that? I know how to write.” And you went to legal writing and, all of a sudden, you’re told, “you’re gonna learn about IRAC.” And you’re saying, “I didn’t come here to talk about Iraq and Iran and Saudi Arabia.” And the professor said, “No it’s IRAC. That’s the way to write a legal memo.” And at the end of one semester, you may have lost all your creativity in writing. It may have just been drained away. This guy did not take legal writing.

Here’s what he says. “It was a cold day in February.” That’s an opening that catches your attention. You want to keep reading. It’s like, “it was the best of times. It was the worst of times.”

*It was a cold day in February. The year was twenty-and-sixteen. Day 26. The beginning of the*

*end of days. Shortly after sundown it came. And when it did, everything halted. Time froze. The world stopped spinning. The unspeakable happened.”*

I’ve got your attention don’t I?

*“And then, the Attorney General forsook her sacred oath and she abandoned the pursuit of justice by moving that my appeal should be dismissed.”*

You want to read more! You want to read more! And you ask yourself, when you read somebody’s brief or you read some judicial opinion, do you want to keep reading after the first paragraph? I don’t know. You want to keep reading here.

The Board of Bar Examiners. As you may have heard, pass rates on the Bar Exam have been down nationwide. They’ve been down nationwide, and, in my opinion, it has nothing to do with the exam. We changed our exam about 12 years ago. We use national questions. It’s all scaled on a national basis. On the other hand, a Bar Exam can never test all the skills that you need as lawyers. A Bar Exam doesn’t test your ability to do advocacy. It doesn’t test your ability in counseling or mediation. It doesn’t test your legal research skills. It tests what you’ve memorized, and what you probably forgot after you left the exam. You memorize the six exceptions to the statute of frauds. You memorize the seven elements of adverse possession. You don’t know those now. If you needed them, you’d look them up! But you memorize them for the Bar Exam. Both law schools, and I will also say the Board of Bar Examiners, in my opinion, does an outstanding job in preparing for and grading those exams. The pass rate on the Bar Exam is because of nationwide trends with the number of students coming to law school and the LSATs of the people coming to law schools. Both deans are aware of this. Both deans and both law schools are making efforts to deal with their students and prepare their students for the exam.

The Board of Bar Examiners has also been asked to look into pro hoc vici issues. And Eddie came to us in September and said that the Bar Association found out that, as Arkansas lawyers go to surrounding states, you want to go to Oklahoma or Louisiana or Missouri and participate in a case, they charge you some money. Every surrounding state charges Arkansas lawyers to come in and participate. We don’t charge outside lawyers a dime! They come in free! And so the suggestion has been that we, Arkansas, through the Supreme Court, come up with a way to revisit the whole issue of pro hoc vici with the goal, not necessarily of changing it all, but of insisting that those lawyers who want to come in here and try a case, they pay some money. In Louisiana, I think it’s \$350 every time you’re in a new case. In some states, it’s so much a year. But there’s a fee. And so the Board of Bar Examiners is looking into that.

District Courts. After Amendment 80 was adopted, the Arkansas Supreme Court issued a per curiam in 2002, and it said it is contemplating that all the part-time courts in the state will move to full-time courts, will change to full-time status. It also said there was a hopeful deadline of 2005. We didn’t make that deadline. We didn’t make that deadline. In 2002, we had 212 basically part-time judges. Next January, we will have 54 full-time district judges and 36 part-time. And when this transformation is complete, we will eventually have 66 full-time district judges and I think the promise of Amendment 80 will then be fulfilled and we will move in that way to providing more complete, thorough justice in those courts.

We have changed three rules of professional conduct. The initiative for this started with access to justice. It went through the professional ethics committee. It was strongly, overwhelmingly supported by the House of Delegates. It came to the Supreme Court. We sent out for comment. We did not have a single negative comment to any of these rule changes. We adopted them. And the purpose of these rule changes is to clarify what is commonly called limited scope representation. And the hope is that younger lawyers, lawyers in small communities, lawyers practicing alone, will be better able to say to clients, "I know you don't want to hire me to do everything. But you can hire me to do this." And it clarifies how that is going to be done. Access to Justice is putting together a toolkit of forms and guidelines and documents to be distributed to assist lawyers in providing limited scope representation. There is another rule out there pending. Four years ago- actually seven years ago, the Arkansas Supreme Court dealt with a case involving attorney files. Client goes to his former lawyer and says, "I want my file!" Lawyer says, "you don't get it." It became a disciplinary matter. The Supreme Court handed down a decision and said, "it would be good if we have a rule discussing this." A rule has finally been proposed. It's out there for comment. You can find it on the webpage. We want comments by September 1<sup>st</sup>. And it addressed such things as, "when the client comes and says I want my file, what does that mean? Everything? Every scrap of paper? Every draft? Every email? What does it mean?" So this rule is intended to give some guidance.

There's another rule under discussion which has not yet been put out. This is still being discussed at the committee level. Not at the Supreme Court level, at the committee level. And that is, fee agreements, as you know, do not have to be in writing. It is recommended that they be in writing. This rule would say, "if the fee that is going to be generated is likely to be more than \$1000, the fee agreement has to be confirmed in writing." And that does two things. It protects the lawyer. It protects the lawyer from the client coming back saying, "I had no idea you were going to charge this much." And it gives guidance and some indication to the attorney- to the client as to what's been charged. So, this is a rule that I hope will be circulated for comment soon.

Earlier this year, we put out a whole group of changes and rules of civil procedure. The most significant change was Rule 4, Service of Process. And the key aspect of that was to change from the strict compliance to the substantial compliance. That is a major change in Service of Process. Going from strict compliance to substantial compliance. We put that out for comment. We got a lot of comments. We got a lot of comments. From everybody for all different sorts of things. We've taken all those comments and we have sent them back to the Civil Practice Rules Committee to evaluate all that. That will be coming back at some point.

The legal profession is changing. And if you compare the legal profession of 10 years ago with today and try to look ahead to 10 years in the future, you're going to see, and the trial judges will tell you. There are far more pro se litigants than ten years ago. There's far more pro se litigants. They don't want to hire lawyers. Some of them are going to Legal Zoom and they're purchasing documents. Sometimes they're filling those documents in and going into court and asking a trial judge to help them with those documents. It's not the responsibility of trial judges. People are finding lawyers by going to Avvo or somewhere else. I went on to Avvo last night. I typed in "Little Rock Arkansas, Family Law." I get the names of lawyers. I get their pictures. I taught some of them. I know who they are. Clients are finding lawyers that way. There are mediation

services online. There's more and more arbitration. There's a decline in the cases filed. In contrast, 10 years ago, there are more law schools, there are fewer applicants who want to come to law school, and there is a decline in LSAT scores. Three states have now authorized some form of legal technicians. Just as there are nurse practitioners who can do things, not everything, a doctor can do, but nurse practitioners. In these three states, there are legal technicians. They are licensed. Sometimes they're in a law firm. Sometimes they are out by themselves. And finally, Dean Nance gave me this two weeks ago. This is something I've said to students for twenty years. It's coming. Dean Nance found it. This is an ad. It says, "find a law store inside Walmart in Joplin, Missouri." "Find a law store inside Walmart in Joplin, Missouri." And I clicked on it and it has the names of a few lawyers down in the fine print. It has prices. It has fees. It has services. I don't know if they had this checked out ethically in Missouri. I can tell you: If this came in this way to Arkansas, there are certainly things that are clear, in my opinion, clear violations of our current rules. But, it wouldn't have to change too much to perhaps make this ethical under our current rules. The profession is changing.

2007, 2008, a committee of eight lawyers and eight judges met at the Arkansas Bar Center, and we worked for over a year on the Code of Judicial Conduct. We took the recommendations from the American Bar Association and we asked, "Do we recommend them in Arkansas? Or should be some changes?" We made some changes. I remember very well sitting in this room, this conference room, and a judge from northeast Arkansas said, "I'd like to take brand new lawyers in town to Kiwanis when I got to Kiwanis so they can meet the other people. That's what I want to do! I'm not harassing them! I don't even buy their lunch! I just want to take them to Kiwanis. Are you telling me I can't do that?" And we put a little wrinkle in the rules that said "No! You can do that. You're not coercing them. You're not intimidating them." We made a number of small changes, and at the end of that, that committee went to the House of Delegates. The House of Delegates approved that code. The House of Delegates, The Bar Association, filed a petition with the Arkansas Supreme Court. And that's how our current code was adopted. A petition from the Bar Association to the Supreme Court. The Court put it out for comment. The Court may have made a few little changes, had a few questions, and then it was approved.

A few weeks ago, I went to Girls State and Boys State. I swore in the officials, the officers, the newly elected. And I was given the opportunity to say a few words to them. I was speaking just before the governor spoke. And I said, "our branch of government, the judicial branch of government, is the weakest branch. Unlike the governor, we don't have a national guard." Unlike the governor, the Chief Justice does not have an airplane. I didn't say that, but perhaps I should have. I said, "unlike the governor, we don't pave roads. We don't have administrative agencies. Unlike the legislative branch, we don't pass taxes. We don't enact statutes. What our branch of the government has is the power of what we say, the words that we say and write and, second, respect in this country and this state for the rule of law." And I said to these high school students, "I want you to think back to what you read in Civics or somewhere. It was a judge who said to a defiant school board, 'open your doors.' And it was President Eisenhower who said, 'I'm going to back up that judge by sending in the 101<sup>st</sup> airborne.' It was a judge who said to President Richard Nixon, 'you've got tapes in the Oval Office. Turn them over to the prosecutor and turn them over to the people.' And president Nixon did. And soon after, he left the White House. It was a judge who said to President Bill Clinton, 'show up for a deposition, raise your hand, promise to tell the truth, and if you give intentionally false or evasive answers, I will hold you in

contempt of Court.’ And she did. And it was the Arkansas Supreme Court that said to the governor and said to the legislature, ‘funding for education in this state is unconstitutional and you need to fix it.’ And they did. And it was a judge who said to a Circuit Clerk, ‘you may not believe in this type of marriage. You may not think this type of marriage is proper. But, it’s the law. Issue the marriage license.’” It’s the rule of law that we serve as lawyers and judges, and we do that in serving the people of Arkansas.

It has been my pleasure and my honor to serve in this position. I have enjoyed almost all of it.

But I look forward to serving for the next six months. Thank you very much.

Thanks