

State of the Judiciary
Chief Justice Brian D. Boatright, Colorado Supreme Court
Message to the Legislature
February 18, 2021

Speaker Garnett, Senate President Garcia, distinguished members of the House of Representatives and Senate:

This past week, I reached out to a longtime employee of the judicial branch. I asked her how she was doing. She is normally very upbeat and positive. That day, she was very direct. She responded that—for the first time in her twenty-year career—she was not proud to tell people that she works for the judicial branch. That broke my heart. But it also steeled my desire for answers. I am here to tell her, the legislature, the governor, every member of the branch, and most importantly, the citizens of Colorado, that we are going to get this right: Where there was wrongdoing, we will address it. Where there was an abuse of power, we will stop it. Where our policies are deficient, we will change them. We want to know the truth. We recognize that the branch faces a crisis of confidence in its leadership. We know that investigating and addressing the allegations within the branch will be a difficult process, but we are committed to seeing it through to the end: This will result in a culture change, and we are going to make sure that happens.

When I say “we,” I mean every member of the supreme court. While we frequently disagree on the difficult legal issues that come before us, we are united and speak with one voice when we declare our commitment to this cause. When I say “we,” I also mean our State Court Administrator, Steven Vasconcellos, who started in that role shortly after the first round of allegations came to light eighteen months ago. When I say “we,” I include the leadership team at the State Court Administrator’s Office. When I say “we,” I also mean the chief judges, court executives, and chief probation officers of courts across the state—all leadership in the branch is committed to ensuring a safe and healthy work environment. With the flood of news in the past couple weeks, it is easy to lose sight of the fact that we have so many dedicated public servants in the branch who care deeply about the citizens we serve. I know that every member of the branch wants answers. I know that every member of the branch wants answers and wants to get this right—everyone at the State Court Administrator’s Office, every judicial officer, every clerk, and every probation officer. Even though they may not be proud of me at this time, I want to say here that I am proud of each and every one of them. In the end, I want them all to be proud to say that they work for the judicial branch.

We have all heard the claims about the training contract. The document which has been referred to as a memo has been released, and that has been the subject of much conjecture. I am not here to comment on any of the claims and conjecture—except to say that the branch takes allegations of misconduct by judges and staff extremely seriously. The conduct described in the allegations, if accurate, is unacceptable and cannot and will not be tolerated. We need to know if human resources investigated any of these allegations, and if they did, what action was taken. And if they didn’t investigate the allegations, we need to know why. What we need, first and foremost, is the truth. Therefore, I have requested a full investigation of the circumstances surrounding the

contract and an investigation into each and every incident listed in the document. I have asked the Governor, the Attorney General, as well as leaders of both parties in the House and Senate to provide representatives for an independent panel that will draft a request for proposal to first define the scope of the investigation. Per our procurement regulations (we are going to do this “by the book”), that request stays open for thirty days. Then, the panel will meet again and select the independent counsel or counsels from those who submitted proposals. That person or firm will then conduct the investigation. We hope to announce the members of the panel this week.

With this procedure, the judicial branch will not have any say in the selection process. We will cooperate with the investigation and will publicly release the results. We also hope that the investigation will provide specific recommendations for changes that we can make to ensure a safe and healthy work environment for all members of the branch going forward. All we ask is that the independent counsel conduct a thorough, efficient, and fair investigation. Until the investigation is completed and any recommendations are implemented, I am to be made aware of any new allegations of misconduct and kept apprised of the progress of any investigation on a weekly basis.

I said that each and every justice is committed to reform. I would like to tell you briefly who we are—not who we are academically or professionally, but who we are as people. Since we do everything in order of seniority, I will start with the most senior.

First, Justice Monica Márquez. Justice Márquez’s roots lie in the San Luis Valley, where the Márquez family has farmed and ranched for several generations. She grew up on the western slope and graduated from Grand Junction High School. After college, she served in the Jesuit Volunteer Corps, working with inner city youth. Her teaching and community organizing experiences in underserved communities inspired her to go to law school. Throughout her career, she has worked tirelessly to promote diversity in the legal profession, and she engages regularly with diverse youth, law students, attorneys, and judges to build an inclusive legal community in Colorado.

Second, Justice Will Hood. Justice Hood and his wife, Diana, moved to Denver more than thirty years ago with a desire to put their new law degrees to use for the public good. Will has spent twenty-four years as a government lawyer or judge. When he was last in private practice, he was the firm’s pro bono coordinator. Diana has spent twenty-nine years working at Legal Aid or running a non-profit that helps abused children. They are most proud of their two adult daughters, one of whom is a legislative aide combatting climate change and one of whom is training to become a wildlife rehabilitation specialist.

Third, Justice Richard Gabriel. Justice Gabriel grew up in a working-class family in Brooklyn, New York. He is the first generation in his family to go to college. Because he was able to attend college and then law school only with the help of significant financial aid, he has devoted his over thirty-year career to “paying it forward,” mentoring countless students and young lawyers, educating the public about the judiciary through the Our Courts civic education program, and promoting professionalism and civility among the bench and bar. Additionally, you can’t introduce Rich without noting that he has played the trumpet professionally for almost fifty years.

Fourth, Justice Melissa Hart. Justice Hart grew up in the Park Hill neighborhood in Denver, where she and her family still live today. She was appointed to the court in 2017. For eighteen years before joining the court she taught at the University of Colorado Law School, where her scholarship, teaching, and public service work were focused on antidiscrimination and access to justice. She has carried those commitments with her to the bench. In 2018, Justice Hart helped launch Legal Entrepreneurs for Justice, an affordable law practice incubator committed to training lawyers who will serve low- and moderate-income Coloradans. She had continued to teach at CU and now also teaches at DU, where her class this semester focuses on access to justice issues.

Fifth, Justice Carlos Samour. Justice Samour was born and raised in El Salvador. When he was thirteen, political unrest forced him, his parents, and his eleven siblings to flee the country. After receiving a death threat, the family packed what they could in their van and left El Salvador forever. With visas in hand, they made the five-day journey to Colorado. When they arrived, they could not speak English, were in culture shock, and only had what they packed in their van. Today, Carlos volunteers at Centro San Juan Diego as part of the Our Court program, teaching citizenship classes to Spanish-speaking immigrants, just like the classes he and his family took when they became citizens. Before joining the court, Carlos was a district court judge in Arapahoe County, where he presided over the Aurora Theater shooting trial.

Finally, Justice Maria Berkenkotter. Justice Berkenkotter is our newest member of the court. As my first official act as Chief Justice, I had the pleasure of swearing in Maria on January 4. She is a former trial court judge and chief judge in the 20th Judicial District, who has spent years working with stakeholders to develop innovative programs that address public safety, mental health, and substance abuse issues, as well as to improve court operations. Maria has two daughters who are also interested in the law—one was sworn in to the bar in the fall of 2019, and one will start law school this fall.

At the risk of appearing selfish, I would also like to tell you who I am, since I have given you my personal commitment to lead this culture change. I am a Colorado native. I grew up the Wheat Ridge/Edgewater area and am a proud Jefferson High School Saint. I decided I wanted to be a lawyer when I was five years old after my dad—who was a lawyer—took me to work one day. He took me to an adoption, and I remember that he made the two people involved so happy—I thought he was like Santa Claus. After that, I never thought of being anything but a lawyer, just like my dad.

Flash forward twenty-five years or so, and I am in court trying a case. At one particular hearing, the judge treated me very badly, very intemperately. I remember thinking that even if the judge was right on the law, there had to be a better way of communicating. That was the first day I thought of becoming a judge. A few years later, I had another experience that cemented that desire. I prosecuted a murder case that dragged on for about two years due to the defendant's significant mental health issues. Ultimately, the jury convicted the defendant of first-degree murder. As a result, the only sentencing option available to the judge was life in prison. I should note that this took place before the Victim's Rights Act was enacted. When I asked the judge if the victim's family could speak prior to sentencing, the judge—who happened to be an excellent

judge— unfortunately denied the request, announcing that the court did not have any discretion regarding the sentencing. I will never forget the faces of the victim’s family. That day, I decided that I wanted to become a judge, and I promised myself that if that ever happened, I would do everything in my power to let people know that I cared and that I truly listened. A few years later, I was appointed to the district court in Jefferson County. That was twenty-two years ago. And treating everyone with dignity and respect to the very best of my ability has been the cornerstone of my judicial philosophy. And becoming chief justice didn’t change that. That is why I am serious about getting answers. Because, at heart, all of this is about how people are treated.

Approximately eighteen months ago, our court realized that we had significant issues within the Department that required immediate action. While the culture problems were not caused by any specific individual— and I am not blaming anyone—we realized that change was necessary. As a result, since that time, almost the entire SCAO leadership team has been replaced. First, Steven Vasconcellos became the new State Court Administrator. We selected him after a national search. During that process, we engaged all members of the branch and solicited their thoughts on the finalists’ vision statements as well as their thoughts after in-person and virtual town hall appearances. We made every attempt to run a transparent process. Since that time, we also hired a new Director of Finance, a new Director of Court Services, and we are in the ongoing process of hiring a new Director of Human Resources.

Next, our court changed how we handle administrative responsibilities. Traditionally, the chief justice handled all of the administrative responsibilities, and the rest of the court received reports on various actions. While the goal of insulating a majority of the court from matters on which it might ultimately have to render a decision was laudable, it was not workable. We realized that we all needed to be much more involved in the running of the branch. We were too disconnected from the employees. As a result, we decided to assign justices to the different departments or functions within the branch. Justice Márquez is assigned to the clerks of court, Justice Hood to financial, Justice Gabriel to IT, Justice Hart to the court executives, and Justice Samour to human resources. We are going to let Justice Berkenkotter get her legs under her before we give her an assignment. At the time, I remained the liaison to probation. We implemented this system to not only improve the flow of information but also to hopefully develop relationships with the employees of the branch. We realized that important information was not getting to the chief justice or the court. If information needed to reach leadership, we wanted our people to feel comfortable approaching and talking with us. In addition, we instituted rotational terms for our chief justice. Justice Márquez will be the next chief. We did this, in part, to keep fresh eyes on things. We now embrace the philosophy that seven brains are better than one and fourteen ears are better than two: There is a real benefit to relying on the collective wisdom and experience of all seven justices.

I would be remiss if I didn’t recognize another crisis around how our minority communities perceive their treatment in the criminal justice system. To that end, we also stepped up our efforts to help diversify the bench. We feel that is an important part of enacting real, lasting change. One of the best ways to ensure equal justice for all is to have judges that reflect the communities they serve. To that end, five years ago, several of our justices formed a “Bench Diversity Dream Team” through Colorado’s Center for Legal Inclusiveness. The Bench Dream

Team became a vehicle to encourage diverse lawyers to consider a career on the bench and to help them navigate the judicial application process. Bench Dream Team members have volunteered countless hours hosting informational sessions, meeting with potential applicants, and conducting mock interviews. As part of the Dream Team's efforts, Justice Márquez teamed with the Center for Legal Inclusiveness, the diverse bar associations, judges, nominating commission members, and News alum Adele Arakawa to produce a training video for new nominating commission members. Among other things, that video teaches commissioners how to combat implicit bias.

Retired Judge Gary Jackson, through his tireless work, made diversifying the bench an urgent priority. Representative Leslie Herod suggested that we hire a Judicial Outreach Coordinator, who would help identify and recruit diverse candidates to the bench. Because of the hard work of the Bench Dream Team; Judge Jackson; Representative Herod; Sumi Lee, our outreach coordinator; Patty Jarzobsky; and many, many others, we have made some inroads. I am proud to say that Governor Polis appointed more Black women to the bench—five—in the one-year period between September 1, 2019, and August 31, 2020, than in the previous twenty-five years combined. In addition, fifty-nine percent of judges appointed by Governor Polis in that same time period were female. That has resulted in a nearly 13 percent increase in female judges in the last four years. With that said, the protest for racial justice which took place this past summer and more recent events remind us that much work remains to be done.

Those events have led us to significantly increase our training around issues of racial equality. Judges Paul Dunkelman and Adam Espinoza— through their leadership roles as Presidents of the District Court and County Court Judges Associations, respectively—have put on a continuing series of excellent webinars on these issues. The webinars are extremely well-attended by judges across the state and, in addition, several districts have made discussing racial justice a special priority. I want to acknowledge the work of the court of appeals. That court established an Inclusivity, Diversity, Equity, and Anti-Racism Committee to combat systemic racism and injustice by promoting acceptance, respect, and value for all persons and creating an ongoing dialogue to confront biases. To date, the Committee has undertaken a number of projects, including spearheading amendments to the Court of Appeals' strategic plan regarding diversity and inclusion, compiling and sharing resources about DEI trainings, and facilitating discussions inside and outside the court, including with regional law schools and law students on these issues.

In the vein of openness, we also looked at the court's practices around sealing records. This past December, with the able assistance of the Colorado Criminal Rules Committee, our court added Rule 55.1 to our Rules of Criminal Procedure. Rule 55.1 is a rule of transparency and accessibility. To borrow from Justice Louis Brandeis, by allowing better and more expedient access to court records, the new rule recognizes sunlight as the best disinfectant. Once the rule takes effect this May, a trial court will not be able to limit the public's access to any part of a court record in a criminal case unless the judge makes written findings that (1) a substantial interest would be served by making the court record or any part of it inaccessible to the public, (2) there is no less restrictive means than making the court record or part of it inaccessible to the public in order to achieve or protect the substantial interest identified, and (3) any substantial interest identified overrides the presumptive public access to the entire court record.

Additionally, any order limiting public access to a court record or to any part of it must indicate the date or event certain by which the order will expire. This will ensure that orders limiting public access do not linger unnecessarily.

I bring these changes up not to claim that we have already changed the branch's culture but only to demonstrate that we are committed to continued reflection on how we can improve. It will take time, but we are committed to the cause.

I started my speech by recognizing that we as a branch are in crisis. But we also face another crisis. This, however, is not a crisis of our own making. This is the practical crisis caused by the pandemic.

To be clear: our trial courts and probation officers have borne the brunt of the effects of the pandemic. Despite risks to their health, our trial courts and probation departments have remained open for business at all times during the pandemic. Our people have acted with the courage of first responders by doing the work required. In my opinion, they have been heroic. While we have made significant changes to how we do business by having virtual and telephonic hearings when possible, there are some hearings that simply require in-person proceedings. Our chief judges have been amazing in how they have innovated and now have modified courtrooms to allow these hearings that must be held in person to be as safe as possible.

But then there are jury trials. They just have not been possible for much of the past twelve months for safety reasons. As a result, we face an unprecedented backlog of jury trials. I will give you a few numbers that demonstrate our plight. Over the past five years, we have had an average of 2,716 jury trials, with 2,400 of those being criminal trials. On January 19, 2021, we had 14,635 jury trials scheduled, statewide—with over 10,000 of those being criminal trials. What that means is that we have somewhere between four and five times the number of criminal jury trials scheduled that we try in an average year. And crime has not stopped, serious crime as not stopped. We come to you, asking for help. But before I address what our strategy is to confront this unprecedented challenge, I want to share my greatest fear about what I am asking.

I recognize that many of you are angry at the branch for the unwanted attention that it has brought to government. You have every right to feel myriad different emotions about the situation. My plea is that you don't take out your anger on our trial courts and on probation, because this is about us serving the people of this state. So I ask you: If you are mad, then be mad at me.

Our trial courts need help to provide the access to justice that our citizens need and deserve. Without assistance from the General Assembly and, ultimately, the Governor, we will not be able to adequately address the tsunami of jury trials that await. I've had discussions with some of you about one of the biggest challenges—enforcing a defendant's statutory right to trial within six months of entering a not guilty plea. In the early stages of the pandemic, with the assistance of the Criminal Rules Committee, we were proactive on this front and adopted amendments to Rule 24 of our Rules of Criminal Procedure. This amendment provides us flexibility while we're in survival mode. Rule 24, however, only applies so long as a fair jury pool cannot safely be assembled. Therefore, once our trial courts are able to summon jurors with some semblance of

normalcy, we will face significant challenges in this area. We are going to have thousands of trials with either ninety-day or six-month deadlines. We need your help.

We are asking for three things: (1) We are asking that you revise the senior judge program to create flexibility that will allow more of our most experienced jurists to either preside over jury trials or to free up our currently sitting judges to try more cases. We have recently retired judges who are willing and able to step in but who do not want to commit to the required sixty- or ninety-day contracts that currently are required by statute. We need more options for length of service. We also need additional money to expand the program. We have good judges on a waiting list, hoping to help. (2) We are asking for additional staff and magistrates. As you may be aware, when the Governor asked for a budget reduction last spring, we complied. After significant soul-searching, we eliminated nearly two hundred positions, which required laying off 110 people from every part of the branch. With the exception of one position, we are only asking for staff to help the trial courts and probation. Jury trials require staff, and conducting jury trials safely during and after a pandemic requires more staff than usual. (3) We are asking you to allow us some flexibility around the six-month statutory deadline. As I just mentioned, the amendment to Rule 24 will no longer be effective once trials resume in earnest.

Just knowing that trials can be held will encourage resolution. Recently, I had a meeting with many of my partners in the criminal justice system. This included two chief judges, the Attorney General, the Public Defender, the director of the Office of Alternative Defense Counsel, the head of the Colorado District Attorneys' Council, several D.A.s, and others. It was a productive meeting where we discussed developing a "Best Practice Template" for triaging the backlog of cases. I welcome working with these same partners around reasonable amendments to the six-month statutory deadline for criminal trials.

As I speak to you today, jury trials are slowly resuming in some judicial districts, with others to follow in the coming months. I am continuing the practice started by my predecessor, Chief Justice Coats, of empowering our chief judges in each district to decide how and when to resume jury trials. Despite criticism to the contrary, one size does not fit all in how individual courts are run. For example, what works in Greeley may not work in Montrose and vice-versa. That is because we have different positivity rates in different counties, coupled with different courthouses with different facilities and different technological capabilities. The decision of how and when to resume trials has to be made at the local level. The chief judges are working extremely hard, and they all have a common goal: to resume jury trials as soon as they can be done safely. But even then, the trials will start slowly due to safety protocols. We want our jurors safe when they serve.

The pandemic has also brought about some positive changes to practices in the courts and probation departments. I fully expect that many of these new practices will continue into the future. As just one example, many parents in the Dependency and Neglect cases have difficulty traveling to and from court due to a lack of dependable transportation. We have seen that many of the review hearings in these cases—which can be brief if things are going well—can be handled remotely, thus helping parents avoid missing work or treatment. This practice will be employed across all case types as appropriate.

The pandemic complicated work for our probation departments, in particular, because establishing the relationship between a probation officer and their client is frequently the key to successfully completing probation. I am sure everyone in this room has experienced the difficulties of connecting with people via one of the virtual platforms. With that said, our probation officers have made necessary adjustments and have remained committed to helping their clients and providing services to the best of their ability.

When people talk about the work of the judicial branch, they often overlook probation. But I want to remind everyone that probation remains the most cost-effective method for supervising offenders. This fiscal year, an offender incarcerated in the Department of Corrections will cost the state approximately \$46,866, an offender in the Community Corrections program approximately \$9,936, and an offender on parole approximately \$6,924. An offender on probation, by contrast, will cost the state about \$1,662—a fraction of the cost of any of the alternatives.

I also recognize that some people are under the impression that probation operates as a sort of zero-tolerance, punitive system—that if, for example, an offender on probation misses an appointment with her probation officer, the officer will immediately file a motion to revoke probation. That’s just not accurate. To the contrary, probation focuses on providing offenders with the rehabilitation and support they need to regain control of their own lives and contribute meaningfully to society. I want to share a story about one probation client. Her story is not an outlier. I am going to share her story in her own words:

“When I started probation, I came as a broken soul. When I came to my first appointment, my children and I were bouncing between living in my truck and a house filled with multiple dealers. We struggled with basic necessities like finding a restroom and getting water. After a few months of failing regular probation miserably, I was handed off to a new program: Specialized Drug Offender Program.

“I sat in orientation and they discussed the program and the treatment provider, Mile High Behavioral Healthcare. They identified so many resources, expressed an underlying faith in us as addicts and our ability to recover, and provided support from all angles. I left the room with tears in my eyes. This is what I needed.

“I started treatment and saw my probation officers weekly. Treatment became my family, probation officers my mentors. They helped instill my faith in myself again. They believed in me and truly cared about my children and [me].

“Today, I am a Peer Coach. My future is limitless.”

Her probation officer said that this client was granted early termination and has carried what she learned forward in her new life.

This is emblematic of the work of probation officers across the state. I know from my time as a trial judge that probation officers take great pride in their clients’ success and consider it a

personal defeat when their clients fail. I am proud to have such dedicated people as part of the branch.

Although I gave you a brief summary of who I am a few minutes ago, I neglected to mention that, in the limited free time that I have as a justice, I enjoy reading history—even if that means listening to a book on tape during my commute. I'm particularly fond of Abraham Lincoln for his strength of character, grace under pressure, and communication skills. If you visit my office or home, you'll notice multiple books on Lincoln, including one about his time “riding the circuit” in Illinois as a young lawyer. As he so often did, he wrote something that still is true today.

In his “Second Annual Message to Congress”—delivered December 2, 1862, after one of the costliest battles of the early Civil War, when he feared that the Union's resolve to win the war was waning—Lincoln stated, and the words have meaning to me today, that “The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so must we think anew and act anew.” Lincoln was talking about the survival of the country. I am talking about maintaining the independence and integrity of the judicial branch. And so I echo his words: We will think anew, and we will act anew.

I want to assure you that we—the judicial branch—will bring that the same clear-eyed perspective, energy, and determination to tackling the challenges that face the branch and the administration of justice in Colorado during these trying times. We are committed to lifting the current clouds over the branch and making it, once again, a rightful point of pride. We are going to *get this right*.

Thank you for the privilege of addressing you today.