State of the Judiciary
Chief Justice Harold G. Clarke, Georgia Supreme Court
Message to the Georgia State Bar Meeting
June 14, 1991, in Savannah, Georgia

I thank you for letting me report Georgia's judicial condition.

Traditionally, a chief justice stands before you saying, "the state of the judiciary is excellent." Generally, this states an accurate fact. But things have never been perfect in the problem-solving business.

Even in the old days. Even in England observers noted imperfections, Charles Dickens spoke critically of the courts. He wrote:

> It exhausts finances, patience, courage, hope, overthrows the brain and breaks the heart.

Georgia's first court had a well-deserved image problem. Created by plan drafted in England before the good ship Anne sailed for the new colony, the court had almost unlimited jurisdiction. The problem came from its personnel. Most of them could not read and were accused of everything from drunkenness to blasphemy and heinous offenses. One early historian wrote they "excelled in injustice and ignorance."

Recognizing this bad press, the judges, then called bailiffs, tried typical remedies. They got purple robes with fur trim and expensive gold-plated maces to pound on the bench. They changed their title to barons, yet they kept the same illiterate, corrupt people on the bench. Their low popularity remained.

This teaches a lesson. The only real road to image improvement follows the route of basic service improvement.

Georgia began a forthright assault on judicial problems long ago. We were the only state with no appellate courts. A dissatisfied litigant simply appealed the case to the same judge who committed the alleged error. You can imagine how fruitful this was.

During the first half of the 1800's, agitation began for what they called a "court of errors." In 1846 they created the Georgia Supreme Court. Many of you no doubt think we truly got a court of errors. Judging from the tone of some motions for reconsideration, that conviction is rampant.

By the way, the original plan called for the Supreme Court to go out of business after ten years, the idea being that all law could be made clear in that period. I offer my thanks to you lawyers for thinking up enough new issues to keep the court in business and me in a job.

We face new challenges today. Basically, the state of your judiciary is good. But it can be better, and it faces dangers. We live in a time when we cannot afford to stand pat. The Georgia courts do not intend to stand pat.

Let me list a few of our attacks on the status quo.

Although some of us old folks don't understand it or even like it, we live in the new world of communications. We no longer look at computers as toys or curiosities. We now see them as keys to unlock the mysteries of ignorance and as a lubricant to ease the movements of an efficient court system. With the leadership of the newly created Courts Automation Commission, the Georgia judiciary heads unafraid into the new world.

That same new world demands other departures from the past. Those departures have begun. I enumerate a few: continued efforts in professionalism; renewed interest In pro bono work; a study on gender bias, attention to post-conviction legal representation; Governor Miller's efforts to broaden the base of the judiciary.

In addition, a serious look into the future comes into focus with the study of how to shape trends in the interest to the public. The future of the courts study aims at eliminating sheer chance from the development of the judicial system of tomorrow.

But problems lie out there unresolved. Indigent defense sits near the top of the heap. Providing lawyers for poor people accused of crimes is a state obligation. The Constitution teaches us that. The courts tell us that. But more importantly, common sense and human decency tell us that. Yet we haven't listened to those voices.

State funding of indigent defense continues to be woefully inadequate. Some of the same voices which rail at the delays in death penalty cases mightily resist one of the root causes of delay – ineffective assistance of counsel. The time for action is here. Adequate funding must come about.

I propose a death penalty resource center for trial counsel similar to the resource center for post-conviction counsel.

Sooner or later ineffective assistance is put in issue in almost every death penalty case. So it just makes sense for it to come sooner than later. We ought to examine the question while recollections remain fresh. I suggest the trifurcation of death penalty cases. As soon as possible after trial, we should appoint new counsel to represent the defendant at a hearing on the issue of effectiveness of counsel. A record should be made so the court can review the question on direct appeal.

I continue to urge that the United States Courts of Appeals be authorized to accept certified questions from state supreme courts on federal law in death penalty cases.

These reforms hold promise for purer justice for the accused and efficient administration of justice.

Let me turn now to the civil side of the courts. The magistrate courts handle more than 1,000,000 cases per year. The superior courts see more than a quarter million filings a year. Superior court jury trials increase at a rate of more than 10% a year.

The men and women of our trial courts deserve high praise for their efforts in keeping the system afloat. But how long can it float under the burden of this kind of increase?

Long ago England abandoned jury trials in most civil cases. None of us want to see that happen here. We stand convinced that our system is the best ever devised. If that system is to survive, it needs help.

We can help it by looking toward effectiveness. Effectiveness differs from efficiency. Efficiency is doing a thing better. Effectiveness is doing a better thing. We need to look for some new things in the court system. Just polishing up the same old things won't do. To save the system we need more than a shoe shine. It's time for a new pair of shoes.

Not every case needs a full blown trial. Some need more effective resolutions.

This is why the Supreme Court joined with State Bar President Evans Plowden in forming the Joint Commission on Alternative Dispute Resolution. The Commission consists of a broad cross-section of lawyers, judges and lay people under the leadership of Jack Watson. It intends to make recommendations by the end of this year and to have pilot programs in place all around the state in both rural and urban areas next year.

But what is this thing called ADR? It is many things, but it is not a replacement for the jury system. It is not a forced resolution of disputes.

It is simply an alternative within the court system allowing the judge to order non-binding efforts to resolve the dispute. Mediation is the most common of the ADR procedures. Arbitration is another. They differ widely.

The common thread is the result – frequent inexpensive resolution of the dispute. The Georgia Constitution mandates this.

When we talk about the process being inexpensive we, of course, talk about money. But there is an even greater expense – the expense in human emotions. This must not be ignored. Last week I heard a lawyer say this:

If war is the last step in diplomacy, then trial is the last step in dispute resolution.

I hope we will join together to preserve our system in the interest of the public.

We can do this by adhering to the biblical admonition: "come let us reason together," rather than following the Madison Avenue motto "I'd rather fight than switch."