

State of the Judiciary: “A Difficult Year that Prompted Reflection”
Chief Justice Randall T. Shepard, Indiana Supreme Court
Message to the Legislature
January 15, 2004

Governor Kernan and Members of the General Assembly:

We usually carry with us for the rest of our lives the memory of where we were when we first learned of certain shocking events – the death of President Kennedy, or September 11th, or the news about Governor Frank O’Bannon. Beyond the immediate trauma, such moments also cause us to reassess our own lives and careers. Actually, many people ask themselves questions like this from time to time anyway – certainly people in public life do. Is what I am doing worthwhile? Am I doing everything I could do for my fellow human beings? In the course of thinking about such questions, we usually learn more about our relationships with each other, and we see more clearly the path that lies ahead.

Since September, I’ve spent more time thinking about what it is that Indiana’s judges do for people, and whether we’re doing well enough at helping to improve the lives people live in Indiana.

And certainly, judges are involved in the lives of citizens on thousands of occasions each day. As we begin 2004, we’re about to pass a remarkable milestone. This year for the very first time the number of new cases filed in Indiana’s courts will exceed two million. That’s 8,000 new cases a day, or five hundred in the time it takes me to give this speech. In short, judges see more people up close and personal than any other institution in Indiana government except maybe the public schools. My report today focuses on what we do for them, and how we are trying to do better.

We See Families

A huge number of people come to court because there is trouble in the family: a disintegrating marriage, domestic abuse, custody and child support disputes, children in need of services, and delinquency. You’ll remember that the legislature asked for an interim study on the idea of family courts, and I proposed that we do some experiments trying new techniques to deploy the resources of courts and social agencies in a more coherent way. Under the leadership of Court of Appeals Judge Margret Robb, last month we extended this “Family Courts Initiative” to seven new counties so that some seventeen counties as varied as Lake, Lawrence, and Tippecanoe are now applying these techniques.

Of course, while the courts are the place where family lawsuits are filed, old-fashioned litigation is not usually the best way to resolve a family dispute. We’ve worked hard at promoting mediation in Indiana, but the problem with family cases is that even mediation costs some money and most people don’t have it. Last year, after a successful demonstrations project in Allen County, led by Judges Tom Ryan and Tom Felts, we asked you for the tools to make family mediation available statewide, and you passed that legislation by unanimous votes in both houses. I’m glad to report that just six months since the effective date of that legislation we are prepared to offer family mediation in counties with a total population of over 1.5 million, and we will stage workshops this spring to help other counties do the same.

To be effective at helping families in trouble, judges have to be alert to changes in the way people live and bring up their children. There are a lot more “blended families” these days, and a child support system that doesn’t recognize that won’t work very well. Our Domestic Relations Committee led by Judge Dan Donohue of Clark County, devised a way that fairly takes multiple family obligations into account. Last year they worked on responding to another change in the American family – the growing use of real shared parenting after divorce. That change, of course, is good news. It’s the policy of this state that both parents should participate in the lives of their children, and the child support system needs to support that policy. Our committee has developed changes to Indiana’s child support guidelines that I think do that and those changes became effective this month.

For all the talk about divorce and distress, there is hope for the American family. The number of children living with two parents has been declining for forty years, but last year it went up. Part of what judges try to do is act in ways that help make such statistics possible.

We Meet People Who Cannot Speak English

We took time last year to assess how we treat Indiana’s new immigrants, the largest group of which is Hispanic. Not even the Census Bureau is really sure just how many people of Latino descent there are in Indiana, but it is certainly a third of a million. Like other people, they find their way to Indiana’s hundred or so courthouses, and once there, they sometimes find themselves feeling just like we’d feel if we were in a new country and could not speak the language. Think of how we’d feel if our home or custody of our children was at stake or if we were at risk of going to jail, and we could barely understand what was being said to us. And let’s say there wasn’t anybody there to translate, or that the person who was trying to translate wasn’t very good at it.

The Supreme Court’s Commission on Race and Gender Fairness, chaired by former Justice Myra Selby and Court of Appeals Judge Zeke Friedlander, proposed a system to help people who face this language barrier, and we asked you to give us a down payment on putting that system in place, and you did. And as it happens, the first group of people who hope to be certified interpreters is here in Indianapolis as a part of the testing process, and we’ll soon make the first grants to Indiana counties to put those interpreters at work where people need them. These new immigrants are going to turn out to be good Hoosiers, and we need to help them get there.

We Find People Without Lawyers

I’ve also been thinking about how complicated the government and its court system can look to people. Try as we do to make it otherwise, it all gets more complicated every year. You pass more laws, we issue more decisions, the executive branch writes more regulations. And the average citizen finds it harder to navigate the system without legal help. A good many people among the working poor are just a little too well off for standard legal aid and not really able to afford market rate legal help.

Judges and lawyers worry about people like that, and there are many ways we’ve tried to give them access to justice. Indiana lawyers have always lent a hand pro bono to some people who simply showed up at the office door. In the 1960s, the federal government began financing legal services offices. Indiana was one of the first states to commit state money to support these local

offices. More recently, most states have used interest generated by lawyer trust accounts to expand the number of lawyers in legal services offices.

On this point, Indiana took a different approach. Had we used that trust account money simply to employ full-time lawyers, we could have hired perhaps ten lawyers, spread across a state of six million. Instead, we used it to build a statewide network of volunteer lawyers led at the local level by judges. By last year, with the help of our partners in the State Bar Association and its Foundation we had doubled the number of lawyers volunteering to help needy people, so that there are nearly 3,000 lawyers covering every county in the state. People all over the country who are concerned about equal justice talk of this system in admiring terms as the “Indiana plan”. I say we have good cause to be proud of what has happened here on access to justice.

And speaking of access, you’ll remember that this legislature made Indiana the first state to start its own program to expand the number of minority lawyers. We’re about to receive applications for the eighth class of Indiana CLEO. This is paying off in visible ways. One day last year I looked out in the courtroom during oral argument at our law clerks and saw something I hadn’t noticed before – that six of the eleven law clerks in the Indiana Supreme Court were black or Hispanic and that four of those six were people who had come up through CLEO. I think it’s something that has never happened in any other American appellate court, and it says something very good about Indiana as a place of equal opportunity.

We Encounter People Who Are Out of Work

A good many of the people judges see in court each day are actually in legal difficulty because they are unemployed or underemployed. And while the task of building Indiana’s job base is in the hands of the legislative and executive branches, we spent time last year reflecting on what we can do within our own sphere of responsibility to support that effort.

One thing Indiana needs to be is a place where employers that are thinking about locating here can bring with them the lawyers they usually use to put those kinds of economic development deals together. We adopted new rules, effective two weeks ago, that make it easier for companies locating in Indiana to bring with them in-house legal talent. For that matter, it will help Indiana’s existing employers, many of which have installations in multiple states, to move legal talent around as their commercial needs dictate.

We are also working to accomplish the same thing on an international basis. Indiana was the first state to adopt the new uniform rule on what are called “foreign legal consultants,” lawyers licensed in other countries who can now obtain an Indiana license to advise Indiana companies on the law of China or Spain, to make it easier to export Indiana goods. And last year, this decision by our Court caught the attention of the United States Trade Representative, a member of the President’s cabinet, who negotiates commercial treaties with other nations. The Trade Representative asked whether we would consent to have Indiana’s rule tendered to the nations with which America is presently negotiating. Of course we agreed, because we believe it’s in Indiana’s interest if foreign countries reciprocate and thus make it easier for Indiana lawyers to work abroad on deals for exporting Hoosier products.

We Choose Who to Send to Jail

Finally, we've been re-thinking our role in public safety. Among the most sobering things judges do is deciding what the punishment should be in criminal cases, some 264,000 times last year some Indiana judges were called upon to decide a penalty -- ranging all the way from a dollar and costs to death by lethal injection. Deciding where each defendant fits along that continuum is one of the most important things we do for our fellow citizens. Two cases from last year still stick in my mind.

One was a child molesting case involving a defendant who worked for the school. He began dating a woman who came to him for advice about her son, and he eventually became sexually involved with her eleven-year-old son. Child molesting is a class A felony, for which the standard sentence under the Indiana Code is thirty years. After he was found guilty, the mother and the son said to the court, "We want him to pay for what he has done," but "if he gets the minimum, that is fine with us." The minimum was twenty years. For reasons I won't take the time to detail, the sentence imposed was 385 years. One of the questions on appeal was whether this sentence was excessive. We decided it was and revised it to 90 years, which even with good time, given the age of the defendant, might turn out to be life in prison. More than 90 years, we thought, did not add anything to punishment for him or deterrence of others.

The other case that sticks in my mind was a case in which the maximum sentence was exactly the right thing. It is a chilling story. Two white guys are hanging around when one of them says, "Do you know what those black spider tattoos are all about?" Yes, came the reply, you get that tattoo when you kill a black person. "I'd really like to get one of those," says the first fellow. They go off to get a rifle and start out in their car looking for a target. They come upon a young African-American man walking across the parking lot at Sears, and the guy who wants the tattoo puts ten shots in him for no more reason than that.

Judge Stephen Platt imposed the maximum. There were a number of reasons, but one was a reason we had never encountered before on appeal -- and that the racial animus that motivated the crime qualified under the Indiana Code as an aggravating circumstance enhancing the sentence. Judge Sharpnack and his colleagues on the Court of Appeals agreed that this was a maximum sentence case. Our court said, "That's right." Every Indiana judge who heard that case said what I suspect other officeholders and Hoosiers more generally would say, that a perpetrator who commits such a crime earns the maximum sentence.

We are a state with a tough approach to crime, but we are also a state, as U.S. Supreme Court Justice Potter Stewart said of Indiana some forty years ago, that has pursued "conspicuously enlightened policy." One of the toughest aspects of the policy is to figure out, as best human beings can do, which defendants can safely be put on suspended sentences, which ones need regular supervision, which ones need the tight supervision of work release or a drug court, and which need a prison bed at the Department of Correction, our costliest alternative.

The easy penalty, of course, is incarceration, but your creation of the Sentencing Policy Study Committee last year, chaired by Senator David Long, through a bill sponsored by Representative William Crawford, is a renewed indication that Indiana is willing to put these policies under the microscope once again and devise the smartest sentencing arrangements we can to protect the public. I think that judges can contribute to that dialogue, and I thank you for including us on this new committee, and I pledge that we will put forth substantial ideas for reforms to Indiana's system of sentencing.

The Need for a New Compensation Plan

Reforms like this depend in large measure on the willingness of able people to lead state government. We need to keep good people in the legislature, on the bench, and in the executive branch. We lost prominent people in all three branches last year largely on the basis of money. And that's because we don't have any regular mechanism for making cost-of-living adjustments for the state's principal officers as we do for most public employees. There are years when the compensation of everyone in government stands still because there simply is no money, and other years like this one, when there's \$90 million in the budget to pay cost-of-living adjustments for everyone from troopers to caseworkers. It is clear to me that the only way to change that is a compensation commission of the sort that states like Missouri and Illinois and Georgia and others employ. I urge you to move us in that direction, towards a new system that assigns these decisions to a commission operating under strict statutory guidelines about when cost-of-living adjustments should be made.

Indiana needs a system that makes it easier for good people to stay. In short, one thing that Indiana needs for its future is a state government that is well led in all three branches.

Conclusion

The tragedy we all experienced at Frank O'Bannon's death was relieved in small part by the celebration of the meaning of a life well lived in the service of others. And the lesson for us is that we must live our own lives, to paraphrase a famous Hoosier, so that Indiana might have a new birth of freedom and that government of the people will carry on.