

State of the Judiciary: "Burdened but Unbowed"  
Chief Justice Randall T. Shepard, Indiana Supreme Court  
Message to the Legislature  
January 12, 2011

Governor Daniels and Members of the General Assembly:

One of the features of our national dialogue last summer and fall was skepticism about the capabilities of public institutions and public leaders. You'd occasionally hear phrases like the "government is broken," and while people say that in Indiana they didn't often say it about Indiana.

I think that's because, even acknowledging the multiple problems that need tackling, the many elements of Indiana government, under the most serious strain most of us can remember, have proven themselves capable of coming to terms with crisis.

So it is with the men and women of Indiana's courts, who have proven able at diagnosing a defect or identifying an opportunity, recruiting talented people and capable of seizing the moment on the basis of the best ideas available.

The challenges of the moment cover an amazing range. Like, what do we do when someone who speaks only Laotian shows up in the courtroom? What can be done to cut the cost of litigation? How do we deal with the phenomenon of jurors using smart phones? How do we expand a new system of assessing the effectiveness of individual courts? How do we provide advocates for the thousands of abused or neglected children? Are there better ways to regulate lawyer advertising? How do we advance the cause of equal opportunity in the legal profession? How do we give a full and fair hearing to litigants when there's a sixteen percent growth in case filings but only four percent more judges?

The men and women of the Indiana courts tackle all these issues and more, both through long-range strategic planning and through immediate action. Today I'll highlight four of these.

### **The Mortgage Foreclosure Crisis**

The first is a genuine crisis on which all three branches of Indiana government have worked: mass foreclosures. Foreclosure filings were even higher last year than in 2009. While Indiana may no longer be near the top of the national list, that's little comfort to the 43,000 new families facing loss of their homes.

You recently passed legislation giving every homeowner the right to a settlement conference and the chance to negotiate for a modified loan. The Indiana Foreclosure Prevention Network led by Lieutenant Governor Skillman, the lenders, Attorney General Zoeller, the Housing and Community Development Authority, and our Division of State Court Administration have been perfecting techniques to maximize the possibility of success.

In the beginning, just five or six percent of homeowners responded to the notice offering a settlement conference. Most people missed it in the blizzard of paper a homeowner receives when a foreclosure is filed.

The judges working on this have discovered that when the court itself sends a separate settlement notice, more than 40 percent of the homeowners respond. To make sure these conferences are productive, we have assigned settlement facilitators to bring the right people and the right documents to the table. The facilitators report that many homeowners appear for the settlement conferences embarrassed, resigned, and tearful. In recent months this system of court-facilitated conferences has been perfected to the point that the number of people who leave the room with a revised loan is half.

We now use these techniques in counties that have 60 percent of the foreclosures and we'll cover the rest of the state by year's end. We do it all without any claim on the state's General Fund because you've authorized a user's fee on foreclosure cases.

Still, this is a fluid situation. A week ago Monday, State Court Administration issued a best practices document to all judges outlining case management improvements that maximize the chance for writing a new loan. Attorney General Zoeller, who has taken a leadership position on foreclosure with the National Association of Attorneys General, has asked the Supreme Court to use its rule-making authority to reinforce these improvements.

There is a need for further legislation, and we've outlined our own ideas to possible sponsors.

### **The Smartest Sentencing Possible**

Just a year ago, Governor Daniels, President Pro Tem Long, Speaker Bauer, Attorney General Zoeller, and I all signed the same letter asking that the Council of State Governments and the Pew Center on the States assist the Indiana Criminal Code Evaluation Commission in a thorough review of our state's criminal corrections. Just weeks ago, these researchers and the Indiana team working with them issued their proposals, and all the Commission members—legislators, corrections staff, prosecutors, public defenders, and judges—endorsed them.

You will know from the press that the central idea of these proposals is to find better ways to sanction non-violent offenders through local corrections. Half of the new commitments to the Department of Correction are people whose crimes are in the least serious category.

In my own career I've handled felony cases for the theft of \$6, and I've signed warrants for lethal injection. In between those polar opposites, making sound decisions about which offenders are so risky that a prison cell is the only right sentence and which offenders may respond well to local alternatives makes all the difference for public safety, recidivism rates, employability of offenders, and the dollars we spend on corrections.

One of the weaknesses in Indiana's criminal justice system has been that we have mostly used relatively outdated assessment tools to evaluate individual offenders. Those assessment tools organize and validate common sense and intuition. Is this offense a defendant's first or second? Were any prior offenses minor or serious? If he's been on probation or parole before, did he successfully complete it or get revoked? Is there reason to believe that requiring drug or alcohol treatment might make a difference?

Are we capable of devising a new, more reliable tool to help sort out who needs to go to prison and who probably does not? The answer's been yes, and last Monday a new generation risk assessment became mandatory in every criminal court and delinquency court. We have trained

and tested 2300 probation and corrections officers, drug and alcohol staff, and judges in using it. The Council of State Governments people told the Criminal Code Evaluation Commission's working group that Indiana is doing a better job at this than any state.

The package of sentencing reforms before you is based on reliable evidence. I think it's good for Indiana and I join Governor Daniels in endorsing it.

### **Tackling Technology**

If there's a field where Indiana's courts have proven themselves capable of identifying an opportunity or a problem, devising a plan to address it and executing on the plan, it is technology. Here are some examples.

You'll know that at your direction, every county now uses a system built by our Judicial Technology and Automation Committee (called "JTAC") to notify law enforcement immediately when a court enters a protective order on behalf of victims of domestic violence. Was there a way to help those victims obtain an order without a trip to the courthouse? We have empowered thirty agencies and 300 victim advocates to apply online. Is there a way to notify victims about a dangerous moment when the abuser receives the order? Yes. Victims will soon be able to receive immediate notice by text or e-mail.

On another public safety front, the question has been how to enforce effectively the laws designated to prevent people who are certified mentally ill and dangerous from purchasing and possessing firearms. At your direction, JTAC has created an electronic system for notifying law enforcement when someone is adjudicated mentally ill. Last week alone, names of 39 people adjudicated mentally ill were transmitted through the FBI so that police and gun dealers could do their part in keeping firearms out of the hands of the mentally ill.

Is there something the judiciary can do to improve the collection of taxes? We collaborated with the Department of Revenue to build a system for transmitting tax warrants directly to local courts. This time last year, 26 counties were using this system and today there are 47. We recently issued the millionth electronic tax warrant for collection at the local level.

Is there a way to stop hand-writing traffic tickets so officers spend less time with a pen and more time on patrol? Yes, and this time last year 143 police departments were using JTAC's Electronic Citation and Warning System. In the last year, 60 more have started using it. Altogether they've created 2.8 million citations that would have been written by hand.

All of these solutions to various problems work ever so much more powerfully when they are linked to each other through a court case management system we call Odyssey. Procured with your blessing three years ago through competitive bidding, we now use it in 77 courts in 26 counties, from large ones like Marion to small ones like Posey, accounting for nearly a third of the state's caseload.

The power of this combination is something judges and clerks and law enforcement personnel see close up. Let me tell you about a recent e-mail from a bail commissioner in Fort Wayne, where we are deploying Odyssey. He was doing a regular check on a defendant out on bail:

Def reported today – on pretrial release for Robbery.

Checked Odyssey per normal supervision course – appeared def had Felony Probation Violation warrant issued out of Huntington County yesterday. Not on Spillman. Called Warrants. Asked them to check IDACS. Not on IDACS. Explained to Rita the basis for my call – had seen warrant on Odyssey. Rita then called Huntington County directly. They reported that they did in fact want the def.

Did my typical stall until warrants showed up and took him into custody.

Such experiences prompt messages like one we received from Hendricks County, “When can you come install Odyssey?”

We are now installing it twice as fast as last year, and we’re working with clerks and judges in places like LaPorte and Shelby and Steuben and eight or nine others. Just how fast we can get this all done essentially depends on how many teams we can send to the courthouses and city halls.

We manage to pay for this work with federal grants or with fees paid by court users, presently \$7 a case. We ask that the user fee be temporarily increased to \$10 to speed up the installation. The House voted to approve doing that in the last General Assembly and the Senate Judiciary Committee did likewise by a vote of 9-0.

All of these achievements are the result of collaboration between the judiciary and agencies like the Indiana Office of Technology, the BMV, the Department of Revenue, the Criminal Justice Institute, DCS and the State Police. None of these could have been accomplished by the judiciary alone or by anybody else alone.

Does this matter to citizens? If you build it, they will come. Rather than driving to the courthouse or hanging on the phone, our constituents were seeking court information this morning at the rate of more than 3400 an hour. I’m proud that Indiana’s courts are creating a 21st Century system.

### **Plain English Jury Instructions**

As for making the legal system easier for citizens, let me mention something we finished just a few months ago.

People come to the courthouse by the tens of thousands to make possible that jewel of the Bill of Rights, trial by jury. During those trials, lawyers and judges explain the law that applies to the case jurors are being asked to decide. Too often, we have talked to jurors about this in legalese.

Committed to doing better, the Indiana Judges Association began work on what we decided to call “Plain English Jury Instructions.” The drafting committee, led by Judges John Pera of Lake County and Carl Heldt of Evansville, and an English teacher, spent three years revising the traditional instructions.

The new instructions were issued during the fall. I’ll give you one of my favorite examples.

Old instruction:

Direct evidence means evidence that directly proves a fact, without an inference, and which if true conclusively establishes that fact. Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably drawn....

New instruction:

Direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. Circumstantial evidence might be the testimony of someone who only saw the animal's tracks in the snow.

### **How Good is What We're Doing?**

On jury instructions, the chief justice of a southern state called last fall to say that their judges had decided to do something and that experts in the field had told her: "Call Indiana."

The chief judge of a large federal court in the north called to say he was thinking about allowing jurors to ask questions during trial and he'd heard that Indiana seemed to have it right. I told him what we were doing and sent him to Judge Robert Altice of the Marion Superior Court.

The Council of State Governments gave JTAC's project called InCite an Innovation in Government Award, and the Kennedy School at Harvard gave its work on e-tickets a "Bright Idea" award.

Judge Greg Donat won the nation's leading honor for devising ways to help citizens who have to navigate the legal system without a lawyer.

The American Bar Association said that our Courts in the Classroom project on civics was one of the best in the country.

The chief justice of a western state stopped me at a conference to say that the members of his court had debated at length whether they should adopt an opinion on medical expenses written for us by Justice Sullivan. And a leading national expert on alternative criminal sentencing, a retired judge from California, told me that Justice Dickson's opinion on using risk assessment tools was the best piece in the country on the subject. Judge Kirsch's opinion on robo-signing in mortgage foreclosures has recently been cited in many places.

In short, Indiana's judiciary is one that keeps its feet planted firmly on Hoosier soil while keeping its eyes on the horizon. They are men and women of high ambition who are capable of confronting a problem, devising a plan, and executing on the plan.

### **Why Does This Matter?**

Whether we can build a better system of justice matters first and foremost to the individual citizens who come to court as part of the two million cases we hear every year. Our first duty is give them a full and fair hearing.

But whether we run a respectable court system also matters for people who have never seen the inside of a courtroom because a reliable court system is part and parcel of a decent government and a crucial element of a healthy and productive economy. I was reminded of this economic

connection while driving to work last week. I heard an interview with the author of a new book on the economic miracle of today's India.

The interviewer asked about what he called the differing narratives of India and the United States. The United States, said the reporter, has always thought of itself as a place of unlimited future opportunity but now wonders whether it will be such a nation in this new century. India, long held back by caste and class, is now written about as the wave of the future. Is India, the reporter asked, "The New Land of Opportunity?"

You're right about the story line, said the author, but in both countries we tend to overlay the story line of the day and underplay the fundamentals:

In America, you take something like American universities, for example; you take the Silicon Valley phenomenon; you take the way the American legal system functions. These are century level advantages. It will take other people a very, very long time to replicate any of these.

In short, the message was that if we do what it lies within us to do, places like India and China aren't going to catch Indiana for a very, very long time.

I promise you we're building a court system that does its part to make that so.