

State of the Judiciary
Chief Justice Randall T. Shepard, Indiana Supreme Court
Message to the Legislature
January 11, 2012

While the reports that the Constitution directs the Governor and the Chief Justice to give are known as the “State of the State” and the “State of the Judiciary,” very little in public or private life is actually static. These annual snapshots always reflect a journey from where we used to be, towards something new and better.

I’m always mindful that the Constitution calls on me to report on the state of the whole judiciary, all 400 of Indiana’s courts, a report on the larger enterprise that is moving from yesterday to tomorrow.

The yesterday of Indiana’s courts lasted largely unchanged over decades. As in many other states, our courts were a collection of silos that rarely connected. There were few agreed ways of conducting business, or assigning the disputes people brought, or managing those disputes to a speedy finish. For much of our history, rules and practices varied so much from one courtroom to the next that even lawyers, and certainly citizens, could rightly think they were crossing the state line when they simply went over to the county next door.

That began to change about a generation ago, and over time Indiana’s courts have become less like a collection of Lone Rangers and more like a group of colleagues with a common purpose. The legislature created unified courts in the state’s urban areas, and it began to support collaboration between judges through the Judicial Conference of Indiana, the Judicial Center, and the Division of State Court Administration.

The movement towards collaboration was visible in 2011 when the General Assembly created three more unified courts in Henry County, Clark County, and Madison County, at the request of judges and county officials who had reached the conclusion that they could be more effective by working together more closely. And at your prompting, the Judicial Conference adopted rules to consolidate probation departments in those few places that were still operating as though criminal justice could succeed in a series of silos.

Joint Action for Families and Children

You could call this growing commitment to joint effort “court reform” or “tax dollar-efficiency,” but it makes a difference in the lives of people. You can see that in fields like families and children and domestic violence. A generation ago, courts heard those disputes about the same way we heard cases on property ownership or breach of contract. The techniques had not grown alongside the size of the problems.

That has changed dramatically. Indiana’s ability to care for abused or neglected children, for example, is light years ahead of where it was just a decade ago. Governor Daniels launched an agency that focuses solely on children, whose caseworkers have enough training and time to do

the job right. And the General Assembly has taken the expense of protecting those children off the backs of property taxpayers.

As for the judicial branch, when children went to court in the old days, too often no one really spoke for them because the parents were so focused on their own conflict. Today, Indiana's courts have people who speak just for the best interests of the child—sometimes lawyers, but more often volunteer Court-Appointed Special Advocates, CASAs for short. The Daniels Administration and the legislature gave the judiciary the resources to recruit, place, and support an army of volunteers who speak for children. Indiana now has more local CASA programs than any state but Texas. In 2011 we trained the largest number of new volunteer advocates ever—1,010. And the number of children awaiting assignment of a CASA is half what it was this time last year.

For particularly acrimonious divorces involving children, we now offer family mediation, something that didn't exist two decades ago. Judge Tom Felts of Fort Wayne first launched this initiative, and you authorized us to use this approach statewide, and we now employ it in 33 counties.

In the cases involving the worst threats, we have more tools than ever for combating domestic violence. In 2002, you made valuable changes to the statutes on domestic violence protection orders, but when a court issued an order, only paper copies existed, making it tougher for the police to enforce them. Not anymore. Thanks to the Judicial Technology and Automation Committee, when a judge issues an order we send it immediately and electronically to law enforcement. JTAC has also enabled local victim advocates like women's shelters to have direct access to the Protective Order Registry, and 71 victim advocates do that in 61 counties. This time last year I told you we were on our way to being able to send text or email notices to victims when a protective order is actually served on the abuser, a particularly dangerous moment. JTAC completed that work and last year we sent notices to 9300 victims. These improvements literally save lives.

More Effective Criminal Justice

This same seriousness of purpose is the story in criminal justice. When I was a trial judge, judges mostly had two sentencing options: prison and probation. In the intervening 25 years, governors and legislators and prosecutors and defense lawyers and judges have wrestled continually with the twin challenges of exploding prison populations and persistent recidivism. State and local ingenuity have produced a different world: 49 certified drug courts, highly professional probation departments with the time and tools to monitor felons who number in the tens of thousands, 56 court drug and alcohol programs, the first veterans courts, delinquency projects run jointly with school corporations and the social work community, and the new risk assessment tools that help identify the most effective sanction for individual offenders. Last year we evaluated 134,000 offenders using this 21st century evaluation technique.

There is deep interest at the local level in finding more effective approaches, even under existing law. In May, the Department of Correction and the judiciary invited people in the criminal justice community to a statewide summit on evidence-based sentencing, and 775 people

came: prosecutors and judges, defense lawyers, community corrections and probation officers, and school corporation staff. It was clear to me that the spirit of reform was alive and well at the local level.

This spirit is vividly illustrated by a project on evidence-based strategies under way in Grant County, led by Judge Mark Spitzer and Prosecutor James Luttrull, that the U.S. Department of Justice plans to use as a national guide.

Courts and Healthy Commerce

Among the heart-warming aspects of stories written in the last few weeks has been commentary on the fact that Indiana's courts are not a barrier to economic development. You could all name states where businesses shy away because of the litigation climate.

One way the legal system can be a barrier has to do with sheer complexity, but this state sometimes strikes important blows for simplicity. On a basic matter like deciding what evidence is admissible in court, for 175 years Indiana employed a system derived from the ancient common law, using appellate court opinions to specify how to submit evidence—how to establish that a document is genuine, what is hearsay and what is not. People confronted with these issues had to search thousands of pages of opinions for guidance. When they were lucky, they found an appellate opinion giving the answer. If they were not so lucky, they would find two opinions giving different answers.

We've now replaced those millions of words with the Indiana Rules of Evidence, just 24 pages covering everything from the definition of hearsay to when you need the original of a document and when a copy will suffice.

There are still debates in the course of a trial about what is admissible, but at least everybody now sings from the same page. Lawyers and judges can know which rule applies and spend their energies exploring how to apply the rule to a particular situation. Citizens who find themselves in court without a lawyer can use this relatively simple roadmap.

Calling such a reform "modernization" passes over what it does for holding down the cost of litigation and improving citizen access. The same is true of the Jury Rules (a recent study ranked Indiana fourth on the fairness of juries—they're drawn from the most inclusive in the country) and the Plain English Jury Instructions (which give jurors a fighting chance to escape the legalese).

The other barrier is partially organizational and partially mental frame of reference. Do people in courts understand that how they perform affects a state's economic climate? I suggest that the work we've done together on mortgage foreclosure proves up our bona fides on that point. Led by Lieutenant Governor Skillman, with energetic participation by Attorney General Zoeller, Indiana has been working to revise statutes and develop new court practices that give homeowners a better chance to re-write their mortgages and stay in their homes, if that's possible. The judiciary has been working to focus all these techniques in the place where it really matters, the courthouses. We have now deployed that new package of practices in the 20 counties that represent two-thirds of the foreclosures, including all 10 of the counties hardest

hit. It turns out that these new processes multiply the chance that a homeowner might achieve a successful workout by six times!

This is important for homeowners, but not for homeowners alone. After all, a functioning real estate market is part of what a healthy economy needs. One of the case managers who you've helped us put in place recently wrote in praise of the many mortgage company lawyers who, she said, view this effort as a win-win opportunity.

A Better Legal Profession

That leads me to tell you about changes in our legal profession that ought to be a source of pride. Indiana became a state where lawyers have to complete continuing legal education because lawyers thought it would be good for them and for clients. The Indiana State Bar Association's original proposal left out judges, but judges insisted that we should impose on ourselves whatever we required of lawyers.

In 2011, there was a development that reflected that same spirit. As a result of the Judicial Conference's strategic planning, judges proposed that judges should have an even higher requirement than practicing lawyers, and now we do.

What else is better about the lawyers and judges who make up Indiana's legal profession? We have:

- improved bar admissions by adopting three new national exams, including one on ethics and one on problem solving;
- created the country's first joint program for impaired lawyers and judges;
- created the first statewide lawyer leadership academy, a project of the State Bar in which Justice David is playing a leading role;
- created with your help, the Indiana Conference on Legal Education Opportunity and doubled the number of minority lawyers.

Is This Quality Work?

While most of what I've said applies to the whole judiciary, I do want to say a few words about the appellate courts. I could talk record numbers, but I'd rather talk about quality. One way to measure quality is whether the decisions issued in Indiana get relied on by lawyers and judges in other states.

There was a time when Indiana stood near the top of the state courts to which lawyers, scholars, and other judges looked for answers to the legal problems of the day. A study in 1912 examined how often state courts cited each other, and Indiana was the fifth, following only New York, Massachusetts, Illinois, and California. A similar exercise in 1920 showed Indiana ranked eighth. A study in 1936 concluded that Indiana ranked fifteenth. By 1975, a study of the

reputation of state supreme courts placed Indiana twenty-fifth. Only Missouri and Texas had fallen further.

That's not the way it is today. Chief Judge Robb's recent opinion about environment liability has been cited in Massachusetts and Texas, placed in a handbook on insurance law, explored by a law journal in Ohio, and cited by the American Law Institute. And a national sentencing expert recently said to me that Justice Dickson's opinion on the use of risk assessment tools in criminal sentencing was the best piece of work anywhere in the country. At a recent national conference the Chief Justice of Nevada said to me, "We were so grateful for Justice Sullivan's opinion on gaming."

This is, of course, grounds for professional pride, and it's probably one reason why more people are voting in retention elections than ever before. But there's a much more important reason. It is the value in the public sector of what George Will recently called "reasoned judgment." Whether the disputes people bring to us are thoughtfully and honestly decided according to facts and law is crucial to a free society.

An Extraordinary Circle of Servant-Leaders

These are but the most evident trends from where we used to be to where we are going, and it is not humility but simple fact for me to say that the circle of people on the bench and in the bar who have been lending ingenuity and leadership is very broad indeed. We are so well served by people like:

- Lilly Judson, State Court Administration, who has just finished holding the highest office in court administration in America as a leader of the National Center for State Courts, and Judge Mike Witte, now director of the Supreme Court Disciplinary Commission, who just finished a term leading all the nation's judges in the American Bar Association.
- Justice Frank Sullivan breathed new life into the cause of bringing more minority law students into court clerkships and is now leading all of the bar's efforts on ethics and professionalism.
- Judge Wayne Trockman of Evansville whose ground-breaking work in drug courts was recently honored by the National Association of Drug-Court Professionals with its "Transformation Award."
- Judge John Surbeck of Fort Wayne, fairly called one of the inventors of re-entry courts, is literally in world-wide demand for his expertise.
- Jan Dickson was rightly recognized in November by the National Center for State Courts for having done more to help the families of judges than anyone, anywhere.
- And Justice Robert Rucker, who chairs the Judicial Council of the National Bar Association and whose career has been such an inspiration to others that the Lake County Commissioners recently renamed the facility in East Chicago the Robert D. Rucker Courthouse.

Extraordinary People Working on Important Causes

These extraordinary people and others have been engaged in making the system of justice work better tomorrow than it did yesterday (“aiming higher,” as a friend said), and their collective commitment is the reason we can be confident about tomorrow. Here are some examples from 2011:

After winning national awards for innovation from organizations like the Council of State Governments, JTAC, led by Mary DePrez, is just on the verge of deploying our new 21st century case management system in 40% of the state’s cases.

- Forty-four new law enforcement agencies began using JTAC’s electronic citation system, bringing the total to more than 250, from the State Police to the St. Joseph County Sheriff’s Department. Last year more than 1.3 million tickets were issued using JTAC technology.
- Our program on civics, Courts in the Classroom, won its tenth award, from the National Council on Public History, for its success in helping teachers and students and the general public understand their courts and their government.
- The Public Defender Commission added yet another large county, Delaware, to its network of upgraded local public defender services, and national experts on indigent defense have been writing about Indiana.
- Judge Diane Schneider of Lake County and others launched ground-breaking work on guardianships for those seniors who have no family to look after their affairs.
- And Judge Schneider spoke on our behalf in urging your adoption of the new Uniform Guardianship Act, just in time for the tidal wave of retiring baby boomers.

My Thanks for the Opportunity

To be engaged with so many splendid people in so many worthwhile causes has for me been a better career than one could ever imagine.

To deliver this final report standing in this place where so many valuable measures in support of a fairer society have found success is simply uplifting. To do this between Mitch Daniels and Becky Skillman is very poignant, for their friendship has enriched my life. And if a fellow imagined that he’d be linked in public memory on the back end of a hyphen, where the name at the front was Joe Kernan’s, how could you beat it?

Could there be a better cause, a more worthwhile way to “spend and be spent” in life than working toward greater justice?

The scores, if not hundreds of times when members of the General Assembly have been willing partners in improving the delivery of justice have been a great gift. Those many moments, and the demonstrated achievements by so many of the men and women on the bench and in the bar,

are the reasons why I say that Indiana will have an even better system of justice tomorrow than it has today.

I have been able to carry my own role in all this with the steadfast love of Amy MacDonell. Amy and Mattie and I are enormously grateful for the countless generousities and acts of kindness we have received.

That graciousness, and simple observable facts, will allow me to leave the stage with full confidence that we will succeed in building Indiana as a safe and prosperous and decent place.

God Bless you, and God Bless Indiana.

And that is the state of your judiciary.