

State of the Judiciary  
Chief Justice Harold Fatzer, Kansas Supreme Court  
Message to the Kansas Bar Association Meeting  
May 18, 1973

President Marvin E. Thompson; Members of the Kansas Bar Association, ladies and gentlemen:

I wish to thank the Kansas Bar Association for extending to me this kind welcome. As I indicated to you last year, I am reluctant to interject myself into these proceedings, yet I have accepted your invitation again. I justify my appearance before you because I believe the proper administration of justice requires an opportunity to discuss matters of mutual interest and concern affecting the courts and the attorneys who practice in those courts. I wish once again to make it very clear I speak for myself only and not for my colleagues.

Since I addressed you a year ago in Wichita there have been significant developments affecting the members of the bar, the courts and the administration of justice in Kansas. I wish to discuss some of them with you briefly this morning.

First—the adoption by the supreme court of rules relating to the annual registration of attorneys and the appointment of a disciplinary administrator.

This item may, at least on the surface, seem of most immediate concern to the practicing bar—if only because of its impact on the pocketbook.

The supreme court has always been concerned with the problem of discipline of erring attorneys. In 1968, the court completely revised its disciplinary rules to provide more flexibility and to give more authority to the Board of Law Examiners. The board became the agency for hearing complaints and making recommendations to the court, doing away with the previous costly and cumbersome procedure of appointing a commissioner to hear testimony in each case.

This was a big step forward, and the new system seemed to work reasonably well. It was about this time that the president of this association, Judge Leo A. McNalley, first publicly discussed the annual registration of attorneys at a meeting of the executive committee in Topeka.

In 1970, the American Bar Association published the report of its Special Committee on Evaluation of Disciplinary Enforcement, chaired by the Honorable Tom C. Clark, retired associate justice of the United States Supreme Court. That report found that nationwide the matter of bar discipline was, and I quote, "a scandalous situation that requires the immediate attention of the profession." In 1971, I was told by the then chairman of that American Bar Association Committee, Mr. Henry Pitts, of Chicago, following the conclusion of his address to the Appellate Judges Conference in New York, that the committee considered Kansas a "bad" state.

This indictment of the national and the Kansas situation from such eminent sources led the court to re-examine the disciplinary procedures in Kansas. We found several deficiencies which were becoming apparent. First, the number of complaints was increasing at a steady rate—the number requiring action by the Board of Law Examiners trebled from 1968 to 1972—and the expense of processing those complaints likewise trebled. The secretary of the board was faced with the mounting and almost impossible task of keeping track of those matters while attempting at the

same time to carry on his private practice. In addition, the fast growing expense of the disciplinary proceedings was still being borne largely by fees from student applicants for admission to the Bar, by an annual appropriation of tax money from the state general fund, and by LEAA funds from the Governor's Committee on Criminal Administration. During the last two years, the committee made available \$17,000 and \$19,000, respectively, to implement disciplinary procedures. The supreme court is convinced that these are inappropriate sources from which to meet expenses occasioned by the unethical activities of the adult practicing bar. It is a few of the members of the practicing bar who cause the problems—and it is the entire bar that suffers in the public image when unprofessional conduct goes unheeded.

In Kansas we have strong and active bar associations, both state and local, which have functioned well in disciplinary matters involving their members. These associations are voluntary, and for reasons which a sizable number of practicing attorneys regard as good and sufficient, they choose not to belong. If disciplinary functions were to be entrusted solely to the organized bar, those attorneys who do not belong would avoid what the court regards as their fair share of the common burden.

One solution to the problem, adopted in several states, is the integrated bar. At this time, the court has rejected the idea of unilaterally integrating the bar, recognizing that many lawyers object to being forced to contribute to the support of positions and programs with which they may disagree.

The alternative, which the court adopted, calls for the annual registration of all practicing attorneys, accompanied by an annual fee sufficient to defray the expenses of the state's disciplinary program. It also calls for the appointment of a full-time official who will act as a central clearing house for complaints against lawyers, coordinate the activities of the state and local bar discipline committees with those of the State Board of Law Examiners, and render such investigative and other assistance as may be required. After considerable deliberation, the court determined to refrain from euphemism and, in the good old Kansas tradition of calling a spade a spade, it denominated that official the "Disciplinary Administrator."

Before implementing this plan, the court had to resolve both a fiscal question and a matter of policy. The fiscal question was occasioned by K.S.A. 7-121a which required that 20% of all fees collected by or on behalf of the Board of Law Examiners be paid into the state general fund. A similar provision applies to other professional and occupational license fees imposed by legislative action, presumably to reimburse the state for such overhead expenses as accounting, auditing and legal services furnished to the licensing agency. Just as the court thought it improper for the Kansas taxpayer to finance the expenses of disciplinary procedures, it also thought it improper to swell the coffers of the state general fund with money extracted from members of the bar by rule of the court for the purpose of self-regulation. Accordingly, we prevailed upon the 1973 legislature to exempt bar disciplinary fees from the 20% "lug" required by statute, and the legislature responded favorably by the enactment of S.B. 296.

The policy question was whether the court should take action "unilaterally" so to speak, and adopt the new rules behind closed doors in the conference room, or whether we should hear the views of members of the bar at a public hearing. While this association overwhelmingly approved the proposal in principle at its annual meeting last year, nevertheless, the court determined that Kansas lawyers should have a look at—and an opportunity to make specific comments on—these proposed rules.

Accordingly, on May 3, the court conducted a public hearing in the courtroom on the proposed rules. This hearing was, so far as I know, unique in the court's history. Notices, together with copies of the proposals, were sent to all attorneys known to the court—approximately 3,500—and written as well as oral comments on the proposals were invited.

One of the purposes of the registration was to compile for the first time a complete and accurate list of Kansas attorneys. Future mailings, such as the one just completed, and those regularly made for the Supreme Court Nominating Commission, can be made with confidence that all the intended recipients will be reached.

As might be expected from a group of strong-minded individualists such as comprise the Kansas Bar, the response was thoughtful and varied. A surprising number of lawyers expressed wholehearted approval, while a very few were totally opposed. Some of the latter were fearful of regimentation or expressed an abiding aversion to anything smacking of coercion; others were opposed because they favor an integrated bar and considered our proposals halfway measures. By far the greatest number of the responses expressed general approval but raised appropriate questions and added concrete suggestions.

At the hearing on May 3, the sentiments were varied — from outright opposition through concern to full endorsement. Among those appearing in favor of the proposals was the distinguished president of the Kansas Bar Association, Mr. Marvin Thompson.

After the hearing, the court met and gave careful consideration to the written and oral comments we had received. Minor modifications were made and the rules were adopted May 4. They will be published in the Kansas Reports, and will be mailed to you on or about June 1, 1973. The court is of the opinion that, in their present form, they will satisfy the major concerns which have been expressed by the members of the bar.

In this connection, I would offer the following observations:

First: The fees fixed by the court for the first year are based on our best estimates of the amount needed to implement this program, knowing our current expenditures from all sources for discipline purposes. Until the first registration is complete, we have no accurate count of the lawyers who will be required to register. The annual fee may have to be revised from time to time, either upward or downward, as we gain experience and some hard facts with which to work.

Second: The court does not expect the disciplinary administrator to be a policeman who seeks out offenses. His title is meant to be descriptive—as "administrator" he will coordinate and direct the efforts of the bar in this area. He will have no policy or decision-making responsibilities those remain with the Board of Law Examiners. Under the rules, the decisions are left with their present holders, with ultimate responsibility resting with the court.

Third: The revised rules do not infringe upon the investigative power and responsibility of those local bar associations which are willing and able to assume them; however, where local bars are small, they understandably find local action in the disciplinary field difficult and uncomfortable. To such bars, the services of the disciplinary administrator should prove invaluable.

Fourth: The court is firmly convinced that the office of disciplinary administrator should be filled by an experienced practicing lawyer. But we recognize that a qualified lawyer may not be

available within our means, and that there may be candidates with outstanding qualifications who are not lawyers. While fully intending to appoint a lawyer if possible, we have removed from the rules any requirement to that effect.

Fifth: As of the present, the court deemed it not advisable to appoint two boards—one relating to admissions to the bar, and the other relating to disciplinary enforcement. This is in accord with the desires of the members of the Board of Law Examiners, who are doing excellent work in both areas.

Sixth: Local registration of attorneys and library fees provided for by statute will be unaffected by the new rules.

Finally, for those who have doubts about the constitutionality of the court's action, I would refer you to *Canton v. Supreme Court of Pennsylvania*, 353 F.Supp. 1307, decided by the United States District Court for the Eastern District of Pennsylvania, on January 31, 1973. In a learned and exhaustive opinion, that court upheld the Pennsylvania rules (after which ours were modeled) against every attack able and ingenious counsel could muster. The complaint was dismissed for failure to raise a substantial federal claim. I heartily commend the case to you for its discussion of both the constitutional issues and the policy questions involved. Again, the citation is 353 F.Supp. 1307.

We are feeling our way with these new policies relating to discipline and earnestly ask each of you to support the court in this endeavor.

I turn now to the adoption of the judicial article last November. This action led the court to two more innovations—the initiation of a comprehensive study of the existing Kansas judicial system, as a first step in establishing the truly integrated court system contemplated by the Constitution, and the appointment of a State Bench-Bar Committee to assist the court in its new constitutional duty of formulating and enforcing a code of conduct for members of the judiciary *at all levels*.

The adoption of the judicial article was a mandate from the people to improve our judicial system so the courts may more efficiently serve the people of this state. The citizens' committee that proposed this constitutional change stated it is the transcendent requirement of the judiciary to provide justice with the least possible delay, and the main areas of reform to accomplish that objective are those designed to attain:

- 1) proper supervision, administration and discipline of judicial personnel;
- 2) qualified judges free of political pressures and considerations;
- 3) such flexibility as will insure efficient use of available judges;
- 4) steadfast recognition of the doctrine of separation of powers;
- 5) adequate tenure and compensation to attract and hold qualified judges on the bench; and
- 6) public confidence in the judicial system.

Before any major changes are made in our court system, it has been my thought that an intensive study of our judiciary should be made. We need to examine our system, see where it is outdated, and recommended changes where improvement is needed.

Pursuant to my request, the 1973 legislature adopted Senate Joint Resolution No. 2 which called for a judicial survey and study to be made by the supreme court in cooperation with the judicial council. Funds were provided to assist in making the study. The resolution called for the establishment of a Judicial Study Advisory Committee to be composed of representatives of the judiciary, the bar, the legislature and the general public. This committee has been appointed by the supreme court and will meet in the very near future. Under the leadership of its chairman, the Honorable Edward F. Arn, a former attorney general, justice of the supreme court, and governor, this committee will assist in conducting the study and make recommendations to the supreme court and to the legislature. Also assisting will be consultants who have had considerable experience in court studies in other states. I am asking that we have full cooperation from the bench and bar of this state in support of this great venture toward achieving the finest judiciary in the land.

An important aspect of the study will be an examination of the appellate process and the need of an intermediate court of appeals which I have previously advocated. I challenge you to take a serious look at the need for such a change in appellate structure and to review the findings and recommendations that this independent study will effect in this respect.

In addition, I ask that each citizen of the state give attention to recommendations the advisory committee will make to the supreme court and the legislature. These recommendations will be important to all Kansans, since they will be the basis for establishing a unified court system as contemplated by the Constitution, if adopted by the legislature.

The area of judicial discipline as envisioned by the drafters of the Judicial Article has already come under consideration by the supreme court. For the first time, the supreme court has created a state Bench-Bar Committee to act in an advisory capacity in liaison between the supreme court and the bench and bar of this state in matters affecting the administration of justice. It is important that there be open communication between the bench and bar and a better understanding of the responsibilities and problems of each. This committee, under the able leadership of the Honorable Frederick Woleslagel, Judge, District Court, Lyons, has been hard at work studying the new Code of Judicial Conduct which was adopted by the American Bar Association last August, and which has been under consideration by the judiciary across the nation. The Bench-Bar Committee will make recommendations concerning the supreme court's responsibility in the area of judicial discipline as set forth in the new judicial article. The court is most appreciative of the dedication with which the members of this committee have responded to the assignments given to them.

The supreme court is also vested, by the judicial article, with the general administrative authority over all courts of the state. It has assumed the responsibility and has taken steps to insure that the training and education of our judges continue to improve.

One recent example of the exercise of administrative authority has been the establishment of a training school for newly-elected judges at Washburn University School of Law. At my invitation, all judges who were elected last November appeared for training by an excellent faculty headed by the Honorable Michael Barbara, Judge, district court, Topeka. This school centered upon the practical requirements of being a judge. It was very well received and appreciated by the new judges, and it appears this type of judicial training should be continued on a regular basis in the future.

Another example of administrative leadership was the calling of the first statewide judicial conference in Kansas. This conference was held in Wichita and centered on a study of standards for criminal justice and was attended by supreme court justices, district judges, judges of the courts of special jurisdiction, prosecutors from over the state, 100 defense counsel, and many others interested in this area of the law.

With the advent of the new judicial article, we are now permitted to start working with courts of special jurisdiction; that is, all state courts below the district court level. A seminar for judges of these courts was held at the Washburn Law School last August, and was well attended. Chief Justice Edward Pringle, of Colorado, participated in this conference. The keynote address by this noted jurist and administrator was an inspiration to all. The special court judges were also invited to participate in the annual judicial conference at Wichita, and the orientation school for new judges at Washburn.

In my address to the legislature last February, I commented upon the proposed Hall of Justice, and stated it should come as no surprise that the supreme court is reluctant to abandon its traditional association with the capitol building and move to other quarters. Nevertheless, the court agreed to vacate its present offices provided the new judicial building is adequate for present and future needs, is of enduring quality, unique in design and significant in character, appropriately situated in relationship to the capitol building, and its occupancy is restricted to the judicial department. The court was not entirely successful in this endeavor.

Subsequently, the legislature enacted and the governor signed into law, House Bill No. 1286 appropriating approximately nine million dollars for the construction of the supreme court building, to include temporary quarters for the attorney general- a plan this court had heretofore considered unacceptable. Considerable disagreement over the location, design, and propriety of the Hall of Justice arose between the members of the legislature, and House Bill 1286 represents a compromise between the House and the Senate. The differences led to a conference committee report that the location and the general exterior design of the building be subject to the approval of the chief justice. I wish to emphasize the conference committee report in no way represents action by me or the court to direct the policy to the legislature in this respect.

With the cost of building materials increasing rapidly, it is paramount that construction commence as soon as practicable so that funds made available will not be diluted. It is the hope of everyone that when the Hall of Justice is completed, it will be worthy of the endeavor and a building with stature and dignity which will represent a tribute to the people of Kansas and the judicial department of this state.

In conclusion, I would like to express the judiciary's appreciation to the members of the bar for their continued support the past year. This support is evidenced by the great strides made to insure efficient and impartial justice to all citizens.

The court wishes to thank the members of the legislature and the governor for the cooperation afforded the judiciary during the last session. I can say without hesitation that the legislature and the executive were responsive to our needs and provided great assistance.

Thank you for your understanding ear, and I trust next year will show an even greater step forward in the improvement of justice in this state.