

Annual Address: State of the Judiciary
Chief Justice Ralph D. Gants, Massachusetts Supreme Judicial Court
Message to Massachusetts State Bar Meeting
October 20, 2015, in Boston, Massachusetts

As I prepared this year's State of the Judiciary Address, I had the opportunity to count my blessings, and many of you are among them. I am blessed to work with my fellow justices on the SJC, with Chief Justice Paula Carey and Court Administrator Harry Spence, and with the chiefs of the trial court departments, each of whom shares my commitment to justice, to solve important problems, and to follow the truth wherever it may lead. I am blessed to work with trial court judges, court clerks, probation officers, court officers, and other court staff who face challenging problems every day in the courtrooms of this Commonwealth with energy, commitment, and imagination. I am blessed to work with bar leadership, including MBA President Robert Harnais and BBA President Lisa Arrowood, who so share my sense of mission that at times it feels as if we have entered into a Vulcan mind meld. We are all blessed in this Commonwealth to have prosecutors, public defenders, and legal services attorneys who are woefully underpaid, but still perform their important work with dedication, ability, and vigor. I am blessed to work with a Governor, a Chief Legal Counsel, and a Judicial Nominating Commission who are committed to nominating new judges who are not only qualified, but thoughtful, fair, and diverse. And I am blessed to work with legislative leaders – Speaker DeLeo and Senate President Rosenberg, the Chairs of the Judiciary Committee, Representative Fernandes and Senator Brownsberger – who are champions of justice and full partners in our efforts to address the multitude of problems that come into our courtrooms every day. And I am blessed to work with each of these extraordinary public servants in the cause of doing justice and solving problems.

In most other states, drug courts, mental health courts, and veterans' courts are called problem-solving courts; we call them specialty courts. We do so because we believe that every court is a problem-solving court, and we do not wish anyone to think that the only place where judges routinely address problems are in our drug courts, our mental health courts, and our veterans' courts. What does it mean to treat every court as a problem-solving court? Let me first tell you what it does not mean. It does not mean that we seek to transform judges into social workers, or that we no longer resolve cases in accordance with law and instead seek to resolve them in accordance with our own vision of public policy, or that we care any less about principles of fairness and due process. What it does mean is best described by two principles that come from the Jewish religious tradition, but probably are shared by nearly every religious tradition. The first is that each of us has an obligation to repair the world. The second is that, if you save one life, it is as if you have saved the entire world. In our courts, we seek to repair the world, sometimes even save the world, one person at a time.

What that means is that our courts will step up to the plate and seek to address the challenging problems that come before us. It means that we recognize that we cannot repair the world alone, that we can do so only with support from the other two branches of government. It means that we recognize that many litigants come to us at the lowest points of their lives: some have been charged with serious crimes, others have been victimized by someone who is supposed to love them, some face eviction from their home, some come to us at the end of a failed marriage. It means that there is someone in the world – a judge, a probation officer, a clerk-magistrate, a

housing specialist – who can offer the helping hand they need to get back on their feet and regain and renew their lives. That is what it means to be a problem-solving court.

To focus on problem-solving courts is to shine a light on the trial court departments that routinely do this every day:

- the Juvenile Court whose statutory mandate is to approximate as nearly as possible the care, custody, and discipline that the children before them should receive from their parents, and, as far as practicable, to treat them, "not as criminals, but as children in need of aid, encouragement, and guidance";
- the Probate and Family Court that attempts to preserve some semblance of harmony and stability for the children of a family whose parents are divorcing;
- the District and Boston Municipal Courts that attempt to save a defendant from opiate addiction, and to protect both the safety of a victim of domestic violence and the rights of the accused;
- the Housing Court that seeks to protect the rights of both tenants and landlords, and seeks where possible to avoid the need for eviction and reduce the likelihood of homelessness. (And speaking of Housing Court, I hope this will be the year that the Legislature grants every resident of Massachusetts, not just the lucky 70 percent, the benefits that come with access to a Housing Court.)

But every civil case, even the typical civil case in Superior Court where money or property is at stake, is a problem to be solved – one that has evaded amicable resolution and has been filed in court, where the litigation will impose considerable costs upon all parties. In the autumn of last year, all the trial court departments with civil jurisdiction embarked on an effort to explore whether we can make the resolution of civil cases more cost-effective, and whether we can provide litigants with alternative means of resolving these disputes that would avoid the need for them to pursue arbitration. These efforts will bear fruit this winter; some buds have already begun to emerge. You can expect three important changes in civil litigation. First, you will be given a menu of options, especially in Superior Court, that will enable you to choose various means of resolving your disputes. You will be able to choose the traditional three course meal of full discovery, the usual tracking order, and a jury trial, or you can choose various lower cost options more appropriate to the size and complexity of your case, and to the willingness of your client to bear the costs of litigation – the civil litigation equivalent of choosing from a buffet or, in some cases, choosing fast food, albeit high quality fast food. It is premature for me to list them, since they are still a work in progress, but I am confident that you will be surprised by the variety of options, because I was surprised by the variety of options. The buffet and fast food options will be available only with the agreement of all parties; if there is no agreement, you go to the default of the three course meal.

Second, even for those who choose that default option, or who cannot agree on an alternative and therefore are left with that default, judges will be monitoring the case more closely to ensure that, whatever track you are on, the time to resolution is reduced and litigation costs are kept reasonable. Rule 26 of our Rules of Civil Procedure currently provides that discovery may not be objected to as long as the "information sought appears reasonably calculated to lead to the discovery of admissible evidence." Many judges interpret that language to bar them from

limiting the scope of discovery even where the discovery sought is disproportionate to the amount at issue, and where the unreasonable cost of discovery will put pressure on a party of limited means to accept an unfavorable settlement or to dismiss its claims simply because the party can no longer afford to litigate the case. I expect that the Supreme Judicial Court's Standing Advisory Committee on the Rules of Civil and Appellate Procedure will send out for comment in the next few months a proposal to amend Rule 26 to provide for proportional discovery, similar to the change to Rule 26 of the Federal Rules that will soon take effect.

Third, in the District Court and the Boston Municipal Court, you can expect that you will see an increased number of dedicated civil sessions, where civil cases will be the sole priority of that session, and not the third priority behind criminal and domestic abuse cases. We have heard loud and clear the comments furnished by the MBA and BBA when we aired the proposal to increase the procedural limit in civil cases in the District Court and BMC from \$25,000 to \$50,000. We know that these cases must be tried efficiently for attorneys to be able to afford to take them, and that, if the time that must be devoted to them is too high, the result will be that there will be no adequate remedy for injuries of this size or that litigants will need to represent themselves in these cases. We know that, when cases are being tried on a shoestring budget, attorneys cannot afford to wait around for a conference or a hearing only to be told that the judge will not be able to reach them that day because of the unexpected crush of criminal and domestic abuse cases that had to be heard before them. These dedicated civil sessions will be designed to enable attorneys to litigate civil cases at a cost that allows them to afford to take these cases.

And once these sessions are up and running, and have demonstrated that they can efficiently handle these civil cases, then we will reopen the idea of increasing the procedural limit to \$50,000.

These changes will alter not only the way that judges handle civil cases; they will require attorneys to change the way that they litigate civil cases. Slow, expensive litigation is the way of the dinosaur; if we do not find ways to make litigation faster and make the cost of litigation proportionate to the amount at issue, litigants will simply find other ways to resolve their disputes – ways that will almost certainly be less fair, less transparent, and that will starve our common law by diverting the cases that enrich it from our public courts.

In a criminal case, problem-solving means not only fairly adjudicating the question of guilt or innocence regarding crimes already committed; it means crafting a fair and proportionate sentence that is designed to reduce the likelihood of recidivism and, as a result, to prevent future crimes. Each trial court department with criminal jurisdiction has been hard at work over the past year developing best practices in sentencing, and that effort, too, should bear fruit this winter. The goal is to ensure that each judge who imposes a sentence has the information needed about the defendant and the crime to determine an appropriate sentence and, where probation is imposed, to determine which conditions will best address the particular needs of the defendant.

As many of you know, the Governor, Speaker, Senate President, and I have invited the Council of State Governments to do a deep dive into our criminal justice system as part of its Justice Reinvestment Initiative, and to provide us with the data and analysis that will assist us in shaping criminal justice policy and reducing the rate of recidivism. I am committed to follow the data and allow it to drive the analysis, letting the chips fall where they may. Already, the Council has uncovered two facts that demand attention: in 2012, 46 percent of those released from state prison in Massachusetts were released without parole or probation supervision, which is one of

the highest rates of unsupervised release in the nation. And of those released with supervision, far more are on probation than are on parole. Data such as these invite serious questions about our approach to post-release supervision. Does it make sense that those prisoners who are most at risk of committing new crimes are denied parole and will have no supervision upon their release unless a Superior Court judge has imposed a sentence of "on and after" probation on a separate conviction? Does it make sense that a Superior Court judge who has determined that a convicted defendant should be supervised upon release from prison is unable to predict with confidence the likelihood that a defendant will be granted parole? If we believe that post-release supervision will diminish the risk of recidivism in most cases, should we consider some variant of the Federal law that allows a judge to impose both a determinate prison sentence and a period of post-release supervision for a single conviction, akin to our "on and after" probation that may be imposed only on a separate conviction? In light of the serious consequences that may arise from a revocation of post-release supervision, should that determination be made by a judge in an open courtroom, with counsel provided to those unable to afford counsel, and with a right to appeal an unlawful revocation to a higher court? That is what happens with a probation revocation, but not with a parole revocation.

The Justice Reinvestment Initiative should encourage us to consider other important policies that might reduce the rate of recidivism. For instance, should we be increasing the availability of good time to encourage prisoners to participate in programs that might reduce the risk of recidivism? Should we be promoting step-down and reentry programs that will ease a prisoner's return to society and reduce the rate of recidivism? And if we think that good time and reentry programs are important in reducing recidivism, should we consider changing our laws governing mandatory minimum sentencing, because good time and reentry programs are not permitted for prisoners serving mandatory minimum sentences?

If we believe that the vast majority of the 46 percent of prisoners currently being released from state prison without any post-release supervision should have post-release supervision, how are we to pay for it? One alternative is to redirect the money that would be saved by reducing the length, and therefore the rate, of incarceration. How can we do that? After all, are we not among the states with the lowest rate of incarceration? It is true that in a nation that has gone mad with mass incarceration, we have maintained some semblance of sanity; our rate of incarceration is less than one-half of the national average. But our rate of incarceration is three times what it was when I graduated from law school in 1980, even though our rate of violent crime today is roughly 22 percent lower than in 1980 and our rate of property crime is nearly 57 percent lower. According to the Prison Policy Initiative, if Massachusetts were a separate nation, our rate of incarceration would be the eighth highest in the world, exceeded only by the United States (which ranks first), Russia, Cuba, El Salvador, Thailand, Azerbaijan, and Rwanda; it is 2 1/2 times higher than the rate in the United Kingdom. There is certainly room in Massachusetts for justice reinvestment and I am confident we can find common ground with the Legislature and the Governor on ways to be smarter on sentencing so that we can reduce both the rate of incarceration and the rate of recidivism.

And if we are truly committed to reducing recidivism, should we not take a fresh look at the various fees we impose on criminal defendants that go to the state's general fund? Indigent counsel fee: \$150. Probation supervision fee: \$780 for one year of supervised probation and \$600 per year for administrative probation. Victim-witness fee: \$90 for a felony, \$50 for a misdemeanor. For an indigent defendant convicted of one felony and sentenced to one year of

supervised probation, the fees total \$1,020, more if a GPS bracelet is a condition of probation, because the defendant is required to pay for that, too. A judge may waive payment where the judge finds it would cause undue hardship, but judges must then require community service in lieu of payment, and the probation department must find the defendant an appropriate community service opportunity.

I know that Massachusetts is not unique in the imposition of these fees. At least 44 states impose a probation supervision fee; at least 43 impose an indigent counsel fee. I also know that the revenue yielded by these fees in Massachusetts is not insubstantial: \$21 million in probation supervision fees; \$7 million in indigent counsel fees; about \$2.4 million in victim-witness fees, in all more than \$30 million per year. But should we not stop and ask: who are we asking to pay these fees? Most are dead broke, or nearly broke. Approximately 75 percent of criminal defendants are indigent. Collection is difficult, and we are asking probation officers to take charge of this collection, and to allege a violation of probation where a defendant fails to pay.

And the law requires yet another payment of a \$50 fee when a default warrant is issued because of a defendant's failure to pay.

We want probationers to succeed on probation, and we want probation officers focused like a laser beam on the elements that will help probationers succeed: finding a job, getting an education, dealing with drug addiction and mental health problems, ending the cycle of domestic violence. Should we not ask whether the financial burden of these fees is making it more difficult for probationers to succeed? Is it increasing the rate of violation? Does it make sense to transform probation officers into debt collectors and community service coordinators, to burden our courts with the obligation to collect these debts, and to use the threat of a violation of probation as a means to induce payment? Are we, in the immortal words of MBA President Bob Harnais, "spending dollars to collect nickels," and are we collecting those nickels from a population who can least afford to pay?

Turning to access to justice, we continue to search for ways to provide equal justice in civil cases to those unable to afford counsel. Two court service centers were opened last year in Boston and Greenfield. Two more have opened this year, in Lawrence and Worcester, and two more are scheduled to open soon in Springfield and Brockton. We have adopted a language access plan that we are in the process of implementing, and have created additional multi-lingual forms and informational materials. We have added more and better self-help content on the trial court website at Mass.gov. This summer, the national Conference of Chief Justices unanimously endorsed Resolution 5, which urged states to develop tools and provide assistance to achieve "the goal of 100 percent access through a continuum of meaningful and appropriate services." We in Massachusetts have embraced that goal since at least 2010, and, under the leadership of our access to justice heroes Judge Dina Fein and Erika Rickard, we intend to prepare a blueprint in the year ahead setting forth what we have done and what we intend to do in pursuit of that goal, and to invite every other state to do the same, so that we can learn from each other in our quest of equal justice for all.

I will end with a topic that I know is near and dear to the hearts of the MBA: attorney voir dire. In the past year, through the leadership of my SJC colleague, Justice Barbara Lenk, the chair of the SJC Committee on Juror Voir Dire, and of Superior Court Chief Justice Judith Fabricant, we have done more than anyone thought possible to implement the new legislation authorizing attorney voir dire in our Superior Courts. We have issued a Superior Court Standing Order

governing attorney participation in voir dire. We have designed a pilot project in which fifteen Superior Court judges are using and studying panel voir dire. With funding obtained from the State Justice Institute, we have recruited 30 Superior Court judges to study attorney- conducted voir dire (and in fact that study group is meeting as we speak). We have provided training to judges and attorneys throughout the state in attorney voir dire, and collected data on the impact of attorney voir dire on our courts. And we are carefully considering how to improve the quality of juror voir dire in courts other than the Superior Court that conduct jury trials. In short, with respect to voir dire, we are learning, training, improving, and adapting. We are improving the quality of voir dire in Massachusetts, and we are doing so hand in glove with the bar.

I now give the podium to my partners in repairing the world, or at least our judicial corner of it: Chief Justice Paula Carey and Court Administrator Harry Spence.