

State of the Judiciary
Chief Justice Jean H. Toal, South Carolina Supreme Court
Message to the Legislature
February 25, 2009, in Columbia, South Carolina

Mr. Speaker, Governor, Lieutenant Governor, President Pro Tempore, Speaker Pro Tempore, Members of the Joint Assembly. I come with very mixed emotions this morning, as I know many of you do, and I will try to attenuate my remarks so that we all may join our beloved Herb Kirsh as we memorialize the wonderful life of Sue Kirsh. She was as dear a friend as I had when I served here. She loved two things more than life itself - one is her beloved Herb Kirsh and the other is the State of South Carolina. I know we will all want to be of comfort to Herb and the family today. So I will try to get right to it. We have memorials of our own today. Frances Smith was an old-fashioned gal with very modern views about the court system. She was the first woman to serve as Clerk of the Supreme Court. We lost her this past week. Mrs. Smith was a proud graduate of the University of South Carolina. Unlike many very sedate members of her generation, when you called her telephone, way before answering machines and fancy devices would do this for you, she would scream into the phone a "cock-a-doodle-do" for her Gamecocks. She had a lot to do with the modernization that continues to this day of how we operate courts of South Carolina. When she was here, she was it - she was the administrator of everything. We also memorialize Jim Johnson, a life cut short, who was one of the finest trial judges that ever will serve in South Carolina. You are replacing him this year, but he will never be able to be replaced in our hearts. I also want to mention at this time, my own law clerk, Katie Bockman, daughter of the well-known professor at the University of South Carolina and practicing lawyer, Bob Bockman. Katie worked here in these Chambers as a law clerk before she came to me. In a terrible accident that was not her fault, she lost her life, right as she began her legal career.

We welcome new members of the Court of Appeals, John Geathers and James Lockemy, both already making a wonderful impact on the work of this very important court. We, with a lot of mixed feelings bid adieu to our wonderful senior member of our court, John H. Waller. Johnny Waller has done it all. He has been a practicing judge, a distinguished practicing attorney, a Member of this body, and a Member of the South Carolina Senate.

He served in every level of government and brought much wisdom to us as we have been delighted to serve with him as our brother. I am hoping that after some respite and attention to the affairs of his children, whom he loves dearly, that he will come and return in his retirement to help us if he can and share his considerable wisdom with ensuing generations of South Carolina judges and lawyers. We also lost to retirement at the end of last year and you have replaced him this year - Appeals Court Judge Ralph King Anderson. What a dynamic tale of service to South Carolina Judge Anderson has brought. He and I served in this Chamber for many years together. He was also a very inventive and vigorous practicing attorney, but his real mark on the profession was as a trial court judge and then as a member of the Court of Appeals. He has still got a lot of work left in him and enthusiasm about the business of law. He has agreed to take over a specialized docket in Florence, which he is managing right now, helping to relieve the backlog on the criminal justice side of the equation in his circuit. He is a wonderful public servant and a guy who continues to give us a lot of help as an active judge in retirement. Other

retirees who will be active in retirement include Jimmy Williams. He says "Jean, I didn't take a breath before you started to assign me all over the place." He is doing a great job with the criminal docket in Orangeburg. John Milling is in private practice, Buddy Nicholson will continue to serve, and we hope Choppy Patterson will as well. On the Family Bench, Barry Knobel, Tim Brown, and James Spruill are three very experienced judges. You all have done a beautiful job with their replacements who are Ed Dickson, Bubba Griffith, Bill Seals, Jeff Young, Alex Kinlaw, Edgar Long and Titia Verdin. They are all wonderful selections and if they aren't proof positive that our system works, I would invite the attention of anyone in this nation to meet these very first class judges, who you have selected.

Now, for a picture of where we stand in terms of how you fund your judicial system. These are hard times, but I don't bring you a message of complaint. I think there is a lot of hope in where we are now, but I want to be realistic with you and tell you where we are now. This slide will show you that when I came to be your Chief in the year 2000-2001, it cost about 46.5 million dollars to run the court system and almost all of it was provided by General Appropriations money. If you look down this chart to the fiscal year in which we are now operating, it costs 60 million dollars just about, to run the department. General appropriations money as I started the fiscal year only accounted for 38.7 million dollars of that fund. All of the rest of it is made up by fines and fees and this next chart shows you what that means in real terms. We started with 38 million dollars in General Appropriations money - the money you put in the General Appropriations Bill. We have received almost 9 million dollars in direct cuts plus the termination of our one-time money. So, we started the year with 29 million dollars in General Appropriations money. We get 15 million dollars from fines and fees that have been developed over the years. I don't like that way of funding the system and have talked to you about it before, but there just isn't anything else to do. Don't feel like you're doing something that is unusual. All across the country, state courts are increasingly depending on fines and fees as a significant part of their revenue because your resources are very strapped, in South Carolina, in particular. We continue to get every year 5.5 million dollars in federal funds and that is what I have used to deploy the State Case Management System. You can see the total funds I have available to operate the system - 50 million dollars and it costs 60 million dollars to run the system. That is a nine million dollar deficit, when you take the cuts and the supplemental one-time money and put them together.

What are we doing to address this crisis? We are reducing judges' travel, we are restricting travel for court reporters and law clerks, we are authorizing clerks of court to keep open court sometimes on a skeleton basis if they have local furlough days. Counties are now trying to cut money by having local furlough days. I told them you have got to keep the courts open to at least receive filings and have citizens be able to access records. I can cut court on some of these days. You can have a skeleton staff. You save money and I save money. We are trying that. We have a hiring freeze. I have cut in half the monthly reimbursements for office allowances for judges.

Frankly, I did that in recognition of the fact that you are considering some reductions in your own reimbursements, so we have taken that step. At the end of this fiscal year, advance sheets will no longer be available in printing. I would have stopped it now because it is a significant amount of money, but State Printing does the work and their budget depends on receiving that, so it is not a net savings to you as you go into the budget. At the end of this fiscal year I am not asking for any further funds for printing. It will all be available online and that is where it will be

accessed.

I understand that the things I have asked for, for years, additional circuit court judges and family court judges, judicial travel and even the money for court technology, is not money that can be brought to the system at this time, given the financial crisis. What other ways are we trying to revamp the way that we do business to try to solve this problem? Let me show you a slide that will show you what our circuit case load is like. We continue to be the highest in filings per judge of any state in the country. That is, we process more cases with less judges on the bench than any other state in the country. We also have a very tough record on domestic violence. Our child abuse and neglect filings are spiraling as are our *pro se* and self-representatives increase. It is a very difficult picture in which to have so few judges available. How are we disposing of cases? This caseload slide shows you that our criminal case load for the last three years continues to go upward, but our pending cases are also increasing. I will tell you in a minute what I have done with the solicitors to try to reengineer the way they call cases, because that is part of what it is going to take to reduce this backlog in General Sessions Court. In Common Pleas, that is your civil side of the docket, our filings are going way up and I can anticipate with foreclosures and everything, these are going to spiral up and our disposition rate is now falling behind. There is a benchmark for cases of 180 days. That is a national benchmark developed by decisions of the United States Supreme Court that says that your benchmark for disposition ought to be 180 days. Now realize that this is an average and in some cases it would take a lot longer and in other cases, a lot less. I have no circuits that are hitting that benchmark in General Sessions Criminal Court. I only have one circuit that is hitting that benchmark in Common Pleas and only two in Family Court, out of the 16 circuits we have in South Carolina. Something has got to give on that figure. I am not satisfied with that and I know you aren't either. So, here are some of the things that we doing to try to improve the efficiency with which we operate; specialized docket management is a part of it.

Solicitors' Differentiated Case Management is a fancy term for trying to get the solicitors to come up with a system that they use all the time and it is standardized about the way they handle their cases. This means that when a case comes in, from the time the arrest warrant is issued, and the time the attorney is appointed, you should have deadlines just like you would have in your private business. If you have a project you are working on, you don't say, well here is the project, and in eight months I hope it is completed. You have benchmarks and deadlines that have to be met to move that project along. The same ought to be true for criminal cases. The solicitors control the docket in South Carolina. We are the only state in the union where that is done, but they can control the docket and run it in a decent way, if they adhere to some kind of business management plan for how they do it. They have all signed an order with me agreeing to manage with deadlines. This means for a death penalty case obviously, your time frames would be different than they would be for running from a blue light.

Each case would have a deadline on when the attorney is appointed, when the discovery information is given to the defendant, when an offer of a plea is made, if one is going to be made, when motions are heard and appearances are made, when the attorney has the opportunity to accept or reject the plea offer, and when the case is scheduled for trial. That is the only way we are going to start managing this docket. When it is not managed that way, a lot of people sit in jails; your counties scream about that because these people are in jails, on the county's nickel, being housed until those cases come up for trial. Frankly, it is not enough now to have people

stay in jail until the solicitor decides that they have served enough time and then bring them up for trial and plead them for time served. That is a way of managing weaker cases, but the real way to manage is to look at them and be realistic about how to go forward with a case, what kind of plea offer to make, and how to dispose of the cases. We have got to start doing that.

Business Courts is another device for taking sophisticated business disputes, those that are business to business. A lot of them involve intellectual property, ownership issues, and funding issues and need to be put in a special docket that is managed beginning to end. I am experimenting with that in Richland, Greenville, and Charleston. The business community is very encouraging about that. It sends a message to business that it is going to locate in South Carolina-that if you have that kind of dispute-it will be managed and not just linger on a trial docket and never be moved forward.

We are using a lot of alternate dispute resolutions. That is increasingly becoming the way to resolve a lot of cases and it is a good thing. Defense, as well as plaintiff, and Civil cases like that way of resolving disputes and frankly, the bigger cases are now being resolved in that way rather than going to trial. That moves them out of the docket. We are strongly encouraging that and I am trying to use my case management system to develop data on how much that instrument is used so as to be able to tell you more realistically - do I need more judges or can I reengineer this system and use other kinds of processes to push our dockets along? We are going to find that answer out.

Alternate Dispute Resolution is one factor. We are going to get a lot more condemnation cases, if additional money comes to the State of South Carolina for bridge and highway construction. When those cases pend, as for example in Horry County when they built the new flyover to the beach, you can jam up a docket with 150 or 250 condemnation cases and nothing else moves. When that happened in Horry County, I got Ed Cottingham, a retired judge, who has got a lot of good mileage left in him and is very enthusiastic, to manage the whole condemnation docket in Horry County. We didn't end up trying but 5 of those cases and all 150 plus were resolved. Again, this is a creative use of ways of managing cases to move them through the docket.

Construction cases are another example. We are experimenting in Horry, Charleston, and Beaufort where they have got a lot of stucco cases and probably are going to get a lot more construction cases. Bad times give rise to more of those cases. Those cases end up settling on the courthouse steps a lot of times, but getting there is miserable. If you don't keep a judge behind the lawyers, sometimes these cases will involve multiple parties, sometimes 10 or 15 parties to an action, and multiple lawyers. If you don't keep that case managed, it just drags out forever. Cliff Newman has agreed for a year to manage the construction case dockets in those counties. That is going to be another way, if it works, that we will use to try to start pulling out cases that can be managed in a different way and moving them forward.

'Access to Justice' for the working poor is going to be a big issue in South Carolina. *Pro se* filings or self-represented filings are up considerably in South Carolina and many people who cannot qualify for legal aid, because they don't have that depressed income level, need a lawyer and can't afford one. How can we make it easier to access the court system? How can we develop forms, how can we develop policies, that don't put the clerks of court or the judges in the business of representing these litigants, but give the litigants a fair ability to take simple disputes

and resolve them without the need for a lawyer? That is what the Access to Justice Commission is looking at strongly and I have got some great people from business, from the legal services community, from the private bar, and from public service, who are working on this issue.

Other new initiatives include new guidelines for real estate closings. The subprime market illustrates all the more in my view the wisdom in South Carolina of having lawyer directed closings, but there is a big issue now about unauthorized practice of law and what other para-professionals can do. I know that issue is before some of your committees at the present time. I ask for a task force to look at this issue and say what are the guidelines, what is the lawyer's role, what are other professionals' roles in the process and I hope that we will be able to bring forth some guidelines. They won't be set in stone, they won't be mandated, but they will be some help to those who engage in closings and what needs to be done to protect the consumer.

We also are looking at proposed amendments to court rules in the area of evidence, civil procedure, and criminal procedure. Particularly in the evidence area, there has been concern expressed in this body about scientific evidence and expert witnesses. We have held a hearing on this very issue and hope to be able to help your two Judiciary Committees navigate this difficult issue, particularly as it impacts product liability and medical malpractice cases. Stay tuned, we hope to be able to have something to you this year on that issue.

The Access to Justice Commission is hard at work. We had eight regional hearings to discuss with real live citizens what the barriers to being able to access the court system are and work groups have now been established on self-represented litigants that I explained to you as well as some other areas that impact how people can represent themselves in court. That also involves training the judges as to how to respect and facilitate the appearance in court of self-represented people, developing a civil divorce package so that if your divorce does not involve property or custody and involves simple no fault grounds, you have got a package you can use rather than having to engage counsel to get your divorce settled. That has been approved by the various levels of our system that have to look at that and will be on the web shortly.

We are reviewing the appointment of South Carolina lawyers to represent people on a mandatory basis without fee. I don't like having to do that, but the United States Supreme Court requires that not just in criminal matters that would involve incarceration, but also in child abuse and neglect, termination of parental rights, and other things, that defendants are entitled to a lawyer. If you can't afford one, the question is who bears that burden.

Right now South Carolina lawyers, by order of the court, are bearing a lot of that burden. I want to see that picture change. I don't think it can change by simply fussing about it or even threatening as some have done. I think it has got to be a partnership between this body and the Bar and hopefully the court system as well. I have asked 'Access to Justice' to take a good hard look at what would be some suggestions in this area. We hope to be able to present those to you this year.

Thank you so much for at the end of the session approving the Sentencing Commission legislation. The Sentencing Commission has been set up. It is having another meeting tomorrow. We are hopeful of getting funding from the PEW Charitable Trust to underwrite this very important effort that addresses consistency in sentencing, lengthy sentencing for violent

offenders, but alternatives to incarceration for non-violent standards for parole, bond standards for re-offenders, and the economic impact of our sentencing system. That and more are on the plate of this commission. I think it is very important work. It has a lot of financial implications for what you do with the corrections systems and it has a lot of financial implications for what our work force is about. We don't need to have a huge divide between an immense subclass of our population that is housed in penitentiaries for years and years at a time. We need to look at this situation and see what we really are doing societally to protect against the violent, but at the same time try to move our society along in such a way that those who can do something else with their lives rather than sit in the penitentiary, can be productive citizens, can be helped to achieve those goals.

Technology update, as you know, has been a signature issue of my administration as your Chief and the biggest way I have tried to reengineer the system to be more effective. It is funded almost entirely with congressionally mandated award money, but unlike some earmarked programs that fund a couple of gas masks that end up on somebody's shelf forever, this system is a model for the nation. The Department of Justice came to audit us this December and wants to showcase our internet based system to show how a small rural state can use an internet based system that the state owns and runs and puts money back into, from fees that counties spend for the system and how that system can be replicated in other states. We probably receive eight calls a week from area states asking to come and look at this system. I will venture to say without a fair contradiction that there is no other deployment of any automated system in any place in state government that has proceeded as successfully as this one. I say that with all lack of modesty. It is the result of can-do people at the county level. We started from the grassroots in magistrate's offices and in clerks of courts offices and in the poorest counties in the State with the notion of what we can do to empower them with the little resources they have. We have wired poor counties, we supplied them with computers, we supplied them with the software system that we own and that the clerks of court and the judges and lawyers help us update. We provide 24-7 support for this system and it really is a wonderful success story for many counties that limped along on their own with a vendor driven system that they couldn't control and simply spent a lot of money on that they never saw the return for. That system is now 71 percent deployed in South Carolina. The gold counties are the deployed counties. The green are the ones we are in actively now and the next online are the blue. Last year, I reported to you that this system was 47 percent deployed. It is now 71 percent deployed. By the end of this year it will be 81 percent deployed. I hoped to have the system completely deployed by the year 2010. That is an immense success story for the people of South Carolina.

I told you about the solicitors and the need to have them manage their system. So here is the status of their system. They came to me when I wanted differentiated case management and said we don't have the software to manage this, we don't have the tools, and we are short of funds to be able to get a system that would run all of our offices. I said, I would go get a federal grant for that. You develop a system, I'll get a grant, we'll put it out to get a vendor and move forward. We've done that. The gold counties are those in which that system is now deployed and the green are the ones who signed contracts and in which deployment is taking place now. By the end of 2010, and maybe a little earlier than that, every solicitor's office in the State will manage their General Sessions and Magistrates docket on this case management system, which integrates and interacts and interfaces with our system.

The big thing that I am adding to it, that we just signed contracts for, is to develop an interface with SLED so that judges, prosecutors, and anybody else who needs it, will get up-to-date real-time information about rap sheets. When you have a defendant that is ready to be sentenced for a particular matter or when you have a juror you are trying to check out to see if they have got a conviction and ought not to allowed [sic] to serve, or you're trying to check out a witness to see what kind of background the witness may have, it is very onerous to try to access that database at SLED and NCIC - the way we do it now. We are in the modern computer age, why can't we have an interface with our court case management system and with our solicitor's system that does that live real-time that gives you exact up-to-date information.

That is what we are going to have by September. I venture to say this will give better access to not only prosecutors and law enforcement, but also to public defenders and everyone else, the ability to be able to truly manage with accuracy, the multiple offenders who jump from county to county and fall through the cracks. You will have an accurate piece of information in front of you when you go to sentence these folks.

For the good of the order I've just got to take a minute to thank everyone on behalf of the court system in South Carolina, for the House Law Enforcement Criminal Justice subcommittee. Annette Young is the longtime Chair. Gary Simrill has been a member for many years and is joined this year by Representative Joe Neal. The Senate is now called the Senate Constitutional and Administrative subcommittee. Longtime Chair is Dave Thomas and John Land and Greg Ryberg have been members of this subcommittee for many years. I can't thank you enough for the understanding reception you have given us when we have explained where we are and what we are doing. We are trying to reengineer to cut the costs. We have saved a little money in carryovers every year. I have been cheap and we are using some of that, but not all of it. We try to make it through these tough times. But when we present our technology systems to the State Bar Convention, Senator Graham was there and this is what he said; "The technology and reengineering efforts of South Carolina's Judicial Department are a model for other jurisdictions across the nation. They are innovative, yet practical. Improve operations today and establish a basis for the future." That is a pretty good endorsement of what we are doing.

I end with this. I always have a reminder of my grandson, Patrick, to close any speech I make. Most particularly when I come home to the place I started in state government-in this very Chamber. I am very optimistic about our court system and our state government. South Carolina has made it through a lot harder times than the times we are going through today. It is going to take decency and compassion and cooperation on the part of all of us to move forward and to be imaginative about what we do with the resources we have. I still say this Joint Assembly is an example to the nation of what it can be like to work in concert and what it can be like if concerns of ideology move aside for a moment and concerns for real people move to the fore. That is what I've heard in every committee I have been to when I talked about what we are trying to do as a court at this time. So, don't let anybody sell you on the idea that what we do as a General Assembly has to be driven by any other consideration than the progress we can make for the citizens of this State. I am confident because I know them well. The leadership of these two bodies and every member is devoted to that goal. On behalf of the many you don't hear, whose faces you never see, and on behalf of the very youngest, like my Patrick, continue the good work and the good effort for the progress of South Carolina. Godspeed.