

State of the Judiciary
Chief Justice David E. Gilbertson, South Dakota Supreme Court
Message to the Legislature
January 11, 2017, in Pierre, South Dakota

Governor Dugaard, Lieutenant Governor Michels, members of the Legislature, Constitutional Officers, my fellow Justices, Judges, Unified Judicial System (UJS) employees, and all citizens of the State of South Dakota.

In March of 1861 as the United States was on the verge of tearing itself apart in a bloody Civil War, Congress passed the Organic Law creating the Dakota Territory. This initial government was modeled after the federal constitution and divided up governmental authority into the legislative, executive, and judicial branches. In 1889 the constitution of the new state of South Dakota continued this model. It remains a fundamental “bedrock” of our republican form of government.

In arguing for adoption of the United States Constitution, James Madison set forth the reasons for the necessity of three branches of government: “It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If [people] were angels, no government would be necessary. If angels were to govern [people], neither external or internal controls on government would be necessary.”

Now, 128 years after the adoption of the South Dakota Constitution, that format continues to stand the test of time and works well for the benefit of our citizens.

ELDER ABUSE

There is legislation that produces little and legislation that produces a lot. In the 1880’s, German Chancellor Bismarck proposed providing retirement benefits for the working class of the German nation. For a leader known for his military prowess, this social legislation shocked the world. The retirement benefits, however, did not begin until the worker reached the age of 70. At that time the average life expectancy of a German worker was age 55. The law was, in reality, an illusion of smoke and mirrors.

Last year this Legislature passed SB 54 which, for the first time, provided broad, across the board, protections for South Dakota’s senior citizens. Under this act, protection begins when a South Dakotan reaches age 65. As we all know, life expectancy in South Dakota now extends well past that age.

As my father-in-law told me, “getting old is not for the timid.” SB 54 makes that journey more safe and comfortable. It does so for two reasons. First, it shows that South Dakota and its citizens care about its seniors. Second, it provides significant protection against abuse. The United States Supreme Court has said on many occasions that “[t]he right to be let alone is indeed the beginning of all freedom.”

SB 54 contains important protections for South Dakota's seniors. For the first time emotional abuse is a criminal offense. We join with 38 other states in making the perpetrator of emotional abuse civilly and now criminally liable. For a violation to occur the perpetrator must be the elder's caretaker and the emotional misconduct must be willful, malicious, and repeated. A careless or negligent act is not a crime. It comports with United States Supreme Court Justice Oliver Wendell Holmes Jr.'s observation that, "even a dog distinguishes between being stumbled over and being kicked." As with domestic abuse, the courts and law enforcement can protect a victim through a protection order and the prohibition of stalking.

In the past, many instances of elder abuse were written off as family squabbles because law enforcement and part-time prosecutors were not familiar with which abusive acts were criminal. This law provides funding for the Attorney General to hire a full-time elder abuse prosecutor and a full-time investigator. It is modeled after a successful program in California. Although this position has only been in existence for six months, the Attorney General reports that the caseload has exceeded his original expectations. There have already been 135 referrals to this new position.

The penalty for financial exploitation of an elder has increased from a misdemeanor to a felony. Previously, a bank or other financial institution suspecting financial abuse of an elder could only report the suspected abuse to federal banking authorities and that report never made its way to South Dakota law enforcement officials. Now banks may also report the matter to the Attorney General who will maintain a central registry of reports and have the ability to investigate and prosecute.

A civil cause of action is available against a person who financially exploits an elder. Should the elder prevail, he or she can recover compensatory damages, punitive damages, and reasonable attorney fees in appropriate cases.

SB 54 reins in abuses in the creation of joint-tenancy accounts. If a person uses a joint-tenancy to financially damage an elder, the court may sever the joint-tenancy and return the funds to the elder unless the other joint-tenant can prove financial contribution to the account.

If financial misconduct is committed by a person who stands to gain through a will or other device upon the elder's death, the court may order the forfeiture of the perpetrator's interest in the will. A perpetrator will no longer be able to literally and improperly "probate" an elder's estate while the elder is still alive.

While SB 54 will not cure all aspects of elder abuse, it will make it more difficult to prey on vulnerable elders and easier to protect them. It certainly makes the temptation less inviting or profitable. As President John F. Kennedy observed, "It is as old as the scriptures and as clear as the constitution. The heart of the question is whether ... we are going to treat our fellow Americans as we want to be treated." Since those elders who need protection cannot be here today, I wish to thank this Legislature, on their behalf, for giving its time and attention to this most important task.

MENTAL ILLNESS AND THE COURTS

In November of 2015, the press reported on the significant increase in the number of people accused of crimes who could not move forward in the criminal justice system due to questions of their mental competency. This is not surprising. According to the Kaiser Family Foundation, South Dakota only has enough mental health professionals to meet 15 percent of the need for mental health services in our state. In the criminal justice context this matters because before a person can enter a plea to a criminal charge, he or she must have the mental competency to understand the charge and assist in their defense. The number of orders for competency evaluations entered by the circuit courts increased from 48 in FY 2013 to 147 in FY 2015. This is a threefold increase in just two years. Having these people languish in a county jail awaiting competency evaluations is not the right way to treat them. It also clogs the criminal justice system and costs additional tax dollars. I believe many of these unfortunate South Dakota citizens are veterans who have run afoul of the law because of PTSD or attempts to self-medicate or mask their problems through substance abuse.

Last November, I called for a task force to address this situation and other challenges at the intersection of mental health and criminal justice. I was quickly joined and fully supported by Governor Dugaard.

Together we created a task force which brought together 22 key stakeholders in the criminal justice and mental health fields. We met for the first time in March 2016 and continued to meet monthly until our work was completed last October. The task force received financial support from the Leona M. and Harry B. Helmsley Charitable Trust.

The task force had three goals:

- (1)** To improve public safety and treatment of people with mental illness who come into contact with the criminal justice system;
- (2)** To more quickly and effectively identify people suffering from a form of mental illness; and,
- (3)** To better allocate limited local resources in order to improve early intervention and preserve limited jail and prison resources for violent, chronic, and career criminals.

The task force drafted a comprehensive report which details many facets of mental health issues affecting defendants who are facing criminal charges in South Dakota's court system. The report proposes legislation that will be presented to this Legislature for consideration. It broadens the definition of professionals authorized to conduct competency evaluations to national standards approved by the American Bar Association. 30% of the other states have already proceeded in this direction. This should speed up the process and save taxpayer dollars. The report also recommends creating a mental health court in Pennington County as an alternative method to treat people with mental health issues who come into contact with the criminal justice system. I have requested funding for this pilot project as part of the UJS budget.

To assist rural law enforcement, the task force recommends investment to promote the expansion of crisis services. The task force also recommends the expansion of a telehealth infrastructure to provide a telehealth option for competency evaluations. The task force further recommends other

proposals. Examples include training in this area for law enforcement, prosecutors, judges and probation officers to educate them on the signs of mental illness and how to better deal with it in the law enforcement and judicial systems.

I would like to thank the members of the task force for their many months of study and hard work that went into the preparation of the report that you now have. This is a fine example of South Dakotans confronting a South Dakota problem and coming up with a South Dakota solution.

DRUG AND ALCOHOL COURTS

A new wave of evil has descended upon our citizens. From Sisseton to Hot Springs, from Harding County to Union County and all points in between, an explosion of addiction mainly driven by methamphetamine is occurring both in rural and urban areas of South Dakota. Ask any law enforcement person from the Attorney General down to the officer on patrol and they will tell you in the last year or two, the problem has exploded. Judge Susan Sabers estimates in her Minnehaha County criminal docket, 95% of the felony cases involve meth. It is no different on the rural front. Sheriff Curt Hall of Faulk County estimates 90% of those in his jail are there because of drug use and 100% of the domestic abuse calls involve drugs.

South Dakota is fortunate to have programs in place for alternative sentencing including drug, DUI, and veterans courts as well as the HOPE program. Without these we would be faced with the unfortunate situation of building a new women's prison and a new men's prison and staffing them on a 24/7 basis.

Drug and alcohol courts in South Dakota continue to grow and expand. As of July 1, 2016, there are eight drug courts, four DUI/alcohol courts, two drug and DUI courts and two veterans courts for a total of 16 courts. This includes a new drug court in Brookings and significant expansion in Minnehaha and Pennington counties.

The number of participants served continues to grow. In 2008, the first year of operation in the Northern Black Hills, we had six participants. In 2015 we served 314 participants. We now actually possess the capacity to serve 450 participants on any given day compared to last year's ceiling of 290.

Our history is positive in moving the programs forward:

YEAR	PARTICIPANTS SERVED
FY08 TO FY12	153
FY13 TO FY16	616
FY17 (projected)	614

Because of our increased numbers, the cost per participant served has dropped due to economy of scale. In 2015 the cost was approximately \$9000 per year, per participant. With the increased

numbers that figure has fallen to \$8300 per year, per participant. Compare these figures with the \$25,000 cost of a year in the penitentiary. We now treat three participants in our drug and alcohol courts for the cost of a single inmate in the penitentiary for the same period of time.

The financial savings and the human gains do not end there. Our drug and alcohol court participants are parents of 707 children who, if their parents were in the penitentiary instead of our programs, would be the wards of DSS at \$10,000 per year, per child. Instead, these 707 children are living with and being supported by their parents. Thus, in one year, we saved taxpayers \$7,070,000 in child care costs.

Additional savings are realized by not having people with addictions clogging our hospital emergency rooms and placing additional burdens on the medical system paid for by taxpayers either in the form of increased medical costs or county poor relief.

While these are good numbers, they are only numbers. The human gains are just as important. In March, I had the opportunity to speak at the DUI court graduation in Rapid City. Five proud people graduated that day. One, with 658 days of sobriety, told of his attempt to defeat alcohol. Although he was only 47 years old, he had been in the penitentiary five times for DUI and failed treatment 15 times. He found sobriety and a new life through the Pennington County DUI court. Summing up the change in his life, he reflected, "everything is better from top to bottom." He now occupies a job rather than a prison cell.

I encourage you to attend a drug or alcohol court graduation.

They are public events and everyone is welcome. I have yet to attend a graduation where people were not moved by hearing graduates speak about their struggle with addiction and the positive turn-around their lives experienced as a result of an arrest which led them to these fine programs.

Sadly, not all of our participants succeed. This past July a participant graduated from one of our drug courts. His future looked bright. On July 26th he was found in a hotel room dead of an opioid overdose. He left behind children who now have no father. We lost a second participant to an overdose in September. We have to face the fact that when we deal with drug and alcohol dependent criminal defendants we are fighting an addiction, and a powerful addiction at that. It is a bitter fact of reality that while we will succeed with a good majority of our program participants, we will not succeed with all. In prior years the consequences of the failure of a program participant were continued addiction and a trip to the penitentiary. With the recent introduction of more powerful and lethal illegal drugs into our state, the consequences of failure now can be death.

VETERANS COURT

The veterans court concept is slowly expanding. There was great excitement in Watertown last spring when the veterans court held its first graduation. With the retirement of the program's founder, Judge Robert Timm, Judge Robert Spears, a former Marine, became the program director. Minnehaha County also started a veterans court program under the leadership of Judge Mark Salter who is also a veteran.

Pennington County is waiting for full funding to start a veterans court. It, however, has started a “veterans track” probation program. It has 128 veterans on probation; 80 are on felony probation. They receive special attention because they have returned from the service with potential service- related problems.

At the end of the horrific Civil War, President Lincoln said, “Thank God I have lived to see this day. It seems to me that I have been dreaming a horrid dream for four years and now the nightmare is gone.” We hope veterans who complete our program will be able to put their demons behind them and say the same.

These programs could not move forward without the full cooperation of the Veterans Administration in South Dakota. It has given us access to both in-patient and out- patient treatment for the veterans who need it.

THE HOPE PROGRAM

As I mentioned, drugs are becoming an increasing problem in our rural areas. The HOPE program was instituted as a pilot program in 2013 to combat the rural drug problem. HOPE stands for Honest Opportunity Probation Enforcement and is modeled after a successful program in Hawaii.

As a condition of supervised probation, participants follow the requirements of HOPE probation under the supervision of a specially trained Court Services Officer. The program focuses on drug offenders with a high risk to reoffend. Random, frequent drug testing is a key component of HOPE. There are swift, certain, and proportional sanctions for noncompliance with probation conditions or failing a drug test.

The first pilot program was initiated in Walworth County in 2014. It was successful and resulted in programs in Brown County, Charles Mix County, Tripp County and Gregory County. The outcome has been positive. A significant number of individuals have been served and there is a high rate of success. In 2014 we served 11 participants. One graduated. In 2015 that number grew. We served 53 participants. 11 graduated. By 2016 we had 96 participants with 26 graduating. “But for” this fine program, many of these participants would be in the penitentiary or would have re-offended resulting in a penitentiary sentence. Judge Scott Myren, the creative force behind this program, estimates 80% of the people who complete the HOPE program would have failed conventional probation because of continued drug use.

Last year this Legislature recognized HOPE’s success, removed its “pilot” status, and allowed statewide implementation of HOPE probation. Statewide protocols have been put in place to ensure consistency. Given the effectiveness of this program, it is the goal of the UJS to use HOPE in a significant number of counties across the state, affording offenders the opportunity to remain in their communities under HOPE probation supervision and to stay out of the penitentiary.

PROBATION SERVICES

Probation is a form of supervision for adult convicted felons. It does not get the public attention that incarceration in the penitentiary or a county jail receive, or participation in drug and alcohol courts, or other alternative sentencing programs receive. Yet, there are more people on felony adult probation in South Dakota than in the penitentiaries, the county jails, and the drug and alcohol programs combined.

While there has been significant growth of the penitentiary population, the county jail population, and other alternative sentencing programs, the growth in the number of people on felony probation is measured in the 1000's:

FISCAL YEAR ENDING	CASES OF ADULT FELONY PROBATIONER
FY11	5130
FY12	5149
FY13	5892
FY14	6893
FY15	8006
FY16	8634

These numbers do not reflect the total number of people on probation. We also supervise juveniles, people convicted of misdemeanors, and Interstate Compact felons from other states. The result is increased pressure on our Court Service Officers who are responsible for supervising probation. The average individual caseload has increased from 88 per CSO in FY 2011 to 114 in FY 2016. The nationally recommended caseload is a maximum of 80. The rubber band will only stretch so far before it breaks.

Cost is a significant consideration. Were the 8634 cases committed by felons in FY 2016 placed in the penitentiary or alternative sentencing programs, those institutions and programs would be overwhelmed. The state could not afford the increased cost. Yet, if those 8634 cases committed by felons continue on probation, they are supervised for a cost of \$3 per day per probationer. That is a bargain.

Does this mean everyone should be on probation? Of course not. Dangerous felons, career criminals, sex offenders and the like belong in a penitentiary. Those seriously addicted to drugs or alcohol belong in our drug and alcohol courts and other treatment programs. The vast majority of the 8634 people on adult felony probation however, remain on, or successfully complete, probation.

RURAL ATTORNEY PROGRAM

In 1862 our first Territorial Legislature met in Yankton. One of its first acts was to organize local government by counties. The construction of courthouses provided a place where citizens conducted the day-to-day legal business that affected their lives. That method continues to this day and will do so into the future.

I never tire of getting into the car and visiting one or more of our 64 courthouses. As South Dakota is the land of “Infinite Variety,” so are our courthouses. They are large, small, old, new, humble, palatial, and everything in between. Three pre-date statehood and are still in use. A courthouse, solely as a structure, serves a very limited function. It is only when one considers what happens inside the courthouse walls, that these buildings acquire a special and unique significance in our society. Courthouses are used to provide justice, resolve disputes, and keep the peace. While participants come and go, the building, and more importantly what it is used for, endures. As the prophet Amos declared over three thousand years ago, “let justice roll down like waters.”

The availability of attorneys in rural areas of South Dakota is essential to the successful operation of our state’s legal system.

Without them a courthouse is little more than any other public building. No legal system can operate on “auto-pilot.” It takes the professional skills of an attorney to keep the system moving.

48 of our 66 counties have a population of under 10,000. The few remaining urban areas cannot become isolated outposts of justice. If they do, it is only a question of time before they topple and the entire legal system begins to collapse.

South Dakota’s rural attorney program continues to be a model for the nation. Its goal is to place licensed attorneys in counties with a population of under 10,000 by providing financial incentives to the attorney to practice full-time in that county for five years. The financial incentive is in an amount equivalent to the cost of an in-state legal education. The program lends a helping hand to those attorneys who want to establish a law practice in a rural area. As President Ronald Reagan noted, “There are no easy answers but there are simple ones.”

Originally this Legislature authorized funding to place 16 attorneys and gave us five years to complete the project. Although each county has individual needs, we were able to fill all 16 slots in a little over two years. We then received legislative authorization to re-direct UJS funds to create an additional 16 slots. We took advantage of this second authorization and now have contracts with 17 counties.

The shortage of attorneys in rural areas is not just a problem for the so-called “fly-over” states. 48 of the 50 states have the same rural attorney problem. These states can benefit from the success of our program. I was pleased to be able to spread the word of this South Dakota success when I addressed the American Bar Association in February and a legal services forum in the White House last April.

The current law limits participants to counties under the population cap of 10,000. There are, however, smaller municipalities in larger counties that could benefit from program participation.

As an example, the town of Wall is hardly a suburb of Rapid City. I will offer this Legislature the opportunity to expand the scope of the current program to include municipalities with a population under 3,000. No additional tax dollars will be required, just expansion of the existing program to include these rural municipalities along with the rural counties.

To show the essential nature of the rural attorney to South Dakota, simply think back on each topic I am discussing today. How many could function without the direct involvement of an attorney? How many small counties and cities could function without legal services? Will we repopulate the land with attorneys available to all no matter the locale? Probably not. But as my friend, Chief Judge Judith Kaye of the New York Court of Appeals observed, "We might not be able to move mountains but we sure can try to nudge them a bit."

SOUTH DAKOTA BAR EXAM

South Dakota and its legal community have a vital interest in maintaining competence in all areas of the law, including Indian Law. As President Thomas Jefferson declared, "If a nation expects to be ignorant and free...it expects what never was and what never will be."

Each of our nine Indian reservations has a tribal legal system and court. Federal statutes play a significant role in the area. Despite its importance, very few South Dakota attorney practitioners possessed a working knowledge of Indian Law when I started practicing law. In 2002, after several years of my urging, the Supreme Court modified its requirements for the South Dakota bar exam and required mandatory testing on the subject of Indian Law. The rationale was simple. To pass the South Dakota bar exam one would have to know the subject of Indian Law and be competent in that area of law. South Dakota was the second state in the nation to test on Indian Law.

The results are impressive. The legal profession in South Dakota now, in large part, possesses the legal skills to practice in this area. This puts us on the right path as commerce and other contacts with the tribes increase and federal laws such as the Indian Child Welfare Act have great impact.

I am opposed to any modification of our bar exam that would have the ultimate effect of removing Indian Law from our legal scene. My position is strongly supported by the Supreme Court and the Board of Bar Examiners. While other states may choose to go with standardized tests that do not include an examination on Indian Law, South Dakota's best course of action is to continue to administer our bar exam on an independent basis consistent with the best interests of all our citizens. Cooperation between the tribes and the state must be more than mere words. It must also be deeds. As Benjamin Franklin observed, "Well done is better than well said."

LEGAL SERVICES

The South Dakota Constitution's Bill of Rights guarantees that: "All courts shall be open and every man for any injury done him in his property, person or reputation shall have remedy by due course of law, and right and justice, administered without denial or delay." For all too many South Dakotans who cannot afford the services of an attorney, this promise is hollow. Trying to navigate our legal system on your own without an attorney carries with it about as much chance

of success as doing surgery on yourself.

For far too long, the three legal aid services in South Dakota that provide legal services to those who cannot afford them have been underfunded and understaffed. Limited federal funds and additional contributions from concerned organizations cannot come close to filling the need that exists. The bulk of the need is in the area of domestic relations. Imagine you, as a parent, having the future custody of your children decided in a court proceeding with you acting as your own attorney. Nationally, 81% of domestic relations cases find one or both of the parties unable to afford an attorney. They must represent themselves in these important cases the best they can.

Three years ago I invited the three legal services entities to participate in discussions about increased efficiency and coordination. While we had fruitful discussions, the core problem was, and still is, the lack of funding to meet the needs. It is time to have a serious discussion about how this crisis can be solved.

SUPREME COURT LAW LIBRARY RESTORATION

I never tire of coming into this beautiful Capitol. It was restored in the 1980's to look as close as possible to the day it was opened over 100 years ago. It is a source of pride for the citizens of South Dakota. In 2014 the gorgeous stained glass, which was in dire straits, was restored. There remained, however, one large public area of the building which was not restored -- the Supreme Court's law library.

Every time an appellate court issues a decision is it carefully recorded in a law book. Over the decades that amounted to a lot of law books that were continually added to the Supreme Court's law book collection. It was only a question of time before we ran out of space for more books.

About 10 years ago technology stepped in and made the bulk of legal research materials available online. Literally overnight, the necessity for a majority of the law books disappeared. This allowed the Supreme Court to contemplate restoring the law library to how it looked in 1911. Unfortunately we did not know what the law library originally looked like. Through a bit of luck we located a 1911 copy of the Western Architectural Digest which showcased a photograph of the law library when the Capitol opened.

Armed with this picture and the ability to discard law books replaced by computer terminals, we started to hunt for a rumored mural covered by bookcases. Removal of the mezzanine bookcases established there never was a missing mural. While the rumor had the makings of a great story, in the end it was not factually accurate. However, we did find names of distinguished Dakota Territorial and early South Dakota Supreme Court Justices painted at the top of the library walls. For unknown reasons, these names along with gorgeous patterns and stenciling had been painted over long ago. Beautiful hardwood floors were covered up with now well-worn carpet. Vintage Victorian brass lighting was discarded in favor of functional, but ugly, florescent lighting.

After careful research and restoration work by people who take great pride in their crafts, you are now invited to step back into time and view the Supreme Court law library as it looked when the building was open. While most of my tasks are important and interesting, very few qualify as

“fun.” This project was “fun,” and we take great pride in now having a fully functioning Supreme Court law library that also carefully preserves the past. You are invited to visit it during our normal business hours.

CONCLUSION

For the past year it has been my privilege to serve as President of the Conference of Chief Justices. This is an organization made up of the Chief Justices from all 50 states, the District of Columbia, Puerto Rico and our Pacific Territories. This has been an interesting and intense year, and I have learned much from my contact with these jurisdictions. It is clear that each jurisdiction has its own legal needs and challenges. The message I wish to bring to you today is that based on what I have observed this past year, South Dakota’s legal system, while not perfect, is heading in the right direction and stacks up well in its attempts to meet the legal needs of our citizens and those who enter our state. To quote that sage philosopher, Dorothy, in the Wizard of Oz, “Toto, there is no place like home.”

When I was growing up in the 1950’s in this state, it clearly was a simpler time. Most houses had front porches. In the evenings in good weather one would sit on the porch and visit with people who happened to stroll by. Everyone knew everyone else so this was a way of communicating face-to-face rather than by smart phones. It was a way to maintain cordial relationships with the neighbors. Gone are most front porches. They have been replaced with backyard decks with “privacy fences” around them. While I have no complaint with a person seeking privacy, some of the concern one neighbor once had for another has been lost.

Hopefully the programs I have reviewed today will help fill that void. As Mark Twain once observed, “20 years from now you will be more disappointed by the things you didn’t do than the ones you did do.”

With technology, attention spans seem to be getting shorter. We should not pass by on the other side of the road like the priest and the Levite in the parable of the Good Samaritan. The most important part of a person’s life is the impact it has on others.

This completes my report to you. I would like to avoid the observation of a church member who once told my Father about another minister, “His sermon was too long. He had seven good chances to quit and missed them all.”

Respectfully Submitted,
David Gilbertson
Chief Justice