

State of the Judiciary
Chief Justice David E. Gilbertson, South Dakota Supreme Court
Message to the Legislature
January 9, 2019, in Pierre, South Dakota

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

The writer of the ancient Book of Ecclesiastes declares to everything there is a season. 2019 opens with significant changes in state government. We have a new Governor, Lieutenant Governor, and Cabinet. We have many new legislators and important changes in legislative leadership. A new Attorney General has taken office.

In the past four years the court system has welcomed three new Justices to the Supreme Court. A fourth will arrive shortly. We have also welcomed 21 new Circuit Judges out of a total of 43 Judges, and 13 new Magistrate Judges out of a total of 16 Magistrates. And, after 29 years of service, Thomas Barnett retired as Executive Director of the State Bar of South Dakota and was replaced by Andrew Fergel.

We do not ignore the past, however, and start totally anew. As Pulitzer Prize-winning author and Presidential historian Jon Meacham noted:

To fail to consult the past consigns us to what might be called the tyranny of the present--the mistaken idea that the crises of our own time are unprecedented and that we have to solve them without experience to guide us... If we know, however, that those who came before us found the ways and means to surmount the difficulties of their age we stand a better chance of acting in the moment with perspective and measured judgment.

Armed with the lessons of the past, we have a great opportunity to move forward with new vigor and new ideas to address old problems and come up with new solutions. This is the essence of democracy--at regular intervals it re-invents itself.

Change does not, by itself, guarantee success. Those who now assume leadership roles still need to communicate with, challenge, and properly motivate our citizens. This is crucial for a judicial system because it has no army or police force to enforce its decisions. It in large part relies on public consent to the judicial system and its decisions. It could not function if it were relegated to a category of "fake news." While such terms may be modern, the concept has existed over the ages. Over 2000 years ago, a Biblical prophet warned that the time will come when people will not listen to sound doctrine. Instead, they will follow their own desires and will collect more and more teachers who will tell them what they are itching to hear.

RURAL ATTORNEY PROGRAM

The South Dakota Rural Attorney Program continues to be the gold standard for every state in

the nation that lacks attorneys in rural areas. The problem exists in every state in the country. Even California and New York have rural counties that need attorneys. I am pleased to report that we currently have contracts with 24 rural counties in South Dakota to assist them in placing an attorney in their county. Since 48 rural counties are eligible for participation that is half of the eligible counties in the state.

A recent expansion of the law allows the program to benefit municipalities with a population of 3500 or less. We are in discussions with several municipalities. I am pleased to announce that the City of Elk Point is our first municipal contract. We hope to enroll at least two more municipalities in the near future.

From time to time I receive questions about the success of the program. The program has been in existence for five years. That allows us the opportunity to review how it is doing. All the trends are positive. Chief among them is that not one attorney who has gone into the program later left a rural practice due to lack of available legal work. The need is there and the need is being met.

I have been asked how many attorneys have signed up for the program and later left for any other reason. That happened in only one of our 24 counties and under very unique circumstances. In that one case, we were able to replace the vacancy within a matter of months and the county continues to enjoy the benefits of the program.

I have also been asked how many people who signed up for the program were not able to participate because they failed to pass the South Dakota bar examination. At the end of FY 2018, of the 24 counties, only one county had that experience. In that county, the person who initially failed the bar exam subsequently passed it and today is practicing full-time in that county.

It is clear that we are obtaining quality participants to go into the South Dakota Rural Attorney Program. Both the attorney and the county are beneficiaries. This is taxpayer money that is well invested and will pay long term benefits for the participant counties and the state. It assists the infrastructure of these rural counties to vibrantly expand and grow, rather than wither away and ultimately become uninhabited with only remnants of courthouses and what once was a thriving rural society.

DRUG AND ALCOHOL COURTS

When I first started to advocate for Drug and Alcohol Courts, I was called upon to justify why they were needed. Some saw drug and alcohol addiction as a minor irritant in a society with larger problems to deal with. However, the UJS proceeded knowing that the need was substantial and growing. Today, one cannot pick up a newspaper or listen to the news without being overwhelmed by the effect drugs have on society. They are everywhere. In the last decade, South Dakota's population grew 8.23% while drug offenses increased an alarming 222 percent. That hardly balances the scales of justice.

This curse plays no favorites in selecting its victims. It strikes both sexes, all races, and people in rural and urban areas of South Dakota. A simple question to ask is where are drugs not a problem? The simpler answer, sadly, is "nowhere."

Law enforcement officers who deal primarily in the area of illegal drug suppression say that in a perverse way, drug addicts are staunch advocates of the free enterprise system. Addicts believe in the law of supply and demand by buying whatever drug is available and whatever drug is the cheapest. Thus, what started out in 2007 as a Drug Court program to deal with meth, has now been forced by the evolving nature of addiction to address prescription drugs, synthetic meth, heroin, and fentanyl-laced drugs. The list expands by the month.

Drugs do not respect age. Law enforcement officials, prosecutors, and judges report an increase in drug use by juveniles. The most problematic situation is where a juvenile uses meth or other drugs because the parents or adult figures in his or her home are addicted. It does not do a lot of good to be told in school about the evils of drug usage when one is confronted with it daily, at home, by parents. Between 2000 and 2018 enough Americans died of drug overdose to wipe out every man, woman, and child in South Dakota. Were this state totally obliterated, it would be front page news world-wide. While the current drug crisis gets some public attention it falls well short of what it deserves, presumably because the deaths occur one at a time.

Drug and Alcohol Courts continue to grow and are a vibrant force to save people from the curse of drug and alcohol addiction. Last year these courts served 490 clients. One hundred four clients completed the programs and graduated. What happens to these graduates? Seventy-three percent continue to be productive citizens who contribute to society by holding jobs, maintaining homes, and supporting their families. That is in stark comparison to those who fall back into addiction and are placed in the state penitentiary.

The cost of participation in these programs continues to be approximately one-third of the cost of sending a person to the state penitentiary for a year. In addition, 1266 children of program participants live with their family rather than becoming wards of the State of South Dakota at \$10,000 per-year, per- child.

For many years, I have encouraged members of this Legislature to attend Drug and Alcohol Court graduations to see firsthand the positive effect these programs have, and to hear each graduate's life story. Many of you have done so and have told me how impressed you were. A graphic visual example of what is accomplished is to see a person on the first day they are enrolled in the program and compare that with the person you see on graduation day. The difference is startling. They were able to follow Winston Churchill's advice: "When you are going through hell, keep going."

It has been said there is no way to place a value on human life. However, I can do that in a limited way today. It is \$8065. That is the cost of keeping a person in our drug or alcohol programs for one year. As I previously noted, it is about one-third of the cost of keeping a person in the penitentiary for that year. It is probably cheaper than a funeral which is where those with addictions are ultimately headed unless the deadly downward spiral of addiction is broken.

MENTAL HEALTH AND THE COURTS

In 2015 the media alerted the public that people accused of crimes were being held in county

jails longer than necessary while they waited for an evaluation to determine if they were competent to enter a plea to their criminal charge. For unknown reasons the number of court-ordered competency evaluations jumped from 48 in FY 2013 to 147 in FY 2015. As a result, a defendant was stuck in limbo in a county jail while waiting months for an evaluation. After reviewing extensive task force recommendations this Legislature passed comprehensive legislation in 2017 addressing the intersection of mental illness and the criminal justice system. The legislation broadened the definition of who could perform a competency evaluation to reduce delay and provided a funding mechanism to assist counties with the costs of these evaluations.

This legislation has achieved very positive results. The average time to complete a competency evaluation has been reduced from the four to six month range to only 37 days. This is a win for those needing evaluations. It is a win for law enforcement who interact with these individuals. It is a win for county jails that house them for shorter lengths of time. And, it is a win for taxpayers who funded the lengthy jail stays under the logjam of the old procedure.

Another improvement is in the area of those initially deemed mentally incompetent to stand trial. In the past, a person the Human Services Center (HSC) determined competent to stand trial after an evaluation and treatment remained there until transferred back to the county where the crime was alleged to have been committed. This caused significant problems at HSC. It has a limited number of beds. A bed occupied by a competent person waiting for transportation back to his or her county of origin is a bed that cannot be used for someone who needs mental health treatment. It costs the State \$631 per day to house prisoners at HSC. In a cooperative effort between the Governor's Office, my office, and the state's circuit judges, this time delay has been slashed. It is a win-win for the defendant, the legal system, and the taxpayer.

Law enforcement provides the initial response to many of South Dakota's mental health crises. To help law enforcement address these crises safely and effectively the Division of Criminal Investigation hired a Crisis Intervention Training State Coordinator last July. This Coordinator trains officers in urban and rural areas and ensures that all South Dakota residents benefit from trained officers who can de-escalate a crisis. Officers also help residents contact appropriate mental health services rather than sending them to jail or transporting them to one of the few hospitals in the state that serve people with significant mental health challenges. These few hospitals should not be islands of treatment in a rural sea of misery because of unavailable treatment.

We all agree that people who commit crimes need to be held accountable. On the other hand, we also know that jail is not the best place for many people with serious mental illness. Nationally 26% of jail inmates have serious mental illness issues. In South Dakota we had no way to determine the extent of this issue. HB 1183 designated a pilot program to do just that. The Legislature required four jails to participate in the pilot program. This was so important, however, that seven sheriffs stepped forward to collect the necessary data through a standardized screening tool designed for correctional populations. They found that between 14% and 27% of those booked into their jails have indicators of serious mental illness and could benefit from obtaining a mental health assessment, and treatment, if appropriate.

In 2017 no money was available to fund a pilot project for a Mental Health Court in Pennington County. Creative minds came together and the money was appropriated in 2018. Led by a specially trained judge, that program includes a team of mental health professionals to provide a treatment plan and services. The team works in coordination with a court services officer, a prosecutor, a defense attorney, treatment provider, and law enforcement to ensure adherence to the treatment and supervision plan. The Pennington County Mental Health Court became a reality on July 1, 2018. The goal to be fully operational by January 1, 2019, was met.

In Minnehaha County the need for a Mental Health Court is great. From February through June of 2018, 515 or 13.5% of prisoners screened at intake in that county jail suffered from a mental illness. It is time to seriously consider the creation of a Mental Health Court in the Sioux Falls area.

All of these improvements increase the efficiency of the judicial system in this state and render quicker and fairer justice to South Dakota citizens. Over the past six years, we have made great strides in how the criminal justice system functions, but we can still do better.

THE BAR EXAM

Last year I informed you that the Supreme Court was contemplating a thorough review of the South Dakota bar exam. We did so as part of our annual rules hearing in February. We received input from the Bar, the public, and the Bar Examiners.

The genesis of this review was the substantial decline in the bar passage rates during the past few years. This decline is not unique to South Dakota. It exists on a nation-wide basis. The causes for the decline are numerous, and most lie outside of the bar exam process itself. Nevertheless, the Court found it appropriate to review South Dakota's testing standards.

Our thorough review occurred over several months. The Court concluded that the bar exam is being conducted in a fair manner to protect the public. That is the ultimate goal of the bar exam. We also knew that South Dakota needs sufficient attorneys who demonstrate professional competence and good moral character. We determined that it was appropriate to drop the minimum passing score on the multistate multiple choice portion of the exam from 135 to 133. We also now allow a carryover of up to three points from the essay portion of the exam to the multistate portion of the exam.

With changes pending across the board in legal education and law school admissions standards, the Court hopes these bar exam modifications will contribute to a greater passage rate while protecting the public's need for competent professional legal services.

The Court continues to be pleased with the dedicated work of the Board of Bar Examiners. The Board administers and grades the bar exam and conducts hearings if an applicant's good moral character is subject to question. We not only strive for intelligent attorneys, we strive for honest ones.

THE LAW SCHOOL

Last year I visited with you about the problems facing the law school at the University of South Dakota. To assist the law school this Legislature provided additional funds to improve its situation. Private individuals stepped forward with generous contributions. This resulted in the funding of 15 scholarships for students who demonstrated exceptional scholastic achievement. We hope that these scholars will choose to spend their professional career in this state after they graduate.

The plan appears to be working. Enrollment had been declining at the law school. It went from an average of around 70 students to 52 in 2016 and 58 in 2017. Declining enrollment resulted in the loss of tuition to the school, and inhibited the number of attorneys in South Dakota. This year this unfortunate trend was reversed with an entering class of 72 students. An increase of 14 additional law students each year goes a long way to providing 14 additional attorneys for South Dakota each year.

The improvement in the bar exam results for USD School of Law graduates is nothing short of stunning. In July 2016, 59% of USD graduates who were first-time test takers passed the exam. In July 2017, first-time bar exam takers from USD had a pass rate of 52%. In July 2018, first-time test takers from USD had a success rate of 82% --a 30% improvement over last year.

These are important steps in improving the status of legal education and the legal system in South Dakota. When combined with our successful Rural Attorney Program they will provide competent legal services to every area of the state.

TRUSTS

The South Dakota Supreme Court's caseload is not static. It changes with the times. Recently the Court has seen significant growth in cases dealing with trusts. Twenty years ago, the Court's docket of trust litigation was minimal.

To some, South Dakota is a "fly-over" state. That erroneous perception, however, does not apply to the world of trusts. The significant expansion of trusts is due to the foresight of governors beginning with Governor Janklow and Legislatures that enacted laws attractive to moving trust assets into South Dakota. The combination of no personal state income tax, no corporate income tax, no inheritance tax, and no rule against perpetuities has produced stunning results.

South Dakota now has 100 trust companies that maintain a physical presence in our state. According to the FDIC, 3.2 trillion dollars is invested in trusts in South Dakota. South Dakota is the number one state in the nation in the amount of trust deposits. While many people find a way to "fly-over" South Dakota, their dollars find a way to land here. With this significant growth, the Supreme Court anticipates its trust docket will continue to grow.

ELDER ABUSE

In 2015 I became concerned about the financial, physical, and emotional elder abuse in South Dakota. I convened a task force chaired by Justice Steven Zinter. The task force recommended

broad protections for South Dakota's senior citizens. A comprehensive legislative proposal was enacted and went into effect in 2016.

A key component of the law was the hiring of a full-time investigator and a full-time Assistant Attorney General to prosecute these crimes. Their exclusive task was to ferret out elder abuse. They have received 790 complaints and obtained 10 convictions. The number of complaints tells us that my original suspicion was correct--there is significant elder abuse in South Dakota.

South Dakota's comprehensive program works for South Dakotans and has become a model for the rest of the country. Very few states have full-time, state-wide investigative and prosecution units. The elder population is the fastest growing segment of South Dakota's population. We can take pride that South Dakota passed a law to protect seniors that actually has teeth and works.

This is increasingly important because of the great number of seniors. Statistically seniors possess the largest concentration of wealth in one age group that we have ever seen in this state and country. They earned it and should not be cheated out of it. As one long-time attorney quipped, "we should not be probating estates of people who are still living."

SUPREME COURT LAW LIBRARY

For the past several years I have been reporting to you on the progress of the restoration of the Supreme Court's law library. The on-going progress generated much interest. To my knowledge this was the last public area of the Capitol that had not been restored to its original grandeur.

Today it is my pleasure to announce to you that the restoration project is completed. You can enter it and see the same decor that those who entered the building in 1911 saw for the first time. Yet, it is a fully functioning law library with the latest computer legal research available.

Our architect, Koch-Hazard, was awarded the American Institute of Architecture South Dakota Design Honor Award in September 2018 for its design and renovation work on this project. My appreciation goes out to all who had a hand in this restoration.

TEMPORARY JUSTICES

Most people are aware that the South Dakota Supreme Court has five permanent Justices. However, South Dakota is a state where everyone seems to know everyone else. This, along with family relationships, can influence which Justices sit on an individual appeal to the South Dakota Supreme Court.

Judicial rules called "canons" provide guidance on when a permanent Justice should be disqualified on an individual case. If a Justice is related to a party to the appeal or an attorney involved in an appeal that creates a conflict of interest. Moreover, a case might involve a close friend or a former business associate of a Justice. If this situation exists, the Justice will not participate in that case.

Moreover, Justices can become seriously ill or pass away. That leaves four remaining Justices

and creates the risk of a tie vote. In that instance the Chief Justice authorizes a retired Justice, a circuit court judge, or a retired circuit judge to act in place of the disqualified Justice. Many retired jurists retain the mental and physical vigor from their years of full-time service, but have simply passed the mandatory statutory retirement age of 70. The jurist selected has the equal rights and responsibilities of a permanent Justice for that individual case. In most cases, only one replacement is needed. In one case, however, all five permanent Justices recused themselves and five replacement Justices were authorized to hear the case. The system has been in place for decades and works very efficiently.

JUSTICE STEVEN ZINTER

On October 30th, the South Dakota Judiciary and legal community were shocked by the sudden death of Justice Steven Zinter. Justice Steven Zinter was a dominant force on our Court for 17 years. He was totally dedicated to his calling to serve the citizens of South Dakota as a Justice. Whether you were of humble means or extremely wealthy, you would get the same fair treatment in his courtroom.

Justice Zinter was a giant in the South Dakota legal community and judiciary and possessed a positive personality the likes of which I have never seen. We are all better for knowing him.

I was asked many times what Justice Zinter's greatest opinions were. He approached each case knowing that he would do his very best to understand the facts and apply the law to get the case decided correctly. He often worked seven days a week; he was not going to quit until he was satisfied that he got it 100% correct. As such, every case he ever handled was his greatest opinion. Given the lengthy time he spent on the bench there are literally hundreds of these fine opinions.

My Father said that for most of us, it is a humbling thought that if we had not been born, the world could have gotten along quite nicely without us. He said it was the few, the very few, who accomplished so much during their lifetime that if they had not been born, the world would have been a poorer place without them. Justice Steven Zinter was one of those precious few.

JUSTICE GLEN SEVERSON

Justice Glen Severson retired from the Supreme Court last June. This severs a career path between Justice Severson, Justice Zinter, and me that started on our first day in law school in 1972.

Several years ago, I was given a judicial gavel that had a claw head instead of a cylindrical head. The person who made it said he thought it was important for judges to "build things." Justice Glen Severson certainly was a judicial builder. As Presiding Judge of the Second Circuit he oversaw the construction of the upper two floors on the Minnehaha County Courthouse. On the Supreme Court, he led in our technology endeavors. He was instrumental in converting the UJS from a paper system to an electronic one.

Justice Severson is modest and would be quick to point to the many dedicated people who were

involved in these projects. That is undoubtedly true, but without Justice Severson's initiative and leadership the projects would have never come to pass.

Because of the quality of the opinions he authored for the Supreme Court, Justice Severson leaves a strong legacy of legal scholarship.

JUSTICE MARK SALTER

When Justice Severson retired, Governor Dugaard appointed Circuit Judge Mark Salter to fill the vacancy. Justice Salter's experience and temperament render him superbly qualified to be the 51st South Dakotan to be a Justice of the Supreme Court.

Justice Salter served in the JAG Corps of the United States Navy. This experience prepared him to run the highly successful Veterans Court in Minnehaha County.

Justice Salter practiced law in Sioux Falls and served in the U.S. Attorney's Office for South Dakota. His appellate talents were recognized there when he was appointed chief of the appellate division. This provided him with a rich depth of appellate experience that is a great asset in his current position as a Justice. He also taught advanced criminal procedure and appellate advocacy at the University of South Dakota School of Law. From 2012 to 2018 he served as a Circuit Judge in the Second Judicial Circuit.

These career paths provide Justice Salter with an extensive background in criminal and civil law, the courts, and appellate procedure. He is an exceptional addition to the Supreme Court.

CONCLUSION

Most historians and most Americans rate Abraham Lincoln as our greatest President. Why? Against overwhelming odds he held the United States together when it was tearing itself apart through a Civil War. When historians are called upon to rate the least successful President, that unfortunate label usually falls upon Lincoln's predecessor, James Buchanan. He is strongly criticized for letting the Union dissolve and doing little to stop it. It is an interesting paradox since both men faced the same problems at basically the same time. The difference? Lincoln took the problems head on and solved them while Buchanan did little. This historical lesson is compelling. As a wise man once said, those who ignore the lessons of history are doomed to repeat them.

I was privileged to become Chief Justice in 2001. At that time the Rural Attorney Program, Drug and Alcohol Courts, Veterans Courts, Mental Health Courts, HOPE Programs and elder abuse laws did not exist. These programs were created to combat problems the citizens of South Dakota experienced. A lot of South Dakotans put in a lot of hard work to make them happen. While these programs are successful and certainly an improvement, I believe the best is yet to come.

To sum it all up, my fellow citizens of South Dakota, one can do no better than that "philosopher" Dorothy in the Wizard of Oz: "Toto, there is no place like home."