State of the Judiciary
Chief Justice Christine M. Durham, Utah Supreme Court
Message to the Legislature
January 19, 2004, in Salt Lake City, Utah

It is a great pleasure to discuss the condition of Utah's Judicial Branch of government. I do so in my capacity as the chair of the Utah Judicial Council, the body constitutionally charged with the power and obligation to make rules for the administration of the courts. Some of you may not be aware of the composition and role of the Council. It is a representative body composed of judges selected by each of the appellate and trial courts for three- to six-year terms, along with a lawyer selected by the Utah State Bar. The Administrative Office of the Courts provides staff support to the Council and, under the Council's direction, administrative support to all of the courts of the state. The Council operates by majority vote, and is responsible for the development of policy and procedure relating to the budget and the operations of the entire judicial branch. It relies upon information and input on priorities that come from governing Boards of Judges for each of the court levels-appellate, district, juvenile, and justice courts. As the chief administrative officer for the system, the Chief Justice has the obligation to preside over the Council's work, to contribute direction to its goals and policies, and to serve as a spokesperson for the judicial branch.

The governance system I have just described is probably the most "representative" or "democratic" system of judicial governance in the United States, in terms of the participation it permits and requires from all court levels, and the degree of cooperation and collaboration it encourages from all parts of the system. The Supreme Court, for example, has a number of constitutional responsibilities that belong solely to it, as opposed to the Council, such as the promulgation of rules of procedure and evidence, the management of the appellate process, the governance of the practice of law, and the power to impose sanctions for judicial misconduct upon recommendation from the Judicial Conduct Commission. In turn, the court relies on the administrative staff of the Council for support in the management of many of its separate constitutional duties such as the rule-making process. In sum, we have in Utah both a highly organized and a very collaborative system of governance for the judiciary.

What I believe to be the excellence of our governance structure is critical to the operation of a court system for the 21st century. Times have changed dramatically for state courts in the last 30 years. As is the case for the rest of the private and public sectors, information management and sophisticated communication systems characterize our everyday business. We rely on professional training and education for our staff and our judges to keep up with always increasing demands for efficiency and effectiveness. In recent years, our people have consistently been asked to do more with less in terms of resources. We have actually had to downsize by 100 people, 8 percent of our non-judicial workforce. I would like to publicly acknowledge the commitment to excellence and to public service that court personnel have shown during hard times.

Another significant development in the work of state courts with which you will be familiar is the still-growing initiative known as problem-solving justice. Far from being a departure from

so-called "traditional" adjudication, I see problem-solving justice as a necessary and vital evolution of the core functions of courts; courts exist to provide peaceful and fair places for individuals and society to bring some of their most difficult and painful problems, and resolving problems sometimes requires more than merely disposing of cases. As long ago as 1971, a federal judge made the following observation about what was happening to American courts:

We expect courts to encompass every reach of the law, and we expect law to encircle us in our earthly sphere and to travel with us to the alien vastness of outer space. We want courts to sustain personal liberty, to end our racial tensions, to outlaw war, and to sweep contaminants from the globe. We ask courts to shield us from public wrong and private temptation, to penalize us for our transgressions and to restrain those who would transgress against us, to adjust our private differences, to resuscitate our moribund businesses, to protect us prenatally, to marry us, to divorce us, and, if not to bury us, at least to see to it that our funeral expenses are paid. (Hufstedler, Charles Evans Hughes Address, N.Y. County Bar Association, 1971)

We could all extend that list of expectations with no trouble at all, and it would contain just about every significant public and private problem anyone could identify. That said, however, it is important to remember that state court dockets tend to consist overwhelmingly of the stuff of everyday life-the repeated minor criminal acts of defendants who can't seem to get their lives together for reasons that include things like substance abuse and lack of education and employment skills, landlords and tenants with disagreements over rent and repairs, families that come to court when relationships go bad, and the tragic aftermath of domestic violence, child abuse, and juvenile delinquency. These categories account for a huge percentage, certainly half or more, of the cases in Utah's courts. And Utah's courts do a good job of staying on top of individual cases. Despite crowded dockets, our trial courts meet or exceed most national case-processing guidelines, and we have not seen the frightening delays that have compromised justice in other states. We could probably, in fact, continue to do nothing but fine-tune our case disposition systems, and still call ourselves a well-run court system.

We aspire to do more, however, and we have embraced the concept that behind the thousands of "everyday" cases I described earlier, there are tens of thousands of people in pain and distress, who cannot solve their problems themselves. Conventional case processing may dispose of legal questions connected to those problems, but it does little to address the real difficulties that cause people to return to court again and again. Nor does it adequately account for the increasing numbers of people who lack the resources to obtain meaningful access to the courts in the first place. Utah's courts today are invested not just in the disposition of cases, but also in case outcomes and in ensuring access to justice for everyone in our community.

As my counterpart in New York, Chief Judge Judith Kaye, said in a speech last year: Problem-solving courts are courts. They strive to ensure due process, to engage in neutral fact-finding, and to dispense fair and impartial justice. What's different is that these courts have developed a new architecture-including new technology, new staffing and new linkages-to improve the effectiveness of court sanctions, particularly intermediate sanctions like drug treatment and community restitution. (Kaye, "Delivering Justice Today," Anderson Memorial Lecture, Yale Law School, April 2003)

Nowhere is this focus on outcomes more apparent in Utah's courts than in the juvenile arena. Due to months and years of work by the courts, the legislature, and child welfare advocates, children from non-functioning families, who a decade or two ago could have been expected to grow up in foster care and frequently to graduate from the juvenile to the adult criminal courts, can now be expected to reunite with their parents thanks to services and programs designed to help those parents, or to be permanently placed in loving, stable homes where their chances of success in life will be greatly enhanced. The following is a letter shared with me by the juvenile court judge who received it two years ago from a little boy I will call "Josh." I have also changed the other names in the letter.

Dear Judge:

I'm just writing this letter to let you know a few things. I remember the day I was taken away from Sally. I packed one Winnie the Pooh shirt, two toys, a bunny, and an angel teddy bear. I felt sad when I was taken away from Sally. I went to the Christmas Box House for a day, then I left that night. I cried a lot, hugging my bear and bunny. Then I went to Mary Brown's house. She had three children. The oldest was named Jerry, the second oldest was named Matt, and the youngest was named Debra. They were nice because we were close in age. I was sad when I left their house because they were nice. Then I went to Mary and Jack Wilson's. They had one child; his name was Pete. He was one-and-a-half. They were very kind. It was hard for me to say goodbye. I was sad when I left. I went to Susan and Bill Jones' house. They had other foster children. Their names were Jackson and Maddie. They were fun because we were close in age. It was hard to go because they were my friends, so I was sad. Then I went to Kent and Joan Smith's house, my adoptive parents. They're great. I love them a lot more than they think and I feel safe and happy because they're loving and kind, and care about me a lot more than I think they do. I just wanted you to know that.

Love, Josh

The little boy who wrote that letter was seven years old. He is the second youngest child of nine born to a single mother with serious functional deficits, probably related to cognitive impairments. One of the older children in the same family first came into the court system when she was two months old and the subject of a neglect referral. She literally grew up in a long series of foster care homes. Services were not provided to her mother, who was never able to regain custody (and was in fact unable to care for subsequent children), but whose parental rights were never terminated. Every 12- to 18-months a court review would determine there was no change of circumstance and would continue previous orders for foster care. At age 18, this young woman appeared before the court and asked, heartbreakingly, why an adoptive family had never been found for her. Another of the brothers, four years younger, had a similar experience, but his court record begins to show delinquency referrals from age nine, including theft, possession of dangerous weapons, assault, alcohol, tobacco, and truancy violations. If I have read his court records correctly, he was referred for delinquent acts 51 times during a nine-year period during which he was in foster care. I can't help wondering where he is now, and suspecting that his life still brings him regularly to court. These events preceded the Child Welfare Act of 1994 and the present commitment of the courts to provide oversight and leadership in outcomes for children, the kind of outcome that permits Josh to declare, after so many "I was sad's", that he now feels safe and happy.

The courts' role in the process of problem solving is vital: the "Key Principles for Permanency Planning for Children" from the National Council of Juvenile and Family Court Judges identifies, among others, the following obligations of judges. I cite them in illustration of my point that courts no longer simply "adjudicate" cases.

- Judges must ensure that the courts they administer provide efficient and timely justice for children and their families.

- Judges must ensure that their juvenile and family court system has the capacity to collect, analyze, and report aggregate data relating to judicial performance, including the timely processing of cases, to ensure the achievement of permanency for children who are under court jurisdiction.

- Judges must convene and engage the community in meaningful partnerships to promote the safety and permanency of children.

- Judges must use their legal authority to ensure that social and protective services are immediately available to families whose children have been placed at risk of abuse or neglect.

- Judges must provide oversight of children and families under court jurisdiction to ensure that these children are safe and have a permanent home in a timely fashion and that the parents/caretakers receive due process of law.

The striking characteristic of these principles is the expansive nature of the responsibilities they place on judges-not just for processing cases, but for protecting and helping people. I am told that research shows that almost everything that happens to move children in custody towards permanent resolution happens in the nine days before the next court hearing-whenever that hearing is-six, three, or one month later. The average length of time a Utah child used to spend in the limbo of foster care was two to three years. Now it is ten and one-half months. That change is in significant part the result of your legislative work and the way judges now treat these cases.

I could talk about problem-solving courts in the adult arena also-drug courts, mental health courts, domestic violence courts-but I think it is very easy for all of us to understand the high stakes nature of what judges do when we think about it in terms we all experience-families and children. I know that child welfare issues will be a significant part of your agenda in this session, and I want to emphasize that the courts have a stake only in the following three things: (1) the safety and welfare of at-risk children; (2) the preservation of fundamental due process rights for parents and family members; and (3) adequate resources for good decision-making (including legal representation for all parties to court proceedings) and good outcomes. The juvenile judge who shared the letter I read to you earlier has been involved with Josh's family for over 20 years now, and tells me that there are children on her docket who represent the third and fourth generations of children from families for whom earlier methods have failed, many of whom literally grew up in foster care. This judge says that Josh's story, and that of two of his other siblings who have been permanently placed under the current scheme, may reflect the beginning of the end of large numbers of children lost in the limbo of foster care. The judge also, and less

optimistically, predicts an upcoming "balloon" in the number of delinquency referrals as earlier generations of those children experience the aftermath of the lack of stability in their early lives.

Before I leave the subject of juvenile justice, I want to mention briefly an innovation of recent duration: the pilot program opening juvenile court proceedings to the public. The courts participating in the pilot have worked hard to create public awareness and protocols that have allowed, so far, a smooth transition. We hope the experiment will yield good information for the development of future practices in this area. We all benefit when the work of institutions that serve the public is visible and understandable. We are committed to the idea that the courts must be accountable, and we supported this legislation for that very reason.

I have said a good deal about the outcome focused nature of the ways courts and judges' view cases these days. From an administrative perspective, we are also making efforts to focus on effectiveness and outcomes and to evaluate our use of resources. We need to be certain that we are investing limited time and money in programs that, first of all, work, but also, and more importantly, are in line with our highest priorities and needs. To that end, the Judicial Council has asked each of the court levels, and each programmatic entity within the court system (including the Council itself), to assess all aspects of court operations in terms of importance and effectiveness. We are undertaking this effort partially in response to the significant budget losses we have incurred over the past few years and in view of the likelihood that our state's economic recovery will not be instantaneous. We are also doing it because it seems to us to be good stewardship over our public responsibilities. Once again, our people constitute our most important asset, and the Judicial Council is depending on them to inform policy and budget priorities for today's and tomorrow's courts.

Finally, let me say a word about issues relating to access to justice and the delivery of legal services. We in the courts are well aware of the need to shore up and maintain public trust and confidence in our institutions. We are actively engaged in numerous public outreach and public educational programs designed to explain the courts, our constitutional system, and the importance of the rule of law to the larger community. We are also very sensitive to the changing characteristics of the people who need to use our services. Just as our dockets are filled by the stuff of everyday life, the people behind the cases are everyday people, sometimes without the resources to obtain legal representation. The courts have done much to facilitate access by pro se litigants, and to make information and forms available online to the public. Likewise, there are numerous entities in the private and nonprofit sector that offer discounted or free legal services for persons of limited means, and the Supreme Court and the Utah Bar have encouraged lawyers to perform pro bono services to meet some of the need. The Bar estimates, based on reported pro bono hours and contributions to the And Justice For All fund, that lawyers have donated $10,000,000 in services and cash to provide legal services to the poor in Utah.

There have been and are now many conversations going on in Utah to address the problem of access to civil justice and the delivery of legal services. I believe the time has come for the creation of a broad-based community initiative to assess the need for legal services in Utah and to bring together the many strands of interest in this problem. We have remarkable resources, and admirable collaboration, in our state, including the Community Legal Center, which the legislature helped fund in its inception and which now houses four different legal service entities

under one roof, the And Justice for All project, a cooperative fundraising program that supports those entities, the clinical pro bono programs at our two excellent law schools, where students learn to be lawyers and provide valuable services at the same time, the Utah State Bar's projects on pro bono and delivery of legal services, the online court assistance programs, and the self-representation clinics currently being staffed by legal services lawyers, sometimes in the courthouses themselves, and other programs too numerous to mention. It is time to take these efforts to the next level, and to create a network of providers, stakeholders, lawmakers, community leaders, consumers, lawyers, and court leaders who can address the issue of access to justice on a statewide level. Other states have begun this effort. Washington state, for example, has created such a network, known as the Access to Justice Board, whose five founding principles are:

- Access to justice is a fundamental right in a just society.

- Access to justice requires . . . [that] legal issues must be adequately understood, presented, and dealt with in a timely, fair, and impartial manner.

- Access to justice depends on the availability of affordable legal information and services, including assistance and representation when needed.

- Access to justice needs adequate funding, resources and support.

- Equal justice under the law requires that justice be available to all people . . . regardless of the popularity of the cause involved, status, or other considerations or characteristics.

(State of Washington Access to Justice Board Principles, adopted May 8, 2003.)

Let me repeat the first principle: "access to justice is a fundamental right in a just society." The responsibility for guaranteeing and protecting it does not lie only with courts and lawyers. It belongs to all who aspire to live in a just society. I believe, however, that the Judicial Council, our court, and the Utah State Bar, which we supervise, can and should play a significant part in putting this issue on our statewide public policy agenda. I know that many of you also have long-standing concerns about access to justice, and I hope that we will find ways to strengthen the vision of a just society in our state and to form partnerships that work. As we begin to think about how to accomplish this, I look forward to productive conversations with your leadership on these important questions.

In conclusion, may I say how grateful I am, and we in the judicial branch of government are, for your service and for your courtesy in inviting me here today. We wish you success and look forward to working with you in the session ahead.