

State of the Judiciary

Chief Justice Thomas E. McHugh, West Virginia Supreme Court

Message to the West Virginia State Bar

May 6, 1995, in Barboursville, West Virginia

Beginning in August, 1994, the Court has experienced dramatic changes. Since then, Justice Workman and I have observed the changes close up. Justice Thomas B. Miller retired after twenty- years on the Court. In September, he was replaced by Professor Frank Cleckley who has been a superior addition to the Court. Also in September, Justice William T. Brotherton, Jr. suffered a heart attack and is still unable to return to the Bench. In April, 1995, Justice Richard Neely retired, and he will be replaced by Arthur Recht later this month.

The Court has routinely recalled Justice Miller, who is to be commended for his able service. Also of special note is Judge Fred L. Fox. He has untiringly and with great diligence served on the Supreme Court since January of this year. Also assisting the Court by accepting assignments to the Court have been Judges Frank E. Jolliffe, Irene C. Berger, Booker T. Stephens, Robert G. Chafin, R. Lyne Ranson, O. C. Spaulding, Thomas B. Canterbury, Albert L. Sommerville and Retired Judge James Holliday. Obviously, some logistical problems have arisen because of the changes, but I am pleased to say that they have not adversely affected the Court's ability to handle cases in a timely manner.

I should also publicly state the significant contributions by our senior status judges. Unselfishly, they accept assignments in all parts of the State. They deserve our thanks.

Court's Caseload

The Court's caseload continues to grow. A total of 2,600 cases are projected for 1995, which would be the second busiest year in the Court's history. The final figure, however, may be even higher as workers' compensation appeals increase in the second half of the year in conjunction with the backlog clearing program currently underway. Of the nine states without an intermediate appellate court, recent figures from the National Center for State Courts confirm our Court's position as the busiest of its type in the country, with 1,000 more cases filed annually than its nearest rivals, Mississippi and Nevada. In fact, in 1993, more cases were filed in the West Virginia Supreme Court than in the supreme courts of Delaware, South Dakota, Vermont, and Wyoming combined. If recent trends in caseload growth continue, the number of cases filed annually in our Court may well exceed 3,000 by the end of the century, which may be unprecedented for a court of last resort in a jurisdiction without an intermediate appellate court.

In addition to volume, the complexity of our cases continues to increase. For example, the number of civil appeals projected this year is 644, which would exceed last year's record total by almost 75 cases, and the number of criminal appeals projected is 208, which would also be a record. Appellate litigation has grown increasingly complex, with many more cases involving multiple parties and multiple issues. Lawyers continue to advance novel arguments and national jurisprudence, though not as dramatically as during the 1970s and 80s, continues to evolve.

Despite the increase in the volume and complexity of the Court's caseload, I am happy to report that, unlike many other appellate courts, we have managed to avoid the accumulation of any backlog and continue to render our decisions in a timely manner. This is attributable, in part, to an outstanding group of lawyers and clerical staff who work very hard to maintain the high

standards of quality we hope we have established. In addition, we continue to modify our procedures, where necessary, to address changes in our caseload. I anticipate further procedural reforms to reduce delay and simplify case processing.

Professionalism

I have spoken to you on many occasions regarding my concerns about the level of professionalism among the members of the Bar. The Preamble to the Rules of Professional Conduct states, "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Without commenting on the first of these three roles, I often observe less than exemplary performance of the second two. With respect to a lawyer's obligation as an officer of the court, the Preamble provides, "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." I regret to note that I have increasingly observed the filing of pleadings in our Court which seem less motivated by a concern with the quality of judicial decision-making than by a desire to bill a client or to gain some tactical advantage. I also lament the inclusion of personal attacks on opposing counsel or a lower tribunal in pleadings filed before the Court. Recently, we cautioned two attorneys who characterized one another's pleadings as "invective and hyperbole" and "half-baked." This type of mean-spiritedness, perhaps reflective of popular culture, has no place in our judiciary. Has not the reputation of the legal profession suffered enough in the mind of the public without its destruction from within? To dismiss the use of intemperate language as merely harmless gamesmanship is to fundamentally fail to understand how such behavior feeds the growing cynicism of the public regarding the legal profession.

With respect to a lawyer's role as a public citizen with a special responsibility for the quality of justice, the Preamble states, "As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, 'l lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in the reform of law and work to strengthen legal education." Certainly, the Bar is to be com- mended for its work to encourage pro bono representation and the continued success of the IOLTA program, which has provided millions of dollars to our State's four legal services organizations. But we must ask ourselves, cannot we do more? Have we sought to work together with the executive and legislative branches to improve the fairness of the law and the quality of judicial administration? Are our views on important social, political, and economic issues tainted by the clients whom we serve, or do we seek to use our knowledge of the law for the betterment of our fellow citizens? Can we do more to educate our citizens and their children regarding the legal system?

As I noted earlier, I have spoken to you on many occasions regarding professionalism. Our Court has also expressed its concerns about the quality of practice before it. We have seen attitudes improve for a short time, but then return to normal. Other than attempting to provide leadership, there is probably little the Court can do regarding the role of lawyers in improving the quality of justice, but I assure you that the Court can and will consider action when lawyers violate their obligations as officers of the court, even where such violations relate to their relationship with other lawyers. Finally, the Court will continue to explore its options for addressing the problem of frivolous pleadings.

Court Security

For the past two years, the number one concern identified at our annual meeting with judges, magistrates, family law masters, probation officers, and officers of the State Bar has been security in the Courts. In the majority of our courts, security is inadequate. Simply put, at times there is a real danger to judicial officers, support staff, and litigants. Many of you practice in these courts and are aware of the lack of bailiffs, metal detectors, and other security measures you see in the Federal Courts. Certainly, a fortress is not the answer. But common sense requires us to be more cautious.

It is not uncommon to have a magistrate respond in the middle of the night to a domestic violence call and open a dark courthouse to meet a victim of domestic violence without the benefit of a bailiff or any law enforcement officer, while the perpetrator waits outside. It is not uncommon for a family law master to conduct a final hearing in a hotly contested domestic case without the benefit of a bailiff or even the availability of a panic button to summon help. It is not uncommon in a high profile criminal case to have the public and witnesses enter the courtroom with weapons, as has happened in our State.

Efforts to improve security in our courts are essential. It will take a cooperative effort of judicial personnel, county commissioners, members of the Legislature, and you, the members of the Bar, to assure that our courts are safe. A concerted effort is going to be made over the next few months to identify the worst of these problems and insure they are corrected.

Domestic Violence

This past week in Charleston there was a conference on domestic violence. The conference was attended by judges, magistrates, family law masters, prosecutors, law enforcement officers, and representatives of advocacy groups for victims of domestic violence. The theme of this meeting was "The Courts, the Community, the Law: Working Together to End Domestic Violence."

Between 1990 and 1993, the number of domestic violence petitions in the magistrate courts has increased from 5,000 to 12,000. Last year there was a period of time in late summer when we were witnessing a death per week from domestic violence.

In an effort to address this very serious problem, the Court has taken two initiatives. First, we have established fatality review teams to review the deaths of any adult person recently involved with the judicial system. It is imperative that the judiciary assess whether officers of the court and others associated with a judicial proceeding follow proper standards to assure that we respond in an appropriate manner to family violence.

Second, the Court has approved, in concept, the establishment of domestic violence coordinating councils to assure that all persons involved in family violence, judicial personnel, law enforcement officers, prosecutors, and advocates for victims of family violence work together to provide a coordinated response for victims. Ideally, the conference on domestic violence held this past week will be the springboard to establish these councils in several communities.

Family violence is a national problem. Solutions are not easily found, and as the increasing caseload indicates, it is having a tremendous impact on our judicial system.

Family Law Masters

Since the last meeting of the State Bar, a number of administrative changes have been made in the Family Law Master System. Five additional family law master positions have been added, giving us a total of twenty-six law masters. The law master regions have been realigned to more equitably distribute the caseload, and the budget for the system has been moved from the Department of Health and Human Resources to the Judiciary.

These changes have helped, but for those of you who practice domestic relations law, I am sure you are aware that there are still a number of problems within the system. For example, in some regions it is difficult to get a temporary hearing in a timely fashion, as well as setting aside enough time in one period to resolve complex cases. In some areas of our State it is difficult to get orders entered in a timely fashion, and in many areas we know facilities and security are a major concern. As a result of these problems, some of the issues such as custody, visitation, and living situations are finding their way on the magistrates' dockets through domestic violence petitions. A magistrate court is not designed to handle these issues, and it is creating a very difficult situation for both judicial officers and litigants.

It is very important for us to continue to review the family law master system. We must continually assess how judicial services are provided to families in West Virginia. As many of you are aware, domestic relations, abuse and neglect, and juvenile cases make up more than fifty percent of the civil docket in the vast majority of our circuit courts. The mix of cases is changing. We must plan for how the courts in this State are going to be structured in the year 2000 to meet this challenge.

Court Improvement Program

In January of this year, the Court received a federal grant which gives us the opportunity to review laws and procedures in West Virginia that are designed to provide rights and protection to parents, families, and children. We will have the opportunity to identify ineffective laws or procedures or barriers to effective decision making. We will highlight practices which are not fully successful and examine areas found to be in need of correction or added attention. Reforms which address the specific needs in our judicial system will be implemented.

The Supreme Court has made a commitment to improve court handling of abuse, neglect, foster care, and adoption. There has been an ongoing effort over the past three years to improve the way these cases are handled through improved case management, and increased efforts to work with the child welfare agency to improve child protective services. This federal funding will give us the opportunity to evaluate our progress in this area.

This review will involve an in-depth study of all such cases in four of our circuits. The study will include observations of hearings, review of case files, interviews with judges, prosecutors and attorneys. A statewide survey will be mailed to all judicial officers, prosecutors and selected attorneys. Our goal is to determine how to improve the court system so that children are not the victims of institutional child abuse, that is, a court or a social welfare agency.

Mediation in Circuit Courts

The Court adopted rules to govern mediation in the circuit courts, effective July 1, 1993. Since that time, mediation has become an integral part of the proceedings in circuit courts. More and more cases are being referred out of the traditional litigation process to mediators. The Bar is to

be commended for assisting the Court in drafting the rules and implementing the system. We thank the Bar for providing the judges with a list of volunteer mediators.

This past week the Court reviewed the role of senior status judges in mediation. There are many cases that would benefit from mediation, but the parties cannot afford to pay private mediators. In some cases, there are no volunteer mediators available. The administrative office is working with a committee of senior status judges and Professor Tom Patrick of the West Virginia University College of Law to develop a protocol for circuit judges to refer cases to senior status judges for mediation. This will assure that mediation will be available to all litigants and not just those who can afford private mediators.

What about mediation to assist in resolving custody and visitation issues? The current rules do not allow for mediation in domestic cases, but the statute that governs the family law master system provides for pilot mediation programs with approval of the Court. Now that the mediation process is beginning to mature, perhaps it is time to explore a pilot mediation program in one of the family law master regions.

As you are aware, custody and visitation are often the most difficult issues to resolve in any divorce case. These are also the matters that cause the parties to return to court time after time to resolve disputes and modify existing orders. Other states have had success with mediation in this area. We plan to review such mediation in more detail.

State/Federal Judicial Council

In 1992, the Supreme Court and the Chief Judges of the Northern and Southern Federal District Courts entered orders establishing a State/Federal Judicial Council in West Virginia. The Council was established to foster cooperation between the State and Federal Courts in several key areas:

1. Assembling a State/Federal Judicial Directory with listings for all state and federal appellate judges, trial judges, magistrates, prosecutors, public defenders, court reporters, probation officers, law enforcement officials, corrections officials, interpreters, and vendors.
2. Conducting joint education programs for the state and federal judiciary.
3. Participation by the Clerks of the Federal District Courts in the education conference for the Clerks of the Circuit Courts which is conducted in August.
4. Developing a computer-based information system for tracking state and federal habeas corpus petitions.
5. Coordinating alternative dispute resolution activities in the state and federal courts.
6. Discussing application of the Rules for Resolution of Court Scheduling Conflicts which were adopted in 1989.
7. Discussing problems relating to court-appointed attorneys in criminal cases.

We know many members of the Bar and many of the circuit judges were not aware of the Council. An article was published in the December 5, 1994 issue of the Supreme Court Journal. Members of the Bar and the judges were informed about the activities of the Council. Subjects that should be addressed by the Council were sought from members of the Bar and judges.

West Virginia is a small state. Lack of communication between the federal and state courts should not be a reason not to identify common concerns. If you feel there are areas that need to

be reviewed, please submit those to the Supreme Court Clerk.

Circuit Clerks

In the next six months the circuit clerk offices of our State will be reviewed. A committee is being formed at the request of the circuit clerks to determine whether their offices should be moved under the administrative jurisdiction of the Supreme Court.

Many of the circuit clerks' offices are adequately funded and operate in a very efficient manner. But there are also several offices that are not adequately funded and lack the basic resources to meet their statutory obligations. These offices are caught between the demands of the Supreme Court, the Legislature and circuit judges. They must compete for funds with other local government offices that many county commissioners believe are truly local offices as opposed to a state-controlled office such as the circuit clerk.

We must achieve a more consistent administration of the system at the local level to assure that these offices are adequately staffed and funded. This is not to suggest that the Court believes these offices should be State funded at a cost of approximately eight million dollars, but it is an area that should be reviewed. By October, a report by the newly-formed Committee will be presented to a legislative interim committee for its review.

Bar Ethics

For approximately two years, the Court and the officers of the Bar struggled to reform the system of lawyer discipline. It was often a very difficult process, and at times strained the otherwise very good relationship between the Bar and the Court. I am pleased to report that significant progress has been made in eliminating the backlog of cases we faced this time last year.

Last spring, in a meeting with the Bar ethics staff, goals were established for processing ethics complaints. At that time, there were over 838 complaints pending, and 257 of these cases were over eighteen months old. After reviewing the pending caseload, it was determined that by July 1, 1995, the caseload should be reduced to 600, with no more than 15 percent of these cases over eighteen months old.

The latest report received from the Bar ethics staff shows a pending caseload of 599, with 183 of these, or 30 percent, over eighteen months old. This represents an excellent effort on the part of the staff. It is also the result of a commitment on the part of the officers of the Bar to address this very critical problem. Both the staff and the officers, under the leadership of Barbara Baxter, should be commended.

There are still too many cases pending that are over eighteen months old, but the progress to date is encouraging.

Pro Hac Vice Rule

On March 1, 1995, the Court amended our pro /we vice rule, pursuant to recommendations of the State Bar, to restrict the ability of lawyers licensed outside the State, as well as lawyers admitted in West Virginia who reside outside the State, to practice in West Virginia. The amendments, effective April 1, impose a reciprocity requirement; require compliance with state

and local regulations; mandate local attorney attendance at all court proceedings and, unless waived, at all dispositions; and exclude West Virginia attorneys without offices located within the State from serving as local counsel. The purpose of these amendments is to level the playing field and to ensure to accountability of lawyers who practice in the State of West Virginia.

Case Processing in Circuit Court

In the next two weeks, the Administrative Office will be releasing the first reports on compliance of the circuit courts with the Time Standards for Case Processing adopted by the Supreme Court in December, 1993. These reports will show the vast majority of the circuit judges are in full compliance with the time standards. Judges have implemented case management systems that have allowed them to comply with standards. The problems many feared would occur when these standards were proposed have not developed. I think the judges have established a good balance between the need of a judge to control the pace of litigation, and allowing an attorney flexibility to manage a case.

The latest national statistics indicate that West Virginia ranks fifth nationally in processing civil cases, and second in processing criminal cases. Most state court systems are not keeping up with case filings, and are developing huge backlogs in spite of the fact that they are adding additional judges on a routine basis. West Virginia still ranks last nationally in the per capita expenditure on our court system, but in the top five in case processing.

Conclusion

This has been a difficult year for the Court. It has been a year of transition, and the transition is not complete. However, even during this difficult period, with the cooperation of many people, we have continued to move forward and address the problems in our judicial system. We have maintained a standard of performance of which I think we can all be proud.

We must continue to work together to seek improvements. WE must assure the citizens of our State a quality judicial system.