

2010
STATE OF THE JUDICIARY
MESSAGE
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CHIEF JUSTICE

Governor Rounds, Lt. Governor Daugaard, members of the Legislature, Constitutional Officers, my fellow Justices, Judges, employees of the Unified Judicial System, and all citizens of the State of South Dakota:

As we all know, South Dakota's government consists of a system which is built on the separation of powers: executive, legislative, and judicial. However, for government to successfully work, cooperation is necessary between the three branches. Accordingly, from time to time I appear in front of committees of this Legislature. In such instances, I often get asked questions about our legal system. I have thought many of the questions excellent. Both the questions and answers are worthy of presentation to the entire Legislature and the public. Thus, this year my message to you is based on the questions I have received from Legislators during committee hearings and in letters, visits to my chambers, and even chance meetings in the hallways and parking lots of this Capitol. I have selected those questions that have the widest possible interest to not only this Legislature, but to the legal profession and the public at large. As such, the Legislature has charted the subject matter of my message: you asked the questions and I will answer them.

Question One

What area of law do we need to be more concerned about that has not received significant public attention?

Answer

Over the years I have kept this Legislature informed about various issues facing the judiciary such as the use of drug courts, the decline of the number of attorneys in rural areas, and the need to make access to our courts available to all. I believe the next area we need to take a hard look at is the increased protection of the elderly.

From 2010 to 2050 experts estimate that the number of Americans over the age of 65 will rise from its current level of 35 million to 85 million. The elderly are the fastest growing segment of our population.

Times have changed in South Dakota. Not too long ago the elderly lived with their children or, if by themselves, in the same town as their children. Neighborhoods were stable and the elderly could count on being assisted by their neighbors. Today, due to lower birthrates, a more mobile society, increased divorce rates, and, most importantly, a greater life-span, we have many more of our elderly citizens living alone with no one to look after them. This makes the elderly ripe candidates for abuse and criminal actions by the unscrupulous.

One cannot open a newspaper without finding another article about a new scam to separate people from their money. All too many of these con-artists target the elderly because they are more trusting and may be less likely to recognize the situation for what it is. Get rich quick, prize contests, and "sure-fire investments"

are offered to the unwary. There are false threats to obtain information and/or money by those masquerading as representatives of a government agency such as the IRS. Some salesmen also ply their trade on the elderly. Why does a 98-year-old need life insurance?

Who will manage the elderly's assets when that time comes is also an issue. If children exist, they may be many hundreds of miles away. Even if children are in the locale, they may not be the ideal candidates for such a responsible position. They may have a conflict of interest in how their parent's assets are used or saved. They may be tempted to "probate" their parent's estate while the parent is still living. As one probate judge from another state sadly stated, "will contests have virtually gone away. The greedy are not willing to wait that long anymore." Unfortunately, some seniors are susceptible to the undue influence of others, especially those they trust.

One state ran a check of the guardianships for the elderly under its jurisdiction. It found that 20 percent of guardianship files showed sufficient evidence of fraud to justify further investigation. Moreover, this check did not include the vastly more commonplace powers of attorney or joint accounts which are virtually free from state regulation and protection.

Many of our seniors live on a limited or fixed income. For them, retaining an attorney for legal assistance may be beyond their means. Inflation and recession have eaten into their ability to support themselves adequately. Others have simply outlived their savings. When Social Security was enacted in the 1930s, the retirement age was set at 65 because the average life expectancy was only 66.

Sadly, instances of physical abuse of the elderly are becoming more frequent. Experts tell us that this physical abuse is vastly underreported in proportion to its occurrence. This abuse can be caused by indifferent neglect or outright attack. In some instances, physical abuse is tied to an adult child who is addicted to drugs and is attempting to get money for more drugs.

Elder abuse is not unique to South Dakota. The Conference of Chief Justices has identified this area of the law as one that it needs to focus on nationally. From this, we may get useful suggestions and information on how to effectively deal with the problem.

Courts need to become proactive in the protection of the elderly and their assets. Courts also need to participate in programs with the members of the bar and state agencies to assist our elders who have made South Dakota what it is today. Those of us who have not reached this age status, if lucky, are headed in that direction.

I am pleased to report that the Access to Justice Program of the State Bar of South Dakota has commenced a pilot project in the Aberdeen area to assist seniors. Attorneys who join the program agree to prepare traditional wills, living wills, powers of attorney, and other documents for those elderly who cannot afford to pay for their preparation. The goal of Access to Justice is to use this pilot project to identify those legal needs which are the greatest and then tailor and implement the program in that direction on a state-wide basis.

At the end of a horrific Civil War which cost 600,000 lives, the victorious Union troops celebrated with a grand march up Pennsylvania Avenue in

Washington, DC. When they marched past the newly completed dome on the United States Capitol, they saw a huge banner which simply said, "To our victorious troops, the one national debt that cannot be repaid." Our elders are the people who built South Dakota, overcame dustbowls, defeated Hitler, and turned back Communism. A similar unpayable debt is owed them. A friend of mine named Clarence who is a bit of a philosopher observed, "they taught us better by example than we probably learned."

Question Two

Will the current economic problems increase the caseload of the courts?

Answer

Common sense and the lessons of history indicate economic downturns increase court caseloads. Many people have lost a job or a home or both. For others the stress of an increasing debt or an uncertain future increases anxiety. It invites attempted escapes from a dreary reality through the abuse of drugs and alcohol. I anticipate more crime in certain areas including DUIs, drug abuse, bad checks, domestic assaults, and no proof of insurance for motor vehicles. The number of divorces and protection orders will likely increase. Child support payments may falter. Foreclosures and collection suits will increase. As stress increases within a family due to economic problems, it will make it harder to work with that family to resolve the problems that got the family into court in the first place.

In many instances the misfortunes were not caused by the people who now feel their effects. The only solution on a large scale is a reversal of our current

economic downturn. In the meantime, the court system will be as understanding of the situation as possible while still applying the law as it has been enacted.

Question Three

Do laws the Legislature pass increase the caseload of the courts and the cost to the taxpayers?

Answer

Some changes in laws have that effect. For example, in 1987 the Legislature increased the drinking age from 18 to 21. I was a circuit judge at that time and my caseload for underage consumption significantly increased. In 2002 the Legislature dropped the alcohol level for a violation of Driving Under the Influence of Alcohol from .10 percent to .08 percent. That year DUI arrests jumped 16 percent. For the prior two years DUI arrests had shown an overall decline of 25 percent.

In no way am I criticizing the decision of the Legislature to make either change. These policy decisions were supported by many good reasons including a push for stricter enforcement of alcohol related crimes and a public that is less tolerant of such conduct. However, all of this points to an increase in court caseload and a corresponding increase in costs.

In reality it is the old question of whether the coffee cup is half empty or half full. If the Legislature passes a law, it is for a purpose.

If the increased scope of a criminal law did not result in an increased caseload, one might ask whether the change was necessary in the first place.

Question Four

When will the Unified Judicial System go to electronic filing of documents?

Answer

For many years, the Unified Judicial System has been working on a complete overhaul of its computer system to streamline all our court processes. Such a project is long overdue. Our present computer system is about to age out and badly needs updating. After years of studying whether it was most effective to attempt to do an in-house solution or an off-the-shelf system, we concluded the magnitude of the entire project dictated that an off-the-shelf-system would be the most cost effective and least time consuming. Last October, following years of preparation and testing, we selected a vendor. The company we chose has considerable experience in providing systems exclusively targeted to the needs of the judiciary. Similar systems have been installed in both federal and state courts around the country. We are significantly behind the ongoing projects in our neighboring states of North Dakota, Minnesota, and Iowa.

As you can imagine the UJS deals with literally tons of paper. Records are created for each court case and must be accessible to all parties involved. The trial record for one case that arrived on appeal before the Supreme Court filled 32 copy paper boxes. We maintain documents for many years, which takes significant personnel time and considerable storage space. The new system will allow all our records in the future to be digitized and archived so that nothing is lost. The new system will drastically cut the amount of paper used and enable information to be distributed electronically. It will reduce the time spent in filing and maintaining the hundreds of thousands of new records we deal with each year.

Our new system will be coordinated with those South Dakota agencies that interact with us. This means, to use a simple example, that a traffic ticket written on a remote roadside can be electronically transferred almost instantaneously to the appropriate clerk of courts and the fine can be paid online with a credit card. This will increase our ability to promptly collect fines and costs. With electronic filing of legal documents all other court processes will also be just as efficient. It will enable us to share information as part of an integrated justice environment and improve our service to the public.

The new system will also allow for electronic scheduling of judicial hearings. It will minimize costs by optimizing the scheduling of court sessions, providing for speedy trial dates, coordinating with jury members, and integrating the schedules of law enforcement officers. It will also have an automated adult and juvenile probation supervision component allowing for the more efficient management of probationers. With this system, South Dakota's judiciary will become more efficient, more accessible, and more responsive to the needs of South Dakota citizens.

Question Five

Why is there such variation in criminal sentencing?

Answer

In crafting sentences for criminal acts this Legislature has wisely concluded that the punishment should fit the crime. To implement this philosophy, wide latitude is given to the sentencing judge. For example, the crime of manslaughter can carry with it any sentence from probation to life in prison.

A factor that affects a criminal sentence is the defendant's prior criminal record. Last spring, 780 of 2000 inmates in South Dakota were repeat offenders. This state's habitual criminal statutes recognize that repeated offenses by an individual call for harsher sentences for the protection of the public.

Other jurisdictions have opted for forms of sentencing guidelines. Under the strictest sentencing guidelines, the judge cannot take into account a defendant's prior history, the facts of the crime, recommendations from the victims, or the possibility of future repeat behavior. These guidelines are not very different from IRS tax tables. No individual considerations are involved. There is little pressure when a judge simply looks up a sentence in the sentencing table. The end result, however, is essentially assembly line justice rather than justice that fits the criminal and the crime.

There is no doubt that South Dakota sentencing statutes give our judges wide latitude. That is the best way to deal with criminals as individuals. However, it does place upon the judge the responsibility to balance competing interests in order to fashion appropriate individual sentences.

Several months ago I received a letter from a man I sentenced for embezzlement nearly 25 years ago. At that time, I felt that he was a victim of alcohol addiction rather than a thief. I gave him a suspended imposition of sentence. I told him I was doing him no favors since he was walking around with the key to the penitentiary in his pocket. He decided by abstaining from his addiction or giving into it whether that key would be used. In his letter, this man reported that not only had he been sober for over 20 years, he had become a

Certified Chemical Dependency Counselor helping others overcome the addiction he has successfully battled. He said: "I feel it is important to let you know that I took the most of what I was and who I am and made the changes necessary in my life. I want to sincerely thank you for helping me get my life on track." Thus, in criminal sentencing one size does not fit all.

Question Six

What do you see as the future for probation in South Dakota as a part of criminal sentencing?

Answer

At the request of last year's Legislature, the Unified Judicial System spent a significant amount of time preparing a report on the future of sentencing in South Dakota. The report emphasizes forms of noninstitutional punishment. I recommend that you review this report and its detailed options for the future.

Currently there are over 9000 individuals on probation or related types of supervision in South Dakota. Over 2000 persons are incarcerated in prisons. Without probation many of those who violated the law would simply be turned loose because we could not build enough prisons to hold them all or pay for on-going operational costs.

The average cost of a person on probation is three dollars per day or \$1095 per year. The daily cost of incarceration is \$63.69 at the men's prison and \$69.38 at the women's prison. Thus, for every three persons who are successfully placed on probation, rather than incarcerated, the savings equals the annual salary of a court services officer.

The intensity of the probation services is tailored to fit the crime and the person committing the crime. While a goal of no further criminal activity is obviously the centerpiece, other goals such as restitution for the victim of the crime are also involved. To accomplish this, the period of probation often is not one of short duration. That average runs from three and a half years to five years.

As an example of the success of probation services, the Third Judicial Circuit statistics show that approximately one percent of those who are on probation violate probation and are sent to prison each month. This is a rate of 12 percent per year who fail and 88 percent who successfully complete probation or successfully remain on probation without a violation. This rate in the Third Circuit has remained constant for the past three years. When you consider the UJS currently has over 9000 people on probation state-side, this bodes well for the proposition that probation is a success in a high majority of cases and saves the taxpayers a considerable sum over the cost of incarceration.

Those who remain in their community on probation hopefully maintain their own homes, have jobs, support their families, and pay taxes. If a person is incarcerated, none of that happens.

This is not to say that all who violate our criminal laws are deserving of probation. Some commit crimes so serious that their acts along with the future protection of society demand incarceration.

Question Seven

Why isn't there more supervision of juveniles on probation, especially those who are ordered to do community service?

Answer

While the prevailing purpose of sentencing adult offenders is punishment, the purpose of dealing with juveniles is rehabilitation. Because of that, many juveniles are placed on probation under the supervision of UJS court services officers. In recent years caseloads have been heavy. The court services officer who supervises the area of South Dakota that prompted this question carries a caseload of 150 adults and juveniles. Not only must he attempt to check on his probationers, he must see to it that they meet their other legal obligations such as restitution, payment of fines, and community service. Nationally experts suggest that a court services officer carry a caseload of no more than 80. When we call upon our court services officers to carry a caseload of 150, something has to give. As one wit quipped, "at that rate, the only ones you dare put under such kind of supervision are those who do not need to be there in the first place."

Last year the number of juveniles placed on probation in South Dakota went up by 16 percent. Adults placed on probation went up by 8 percent. Both figures are well in excess of the national increase of 2 percent. Caseloads went up by 16 percent for juveniles for the same number of court services officers as we had the year before. Despite these large increases, the UJS did not request any additional court services officers.

A couple of years ago I had the chance to renew the acquaintance of a childhood friend. We talked about our formative years and how they were influenced by parents, teachers, clergy, scout leaders, and neighbors. My friend looked at me and said, "you could say we were raised by the entire town." In that

era he was right. Today that no longer exists and those tasks all too often fall upon court services officers.

You can stretch this rubber band approach and it will still be a rubber band. However, increased stretching will eventually result in the rubber band breaking.

Question Eight

Last year the Legislature authorized the funding for two more circuit judges. What makes a good judge?

Answer

Before I proceed with the answer, I would like to thank this Legislature and Governor Rounds for the authorization of the two additional judgeships in our two busiest judicial circuits in the state, the Second Judicial Circuit and the Seventh Judicial Circuit. I believe these additional judgeships will solve our docket congestion problems for the foreseeable future. The Governor acted promptly in the selection process and we now have Judge Larry Long on the bench in the Second Judicial Circuit and Judge Mary P. Thorstenson in the Seventh Judicial Circuit. Moreover the Governor also appointed Judge Robin Jacobson Houwman to replace Justice Severson in the Second Judicial Circuit after Justice Severson was appointed to the Supreme Court.

There are no checklists to determine what makes a good judge. Entire books could be written on the subject and there would not be complete agreement. On the day I became a judge, a veteran retired judge told me, "David, the difference between being a lawyer and a judge is the difference between eating in a

restaurant and running one." Now with 25 years of judicial experience, I could not agree more.

I think it helps that our judges often live in the communities where they work. While they may serve adjoining counties also, the visits are frequent enough that the judge becomes acquainted with those neighboring counties.

The ability to make up one's mind is essential. The volume of cases a judge sees calls for an attentive listening to the facts and the ability to apply the law to those facts in an orderly manner.

Finally, patience, a good sense of humor, and a lot of common sense helps greatly.

While it is not my intention to go into it in great detail today, I believe our state has an outstanding method of filling judicial vacancies. Unlike other states that choose judges in partisan political elections or through multi-million dollar campaigns, our system seeks to put those with a qualified background in a judicial position. This gives our judges the public image of being beholden to no major contributors, a single political party, or special interests. Does a contributor of a large sum of money to a judicial candidate do so solely because he or she is interested in the impartial administration of justice or good government? Human nature leads many people to conclude "probably not."

This very issue was addressed by the United States Supreme Court this past June in the Massey case. There a candidate for a state supreme court was the beneficiary of a three million dollar campaign contribution from an individual whose company had an appeal pending in front of the state supreme court. The

candidate was elected to the court, sat on the case, and was a member of the majority that reversed a judgment against the judicial campaign contributor's company. The United States Supreme Court held that the judge should have recused himself from the case as a matter of due process. By sitting on the case in these circumstances the judge created "in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Question Nine

Beyond the name, who is our new justice?

Answer

The newest Justice of the South Dakota Supreme Court is the Honorable Glen Severson of Sioux Falls. Justice Severson practiced law for many years in Huron. After that, he was appointed a circuit judge in the Second Circuit which is where he was raised. When Presiding Judge Meierhenry became Justice Meierhenry, I appointed Judge Severson to be the Presiding Judge of the busiest circuit in the state. Beside his administrative duties and his heavy court caseload, he somehow found time to work with Minnehaha County to add two additional floors to its courthouse and work with Lincoln County to completely renovate its lovely Victorian era courthouse. For a change of pace he enjoys retiring to the family farm to do a bit of farm work.

Question Ten

Is there an area of concern that does not require a monetary solution?

Answer

As we complete the first decade of the 21st century, the issue of our personal and family privacy is one that faces all of us. When we make a phone call there is now a permanent record of who we called. If we access something on the Internet there is a permanent record of what we were looking at. While this may assist advertisers to tailor their goods and services to our interests, it also has potential for abuse.

Our parents and grandparents lived in houses that had front porches. At night they would sit on them and visit with those neighbors and friends who strolled by. Now we sit in the backyard on decks surrounded by privacy fences. This change arises in many places from the intense compaction of how humans live today. While we in South Dakota still have wide-open prairies, in many respects we are caught up in a hectic pace of life and impersonal forces. In a couple of generations we went from being identified only by name, to having a Social Security number, to now having passwords, combinations, identification, and PIN numbers.

Unlike many areas of our law, such as commercial transactions or the criminal law, there is no single "legal code of privacy." The word privacy is not mentioned in either the United States or South Dakota Constitutions. If one looks up "invasion of privacy" in the South Dakota Codified Laws, it consists of only three short provisions. Privacy is a combination of state and federal statutes and regulations, court decisions, and privately negotiated agreements. Many courts including our own South Dakota Supreme Court wrestle with the problem of where to draw the line between societal and individual rights.

Those who drafted the South Dakota Constitution in 1889 certainly valued the right to be left alone and protected their valued documents by storing them in a mattress or a more secure place like a safe, in many cases backed up by a Smith and Wesson. They hardly could have dreamed of the damage done to an individual by the mere invasion of what today we call a computer hard-drive.

Take for example the subject of garbage. I use it as an example because the South Dakota Supreme Court has recently had to address the subject and moreover, we all generate it. Does someone have the right to enter your house and rummage through your trash? Obviously not. Do you have the right to expect your garbage long deposited in a dump or landfill will remain your private personal property? Obviously not. How about garbage you place in your back yard? How about garbage you place in the street or boulevard in front of your house on pick-up day? Does it make a difference if the person going through your garbage is a police officer or simply a snoopy neighbor or someone trying to steal your identity?

This is an example of what causes a debate on where to draw the line. However, after September 11, 2001, you have to add to the issue the concern that it may involve our outright survival. Moreover, those who seek our personal information might not be just snoops. They may be thieves who wish to steal our identity to use it as the basis to abscond with our assets or commit fraud using our name.

The law is evolving. However, it is clearly a case of the law trying to catch up with the rapid changes in technology and society. Given the ongoing pace of change, that catch up may be a continual process with total legal protection never

achieved. As we watch the sunset over a lake which we both love, my philosopher friend often says, "God's not making any more shore line these days. What he gave us we have to protect." Likewise, the loss of privacy is a cause for concern and in the words of a popular song of several decades ago, "you don't know what you've got until it's gone."

However, the South Dakota Supreme Court does not make the law, it merely interprets the constitution and laws. While we might think we know how to effectively respond, that response may be beyond our judicial powers. As Supreme Court Justice Hugo Black observed during the end of his lengthy service on the United States Supreme Court:

I realize that many good and able [persons] have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat oldfashioned, I must add it is good enough for me.

CONCLUSION

The questions you have asked and my answers are as diverse as the many tasks which the Unified Judicial System undertakes in the execution of its

constitutional and statutory duties. Many of these questions and answers point out the problems we face today and our future challenges. As I commence my third term as your Chief Justice, you would think that by now there would be nothing new for me to be faced with or solve. However, there are very few of my days which do not bring something across my desk for which I cannot simply look up an answer in a book because it has been done that way in the past.

The first step toward solving problems is identifying their nature. From there, potential solutions can be debated and solutions implemented. In 1981 when he took office, President Ronald Reagan gave our nation inspiration when he observed:

We're not, as some would have us believe, doomed to an inevitable decline. I do not believe in a fate that will fall on us no matter what we do. I do believe in a fate that will fall on us if we do nothing. So, with all the creative energy at our command, let us begin an era of national renewal.