

# **STATE OF THE JUDICIARY MESSAGE**

**JANUARY 1998**

**ROBERT A. MILLER**

**CHIEF JUSTICE**

Dear Governor Janklow, members of the Legislature, Constitutional Officers, my fellow Justices, Circuit Court Judges, and Friends of the Unified Judicial System:

Once again, it is my pleasure to report to you on the state of the Unified Judicial System of South Dakota. As we enter the twenty-third year under the unified court structure, I am pleased to report that the system is healthy and that justice is being dispensed by the courts of this state in an efficient and effective manner.

A famous political observer once noted that "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate." Whether we speak of crime, the breakdown of the family, election disputes, the environment, the rights of a criminally accused person, or the obligations of the respective branches of government under our constitution, there is scarcely a disputed legal, social, or political issue that does not intersect with the court system at some point. Given this fact, we in the UJS, from justices and judges to court services officers and clerks, take very seriously our obligation to act efficiently, speedily, and most importantly justly in carrying out our duties.

## **PERSONNEL CHANGES**

As you know, last February the Supreme Court amended SDCL 16-6-1 to provide for an additional circuit court judge in the Second Circuit. This circuit, which has jurisdiction over Minnehaha County, had experienced a significant growth in cases that mirrored a similarly significant population growth in that area in recent years. Joseph Neiles of Sioux Falls was appointed by Governor Janklow to the newly created position. Judge Neiles, who has served many years as a magistrate judge, brings a wealth of judicial experience to the circuit court bench. He is deeply dedicated to the work of justice, and we are very pleased that he has joined the circuit court bench.

This past December, Ms. Jill Engle, Clerk of the Supreme Court retired after over thirty-two years of service to the state as a legal secretary, deputy clerk and clerk. During her over twenty years as Clerk, Ms. Engle served with distinction not only the people of this state, but also in national leadership positions with the Association of Appellate Court Clerks. She will be missed not only by the justices of the Court, but also by the many members of the bar and public that she helped navigate through the appellate process.

In her place, the Supreme Court recently appointed Ms. Dorothy Smith as the new clerk. Ms. Smith served over twenty-three years as the deputy clerk of court and has a long

history of public service to this state. Like her predecessor, Ms. Smith brings a wealth of experience and knowledge to her new position. I have no doubt that Ms. Smith will continue to provide the same exceptional level of service that the public has come to expect from that office.

### **SUPREME COURT**

Last year I reported to you that there had been a dramatic increase in filings. I am pleased to report that in 1997 the filings in the Supreme Court returned to their pre-1996 level. I sincerely hope this trend continues. That is not to say that we have not been busy. We still have decided more cases in the past twenty-six years than we did in all of our prior history—and we did so in less time. Although the cases continue to be more complex and require continued research, study and consideration, we are proud that our caseload remains current, with no backlog.

We held two terms of court outside the Capitol this past year. As has become the custom, our March term was held at the USD Law School in Vermillion. Our October term was held on the campus of Huron University. All sessions were attended by large numbers of high school and university students, as well as members of the general public. We hope this practice of holding terms of court outside of Pierre provides a meaningful opportunity for citizens and students to become acquainted with us and with our Court. The justices surely enjoy these sessions and are pleased to be able to become acquainted with and meet so many citizens of our state.

### **CIRCUIT COURTS**

The volume of work of our circuit courts continues to increase and expand. This is not surprising given that the population of the state has increased some 36,000 people in the last several years, and continues to grow. People are turning to the court system in increasing numbers to solve many of today's social, political, and personal problems. For example, the stalking legislation passed last year produced over 75 new cases in the first four months of the year as people, utilizing this law, asked the courts to intervene in difficult personal situations.

We welcome the people using their court system. It is an important indication of public confidence in the justice system and an expression by the people that they have faith in their government and in that arm of government charged with administering justice. In the absence of such faith and confidence, people turn to vigilante justice and settle their disputes in our streets. Thus, we recognize the grave and important public service we are proud to provide.

While we saw some decreases in certain types of case filings, we saw corresponding increases in other areas. Overall, there were more than 1,100 formal cases filed in the circuit courts of this state in FY 1997 than in FY 1996. Increasing caseloads during FY 1997 are consistent with what we have experienced for the last ten. Of course, to simply say that we experienced increases in FY 1997 tells only part of the story. While we saw

decreases in the number of juvenile and domestic relations actions filed in this state, we saw over 1,100 more criminal cases filed, over 40% of which were new Class 1 misdemeanor and felony cases. (A more comprehensive breakdown of case filings and caseload trends is contained in the *Annual Report*.) We do not see any abatement in the trend of increasing caseloads.

Given current trends, this past year the UJS engaged the expertise of the National Center for State Courts (NCSC) to construct a weighted caseload model so that we would have a much better handle on the workload of the judiciary. The study, substantially underwritten by a grant from the State Justice Institute and supported by several legislative leaders and the governor, captured a picture of the true workload of South Dakota's circuit courts. The premise of the study was that not all filings are equal in terms of the amount of judicial resources needed to bring a matter to closure. We know through experience that felony cases consume much more judicial resources than small claims cases. We now know through an objective, scientific, and statistically valid model the average amount of judicial resources consumed by certain case types and how much judicial resource is needed in South Dakota to service the caseload.

Twenty-four of thirty-six circuit judges participated in the study as did ten magistrate judges; a participation rate of over eighty percent. We are told by the NCSC that this is one of the highest percentages of participation in the nation. I want to publicly commend the circuit and magistrate judges who, for a two-month period, literally logged every working minute of every working day.

At the conclusion of the study we learned the following: With the addition of the thirty-seventh circuit judge, South Dakota has a statistically insignificant *deficit* in the number of judges needed to manage our current caseloads. Thus, we have approximately the right number of judges in South Dakota. While we currently have a sufficient number of judges in the state, the study also revealed that those judges may not be assigned where they are most needed. The weighted caseload study will assist the Court in managing more efficiently the judicial resources of the state.

We also learned some interesting things about cases in South Dakota. Juvenile dependency cases and administrative appeals, followed by felony cases and juvenile delinquency cases, consume the greatest amount of judicial resources. For example, we now know that an average felony case requires 132 minutes of judge time and Class 1 misdemeanors require 26 minutes of judge time. This may seem unremarkable except when one considers this: just the increase in Class 1 misdemeanor and felony filings in FY 1997 required the UJS to use more than 375 additional hours of judge time over that available in FY 1996. This says nothing of the hours consumed in our clerk of court operation to handle the filings.

The weighted caseload study will not only be helpful to the UJS, but may also be helpful to the legislature. Armed with this information, we can now project the workload impact of some types of new legislation and the mandates that frequently accompany it. Although we have absolutely no control over increases or decreases in our caseloads, we

are in a much better position to assess the true impact of public demand for, and legislative changes to, the judicial services provided by our circuit courts.

## **COURT SERVICES**

Last year I announced that the UJS was embarking on a new probation philosophy called the Balanced Approach to Restorative Justice. This three-pronged philosophy seeks to balance in our probation programs concerns for community safety, victim and community healing, and improving offender skills so that they do not re-offend. It is no longer enough to simply supervise probationers; we must also restore the victims of crime and a sense of safety to our local communities. Crime is a violation of state law. It is an affront to the peace and dignity of the people of this state, but it is also harmful to specific citizens living in identifiable communities in our state. Crime is frequently caused by individuals who lack the necessary skills to function appropriately in our society. Many of our probation programs are being restructured to acknowledge this reality.

We are very excited about our efforts and have received a great deal of positive response from many communities across the state. In all eight circuits of the state numerous restorative justice programs are running. Juvenile and adult offenders are helping to clean up our communities, construct low income housing in cooperation with Habitat for Humanity, and participate in "crime repair crews" who restore homes and businesses that suffer criminal property damage. In one circuit of the state, victim impact panels are being used to mediate conflict between the victims of crime and the perpetrators of crime so that the former can express their anger and hurt, and the latter can hear about the real injury they caused to a real person. Currently, there are over forty restorative justice programs in operation in South Dakota and these programs continue to expand. So impressed was Attorney General Janet Reno that she extended a personal invitation to me requesting that the UJS send a delegation to a national restorative justice conference held in Portland, Oregon, this past December.

Restorative justice clearly does not have universal application. There are certain crimes which require the harshest response of our society and our courts, and our judiciary will continue to respond accordingly when confronted with such circumstances. But there remain many people who can benefit from being held more strictly accountable to their victims, their communities and themselves outside the walls of a prison. That is the focus of restorative justice and I am proud that South Dakota, through the UJS, is currently the only state in the nation that has been able to implement this philosophy statewide. This says much for the people of this state, for our judges, and for the court services officers who work to keep our communities safe.

As part of our attempts to improve probation services we are again asking the legislature to fund additional court services officers. If funding is approved, these officers will be stationed in the First and Fourth Judicial Circuits. Both of these circuits, located in the I-29 and I-90 corridors, are experiencing population and crime growth largely as the result

of people and businesses moving into the area around Sioux Falls. We believe that the addition of these officers will help improve our capability to implement more programs consistent with the Balanced Approach to Restorative Justice. We also believe the addition of these officers can benefit the Department of Corrections by giving us the ability to lessen the growth of individuals committed to the Department.

## **FINANCES AND THE UJS BUDGET**

We continue to hear calls for reductions in the costs of operating the UJS at a time when we face a growing demand for judicial services. In recent years, and more importantly in recent months, there have been suggestions that the judiciary reduce its demand on the state's general fund in a proportion similar to the cuts undertaken by the executive branch. There is apparently a belief in some circles that the UJS is either not responsible or not efficient in managing its resources. As we are an apolitical branch of government, and bound by certain canons of ethics regarding the nature of our work, it is difficult at times for us to compete in the political arena that is properly the hallmark of the legislative process. Thus, I have no doubts that these calls will come again during the upcoming session. I would, however, offer the following observations.

According to the National Center for State Court's publication *Examining the Work of State Courts, 1996*, of the thirteen unified court systems in the country South Dakota is third in the number of filings per judge. Nationally, South Dakota ranks seventh in the number of filings per judge placing us in the company of such states as Massachusetts, South Carolina, and New Jersey in terms of demand for judicial services. In civil filings per 100,000 population, we are in the top ten even though we rank forty-sixth in population. In felony filings per population, we rank sixth among the thirteen unified court systems with a caseload growth rate of 10% between 1994 and 1996. Nationally, South Dakota ranks twenty-first in the number of felony filings per judge, just slightly behind Arizona.

I believe these national figures give a more enlightening view of the work of the UJS as compared to its sister states. While we rank 46th in the nation in population, we rank disproportionately high in caseloads per judge. Certainly statistics can be viewed from several angles, but I believe these national statistics are an indicator of what is happening to our courts nationally and in the state.

I also believe it is important to make some observations about the 1999 budget request. First, in the overall scheme of the state budget, the UJS consumes a relatively small portion of the state's funds. Over the last ten years the amount of money needed to operate the UJS has declined from 4.1% of the general fund to 2.7% of the general fund.



**South Dakota Branches of Government  
Growth of General Funds form FY89 to  
FY99**

The number of employees who would be working for the UJS, even should the legislature adopt the FY 1999 budget proposal, is 433.0 FTE. This is an increase of only 12.6 budgeted FTE in ten years. During this same period the number of felony filings in the state increased from 3,907 to 6,099, an increase of 56%. The number of small claims cases has nearly doubled while the number of domestic relations cases has nearly tripled. As a portion of the state's workforce, we account for 3.6% of all state employees. Yet we serve citizens every day in every county of the state. In an effort to contain costs in the face of rising demands, we continue to review every position to determine its need and placement. This year alone we offset our request for additional personnel by eliminating two positions.



**South Dakota Branches of Government  
Growth of FTE from FY89 to FY99**

Second, the judiciary is a system. While the executive and judicial branches of government have different obligations under the constitution, we work in a systemic manner when it comes to many areas of law enforcement, prosecutorial and incarceration responsibilities. We in the judiciary have the adjudication function and we act not only as a monitor on the actions of government, but also as the gatekeeper for those executive agencies having responsibility for corrections. No action—whether civil or criminal—results in a person being held fully accountable until the matter is brought before the courts of this state and judged according to our laws. No one is fined until the courts adjudicate their guilt. No one is sentenced to the penitentiary until a court does so.

It is disturbing that, at a time when resources are being made available at the front and back of the criminal justice system at an increasing pace, there is a call for cuts in the middle of that very system. At the front of the system, the Attorney General's staff has increased by 5.9% in the last several years. Utilizing in part federal grant money, the number of local, county, and state law enforcement officers has grown by almost 110 officers in just two years. On the back end of the system, the Department of Corrections has increased its staff by some 156 FTE in the last five years. The UJS has increased its staff by only 10 FTE during this same period.

All of these increases demonstrate a public policy decision to get tough with lawbreakers. This is an appropriate policy and one we in the judiciary will support within the limits of the constitution. Respect for and enforcement of our laws are the only things that divide a civil society from anarchy. Thus, I do not question these increases on either side of the system. However, we must all realize that removing resources from the middle of the system will produce two results: (1) an ever-increasing backlog of cases, and (2) a growing disrespect for the enforceability of our laws as people come to realize that justice and accountability are increasingly delayed.

In recent years, all requests for additional staff have been almost exclusively for the circuit courts of this state, not for the administration of the system or for the Supreme

Court. We are placing our people where the work is and we hope you will continue to support our efforts.

### **PLANNING COUNCIL**

The UJS Planning Council which began some eighteen months ago has completed three sections of its four-part study of our operations and has sent recommendations to the Supreme Court. The first part of our study examined much of the internal operations of the system with specific emphasis on the areas of technology, human relations, and system administration. Examples of recommendations made in the area of technology are a call for a broad-based technology advisory council to assist the UJS in charting the future of judicial information systems, the development of electronic filings standards to reduce paperwork, and the development of video technology to allow for more timely court processing without the need to constantly travel. In the area of human resources and administration, the council called for the development of a permanent administrative advisory council, the consolidation of county law libraries utilizing advanced technologies, and the development of coordinated procedures to assist the courts and the counties with the collection of court-appointed counsel fees.

We have acted on many of the council's recommendations and have set time tables for their implementation. Other recommendations were referred for comment to those most impacted by the change. We will act on those recommendations only after we receive their responses.

Of greater interest may be the work of the council regarding the issue of demographics; that is, where are our people, where is the work, and how can we do the people's work more efficiently. This will be, by far, the most controversial work of the council and the Supreme Court. The council has studied at length the demographic trends that have affected the state for the last thirty years. They have found—as one might expect—a close correlation between population and the number of cases filed in our courts. There is no doubt that the population of this state is shifting, and the judiciary must adjust to this reality. At the same time, we have an obligation to ensure that all citizens, no matter where they are located, have access to quality justice. As you can undoubtedly understand, striking a balance between these competing needs has been difficult. The council is working diligently to develop realistic recommendations. We will certainly seek public comment on those recommendations before enacting any major changes.

### **COURT-APPOINTED COUNSEL FEES**

As I noted in my September letter to the county commissioners, copies of which were sent to all of you, the UJS continues to work very hard to see that the counties in the state are reimbursed as much as possible for court-appointed counsel fees. Out of concern for the seriousness of this problem, the State Bar and the UJS formed a joint committee comprised of legislators, county commissioners, attorneys, and judges to examine the broad range of legal and financial issues that surround the constitutional requirement to provide court-appointed counsel.

It is important, I believe, to separate the emotion that surrounds this issue from the facts. In FY 1997 counties reportedly spent \$5.3 million for court-appointed counsel, public defenders, investigators, and expert witnesses for criminal defendants. The UJS collected from defendants or by way of court surcharges over \$1.2 million. Forfeitures, fees, and petty offenses added up to an additional \$1.7 million for a total distribution to county general funds of approximately \$2.9 million. We are working very hard to continue this upward trend in the present fiscal year. Thus, although we are at times painted as being unconcerned with court-appointed counsel costs, I believe the facts portray an entirely different picture.

We in the UJS remain committed—within the framework of the constitution—to improving the recovery of court-appointed counsel costs. For example, recent legislation sponsored by the UJS empowers judges to require many defendants to contribute to the cost of appointed counsel on an "as-you-go basis." The result of that legislation was a 26% increase in the collection of court- appointed counsel fees in the first quarter of this fiscal year as compared to the same period last year. Certainly our efforts will not be successful in every case, but we do believe there is room for improvement and will continue to search for those improvements.

### **JOINT ALTERNATIVE DISPUTE RESOLUTION COMMITTEE**

I am pleased to announce that the State Bar and the UJS have formed a joint committee to examine providing alternative dispute resolution (ADR) services to a wide range of civil cases. Too often, justice is thought of strictly in terms of an adversarial battle in the courtroom. Yet justice can be facilitated through mediation services and other forms of ADR. We must recognize that the best resolution of a dispute may not necessarily occur in a courtroom. Nowhere is this more clear than in the area of domestic relations, where already antagonistic relationships may be further harmed by the adversarial process.

ADR is not appropriate in every case. Certain disputes must, of necessity, be resolved in our courts and are best resolved through the formal adversarial process. But we must also be open to the fact that other cases are perhaps best handled in a less formal, more conciliatory manner. Over the next year, the Joint ADR Committee will examine the wide range of issues that would surround the expansion of current ADR programs.

### **CONCLUSION**

I want to take this opportunity to thank my fellow justices for their support and encouragement over the past year as I continue to serve the people of this great state as Chief Justice. I also want to acknowledge the work of the fine people of the UJS who quietly serve with distinction and excellence. Implementation of such programs as the Balanced Approach to Restorative Justice, which has brought the state national recognition, could not have been accomplished without the full cooperation of employees throughout the system. I am very proud of our court system and its ability to respond to the needs of our people. Although the UJS is far from perfect, the system is comprised of many exceptionally talented individuals who have dedicated their lives to serving the



people of this state. This is no small deed given that in the last twenty-five years the great respect given to public service has all but evaporated. Relying on the creative talents of all judges and employees, we will continue to build upon our successes, correct our failings, and respond to the needs of our people to see that justice is done. As Alexander Hamilton observed in 1788, "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained or until liberty be lost in the pursuit."