
THE STATE OF THE JUDICIARY IN TEXAS

Presented to the 83rd Legislature by Chief Justice Wallace B. Jefferson
Austin, Texas • March 6, 2013

GOVERNOR PERRY, GOVERNOR DEWHURST, SPEAKER STRAUS, MEMBERS OF THE LEGISLATURE, PRESIDING JUDGE KELLER, AND ALL OF MY JUDICIAL COLLEAGUES THROUGHOUT TEXAS. THIS PRESENTATION IS ENTITLED “STATE OF THE JUDICIARY,” BUT AS I BEGAN TO THINK ABOUT THE MESSAGE I WOULD LIKE TO CONVEY, IT OCCURRED TO ME THAT THE CHALLENGES WE FACE ARE MUCH LARGER THAN WHETHER OUR COURTS ARE FUNDED ADEQUATELY. THE QUESTION IS NOT HOW IS THE JUDICIARY? WE MUST ASK INSTEAD WHETHER OUR SYSTEM OF JUSTICE IS WORKING FOR THE PEOPLE IT HAS PROMISED TO SERVE. DO WE HAVE LIBERTY AND JUSTICE FOR ALL? OR HAVE WE COME TO ACCEPT LIBERTY AND JUSTICE ONLY FOR SOME? SO LET’S NOT LIMIT OUR INQUIRY TO WHETHER THE JUDICIARY IS HEALTHY. COURTS EXIST NOT TO PERPETUATE THE JUDICIAL BRANCH FOR ITS OWN SAKE, BUT TO ENSURE THAT THE CONFLICTS HUMAN BEINGS ENCOUNTER, WHETHER CRIMINAL OR CIVIL, ARE ADJUDICATED IN A NEUTRAL FORUM, AT AN EFFICIENT PRICE, PRODUCING FAIR OUTCOMES.

BASIC CIVIL LEGAL SERVICES

For those who can afford legal services, we have a top-notch judicial system. Highly qualified lawyers help courts dispense justice fairly and efficiently. But that kind of representation is expensive. A larger swath of litigation exists in which the contestants lack wealth, insurance is absent, and public funding is not available. Some of our most essential rights—those involving families, homes, and livelihoods—are the least protected. Veterans languish for months before their disability, pension, and educational benefits arrive. As a result of the recent financial crisis, lower- and middle-income homeowners and tenants face foreclosure and eviction. Ever-increasing numbers of consumers and small businesses have filed for bankruptcy. And few can afford a lawyer to guide them through these crises.

Nearly six million Texans qualify for legal aid. Yet our state’s legal aid programs meet but 20 percent of the needs of indigent Texans, forcing many to go it alone in our courts. In South Texas, 2.6 million people qualify for legal aid. That means that there are 21,000 potential clients for each lawyer employed by the region’s main legal aid office.

It is clear to me, then, that we must fund our state’s legal aid programs. Fortunately, for our great state, it is clear to you, too. When we told you that the largest source of funding for these programs, interest on lawyers trust accounts, plummeted 75 percent in the last 5 years, you came to the rescue. The 81st Legislature appropriated \$20

million in general revenue for the 2010-2011 biennium. Even as the fiscal crisis hit Texas hard, the 82nd Legislature provided \$17.5 million for this biennium. And in this session, the House and Senate have indicated general-revenue funding will remain at these levels. On behalf of desperate Texans who have no other options, I thank you for your continued support of basic civil legal services. Without your assistance, the situation would be utterly hopeless.

The legal profession is doing its part. Texas lawyers donate about 2.5 million hours of free legal services to the poor each year. In the Supreme Court, we have had tremendous success with a pro bono program that matches some of our pro se litigants with appellate lawyers who have donated their expertise to the cause of justice. More than 300 lawyers have signed up to participate, and we have referred dozens of cases to that program since 2007. Several of our intermediate appellate courts have adopted similar initiatives. But even if we were to require every Texas lawyer to represent at least one indigent client, we would serve less than 40 percent of the poor who seek help. We must do more, not to preserve the judiciary, but to keep the courthouse doors open for all of our neighbors.

INDIGENT DEFENSE

I have been talking about basic civil legal services. But on the 50-year anniversary of *Gideon v. Wainwright*, I cannot resist a few words about our criminal justice sys-

tem. Gideon, charged with breaking and entering in Florida, asked for a lawyer; was denied counsel; and then was convicted. While in prison, he scrawled a petition on prison stationery, and asked the Supreme Court to reverse his conviction. In that famous case, the court concluded unanimously that the Constitution guarantees a defendant the right to counsel in criminal proceedings. After retrial, with appointed counsel, Gideon was acquitted.

And this brings up my second point. To sound Gideon's trumpet in Texas, we must insist that criminal defendants have qualified counsel who are equipped with the time and resources to mount a meaningful defense. Texas ranks 48th in per capita funding for indigent defense. As alarming as that figure sounds, it masks extraordinary improvements implemented here in just a few short years. The Texas Indigent Defense Commission, chaired by Presiding Judge Keller, has developed innovative programs to increase delivery of indigent defense services. With the Legislature's financial help, thousands more Texans now receive constitutionally guaranteed defense representation.

A prime example is the Regional Public Defender Office for Capital Cases, headquartered in Lubbock. The pool of lawyers qualified to handle these complex cases is quite thin and, until recently, local communities had few resources to pay for these incredibly costly matters. This regional office, serving more than 155 counties, both ensures quality legal representation for the defendant and mitigates the expense a capital case inflicts on the county.

The Harris County Public Defender office opened two years ago through a grant from the Indigent Defense Commission. Among other responsibilities, that office represents juvenile clients who are also victims of human trafficking. And Bell County developed a program, with assistance from the commission, that provides specialized representation and legal support services to defendants who have mental health concerns.

The most innovative project is happening right now in Comal County. The commission gave the county a grant to fund a pilot project that will allow indigent defendants to select the qualified attorney of their choice, rather than receiving attorneys appointed by judges or court administrators. With this idea, new for the United States but standard practice in England and elsewhere, defense lawyers will be more directly aligned with the interests of their clients. Comal County will work with indigent defense experts to assess the current system and to recommend qualitative and quantitative improvements.

A caveat. As with basic civil legal services, funding for indigent defense does not currently meet the demand. State funding through the commission covers only 15 percent of the total indigent defense expenditures in

Texas. For that reason, the commission's appropriations request seeks to close the funding gap, providing relief to counties by sharing the costs of indigent defense equally with county government. We have seen the commission's success in forging successful programs and partnerships with county governments. I encourage you to increase funding to the commission so it can carry on this important work and ensure effective representation for all indigent defendants.

A final, but important, word about our criminal justice system. If innocent people are rotting in prison for crimes they did not commit, we certainly have not achieved justice for all. Michael Morton's recent exoneration epitomizes the need to address the issue of wrongful convictions in Texas. He spent 25 years in prison, convicted of murdering his wife, until DNA evidence confirmed his innocence.

In the last 25 years, 117 Texans have been exonerated. Forty-seven were cleared based on DNA testing, more than any other state. Wrongful convictions leave our citizens vulnerable, as actual perpetrators remain free. And they leave us with the distinct impression that we today suffer from a systemic deficit in our collective approach to the way we decide how to administer criminal justice.

As in years past, I continue to recommend the creation of a commission to investigate each instance of exoneration, to assess the likelihood of wrongful convictions in future cases, and to establish statewide reforms. I appreciate the leadership of Senator Ellis and Representative McClendon in this area. I also appreciate the Legislature's support of the innocence projects at our state's four public law schools. Since 2006, the projects have helped identify and overturn ten wrongful convictions in our state. In many of these cases, the same investigation that cleared an innocent person also identified the actual perpetrator.

PRO SE LITIGANTS

I have spoken about the indigent. But there is a dark secret that plagues our justice system as a whole. We in the judiciary must bring this secret to light. The sad fact is that the middle class and small businesses find our system unworkable and unaffordable. They believe there are too many unnecessary lawsuits, coupled with incessant legal wrangling that drags out cases. And they feel that even if they are entitled to a remedy for a legal wrong, they cannot afford the fees a lawyer quotes for vindication. It is time for us to do our part to answer these concerns, because if the remedy is unaffordable, justice is denied.

Eligibility for legal aid is generally capped at 125 percent of federal poverty guidelines. A family of four with an income of \$30,000 does not qualify. After that family

pays for shelter, sustenance, and the other necessities of daily life, it cannot possibly afford a lawyer for the most basic legal necessities of life. The most generous legal aid programs limit eligibility to those within 200 percent of federal poverty levels, meaning that a four-person household with income over \$46,100 does not qualify. Statutory rights to counsel generally apply only to the indigent, as do most pro bono efforts. Increasingly, litigants are representing themselves, because they have no real alternative.

We have more lawyers in America than at any time in our history. In 1960, there was one lawyer for every 627 people in the United States. Today, there is one for every 252. Isn't it ironic that as litigants are increasingly forced to represent themselves, law school graduates cannot find jobs?

I believe that we have to shift our thinking. Access to justice is about more than giving a poor person a lawyer. An accessible justice system requires that even broader segments of our society be able to use it, including those that are forced to navigate the judicial system alone. Our remedies must be expansive and creative. We must change the way we do business in our courts to meet the needs of all citizens and businesses while at the same time improving customer service, increasing transparency, and investing in technology to decrease costs and increase efficiency. We must develop a judicial climate in which people who lack money to hire a lawyer have a reasonable chance to vindicate their rights.

To address this, the Supreme Court recently approved forms that litigants may use when seeking an uncontested divorce involving no children and no real property. Forty-eight states have court-approved family law forms. Of the thirty-seven states that have forms for divorce proceedings, all have reported a positive impact on the overall efficiency of those cases. I commend the efforts of the Real Estate, Probate and Trust Law Section and Appellate Section of the State Bar, both of which have undertaken similar forms efforts in their respective specialties.

Through the promulgation of procedural rules, we can reduce the expense and delay of litigation while simultaneously protecting the rights of litigants. At the Legislature's direction, the Supreme Court recently adopted rules to simplify proceedings in cases involving claims for monetary relief of less than \$100,000. Discovery is limited; the cases are expedited. Now, a case that is vital to the success of a small business owner can actually be tried, to a verdict. A remedy for a legal injury—even for the individual who cannot afford to pay a lawyer \$500 an hour. The Supreme Court also adopted a rule allowing trial courts to dismiss cases that have no basis in law or fact. The net result is that cases that have no business in the courts will be shown the door, expediting relief for liti-

gants who are subject to frivolous suits. Finally, we are working on rules to simplify and consolidate small claims cases in our justice courts. These rules will be comprehensible for citizens who are representing themselves in court, and ensure the fair, expeditious, and inexpensive resolution of their cases.

E-FILING

One of the more intractable barriers to justice is antiquity. Our courts operate much like they did in 1891, with paper, stamps on paper, cabinets for paper, staples, storage, shredding of paper. To paraphrase, the era of big paper is over. We must modernize the courts so that the people can swiftly find case information, instructions for how to resolve their disputes, even videos demonstrating proper court protocol. Since 2007, all of the Supreme Court's arguments are webcast. And a new case management system, designed by the Office of Court Administration and now used by the Supreme Court and ten of the 14 intermediate appellate courts, has increased the speed with which we decide cases. The effect? The child from a broken home is returned to normalcy faster, the building tied up in litigation can finally be sold. Responsible investment in technology saves money and promotes efficiency.

If paper is dead, what will take its place? In December, the Supreme Court mandated electronic filing in civil cases by attorneys in appellate, district, county, and statutory probate courts on a rolling schedule, beginning next year. The court's order requires the use of one uniform, statewide e-filing system overseen by the Office of Court Administration. With e-filing, document storage expenses for court clerks decrease. Staff that formerly spent time sorting and file-stamping paper can be assigned to higher-skilled tasks. Important court documents are less likely to be damaged or lost. Attorneys can file their pleadings across the state without the need to master various filing systems. And litigants can more quickly access documents online.

But e-filing currently requires litigants to pay a fee each and every time a document is filed. Those expenses add up quickly, even if only a few documents are filed in a case. This week Senator West and Senator Duncan filed SB 1146 and Representative Hunter and Representative Senfronia Thompson filed HB 2302 to address this problem. These bills decrease the cost of e-filing by shifting from a per-document fee to a one-time fee, paid at the beginning of each case. If these bills are passed, the per-case cost to e-file will be less than the per-document cost to e-file now. I commend and support efforts like these to lower the cost of litigation in our state, a key to ensuring access to our judicial system.

JUVENILE JUSTICE

Now, if antiquity is the root of our paper problem, modernity is the curse of our juvenile justice system. In modern times, we have elected to give our children tickets for the kind of misbehavior that, in the old days, landed you and me in the principal's office. Class C misdemeanor tickets for "disruptive" school conduct. The child must appear in court to answer the charges. She has no right to counsel and no guarantee that her record will be sealed. Cash-strapped families forego representation, often with devastating consequences, like arrest warrants and criminal records. An estimated 300,000 misdemeanor tickets are issued in our state's schools each year. We are criminalizing our children for non-violent offenses. Students receiving these tickets are stigmatized. They often miss class or drop out of school altogether. We must keep our children in school, and out of our courts, to give them the opportunity to follow a path of success, not a path towards prison.

Senator Whitmire leads in this area, not just in Texas, but nationally. He and Senator West have joined forces this session to address some of these issues. They both understand that we must work together—legislators, judges, educators, law enforcement officers, and others—to address misbehavior in our schools, promote good behavior, maintain the safety of our students, increase graduation rates, decrease students' exposure to the court system, refer students to proper community and mental-health resources when needed, and apply these policies consistently across schools and student bodies.

GUARDIANSHIP

After "liberty and justice for all," one of the most revered phrases I know is "honor thy father and mother." I am incredibly fortunate to have both my mother and father here with me today, and two of my siblings, Leah and Lamont, who love and care for them in San Antonio. But for each member of the greatest generation that has the tender care of family, there is an elderly citizen for whom Texas provides few protections from abuse.

The population over age 65 in this state will increase by almost 50 percent by 2020 and will more than double by 2040. Many of those individuals will need help managing their affairs—some through the appointment of a guardian. But Texas currently has only 368 state-certified guardians who handle only 5,000 of the 40,000 pending guardianships. Families, friends, and attorneys serve as guardians in the remaining cases. Only ten of our 254 counties have probate courts with resources to adequately prevent abuse. An exploding elderly population will stress the guardianship system. We must begin to address these issues and prepare.

For this reason, I am today announcing the creation of a special committee of the Texas Judicial Council whose sole mission will be to honor our mothers and fathers. The committee will make recommendations to ensure their safety and financial security, and I hope you will all support the effort.

CONCLUSION

We must provide legal aid for the poor, modernize our system for the middle class, build a sane disciplinary regime for our children, protect our parents. We should do one more thing. Discard our broken system in which judges of enormous talent are removed from office not for ineptitude, but only because they happen to be a member of the wrong political party when partisan winds shift. All of these reforms are encompassed in the judiciary's obligation to provide access to justice. That phrase is often thought of in terms of providing legal services to the poor. It is that, to be sure, but an accessible justice system requires that even broader segments of our society be able to utilize it. Viewed this way, our remedies must be more expansive as well. Just as no single defect created the barriers, there is no unitary solution. So we must marshal all of our forces.

On Feb. 24, 1836, Texas forces were under siege from the Mexican army at the battle of the Alamo. William Barret Travis, the commander of the Texian soldiers, sent a desperate plea for help. Addressed to "the People of Texas & All Americans in the World," he asked "in the name of Liberty, of patriotism & everything dear to the American character, to come to our aid, with all dispatch." He vowed never to surrender or retreat, promising "victory or death." His fate was sealed March 6th, exactly 177 years ago.

We are at a crossroads 177 years later. Addressing the challenges in our justice system requires a fundamental shift in thinking. Our courts are the final line of protection for individual rights. They provide access to justice, protect us from abuses of power by corporations or the government; they protect our most basic constitutional rights. But the courts must, themselves, reform. We need to change the way we do business to better meet the needs of citizens and employers across our state. That's why we are investing in technology to save taxpayers money and to provide better customer service to those who come to us for justice.

My presentation today is not a State of the Judiciary. It is a call to arms. "[I]n the name of Liberty, of patriotism & everything dear to the American character," Commander Travis urged Texans to act with dispatch. Today, let's marshal our forces to confront our challenges so that we can better serve the people. We may not win the entire battle today. But, as we Texans like to say, remember the Alamo!