Annual Address:

State of the Judiciary

October 24, 2018

Great Hall, John Adams Courthouse
Boston, Massachusetts

Remarks by

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Chief Justice of the Supreme Judicial Court

It is a privilege and a pleasure to have the opportunity to speak with you each year about our common enterprise, the fair and efficient administration of justice. I say "our common enterprise" because the fair and efficient administration of justice is not only the work of judges and justices, but of clerks, court officers, probation officers, court facilities employees, and administrative staff. Those who do not recognize it as a team effort have never presided over a courtroom. And, of course, we could not provide the quality of justice that the people of this Commonwealth deserve without the dedication, integrity, and, at times, courage of attorneys, witnesses, and jurors. I am grateful for all that you do, every day, in every courthouse in Massachusetts.

I am also grateful for the support that our branch of government receives from the Legislative and the Executive branches. We are blessed to have a Speaker, a Senate President, and a Governor who understand that the problems we confront every day in our courts – opiate addiction, mental illness, domestic violence, homelessness, delinquency, to name only a few – are the same problems they are committed to address, and that our success is their success. We have proven in Massachusetts that you can have a productive partnership among the judicial, legislative, and executive branches of government, and still respect the independence and prerogatives of each branch – one more example of this Commonwealth serving as a model for the nation.

I also want to thank the Massachusetts Bar Association for sponsoring this event. And I want to take a moment to recognize the important work of the MBA, the Boston Bar Association, and our other affinity and regional bar associations in helping to improve our justice system. Let me cite three quick examples.

- At his recent swearing-in ceremony, MBA President Chris Kenney proposed a program to give new lawyers training in trial practice and then match them with litigants who need representation, on a pro bono basis, in civil trials in the District Court and Boston Municipal Court. This is a brilliant win-win idea: it will help new lawyers gain needed trial experience, and it will assist litigants who cannot afford counsel to ably present their claims and defenses at a civil trial. We will do what we can to help the MBA make this idea a reality.

- Earlier this year, the BBA announced the Service Innovation Project to engage lawyers in obtaining sensible solutions to school disciplinary issues that otherwise might result in suspensions or expulsions and likely start a student down the "school-to-prison pipeline." I congratulate the BBA on recognizing the need for justice in a school principal's office, to diminish the risk that the same student will later find himself or herself seeking justice in a Juvenile or adult courtroom.

- Earlier this month, the Hampden County Bar Association and MassMutual were nationally recognized by the Pro Bono Institute for their partnership in organizing and sustaining lawyer-for-the-day programs in Springfield in the District Court, Housing Court, and Probate and Family Court. As a result of their partnership, and the ongoing work of Community Legal Aid in the region, many more pro bono volunteers are serving many more clients who would otherwise go unrepresented. Innovative partnerships like this bring us closer to our goal of having robust lawyer-for-the-day programs in every corner of the Commonwealth.

The health of our legal system depends on the health of the legal profession, and the health of the profession depends on the health of our lawyers. The August 2017 Report of the National Task Force on Lawyer Well-Being reveals what we all know to be true: too many attorneys are struggling with serious health issues that are exacerbated, if not caused, by the way that law is practiced today. The practice of law has always been demanding, but it is especially challenging now, fraught with ever-increasing financial pressures, client demands, and work expectations that are taking a terrible toll on many of our most resilient attorneys. A 2016 study that surveyed nearly 13,000 practicing lawyers found that between 21% and 36% qualified as problem drinkers; approximately 28% were struggling with some level of depression, 19% with anxiety, and 23%

with stress.[1] The study found that younger lawyers in the first ten years of practice and those working in private law firms have the highest rates of problem drinking and depression. The struggles of many attorneys begin in law school. A separate study of 3,300 law students in 2016 found that 17 percent have experienced some level of depression and 14 percent had experienced severe anxiety; six percent reported serious suicidal thoughts in the past year and one-quarter were at risk for alcoholism.[2]

Frankly, there is no reason to be surprised by any of this. I paid my way through law school and left with $15,000 in student debt; if I were to do that today, I would be at least $150,000 in debt and worried how I would ever afford to pay it back on a public sector salary. Different jobs come with different problems. At large law firms, the hourly billing expectations keep increasing, but there are still only 24 hours in a day. In the 1960s the median number of billable hours was approximately 1,500 per year for partners and associates; by the 1970s, the target for most firms was between 1,600 and 1,800 hours.[3] A 1990 study conducted by the American Bar Association Young Lawyers Division revealed that 45% of attorneys in private practice billed at least 1,920 hours per year, and 16% billed 2,400 or more hours per year.[4] In 2016, the National Association for Law Placement reported that average associate hours in 2014 were 2,081 per year.[5] For many

[1] Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW, The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, Journal of Addiction Medicine, Vol. 10, Issue 1, 46–52 (January/February 2016), https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx.

[2] Jerome M. Organ, David B. Jaffe, and Katherine M. Bender, Ph.D., Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns, Journal of Legal Education, Volume 66, Number 1, 136-138, 145 (Autumn 2016), https://jle.aals.org/home/vol66/iss1/13/.

[3] Susan Saab Forney, Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of the Billable Hour Requirements, 69 UMKC L. Rev. 239, 247 (2000) https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1421&context=faculty_scholarship.

[4] *Id.*

[5] Update on Associate Hours Worked, NALP Bulletin (2016) (https://www.nalp.org/0516research).

small firm practitioners, those long hours are devoted to scrambling for business, diversifying their areas of expertise, and trying to get paid for the services they provide. Most cannot afford the administrative support of a large firm, and many lack a sounding board to help them think through new ideas, business plans, and legal strategies. Lawyers who handle criminal cases (whether on the prosecution or the defense side), child and family law cases, immigration cases, and civil legal aid cases often take on the trauma and stress of their clients (or, for prosecutors, of the victims of crime), and must often deal with their own financial stress from getting paid too little for their challenging work.

And the pace has become relentless. When I was a private attorney, clients would leave me a voicemail on my office telephone in the evening, and expect a call in the morning; today, when clients email or text their attorneys, they expect an answer NOW, 24/7, even if they really do not need the answer until the next morning.

When Richard Soden received his well-earned lifetime achievement award at the recent BBA breakfast, he recalled that in 1972 a prominent rain-making attorney at his law firm took him aside and told him that it was important that he take care of his clients, but it was equally important that he take care of his family, his health, and his community. We need to make sure that this advice is bred in the bone of every lawyer, and we need to create the conditions in our legal profession that allow every lawyer to follow that advice. I do not know if we can pull this off, but I damn well know that we need to try. We need not start from scratch; the Report of the National Task Force on Lawyer Well-Being includes 44 recommendations for improving lawyer well-being.[6] The SJC has recently formed a Steering Committee on Lawyer Well-Being that will

[6] The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, The Report of the National Task Force on Lawyer Well-Being, 4-6 (August 2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf.

explore ways to reduce stress on attorneys, increase professional satisfaction, help restore work-life balance, and better support those who are confronting mental health and substance use disorders. Because the legal profession comprises so many different legal communities – small firm lawyers, big firm lawyers, prosecutors, defense lawyers, legal services attorneys, judges – as well as law schools, bar regulators, and lawyer assistance programs, the committee has a member from each area of the legal community, who will be responsible for consulting with others in that community to learn what is currently being done to support lawyer well-being, to explore best practices, and to consider whether structural changes need to be made to better foster the health of the profession. Justice Margot Botsford – whom I have kept almost as busy in retirement as she was while serving on the SJC – has generously agreed to lead the Steering Committee. They met for the first time last week, and I hope many of you from each of the various legal communities will work with them so that we can make the life of a lawyer what we hoped it would be when we applied to law school.

The Legislature this year enacted important criminal justice reform legislation, an impressive achievement of substance, thoughtful compromise, and legislative craftsmanship spearheaded by the Chairs of the Judiciary Committee – Representative Claire Cronin and Senator Will Brownsberger. Among the important elements of that legislation was its focus on reducing the rate of recidivism by diminishing the collateral consequences of a criminal conviction that make it harder for defendants to do precisely the things we want them to do upon their release – manage their mental health challenges, deal with their substance use disorders, get an education, find a job, obtain stable housing. Lowering these obstacles to a defendant's success is a critical first step. But, for high-risk, high-need defendants, it is not enough. They will need treatment and medication to manage their mental health challenges and deal with their substance use disorders.

They will need help to surmount the hurdles that might prevent them from obtaining the loans they need to further their education, or from obtaining the licenses they need to find and keep a job, or from residing in public or otherwise affordable housing. We cannot reasonably have confidence that defendants will be able to get back on their feet and not commit new crimes if they are unable to obtain necessary medical and psychiatric treatment, unable to obtain employment or vocational training, unable to pass the HiSET exam or get a college degree, and unable to find stable housing. Because, as one former inmate noted in this very hall in March 2017, "The streets are always hiring."[7]

Prison, the houses of correction, and parole are where the Executive branch and the Sheriffs have the opportunity to work with convicted defendants to reduce their rate of recidivism; probation is where the judiciary has that opportunity, and we aim to seize that opportunity. Over the past five years, we have worked on re-envisioning what it means to be a probation officer – with a focus on evidence-based practices, including adjusting the intrusiveness of the conditions we place on probationers to the probationer's level of risk and need. Research shows that the most effective recidivism reduction occurs when we do that matching – using higher levels of intervention with higher risk probationers, and lower levels of intervention with lower risk probationers. Our task now is to ensure that probation officers have the tools and resources necessary to carry on this work and fully implement its vision of enabling recovery and rehabilitation to take hold in each probationer's life.

[7] Adrian Walker, The formerly incarcerated still struggle to find work, Boston Globe, Mar. 22, 2017, at https://www.bostonglobe.com/metro/2017/03/21/years-after-criminal-justice-reform-formerly-incarcerated-struggle-find-work/0UkQxfESAv7zGgnNO8TtuL/story.html.

A probation officer plays three important roles in the life of a probationer. First, a probation officer is an enforcer of probation conditions – the person who performs periodic drug and alcohol testing, makes sure that a probationer is wearing the GPS bracelet, complying with a curfew, staying away from prohibited locations, and attending required substance use disorder treatment or an intimate partner abuse education program – and the person who will issue a violation notice when these conditions are not met or when the probationer is rearrested. Second, a probation officer is a counselor, the person who works with the probationer to help him or her find a better path. Third, a probation officer is a service coordinator for those given straight probation and a reentry coordinator for those coming to probation after having served time in custody: the person who will help the probationer identify the services he or she needs to succeed, know if those services are available, and where, and help the probationer to obtain those services in the community. Right now, probation officers are connecting probationers to a variety of community resources, from parenting classes to treatment and training programs.

But we need to support probation officers to enable them to do more in this third role as a service or reentry coordinator. Just as a primary care physician can refer patients to specialists who will address the identified medical and psychiatric needs of their patients, so, too, can probation officers refer their probationers to special programs that provide them with mental health or drug treatment, or to programs that provide job training, tutoring, mentoring, or peer counseling, or to legal assistance providers that can help them to keep or obtain affordable housing, to remove obstacles to finding employment or obtaining student loans, and to reinstate drivers' and occupational licenses. If probation officers are to succeed in this third role, we need to provide them with an inventory of available resources in their geographic areas so they know what services are available, and with the training needed to learn how to access them. And, most importantly,

we need funding to ensure that these services actually become available. One way that the Legislature has done this is to appropriate funds to allow Probation to contract for residential reentry services. If someone released from custody does not have a stable place to live, that person is unlikely to succeed in recidivism reducing interventions and treatment. But residential reentry, even with this new appropriation, can help only a fraction of our probationers. We need additional funding to enable Probation to obtain the range of support services that are needed by the majority of our high-risk, high-need probationers.

When we equip probation officers to focus their efforts on high-risk, high-need probationers, when we employ evidence-based practices to match each intervention to each probationer, and when we make available to probationers the specialized services they need to succeed, we will reap the recidivism reduction fruits of criminal justice reform. The landmark legislation enacted this year is an impressive beginning to criminal justice reform, but it is only a beginning. Criminal justice reform 2.0 must refocus on reentry and include the funding needed to give defendants a fair and reasonable chance of succeeding upon release.

I cannot close this State of the Judiciary address without recognizing that we in this Commonwealth are not immune to threats to the independence of our judiciary and the rule of law that exist elsewhere in our country. True, in contrast with some states, we have a Governor and legislative leadership who recognize the importance of judicial independence and respect the rule of law. And true, judicial independence is explicitly part of our Massachusetts Constitution, which proclaims: "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit." But I am saddened to say that some semblance of a threat to the independence of the judiciary and the rule of law has reached our Commonwealth.

It is not the first time. In 1853, many were angry at judges for enforcing the Federal fugitive slave act, and proposed judicial elections as the remedy. At the Constitutional Convention of 1853, Richard Henry Dana, perhaps the greatest defender of fugitive slaves, rose in opposition to the proposal. Dana declared, "I can say to the poorest and humblest man: 'You have come to a country where no man can oppress you, where the government, where the legislature, and where the people itself cannot oppress you. If a sudden movement of popular opinion should turn against you, and you should become odious, or stand in the way of their will or their interests, you may come to my humble office, and, with a piece of paper no bigger than a man's hand, I can set at defiance a majority of thousands of the people of Massachusetts. I can point to the Constitution. I can go to the tribunal and assert your rights.'"

"'Aye,' says my client, 'you may, but how do I know that that tribunal will assert [my rights]?' . . . Now, I say . . . 'These [judges], whom you see before you, hold their offices so long as they behave themselves well; they cannot be removed, nor can they in any way be affected in their persons, property, hopes or fears, for their decision in your case."[8]

In the face of such argument, the proposal for judicial elections went down to defeat, and the Commonwealth has maintained an appointed judiciary ever since.

What does it mean to say that judges shall hold their offices as long as they behave themselves well? If the purpose of that Constitutional guarantee is to protect individuals from the tyranny of the majority, as Dana argued, then surely it cannot mean that judges are subject to removal merely because they have made an unpopular decision. If judges must calculate the potential cost to their careers every time they render a judgment that the majority may disagree

[8] Richard Henry Dana, Jr., Speeches in Stirring Times and Letters to a Son, ed. Richard H. Dana, 3d (1910), 99-100.

with or misunderstand, then our Constitution's promise of "an impartial interpretation of the laws" will be at risk.

Judges should of course be held accountable for misconduct. If we violate the Code of Judicial Conduct, we should be subject to discipline and, in the most egregious case, removal. Our court recently demonstrated that it will not hesitate to take serious action when a judge's improper behavior brings the judiciary into disrepute. But it is crucial to distinguish between judicial misconduct that merits discipline, and mere disagreement with a judge's exercise of discretion within the bounds of what the law allows.

Every day, judges must make tough judgment calls in difficult cases. A judge reviews the law and the evidence and makes the best decision he or she can under the circumstances, often with too little time and too few resources. From a defendant's initial appearance to sentencing, everything a judge says in a criminal case is on the record, and subject to being closely scrutinized, second-guessed, and at times taken out of context. Sometimes the facts are not clear; sometimes the law is not clear; and sometimes, it simply may not be clear how to weigh legitimate and sharply divergent arguments and interests.

Judges sometimes make mistakes; if they did not, we would not need appellate courts. And even when judges act properly within the bounds of the law, it is inevitable that in difficult cases some people will disagree with our decisions. It is fair game to criticize a judge's decision. And if you do not think judges hear and are sensitive to such criticism and to being reversed by an appellate court, I can tell you from personal experience that you are wrong. But threatening judges with removal solely because of a mistake or an unpopular decision threatens the independence of the judiciary and, more importantly, threatens our constitutional obligation to apply the law equally

and fairly to every litigant, whether that litigant be a sex offender, a drug dealer, a drug addict, or the Commonwealth, a landlord or a tenant, a husband or a wife, an alleged abuser or a victim of abuse. If we are to provide every person fair and impartial justice in our courts, we must allow judges to make decisions based on their best judgment of the law and the facts, unburdened by any fear that a controversial decision may jeopardize their careers.

I will gladly compare the quality of our judges to those of any state in the nation. They are selected through a judicial nominating process that is rigorous, fair, and historically nonpartisan, and nominated by Governors who have taken very seriously their obligation to maintain excellence in the judiciary. New judges in our seven Trial Court departments undergo a training program far superior to any that existed when I first took the bench as a Superior Court judge twenty-one years ago, and all new judges are now assigned a mentor judge for their first two years. Every Trial Court department devotes great pains to educate their judges regarding new developments in the law at regular court conferences, and the Judicial Institute and the Flaschner Institute provide high-quality educational programs throughout the year. Every judge receives periodic judicial evaluation by attorneys, staff, and jurors, and we are struggling to diminish racial and ethnic bias in these evaluations. Allegations of misconduct are investigated by an independent Judicial Conduct Commission, and where it recommends that a judge be severely sanctioned, the matter is adjudicated by the SJC.

Through the leadership of Chief Justice Paula Carey and Court Administrator Jon Williams, and Harry Spence before him, we have created a culture in our judiciary where we call things as we see them. We acknowledge our errors and take steps to correct them; we identify areas where we are not where we should be and work to get better; we continually aim to innovate, to explore, to critique, and to adapt. In short, we endeavor not only to be better than we are, but

to be a model for the nation and the world. We are not perfect, but we aspire to be. And we can dare to reach so high only because we work respectfully and collaboratively with every member of our court family, with the bar, and with our friends in the other two branches of government. I do not underestimate the challenges we face as a judiciary and as a Commonwealth, but I also do not underestimate the energy, imagination, will, and perseverance that we can bring, as a team, to confront those challenges.