

MAINE STATE LEGISLATURE

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LAWS
OF THE
STATE OF MAINE

AS PASSED BY THE
ONE HUNDRED AND FIFTEENTH LEGISLATURE

THIRD SPECIAL SESSION
October 1, 1992 to October 6, 1992

FOURTH SPECIAL SESSION
October 16, 1992

ONE HUNDRED AND SIXTEENTH LEGISLATURE

FIRST REGULAR SESSION
December 2, 1992 to July 14, 1993

THE GENERAL EFFECTIVE DATE FOR
FIRST REGULAR SESSION
NON-EMERGENCY LAWS IS
OCTOBER 13, 1993

PUBLISHED BY THE REVISOR OF STATUTES
IN ACCORDANCE WITH MAINE REVISED STATUTES ANNOTATED,
TITLE 3, SECTION 163-A, SUBSECTION 4.

J.S. McCarthy Company
Augusta, Maine
1993

**STATE OF THE
JUDICIARY ADDRESS**

OF

CHIEF JUSTICE DANIEL E. WATHEN

February 18, 1993

"THE STATE OF THE JUDICIARY"

A Report to the Joint Convention of the 116th Legislature

By Chief Justice Daniel E. Wathen

February 18, 1993

It is an honor for me to address the 116th Maine Legislature on behalf of the Judicial Branch of Maine's government. With me today are eleven of my colleagues from the Supreme, Superior, and District Courts. Along with 34 other judges, who I might add are all working this morning, they are responsible for justly resolving the 300,000+ disputes that are filed each year in Maine's courts.

Today I want to report on the cause of justice, but to do so primarily from the perspective of the approximately 500,000 people who each year turn to the courts expecting prompt and effective protection for their legal rights.

When I became Chief Justice eleven months ago, I visited every one of the 50 courthouses in Maine. I went in the front door and tried to look at the court through the eyes of a member of the public. In Lewiston I blended in so successfully the clerk would not let me in to see the judge.

My visits confirmed what I knew, there are problems. The courts of Maine are seriously stressed. The needs of the citizen have been delayed.

I have placed on your desk this morning a list, collected at random, of the types of civil and criminal cases most recently filed in each of those 50 court locations. If you and I had the ability to look in on all the courts this morning, this is a snapshot of the new business we would see.

I show you this so that we can think about the people behind each case. Each individual is vitally concerned either about their person, their property, or their family. Some cases disturb only the parties, while others disturb the security of the entire community and state.

When you consider that more than 300,000 of these new cases are filed each year, it is clear that the needs of the Judicial Branch must be measured by the needs of the people who turn to the courts for help.

If you ask the average citizen of Maine, as I have, what is wrong with the judicial system, you will be told "it takes too long and it costs too much." Although justice requires unhurried deliberation, the citizen knows the problem: there is far too much delay and delay contributes to the cost of litigation.

We have known for a long time that delay denies justice. The Magna Carta written in 1215 provides "to no one will we delay right or justice." In 1792, Daniel Davis, a leader of the effort to separate Maine from Massachusetts, filed a report urging separation and listed delay in the Massachusetts' court as one of the principal reasons.

Finally, article I, sec. 19 of the Constitution of Maine that became effective in 1820 echoes the promise exacted from the sovereign in the Magna Carta and proclaims that "right and justice shall be administered freely and without denial, promptly and without delay." The courts are ultimately responsible for insuring compliance with that mandate.

The snapshot I have provided is a troubling picture in this regard. The first column under the Superior Court contains my estimate of the average length of time it will take that case to be tried if a jury trial is requested. The second column contains accepted national standards for timely case processing promulgated by the National Center for State Courts and the U.S. Department of Justice.

Bear in mind that for the most part our court system is unautomated and the information I have provided does not include the District Court where things proceed more expeditiously, but believe me unacceptable delay occurs throughout the system.

Confronted with the need for increased judicial services, we in Maine have chosen to delay, ration, and postpone right and justice. A person bringing a civil jury action in this state's capital, for example, not only faces filing fees of \$400 but also approximately 3 years of delay in the Superior Court. A simple OUI case requires 491 days to be tried by a jury.

Right and justice are not commodities to be paid for by the user and denied to those without funds, rationed in scarce times, and offered freely only if and when financially convenient. Such a view is at odds with our constitution

and defies common understanding of the critical importance of prompt, accessible, and effective justice to the community of Maine.

The citizen's perception of the courts is undermined by expense and delay and a loss of respect is certain unless it is corrected. Justice postponed is constitutionally unacceptable, unacceptable to us, to you, and to the people we serve.

Consider the consequences of unnecessarily extending an abusive family relationship by even six months or delaying for several years the receipt of compensation for disabling personal injuries. You and your constituents know that delay imposes great human and financial costs.

Why do we have such delays? The answer is simple, the court system is seriously understaffed, underfunded, and enmeshed in unnecessary and wasteful administrative complexity. Maine's financial condition in the last two years did not cause this condition, but it certainly caught our attention by emphasizing dramatically the necessity for change.

In a recent report, a national committee on "funding the justice system" identified seventeen events or crisis points that indicate serious stress in a state court system. Maine has experienced at least ten of those crisis points, with seven occurring in the last year. They include such things as budget cuts, lay-offs, furloughs, shutdown of civil cases, increased filing fees, increased fines, inadequate resources for indigent defense, imbalanced resources, cut in juror compensation, and judicial vacancies used for cost containment.

These events are significant because, as I suggested, they reflect a view of justice as a commodity or a service to be offered only when financially convenient. The only crisis points identified by the committee that we have yet to experience are intergovernmental litigation concerning court funding, early release from prisons as a result of overcrowding, and the shutdown of courthouses.

Beyond the explanation offered by the committee report, there are other obvious reasons for unacceptable delay in Maine's courts. When fully staffed at 50, Maine has the fewest trial judges per capita of any state in the nation and yet we have operated with up to five vacancies for approximately a year and a half. For example, we have had a vacancy in the Superior Court in Augusta for nearly two years. The judges we do have, however, move more cases than the national average.

With a total nonjudicial staff of 339, we have fewer people today than we had in 1986. To give you some basis for comparison, our new State Court Administrator had a staff of 290 in just the Family Court of Delaware, a smaller court than our District Court with a more limited jurisdiction in a smaller state with a much smaller population.

How do other states offer more judges and larger staffs? They spend more. According to figures published by the U.S. Dept of Justice, in 1990 the expenditure per capita in Maine for court services was \$18.99 while the national average was \$31.18. Neighboring Vermont spent \$27.54, N.H. \$29.72, and Mass. \$35.73. If our budget was increased by 1/3, we would still not reach the national average.

My purpose is not to paint a negative picture, nor am I here today to plead for significant increases in funding. I understand the budget realities and believe me I am not discouraged. I am pleased with the progress we are making, and I am proud of the performance of our judges and staff.

But an honest assessment of the state of the judiciary must begin with the hard fact that there are serious underlying causes for delay and lack of service. We can do a better job of managing judicial resources and we will, but meaningful and lasting improvement is possible only if we resist the temptation to accept easy solutions that address appearance but ignore substance.

To use a farm expression, don't think you can fix the court system by tinkering with it. Its been tinkered too much already.

In our initial response to the budget crisis, we in the judiciary contributed to our current situation. Too readily we offered up court locations, judicial vacancies, judicial education, and staff. Fortunately, the Legislature rejected court closings, and I certainly urge you to assist us in championing the need to maintain and improve our present system of convenient and accessible local courts.

I am pleased to say that several months ago we reordered our affairs so that all judicial vacancies could be filled within our existing budget, and we look forward to the day in the near future when we are back at full strength. We

must promptly address the fact that 40% of our judges have not received basic judicial training at the National Judicial College.

In these difficult times we are challenged to change and improve for the future. What should our courts look like. My thoughts have evolved from three sources: my own work and travels, a comprehensive management survey conducted on a volunteer basis by the Portland consulting firm of Barton & Gingold, and the hard work of the members of the Commission on the Future of Maine's Courts established by this Legislature. Their final report will be delivered in early March.

Let me offer you a brief sketch of what I see before us: first we must reaffirm the status of the judiciary as a co-equal branch of government, with constitutional responsibilities to Maine's citizens separate from the responsibilities of the Executive and the Legislative branches.

Next, judges, as one commentator remarked, must understand that like the rest of government they are accountable to the people. They must become comfortable with technology, appreciate the benefits of negotiation, and be willing to spend time and effort in planning.

Courts must be accessible to every individual and particularly to those who are without the means to be represented. Our civil procedure must adapt to those who represent themselves. Proceedings must be marked by respect, efficiency, fairness, and equality of consideration.

The internal structure and management of the court system must reflect the same values. The administrative structure must be clear, democratic, and participative. Communications, both internal and external, must be open and frank. We must achieve and maintain competence in the use of available technology. In all of our efforts we must focus on gathering the actual needs of the public, stating those needs effectively, as I am attempting to do here today, and meeting them. In broad strokes, that is my personal view of the future.

Let me briefly report on some modest progress. We have selected a new State Court Administrator to serve as the chief operating officer of the courts. Ted Glessner has the management style I have described and has a proven record of accomplishment in administering the family courts of Delaware. We expect good things.

We have improved and opened internal communications, clarified management structure, and with the assistance of volunteers from BIW, UNUM, and the University of Southern Maine, we have made significant progress in changing our system of management.

So far we have done this without spending money. We expect a grant in early March, but with it or without it we are committed to creating a single coordinated system that focuses on meeting the needs of the public and values its strongest asset: the people who do the work in our courthouses.

I am also proud to report that we have a task force of judges, staff, and volunteers studying the adequacy of the services we offer to people with disabilities, and we just recently created a 13-member Commission on Gender, Justice, and the Courts, which under the leadership of Prof. Colleen Khoury from the Univ. of Me. School of Law, will address the issue of gender bias and other minority concerns in all aspects of the courts' operations.

Despite our progress, we have a long way to go in improving the services we offer the people in Maine. How can this Legislature help?

First and foremost we need a degree of independence from the fiscal regulation imposed by the executive agencies. I do not want to overstate our case for we receive cooperation from the Legislature, its staff, and the Bureau of the Budget. The present system works but, as the Special Commission on Governmental Restructuring recognized two years ago, it is time consuming and duplicative.

We have resubmitted the proposal of the Commission as it pertains to the judiciary and we would urge that you consider it favorably. Essentially the legislation enhances the authority of the State Court Administrator, calls for submission of the judicial budget directly to the Legislature with recommendations from the Governor, requires a long-range planning process, and eliminates duplicative financial procedures. You may recall that the Commission bill was passed by the 115th Maine Legislature but was vetoed for reasons unrelated to the judicial provisions.

Next we need enough breathing space and the resources to permit us to plan and install a modern information network. Despite past efforts, only the criminal and traffic infraction docket in District Court is computerized. Except for financial reporting, the rest of the court system remains unautomated. Computer software is now available off the shelf that would appear to satisfy most of our needs.

In my judgement, no single project will improve the level of service we offer the public more than state-of-the-art technology. The impressive performance of the District Court Violations Bureau attests to that fact. We are in the planning stage and exploring the availability of grants and federal funds.

We have a very small computer staff, however, consisting of only five people. At some point we will need more staff. Even now, this project will limit their ability to answer data requests and provide modifications to our existing system. You cannot imagine how much time and effort is involved each time this Legislature adds a new surcharge or special fund to criminal fines, for example.

In short, we need a breathing spell to plan, select, finance, and install a modern system that meets our needs for flexibility, information, and efficiency. We are not seeking additional funding at this point.

Next, we require legislative recognition of the fact that certain expenditures are mandated by both the state and federal constitutions. I refer principally, although not exclusively, to that item in the judicial budget that bears the misleading caption "court appointed counsel."

This category of expense would be more accurately described as "legal services for indigent persons involved in child protection, mental health, and criminal cases." This account is not confined to providing defense counsel for indigents charged with crime. Mental health and child protective cases alone account for nearly 50% of the indigent funds expended in the District Court and more than 25% of the total of all expenditures throughout the system.

The significance of that fact is not well understood. Witness that within the past year the Department of Human Services added 25 child protection workers and yet no additional funds were appropriated for the legal or judicial services that will necessarily result from their increased efforts to protect our children. In fact, such filings increased 16% this year. Indigent legal expenses are unavoidable unless the State abandons its responsibilities to prosecute crime and protect children and the mentally ill.

In recent years, particularly since 1989, the Legislature has only partially funded this account in the General Budget and then has made an emergency supplemental appropriation during the last half of each fiscal year. This two-step process is time-consuming and has resulted in chronic underfunding. Despite a supplemental appropriation in each year, more than one million dollars of unpaid legal expense has been permitted to accumulate since 1989 and is carried from year to year.

The figures for the current year demonstrate the point. In fiscal '92, we paid out a total of \$4.56 million for indigent legal services and carried more than \$1 million in unpaid bills into the current year, and yet the initial appropriation for the current year is \$4.25 million. At this point I must commend Senator Pearson, Representative Chonko and the other members of the Committee on Appropriations for their leadership in connection with the emergency appropriation that received initial approval here on Tuesday. Without that appropriation all funds would have been exhausted before we reached the fourth quarter and the accumulation of unpaid bills would have increased significantly.

This will always be a troublesome expenditure and many have wondered if there is a better way. Let me state my view unequivocally, the existing system of appointing private attorneys is the most inexpensive method for the State to discharge its constitutional responsibilities and an authoritative study suggests that the quality of the representation provided is at least equal to that received by clients who retain their own counsel.

We in the judiciary are willing to consider any other method of providing counsel and the State could employ full-time public defenders. I am certain that that would result in significantly higher expenditures.

The per capita expenditure in Maine for court-appointed counsel in criminal cases is currently under \$3.00, while the U.S. Dept. of Justice reports that the national average is \$5.37, with N.H. spending \$6.53, Vt. \$6.63, and Mass. \$8.62.

The lawyers in Maine provide a valuable public service at very favorable rates. Until we change the system, the state should willingly honor its obligation and fund this account fully.

The two-step budget process I have just described is not confined to expenditures for legal services for indigents. In every year that I can recall we have required emergency supplemental appropriations for routine operating expenses that were projected and known at the beginning of the budget cycle.

The Judicial Branch has been roundly criticized for its lack of short and long term planning. The connection between budget uncertainty and planning is obvious. We never know until just before the fourth quarter of each fiscal year what our final budget will be. Such a process provides no opportunity for planning.

We understand the fiscal reality and we appreciate the cooperation we receive, but the entire judicial budget is less than 2% of the total state budget. We neither make nor break the budget. As a coequal and independent branch of government with separate responsibilities, our performance would be improved by a greater degree of budget certainty.

Finally, I must report that we need to begin the process now to plan the replacement of the District Courthouses in Skowhegan and Biddeford. Skowhegan's courtroom is located on a second floor in rented space and is inadequate, as all who have entered will attest. Biddeford, the second busiest District Court in the State of Maine, is housed in less than 4500 sq. ft. of space and is so crowded it defies description. If you want a vivid description, I refer you to any of your colleagues from York County. We realize that building funds may be out of reach at the moment, but now is the time to plan and invest for the future.

The late Louie Jalbert who graced these chambers for so many years is quoted as saying that "the only one who enjoys a speech is the guy giving it," and so it should come as no surprise that I have enjoyed this opportunity to talk with you and the people of Maine.

I have emphasized the fact that we have separate powers, and we do, but I want to close by assuring you that we enjoy a unity of purpose and concern. We are all accountable to the women, the men, and the children of Maine.

In recognition of the fact that we are engaged in the common task of governing, I would respectfully offer the suggestion that the leaders of the three branches of government should meet openly and informally, perhaps once every year or two, and talk about the problems that confront us all.

You would be surprised how much wisdom and experience my colleagues possess, and I know the same is true for those of you who serve in these legislative halls and the executive offices.

If, in our separate spheres, we are to govern wisely in these challenging times, the people of Maine deserve all that we collectively have to offer.

Thank you.