



State of the Court

2004 Address of Chief Judge Kocoras

STATE OF THE COURT ADDRESS - APRIL 15, 2004

Thank you Arlander. Good afternoon to you all. I want to thank Arlander, the officers and all of the members of the Federal Bar Association for inviting me to speak to you today. It is a wonderful tradition that your invitation perpetuates, and I am honored that you have given me this forum to express some of my views and opinions. These are my own thoughts and expressions, and I cannot affirm whether any or all of them are shared by my judicial colleagues, but I hope some are.

In preparation for this speech and, not surprisingly, I went back to last year's speech to see what I had to say. It is important to be fresh and reflect on the year just passed and not dwell on things longer ago than that. Sadly, however, some things carry over. For one thing, our nation is still very much at war. Freedom and our way of life have become even costlier and we have all been affected by it, some families more deeply than others. We have been witness to the slaughter of innocents, with the application of reason as a means of resolving disputes all but abandoned in many parts of the world. That is why it is more imperative than ever that we propagate the rule of law and venerate its wisdom.

Aside from world affairs, we have issues much closer to home that deserve our attention and call for the best from us. One of these topics is also a carryover from last year, and that is the continued politicalization of the judicial appointment

process at the higher levels of judicial vacancies. Last year, it was nominee Miguel Estrada who was left twisting in the wind. This year there are others. Failure to bring nominations to the floor has produced recess judicial appointments. Each side has managed to offend the other, but both sides have succeeded in sullyng the process. Opinions of judges are now sometimes reviewed with the perceived philosophy of the appointing president the feature of the story rather than the compelling force of the reasoning contained in the opinion. The independence of the judiciary is being challenged and, more fundamentally, respect for it diminished. You cannot cheapen judicial nominees and judges without cheapening the quality of justice in the process.

Another trend which I find disturbing is the disappearing trial. While lawsuits of all kinds, both criminal and civil, are continually increasing, the percentage of cases terminated by trial is significantly decreasing. The number of trials per judgeship, both in the Northern District and in all other federal courts, shows a steady decline over the last 10 years. So why do I view this as a disturbing trend—it is because some of the reasons for it are troubling and in the long run, unhealthy to our system of justice.

Although it is difficult to know all of the reasons behind the steady emergence of alternative dispute resolution processes in the civil law, some of them

are obvious. These include efforts to minimize the risk of loss by both plaintiffs and defendants. Trials often produce results of either all or nothing, while notions of compromise have the allure of a form of insurance. There is not much lawyers or judges can do about that factor.

But another reason, obvious to me, is the high cost of litigation and the length of time it often takes to get to the end of the litigation road. In my view, some of the proliferation of ADR is a commentary on our failure to offer speedy results at an affordable cost. And a major culprit in that analysis is the matter of discovery. The conduct of sometimes never ending discovery contributes in a strong way toward the movement away from a court system production of justice versus some alternative method of dispute resolution. Discovery is costly—often quite so—and litigants ask why so much is necessary and whether they are getting their money's worth. It is a problem we have faced for many years with periodic changes nibbling at the edges but none producing meaningful change. I submit we can and should do better.

The reason why we need to look closely at this trend is the effect a declining trial experience produces. I have long thought it was a genius of both our civil and criminal justice systems to use ordinary citizens to determine factual disputes. Jurors are people of good will, hard working and willing to participate in our self-

governance. When they serve, their belief in the value of our justice system is fortified in an important and lasting way—I have seen that result too often to doubt its presence—or its force.

With equal force, the use of juries bolsters society's confidence in the justice system. Is there an adequate substitute for the collective wisdom and common sense embodied in a cross-section of the community? I think not. A verdict of one's peers is difficult to criticize. Trials are open for all to see. Evidence is presented in open court, and verdicts are rendered only after all voices are heard and considered. Openness inspires confidence in the wisdom of the results produced by jury trials. This confidence, along with the opportunity for citizen participation in the rendition of justice, are worth of perpetuation. We lose that with ADR.

Also diminished is the precedential value of cases. Most mediations and arbitrations are not held in public forums, nor are they open to the public. Their outcomes are often governed by secrecy provisions. These processes impede the general development of the law. Comment on cases, outcomes, and legal principles involved are circumscribed or stifled, with commentators and scholars having much less to write and speak about. In short, the diminution in the conduct of trials is not only reflective of the failing of our traditional mechanisms for the production of

justice, it produces a loss of values and participation by members of the public. The trend is an unhealthy one.

And now even closer to home and not controversial is a little discussion about our court. You already know of the appointments of our two newest judges, Sam Der-Yeghiayan and Mark Filip. Our court is small, and just 2 people make up almost 10% of the active judges. I want to pay public tribute to both Senator Fitzgerald and Senator Durbin for the quality of these two appointments and others they have made. We have been well served by both Senators. Still on the personnel side of the bench, you may know that Suzanne Conlon is going on senior status on April 17—two days from now. Magistrate Judge Ed Bobrick is retiring in June of this year.

In addition to the vacancy caused by Ed's retirement, our court has been authorized a brand new Magistrate Judge position for Chicago. Last week, we announced the two vacancies we intend to fill when the process runs its course. My belief is that it is a great job, the pay is good, there are no billable hours, your colleagues are nice, and the boss can't be beat. I'm encouraging applications because excellence on the bench is a starting point in measuring the quality of justice the system produces.

Also in process is the institution of Case Management/Electronic Case Filing, known as CM/ECF. We are in the middle of implementing this system for the district court, a system that is being installed throughout the country with the assistance of members of the Administrative Office of the United States Courts based in Washington, D.C. As reported by the technicians and others familiar with the system, there are some bugs to be worked out. I am loath to predict when everything is finished to the general satisfaction of judges and lawyers, and any date suggested would be guesswork on my part. Nor am I able to tell you the precise contours of the system, but I can tell you its objects. Ultimately, it is to make the filing of documents easier and faster. Data will be easier to retrieve and use, with a minimum of complexity. It may not approach the title once used to describe something as revolutionary as that book's contents, but for many of us, the title Brave New World comes to mind.

Those who know me know my speeches are not long on statistics, but we have some for your perusal. I believe the story they tell is the following:

1. We are a very busy and active court with lots of work to do;
2. We are a very efficient court in the time it takes to dispose of civil cases;

3. While the number of civil case filings have held steady these past three years, the figures also show a significant increase in the number of criminal defendants we have considered over the same period of time. The increase in criminal cases often taxes the resources of the system in many ways, and is not limited to its impact on judicial workloads. The U. S. Marshal and his staff are also substantially burdened inasmuch as they have principal responsibility for the movement of prisoners. Likewise, the MCC is bulging at the seams with many prisoners housed at locations a good distance from the courthouse. I want to publicly acknowledge the work of the U. S. Marshal and the deputy Marshals. In the main, they do a terrific job. We are all working to keep screw-ups at a minimum. I also want to publicly applaud Warden Jerry Graber at the MCC. He does a masterful job in handling an over-capacity prison population with efficiency and calm.

As long as I am acknowledging meaningful contributions to our work, I want to make special mention of Arlander Keys. The term of Presiding Magistrate is two years with a two year renewal if warranted. When I took office as Chief, Arlander was the Presiding Magistrate Judge, but only had a few months to go before his four years were up. I decided to extend Arlander's term for an additional year for two

independent reasons. The first was the excellent job he had been doing. He was highly regarded by his colleagues and enjoyed the respect of lawyers and parties appearing before him. Excellence of performance is worthy of special recognition. The second reason was my infancy in the job as Chief Judge, and I thought I would have a better handle on who should be his successor with a little more time in office under my belt. I was right on both counts. After the year passed I decided to select Mort Denlow as Presiding Magistrate based on his demonstrated strong performance in his first term as a magistrate judge. I think I made another good choice.

The final topic I wish to address is the matter of security. As federal judges, we are a branch of the United States Government and work in a public building. You, as lawyers, work with us in the same place. All of us on the local level are guarded, in some way or other, by Court Security Officers, Deputy U. S. Marshals, and other law enforcement officers. We are all inconvenienced in some way by virtue of security measures in place. Public commerce is not as free and easy as it once was. We all grumble from time to time over what we sometimes think are needless intrusions or requirements; that is human nature. But one thing we must never do is take for granted the comfort supplied to all of us as we go about our daily business, or the risks these officers so willingly and bravely assume in the

name of duty and responsibility. They are entitled to our special respect and our special thanks and, in this speech, our special recognition.

I want to again thank you for your invitation to speak this afternoon. Some of you may agree with some of the sentiments I expressed, and some may disagree. As Chief Judge, you have afforded me a special opportunity to express my views, and I feel an obligation to do so honestly. To suggest any curtailment of discovery in federal cases may border on legal blasphemy. I am mindful of the need of lawyers to fully know the evidence they may have to confront at a trial, as well as the necessity to fully develop the information supportive of their own positions. But the notion of excess is neither new nor uniquely my own, and I believe to be one of the main causes of the vanishing trial. It is our collective responsibility to preserve the best of our system, while eliminating that which is slowly operating to destroy it.

Thank you very much.

I will take any questions you may have, on these or other topics.

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