

Meeting of the Representative Assembly
State Bar of Michigan
Saturday, April 18, 2009

Good morning. It is a pleasure for me to have this opportunity to address you here today. I must confess that I have a strong sense of déjà vu, realizing that it was a little over 20 years ago that I was in practice and a member of the Representative Assembly. I recall wondering then whether the work we did on the Assembly was noticed, much less appreciated, by the Michigan Supreme Court. I can now assure you on that score: my colleagues and I value this Assembly and the legal profession that it represents. As someone who has been involved in state and local bar activities for many years, I continue to believe that the organized bar, particularly the mandatory bar, is essential to maintaining the integrity of the profession.

Obviously, any bar association must to some extent support its members in the practice of law. That includes offering services and opportunities for members to improve their skills, find better ways to manage their practices, and market their services - in short, to make a living. But the organized bar does more. It serves as a vehicle for each of us to look beyond our own interests to the greater needs of the justice system.

This morning, I will give you an update on some recent developments at the Supreme Court, including our administrative work and some of my goals as Chief Justice. It's my hope that you'll find something in my report today that will interest or engage you, recognizing that, as members of the profession, our ultimate responsibility is to the rule of law and the justice system that makes it possible. You can and should, both as individuals and as an organization, play an advisory role in the Supreme Court's administration of justice.

In that regard, I'd like to recognize just a few of the Representative Assembly's contributions to the Court's administrative work. MCR 8.126, which governs pro hac vice admissions and went into effect in June 2008, was a Representative Assembly proposal. Interestingly, in the first six months, this rule has generated about \$27,000 in fees that are allocated to the attorney discipline system and Client Protection Fund. The waiver of dues for State Bar members in full-time military service, adopted by our

Court in October 2008, also originated with the Assembly, as did rules about electronic service and others that have been adopted by the Court in the same or nearly identical wording as proposed by the Representative Assembly.

We appreciate the Assembly's continued involvement in the Court's administrative process, particularly when that process is now more public than ever. As you know, beginning in January, the Supreme Court began to hold its administrative conferences in public, and they are televised by Michigan Government TV. This change, in my opinion, was long overdue and will help bring greater transparency to the Court's administrative work. Obviously, our decision-making process regarding cases cannot take place in public. But I believe that the Supreme Court, in its administrative role, functions no differently from any other branch of government. For example, the State Board of Education, on which I served for 12 years, held its meetings in public, and throughout those 12 years I don't ever recall thinking that we were impaired or hampered in some way because we were working under the public's eye.

For some years, the Supreme Court has had a public administrative process, in the sense that we publish possible court rule changes and other administrative proposals for comment and hold public hearings. To me, it made no sense that we would hold part of that process in public but keep our administrative conferences behind closed doors. So I welcome this change.

That is not to say that my six colleagues and I have perfected the way we hold these conferences. There is, inevitably, some awkwardness involved in making any significant change, and indeed, we are still working out the rules that will govern these meetings. The famous saying about not watching either sausage or legislation being made applies to these conferences as we adjust to holding them in the open. It may not always be pretty, but I think anyone watching would realize that the Justices bring a lot of passion, energy, and commitment to their work. When we've gotten past our growing pains stage, I think the public, particularly the bar, is going to be much better informed and more engaged in our administrative process than ever before.

At the risk of telling you what you already know, I'd like to quickly go over how the Court's administrative process works. When the Court receives a proposal for a

rule change, there's an initial period of study and discussion among the Justices.

At our public administrative conferences, we decide what action to take - for example, whether to publish a proposal for comment. If so, the proposed change goes on our web site and is also distributed to the media and the State Bar. The State Bar publishes it in the Bar Journal and electronically via the weekly public policy update, which is both e-mailed and archived on the State Bar's web site. There is a comment period, typically of 90 days. Comments can be submitted to the Clerk of the Court either by e-mail or by letter. All comments are posted on the Court's web site along with the proposed rule change that they address.

Once the comment period expires, typically the matter is put on the Court's agenda for a public administrative hearing. These hearings are open to anyone who wishes to comment on an agenda item; it's an additional opportunity for the public to have a say in the process. The details of each administrative hearing are published on our web site, released to the media, and made available by the State Bar.

Following the hearing, the Court votes on the proposed change - again, in public. The Court may adopt the proposal as written, adopt an amended version, or decide not to adopt it in any form. Our decision is definitely influenced by the comments we have received, both written and at the hearings.

It's fair to say that one of the most high-profile administrative matters before the Supreme Court today is the question of our recusal procedure. As you know, it's been the Court's traditional practice for a challenged Justice to decide whether to recuse himself or herself. It has also been the tradition that a Justice need not give any reasons for the decision, and it's been unclear what standards a challenged Justice should apply.

One of my goals as Chief Justice is that the Court adopt a written recusal procedure that is clear, fair, and workable. To that end, last month, the Court published three alternate proposals for public comment. The comment deadline is August 1, which I realize does not provide a window for the Assembly to comment as a body, but I bring this up to encourage the input of individual members.

Obviously, I am only one of seven votes, so what I say here today does not reflect the Court's official position nor necessarily the opinion of any of my fellow Justices. Speaking for myself only, I strongly favor having a written recusal rule that provides for some review of a Justice's recusal decision, based on an impartial review standard.

The *Caperton* case, recently argued before the U.S. Supreme Court, is a reminder that we can't always allow the challenged Justice to be the last word on a recusal motion. I also think that we can't have a recusal standard that allows an attorney or party to create grounds for recusal through personal attacks on a Justice. It doesn't make much sense for us to have a rule that allows Janet to punch me and say, "Okay, now you're biased against me."

This is a complex and difficult issue. But that is no reason for the Supreme Court to shrink from the task of formulating a recusal procedure. As I said, we hope for much input from the bar membership. If you go to the Supreme Court's web site and look under the "resources" tab, you will find a link which will take you to proposed court rules and this particular item, ADM 2009-4, with instructions on how to submit comments.

One particularly valuable part of the process, at least for me, is that comments on this and other published administrative matters are posted on our web site, generating more comments, as others react to what's been posted. So you may find it helpful to view the comments page on this and other matters before submitting your own.

One of my responsibilities as Chief Justice is to appear before the Legislature at budget hearings. I'll be appearing before a House subcommittee next week. This is a considerable task, as you can imagine, because despite the great respect the Court enjoys with the Legislature, the fact is that legislators are under great pressure to cut the budget, ours included. On the other hand, I get to present some of the most exciting work our judicial branch does to further the administration of justice, including a new pilot project for mental health courts and our many technology initiatives.

Earlier this year, the Pew Center on the States released a report entitled, "One in 31: The Long Reach of American Corrections," that underscores the dire need we have for alternatives to incarceration. The report's conclusion was that we have reached a point where the skyrocketing rate of imprisonment is not having the desired

effect: we are not gaining better public safety and certainly not preventing recidivism. In Michigan, \$2.18 billion was spent on corrections in fiscal year 2008, and as of the end of 2007, one in 27 adults was under some form of correctional control - prison, jail, probation, or parole.

Now, were we not prodded by the worst fiscal crisis in a generation, we might be paying less attention to this problem. But corrections spending, formerly off-limits, has become a prime target for cuts in Michigan and in our sister states. We're forced to look for better ways to deal with offenders. Common sense says that it would be far better, and far less costly, to make available to nonviolent, low-risk offenders services that would help them avoid landing in trouble again. And one very promising answer to this problem is the problem-solving or therapeutic court movement.

In Michigan, the therapeutic courts approach is most evident in the 89 drug and sobriety courts that we have instituted throughout the state. Some focus on adults, others on juveniles, still others on drunk driving offenders or parents whose substance abuse leads to child abuse and neglect. Recent studies by the State Court Administrative Office and the federal Governmental Accountability Office indicate that drug courts reduce recidivism and save taxpayer money. A 2008 study by the Urban Institute found that, for 55,000 people in adult drug courts, about half a billion dollars was spent on supervision and treatment - but those programs reaped savings of over \$1 billion in reduced law enforcement, prison time and victim costs.

One of the challenges we now face is to continue funding for these programs. The judicial branch faces a 2 percent reduction in general fund and the loss of \$550,000 for the mental health court pilot, and may lose federal funding for our drug and sobriety courts. I have asked the Legislature for federal stimulus funding for our drug and mental health courts in the event of a budgetary shortfall. I believe that any investment we make in these courts will be well rewarded - for the offenders whose lives are turned around, for the public's greater safety, and for the taxpayers.

On the technological front also, the Court is doing its best to keep pace with the times. In recent years, the Judicial Information Systems division of the State Court

Administrative Office took the lead in the Judicial Network Project, through which over 95 percent of all felony and misdemeanor dispositions are now reported electronically - on a daily basis and often immediately -- from state courts to the Michigan State Police and Secretary of State.

Other projects include online payment of traffic tickets, a statewide system for trial court case management, video conferencing for prisoners, and electronic filing of court documents. And we're particularly excited about the Judicial Data Warehouse, well on its way to becoming a statewide repository of court data for both pending and closed cases. As of the end of 2008, the warehouse contained over 34 million documents and was implemented in 219 courts. The warehouse has many potential applications, ranging from law enforcement to child welfare.

This truly is a brave new world for the administration of justice, but here again, we find ourselves challenged by budgetary constraints. We hope that the Legislature will allocate some stimulus funding to allow the Judicial Data Warehouse to be implemented in the 25 courts remaining, allowing us to complete the project more quickly and freeing up money for other initiatives to benefit the public, such as online ticket payment.

I do have a wish list for my tenure as Chief Justice, and topping the list are projects to improve access to justice. In a better world, we'd have enough legal aid funding to accommodate everyone who could not afford to pay for an attorney, and legal aid lawyers would be compensated at a level that would not compel them to take on huge caseloads just to make ends meet. Legal self-help centers, such as that in Washtenaw County, offer valuable assistance to those who must navigate the legal system by themselves on basic matters, but are no substitute for a good lawyer for those for example charged with serious crimes or facing termination of their parental rights.

Recently, with the closing of the Detroit Police Crime Lab, we have had to confront the very real possibility that there may be innocent people serving prison terms as a result of faulty evidence. Reviewing these cases has a price tag, and I've asked for stimulus money for that project. But in the months to come, it's going to be up to all of us to find ways to improve the system that are also cost-effective. I don't pretend to have the answers, but I

do know that we have to find them, and I hope that I can count on your help in doing so. Thank you.