

State of the Judiciary
Chief Justice Margaret H. Marshall, Massachusetts Supreme Judicial Court
Message to Massachusetts State Bar Meeting
October 11, 2007

President White. Distinguished guests. Thank you, the leadership and members of the Massachusetts Bar Association. You are, you always have been, among the Judiciary's most stalwart partners in the hard work of advancing justice for all.

The reputation of this association for public service reaches well beyond the Commonwealth. I was delighted to learn that, together with the Boston Bar Association, the MBA has received the prestigious Harrison Tweed Award from the American Bar Association for extraordinary achievement in increasing access to civil and defender legal services for the indigent. It is an honor well deserved.

And hardly surprising. I have been a member of this Association for many years. I have seen its exponential growth. I have admired your unfailing ability to focus on new opportunities for public service, and service to the profession. This Association leads with creativity and foresight. Along the way, you have developed a thriving, diverse, dynamic institutional structure to propel your interrelated goals of justice and professional excellence. You have, in short, created and followed an exemplary business model.

Can we say the same for our courts? Until recently, the idea that courts should have a business model struck many as unseemly. "We deliver justice, not widgets," was a remark heard too often. But the remark was misplaced. Focus. Disciplined management. Efficiency.

Responsiveness. The formula for a successful law practice and a well-run nonprofit entity has many of the same ingredients as a well-functioning court system.

You need not take my word for it. In the words of one recent comprehensive study, "the judiciary is a vital factor in the Rule of Law and more broadly in economic development."¹ The United Nations. The World Bank. China, Brazil, and other developing economies. All have come to recognize that economic development and an independent, well managed judiciary wedded to the rule of law go hand in hand. "Government has an essential role to play in investing in the human resources and infrastructure needed to develop an entrepreneurial culture," a British sociologist observes.² The essential role of government in fostering entrepreneurship is most effective when written guarantees of personal freedom and property rights are neutrally enforced by independent judges.

Why do I mention the needs and structures of a thriving economy in a report on the Judicial Branch? To be sure, the respective goals of enterprise and of our courts differ markedly. Yet is there anyone who would argue that good management is irrelevant to our courts' core mission to

¹ See generally, Kenneth Dam, *The Judiciary and Economic Development* (March 2006, John M. Olin Law & Economics Working Paper).

² Anthony Giddens, *The Third Way. The Renewal of Social Democracy* (1998), quoted in *The Big Book of Business Quotations* 186 (New York: Basic Books 2003).

deliver "justice freely . . . completely, and without denial; promptly, and without delay?"³ That is a quotation from the Massachusetts Constitution.

Some of you here today represent businesses or individuals in civil matters. Others represent victims of crime or criminal defendants. No matter whom you represent, you know that it matters, it really matters, whether a case moves smoothly through the court system or is ensnared in endless, infuriating delays. An unfinished transcript. A lost file. A poorly managed docket. An endless round of continuances. Such inefficiencies draw a heavy toll. On a crime victim's peace of mind. On the cash flow of a small business. On the manageability of your own caseload. And, ultimately, on the public's perception of its government.

We all have a stake in a judiciary that not only excels in substantive justice – as we do in Massachusetts – but also delivers justice fairly, promptly, without delay. That is why I am delighted to report that the past year has been one of significant progress in the management of our courts.

As you know, in 2002, the Justices appointed a blue-ribbon panel of outside management experts to evaluate the way our courts work. Since the publication of the commission's report, in 2003, the operating model of the Judicial Branch has undergone significant and far-reaching changes. First, we developed a blueprint for change. Now that blueprint is becoming a concrete edifice. This afternoon I can highlight only a few of the many, significant reforms our courts have made in the way we conduct judicial business.

First, the Court Management Advisory Board continues to monitor and advise on structural changes in the Judiciary. The Board was created in 2003 by the Legislature to assist the Judiciary in facing its management challenges. Recently the members of the Board issued their second annual report on the performance of the Trial Courts. What did they find?

Progress, progress, and more progress. Advisory Board members visited courthouses throughout the Commonwealth. They reported, and I quote, "being struck by the energy displayed by local court leadership and the commitment to achieve progress on" management reforms, even in the face of heavy workloads and limitations on space and resources.⁴ Advisory Board members found – again I quote – "great accomplishment and progress" being made on establishing, reporting, and analyzing objective data on court performance. They found that "for the first time in the history of the Trial Court . . . data and statistics on court performance have been used as a case/court management tool."⁵ They applauded the creation of court staffing models, and the updating of those models based on current workloads.⁶ And they lauded progress on implementing our electronic case management system, MassCourts, across the Trial Courts.⁷

I shall return to some of these items shortly. My point here is this: Members of the Advisory Board have no incentive to sugar-coat their responses to our efforts. They are leaders in their respective fields, busy professionals whose time is much in demand. Their work on the Court Management Advisory Board has been consuming, and unremunerated. Yet this year, when their

³ Massachusetts Constitution, § 12.

⁴ Court Management Advisory Board 2006 Report at 2.

⁵ Id. at 3.

⁶ Id. at 6.

⁷ See id. at 5-6.

initial commissions expired, every member agreed to be reappointed to a second term. All ten. I take this opportunity to extend to Michael Keating, Chair of the Advisory Board, and every Advisory Board member our gratitude for your selfless work. Your expressed confidence in the leadership of Chief Justice Mulligan and the Trial Court Chief Justices is a sure sign that we are on the right track.

A second measure of progress this year: metrics. Time standards are now in place in every trial court department, in all cases, civil and criminal. We have established objective goals to measure the extent to which the flow of cases is consistent with those time standards. We are collecting hard data, measuring progress toward those goals. In the past year, Chief Justice Robert Mulligan instituted a quarterly reporting system to provide a real-time assessment of that progress. This is not glamorous work. But without objective instruments of measurement, it is impossible to determine how quickly we are advancing toward our goals.

Again, the signs are promising. One example: the clearance rate metric measures whether each court is keeping up with its incoming caseloads. Clearance rates need to be more than 100% for the number of cases disposed of to exceed the number of cases filed. For 2006, the Trial Court set an aggressive clearance rate of 110 % for all court departments. The result? The average departmental clearance rate was 116 %.⁸ The goal established in 2006 to reduce the load of aged cases in the Trial Courts was an ambitious 33 %. In fact, in 2006, the number of aged cases was cut from approximately 177,000 to approximately 87,500, for a reduction of 50.6%.⁹ We know our courts are expediting the delivery of justice because the data tell us so.

This year, Chief Justice Mulligan will add a new metric, focusing on constituent satisfaction. The metric has been piloted in one division of the Boston Municipal Court and soon will be rolled out in all divisions of that court, with a roll out to all departments to follow. The new metric will enable the Trial Courts to capture not only improvements in the delivery of justice, but the perception of progress of those who use our courts. The user satisfaction metric will allow us to keep our finger on the pulse of changing public perceptions and needs.

One final note about metrics. They are not secret. You can find Chief Justice Mulligan's quarterly and annual reports, as well as the Advisory Board reports, on the Trial Court website.

Now, a third measure of progress I want to mention – technological innovation. The management theorist Lester Thurow has said that we live in an era of "manmade brainpower industries."¹⁰ The Judiciary is committed to harnessing "brainpower industries" to serve all those who use our courts. In 1976, when I graduated from law school, docketing was done by hand.

In 1999, when I became Chief Justice, the laborious practice of hand docketing remained common. No longer. Earlier this year, the Trial Court completed the roll-out of MassCourts Lite in two of our Trial Court departments. MassCourts Lite is the core of the Trial Court's criminal case management system. By allowing faster, more accurate information sharing in criminal

⁸ Administrative Office of the Trial Court, *Enhancing the Delivery of Quality Justice: Report of the Court Metrics Project Calendar Year 2006* at 10.

⁹ *Id.* at 18.

¹⁰ Lester Thurow, *Reclaiming Prosperity: A Blueprint for Progressive Economic Reform* (1996), quoted in *The Big Book of Business Quotations*, *supra* at 189.

cases throughout the courts and their constituent agencies, MassCourts is an important public safety initiative. The full criminal and civil capabilities of MassCourts are now in place in three of the five divisions of the Housing Court. The full roll out of MassCourts in the Land Court has allowed that Department to close approximately 27,000 of its pending cases. We expect similar progress as MassCourts goes online throughout the Trial Courts. My congratulations, and thanks, to Justice James McHugh and Chief Information Officer Craig Burlingame for captaining this massive vessel, and for Chief Justice Mulligan and the Trial Chiefs for getting it safely to port . . . in our courtrooms.

The progress we have made with MassCourts is significant. But it is only part of this year's technological innovations in the courts. You told us that you wanted electronic access to oral arguments in the Supreme Judicial Court. We provided it. Since 2005, in cooperation with Suffolk University Law School, every oral argument in the Supreme Judicial Court, live or archived, may be viewed over the internet. We have done more. The Clerk of the Supreme Judicial Court is now scanning the briefs in cases scheduled to be heard before the Justices. The briefs will be linked to the webcast of the associated oral argument, and the ultimate opinion.

This means that the lawyer in Greenfield, the litigant in Cleveland, or the journalist in Barnstable are the same short mouse-click away from these materials, as are those who are close to the courthouse.

We recently unveiled a fully-redesigned Supreme Judicial Court website. Whether you are looking for a copy of the court's rules, information about court committees, educational material for a high school student, information on law clerk hirings or bar admissions, or an explanation of what takes place on the day of oral argument – you will find it at one address: mass.gov/sjc.

We will continue to explore the power of information technologies to make our courts more accessible and transparent for all.

Last, on this brief and necessarily incomplete list of this year's achievements: judicial evaluations. Over the last several years, with the cooperation of thousands of attorneys (and others) around this state, more than 82,000 individual judicial evaluations by attorneys alone have been completed, assessing each of our trial court judges in sixteen separate performance areas, such as management of the courtroom, demeanor, and timeliness of written decisions. By the summer of 2008, we will have completed two full rounds of evaluations.

On average, each judge has been assessed by more than 100 attorneys in each round of evaluations. This has been a tremendous opportunity for judges to access information on how they are perceived by those who appear before them. It has also provided data valuable to the leaders of the judicial branch on the performance of the judges for whom they are responsible. A meeting between each judge and his or her departmental chief justice to review and discuss the information obtained from the evaluations is a critical part of the judicial evaluation process.

The results obtained to date reflect most positively on the Massachusetts judiciary. The great majority of our judges are evaluated as regularly performing their duties well, with only a small percentage requiring improvement of their performance. To me, a more significant development is that the trends are in the right direction, with the already high number of positive evaluations actually increasing from the first to the second round.

Those judges requiring improvement participate in an enhancement program, where an individualized plan is developed that can include, among other options, mentoring, continuing professional education, and peer observation. I should point out that a large number of our judges, regardless of their evaluations, take advantage of many of these options to enhance their own abilities in the courtroom. Our goal with each new round of evaluations is to raise the level of performance of all judges in the Commonwealth.

I have highlighted only a handful of milestones on the way to establishing Massachusetts as, in every respect, a premier State court system. The hardworking judges and staff of the Judiciary deserve much credit, for they are on the front lines of these changes. Our two co-ordinate branches of government have been indispensable allies.

You, the leaders and members of this association, have also been key to our success.

You have carefully documented the state of our courts. You have respectfully but firmly insisted that we should do better. You have helped build the healthy momentum for change we see today. It has not always been easy. And I recognize that some changes have been more difficult than others to absorb.

The top-to-bottom transformation of our judicial administration is at times challenging. In management as in physics, there is no movement without friction. But I commit to this: We will continue to invite you to the table, in planning, implementing, and assessing our reform efforts in the courts. We will listen to your concerns. We will continue to work with you in partnership, as we have consistently tried to do.

This year our work together has taken many forms. Members of the judiciary have worked closely with the members of the bar to draft a guide to Massachusetts evidence. Because Massachusetts is one of only several States without codified evidentiary rules, the guide should prove most helpful to litigators, litigants, and judges. The Advisory Committee, appointed by the Supreme Judicial Court, will carefully review the responses to its call for public comment on a draft of the guide that is now circulating.

We are in the process of soliciting comments from judges, attorneys, and litigants who participate in the pilot project on limited assistance representation taking place in the Probate and Family Courts of Suffolk, Hampden, and, more recently, Norfolk counties. Every step of the way, from planning the pilot project to training attorneys, the organized bar has worked with us on this important initiative.

Today I have the pleasure of announcing two new joint ventures. First, you have requested our assistance on a project to develop plain English jury instructions in civil cases. The Justices have supported the creation of an MBA committee on plain English jury instructions. Chief Justice Rapoza of the Appeals Court will name one of the Justices of his court to serve as co-chair. Other judicial members of the committee will be appointed by the Justices from the recommendations of the Trial Chiefs. Language should not be a barrier to justice. This is a most worthwhile initiative.

The second joint venture is a series of bench-bar meetings to elicit reactions from lawyers concerning court management initiatives. The first such forum was held on May 29 of this year at the offices of a downtown Boston law firm. For two hours, Chief Justice Mulligan, members of the Court Management Advisory Board, and I participated in a frank exchange of views on

court management reforms with over one hundred and twenty trial attorneys. The input of the trial bar and a dialogue with judges have great value as the court continues to implement its management initiatives. With the support of this Association, we will convene a series of bench/bar discussions on case management and other reforms. These meetings will be organized by specific trial court departments and will be held regionally throughout the Commonwealth, beginning in 2008.

This has been a year of much progress on the road to excellence. But when "doing justice" is your business, progress can be shifting and contingent. The goalposts change with society's changing needs. But move forward we must. "[An organization] with no sense of crisis and no appetite for reform will eventually lose the battle against time and disappear," says one entrepreneur.¹¹ No constitutional democracy can afford that fate for its independent courts. And so we venture together: all branches of government, the bench and the bar, the public and the private sector, each emboldening the other to work harder, smarter, and better for our common good.

Last year our nation observed the one-hundred and fiftieth anniversary of one of this nation's most influential jurists, Justice Louis D. Brandeis. Justice Brandeis's remarkable life has special resonance for Massachusetts. Louis Brandeis came of age as a lawyer in this Commonwealth. After graduating from Harvard Law School, where his brilliance was legendary, he and a partner opened a private practice in Boston. There Brandeis became a successful corporate lawyer. Wildly successful. But his demanding work for large and small corporations and others did not dissuade him from carrying a breathtakingly broad pro bono caseload. On nearly every major social issue of his day, Brandeis weighed in as pro bono counsel. Why? Because he believed to his core that the interests of the legal profession and the interests of the public are dependent on one another. In this respect as in so many others, Justice Brandeis was a complete lawyer, and a complete justice – a man who saw, in his words, "abundant opportunities for usefulness."¹²

As we move forward in partnership – toward a court system of exemplary justice for all – we would all do well to emulate his extraordinary model.

Thank you.

¹¹ Kunio Takeda, Japanese entrepreneur, interview with *Fortune* (March 2003), quoted in *The Big Book of Business Quotations*, supra, at 60.

¹² Louis D. Brandeis, from a speech entitled "The Opportunity in the Law" presented to the Harvard Ethical Society, May 4, 1905, quoted in Susan A. Pasternack, *Justice Louis Dembitz Brandeis: Guided by the Light of Reason* 31 (Brandeis Univ. 2007).