State of the Judiciary
Chief Justice Jean A. Turnage, Montana Supreme Court
Message to the Legislature
March 5, 1997

President Akelstad, Speaker Mercer, members of the Senate and House, Governor Racicot, Justices of the Montana Supreme Court, distinguished public officials, staff of the Fifty-Fifth Legislature, guests, ladies and gentlemen.

Thank you for this honor and privilege to address this joint session of the Fifty-Fifth Legislature.

I would like to take this time to highlight some of the Judiciary's workload, its accomplishments and its concerns.

Before doing so, I think it is appropriate to review some history and constitutional provisions concerning separation of powers, that have placed the Judiciary of the State of Montana as a distinct and separate branch of Montana government with the Legislative and Executive branches.

The great charter of liberties of King John, the Magna Carta, granted at Runingmede, June 15, 1215 – a charter of freedom for the individual – separated the total power over citizens then concentrated in the hands of the king, and gave to individual citizens a voice in the control over their lives and liberties.

This doctrine of separation of powers is as important to the Legislative branch of government, as it is to the Judicial and Executive branches.

James Madison, a principal author of the Constitution of the United States, expressed it eloquently when he wrote:

> **The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.**

Madison's admonition found its way into the Constitution of the United States and is found in Articles I, II and III. The doctrine was adopted in the 1889 Constitution of Montana in Article IV, Section 1, and, in 1972, the people of Montana adopted Article III, Section 1, of the Constitution of Montana providing:

> Separation Of Powers. The power of the government of this state is divided into three distinct branches – legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

It is beyond challenge or argument that the constitutional doctrine of separation of powers is the linchpin that holds the constitutional guarantees of our government together. The right of our

people to choose their form of government and to protect their lives, liberties and property is dependent upon this doctrine.

It is important for all of us to keep in mind that an effective government for the people of this state requires understanding and cooperation between the Legislative, Executive and Judicial branches, recognizing, of course, the constitutional limitations on the respective areas of authority of each branch.

It is when one branch of government attempts to exercise the power of another branch of government that the separation of powers doctrine applies. There are many areas of administrative, nonpolicy matters in which inter-branch cooperation is needed and proper.

Your perspective, the Governor's perspective, and our perspective within the Judiciary must be guided by the knowledge that a strong and independent Judiciary is crucial to the preservation of our legal rights and constitutional liberty. Words in our state and federal constitutions, and in our state and federal statutes, are only words until they are construed and upheld by our courts. Such provisions are not self-executing. The members of the State Bar and our state courts are the first line of defense against attacks on these rights and liberties and are crucial to maintaining stability in difficult and changing times.

As all of you know, the Supreme Court in a unanimous opinion decided, February 27th, in the major class action tax case of Albright and others, against the State of Montana and others, reversed the order of the Cascade County District Court holding that the Department of Revenue had failed to equalize the values of taxpayers' properties as required by the Montana Constitution and as required by statute.

The Cascade County District Court concluded that the Department's market based method of appraisal and equalization which utilizes, depending on available data, the market data approach, income approach and cost approach or combinations thereof, violated section 15-7-112, MCA. The District Court concluded that this section allowed only one method or approach to appraisal and that the Department's use of three approaches violated this statute. The District Court basically ruled that there can be no flexibility in appraisal by the Department. In this, the District Court erred.

Likewise the District Court erred in concluding that Article VIII, Section 3, of the Montana Constitution required that a single approach to appraised value is all that can be utilized by the Department.

The Supreme Court decision in the Albright case makes it clear that the framers of the Montana Constitution intended and the Constitution provides that the Legislature shall have broad flexibility to provide by statute for appraisal, assessment and equalization of all property in Montana. Article VIII, Section 3, of the Montana Constitution provides: "The state shall appraise, assess, and equalize the valuation of property which is to be taxed in a manner provided by law." There is no mention in this Article of any one or more methods or limitations on the Legislature in achieving these mandates.

The transcript of the Montana Constitutional Convention debate clearly establishes that this was the intent of the framers in adopting Article VIII, Section 3.

In debate, Delegate Russell C. McDonough was directed a question by Delegate Peter Lorello. The transcript states:

> Let's get to the word "equalize." And let's suppose that today we build a home in Billings costing $25,000. Let's then build another home in Philipsburg, Montana, and it too will cost $25,000. Now then, would you tell me what the taxes would be on these two homes? Just what would they be at the end of the year? How would you equalize these things, between the two cities?

Delegate McDonough answered:

> What we do by this proposal, we don't tell anybody how they're going to equalize these two taxes between these two counties; we leave that to the Legislature. And one thing I'd like to make clear on that here – that we don't say anything has to be equalized in any one manner. We leave that to the Legislature and the body that they set up…We don't say that land has to be taxed on market value. And incidentally, houses are – residential houses are in Montana. We don't say that other land can't be taxed on productive value…And there's nothing in what we're proposing that you can't tax it on productive value. This thing about changing – how do you arrive at valuation, we're leaving that wide open, because how to arrive at valuation of any piece of property is very complex. And market value is just one of the things you take in consideration. Now, on the difference between the houses. Presently now, houses are started off with – that class of property does start off with market value. And if the house is only worth – you build a house in Philipsburg and if there's not too much market for a house and you pay $25,000 for it, it might only be worth 20. And if the Legislature says that houses will be on market value, then that house will be 20 in Philipsburg and 25 in Billings…But I don't know what the Legislature is going to do. They might actually go to a rental value instead of a market value…And they should be allowed that flexibility…

I know that the Fifty-Fifth Legislature has serious issues pending concerning property taxation. The Supreme Court's February 27th opinion in the Albright case reaffirms that the delegates to the Montana Constitutional Convention and the Constitution provide the Legislature the authority to equalize the value of taxable property in Montana as the Legislature, by law, shall determine and that the Legislature is not limited in providing methods for fair and equitable assessment and appraisal to achieve equalization.

Some review of the ever-increasing litigation filed in our courts of limited jurisdiction, district courts and the Supreme Court is needed for all of us to have a perspective on the caseloads of the Montana Judiciary.

I realize that statistics are not all together appealing and if you occasionally look at your watches, I will not be concerned – unless you start shaking them.

The number of new case filings in the Supreme Court for 1996 was 731. Compared to the 580 case filings in 1995, this is a 21 percent increase. If the percentage increase continues in this and future years, the appellate work of the Court will be in jeopardy. Inevitable delay in resolving appeals will occur, and time needed to carefully consider appellate matters will suffer. We urge

this Legislature and the next Legislatures to consider providing some type of intermediate appellate court system for Montana. Thirty-nine states now have such courts and many have, in addition, family courts or youth courts.

On case dispositions by opinion for civil cases, tort actions amounted to 20 percent of the caseload. Of the other 80 percent of the civil case dispositions, 27 percent related to family law matters – disputes most often involving children, their custody and support.

Caseloads continue to increase in the District Courts. 1996 new case filings amounted to 33,721 cases – a significant 2.6 percent increase over 1995.

The new case filings in courts of limited jurisdiction will exceed 300,000 cases in 1996 – what I believe will result in a significant increase over 1995.

Increased complexity of litigation and increased litigation in general confront our court system and will, without a doubt, continue to confront our court system in the future. I would like to take just a moment to talk with you about an issue that has troubled me for some time. It hovers over our entire judicial process.

Take a moment to think back to your own life experiences and ask yourself when was the last time you heard the simple statement, "I am responsible." In our criminal justice system, in our civil justice system, and as we are reminded daily in the media! In today's world nobody is responsible for anything. Either things just happen or, more likely, we are all victims.

Evading individual responsibility is not an excuse – it has become a given. Unfortunately, this, I fear, is a public mindset, coupled with a lack of civility between individual citizens, which forms a nesting ground and rookery for increased litigation.

The Book of Genesis reminds us that shirking individual responsibility is as old as the story of mankind. When it came time to explain the missing fruit and the loss of innocence, Adam blamed Eve, and Eve blamed the serpent.

In addition to the Court's work rendering decisions on appeals and other matters filed before the Court, many other duties of the Court require attention on virtually a daily basis.

The Court is responsible for the overview and management of many important boards and commissions – Sentence Review, Commission on Practice, Board of Bar Examiners and Character and Fitness of applicants for admission to the Bar, Commission on Courts of Limited Jurisdiction and other important programs mandated by legislation. The Judiciary is fortunate to have attorneys and lay persons who, without compensation, give generously of their time and talents to serve on these boards and commissions.

A major accomplishment in 1996 has been the addition of Rule 54 to the Montana Rules of Appellate Procedure providing for mandatory Alternative Dispute Resolution. The Supreme Court authorized a committee to review and make recommendations for adoption of what is now Rule 54.

The Court takes this opportunity to recognize and express its thanks to the members of this committee whose work encompassed many hours of meetings and drafting to produce Rule 54.

The fundamental purpose of Rule 54 is to provide the citizens of Montana with final resolution of disputed matters appealed to the Supreme Court in a timely and cost-effective procedure.

The structure of Rule 54 provides a mediation process that offers a pathway to settlement of litigation. Rule 54 provides for mediation in three areas of civil law: workers' compensation, domestic relations and money judgments.

The rule has been in effect only a short period of time and has resulted in settlements in domestic relation and money judgment areas of civil appeals.

There is much to be said for the old adage that a poor settlement is better than a good lawsuit.

Another step taken in 1996 was the establishment of an ad hoc commission to review and propose revisions to the Rules for Admission to the Bar of the State of Montana. This commission is comprised of representatives from the law school, the judiciary, the bar, and the public at large. It is charged with the responsibility of submitting to the Supreme Court a comprehensive review and report incorporating any changes and recommendations it considers necessary to improve the rules and programs in the admission process.

Montana's judicial system also includes two legislatively-created courts that are identified as administrative courts, each of which plays an important role in Montana.

The Workers' Compensation Court has a very heavy caseload and is a focal point of matters of great concern to Montana – the workers' compensation system. This court must provide a just and fair system for resolving workers' compensation claims and disputes.

The Legislature also created the Water Courts of Montana which have a task that is almost beyond description in workload. Ultimately, this court system will put to rest the question of a fair and just determination of water rights of Montanans.

I commend your inclusion of a study proposed in House Bill 493, now in appropriations, addressing family law. Nearly all family law issues involve the best interest of small children. Avoidance of delay in resolving and bringing stability into the life of a child is imperative. Delay of often two years or more in litigation over who shall have custody of a young child is an eternity in the life of that child. Any step forward in the area of family law will be welcome.

A startling development throughout our court system is a large increase in the number of pro se litigants who cannot afford attorney representation and the costs of litigation. This includes not only those who seek access to the courts to bring a suit for legitimate redress, but those who find themselves in a court suit as defendants to defend themselves and present a legitimate defense. It is not only the low income citizens, but the average working man or woman of middle income that cannot afford what may be ruinous legal expenses.

In order to obtain their constitutional right of access to the courts, they resort to representing themselves pro se, most often with disastrous results and a denial of their right to justice.

Cuts on the national level for support of legal services has exacerbated this problem. Whatever this legislature can do to provide funding and support to legal services in Montana for those entitled to such assistance will in part help to assure justice to everyone.

The Judiciary takes this opportunity to thank the Legislature for enacting in 1995 a fair and reasonable provision for judicial compensation. This provision will eliminate the problem of seeking at every legislative session requests for consideration of judicial compensation.

The Judiciary also takes this opportunity to thank the legislature for providing in 1995 support for automation of Montana's court system. Major progress has been made since the last session, and on the District Court level all fifty-six county courts will be completed before the next session of the legislature.

Automation technology has been installed in approximately 45 percent of the 138 courts of limited jurisdiction.

One of the important and difficult tasks that the office of the court administrator has been directed to pursue is the development of our own case management system – in other words, the software that is required to run the computers. This task has been achieved and is being updated as new developments require. The importance of owning and developing in-house software is obvious. There is no need to pay an outside provider an exorbitant amount of lease money in order to use a software rented package. On a statewide basis in the long term, such in-house developed software, provided at no cost to the users in all of the counties of Montana, will save tax dollars in huge proportions.

A technical hotline was established by the court administrator to provide technical support to the district and limited jurisdiction courts where the new technology has been installed to quickly resolve automation questions. The automation staff has fielded an average of 400 of these questions each month.

These major accomplishments in court automation would not have been possible without the cooperation of the Legislature.

You will be provided with a detailed discussion of the statistics and other matters relating to each of the courts of Montana in the annual judicial report.

Our civil courts underpin our economy and way of life. They mirror and help develop positive changes in the economic, technological, ideological and moral conditions of society. They yield benefits far greater than those accruing to the litigants alone. For example, landmark cases represent turning points in law and social attitudes. Nonlitigants order their affairs by the results of these cases.

To those injured on the job or by a defective product, to victims of negligence, to those evicted unfairly, to defenders of our waterways against chemical dumping, to small businesses fending off monopolistic practices, to people with a grievance against their government, to abandoned children who need adoption or protective care, to farmers, ranchers and shop owners fighting to keep their properties and their doors open in difficult times, to those discriminated against on the

basis of race, age, sex, religion, disability or other unlawful reasons, our civil courts represent the fulfillment of the basic need for fairness and justice.

When a young mother goes into a busy court to obtain an order that will protect her and her children from an abusive mate, she doesn't distinguish between the law enacted by the legislature and the judge who administers it. In her view, it is one system. Either the law works and she is protected or the law doesn't work and she and her children remain in danger.

Our mission is to administer justice and serve those who come to us to resolve their disputes.

I want to specifically acknowledge with gratitude the invaluable help and assistance of the State Bar of Montana. Its officers and members have unselfishly provided to the Court and the people of this State many services that were rendered without charge. Invaluable help and assistance also has been provided by the University of Montana School of Law, through the time and effort freely given by Dean Ed Eck and the faculty of the School of Law.

I also recognize the professional and dedicated work of district judges, judges of courts of limited jurisdiction, the Clerk of the Supreme Court and his staff, clerks of the other courts and their staffs, Justices of the Supreme Court, staff of the Court, and the court administrator and his staff. Without this professional and dedicated assistance, effective administration of justice would not be accomplished.

Times move quickly, and while the present may seem eternal, all too soon future generations will be here to appraise us as we now appraise the work of our forebears. When they do, they will hopefully conclude: This was our state – still in its youth – and we did our work well.

On behalf of the Montana Judiciary, I thank the members of the Legislature for their support and willingness to listen to the accomplishments and concerns of Montana's judiciary.