

State of the Judiciary
Chief Justice Thomas J. Moyer, Ohio Supreme Court
Message to Ohio Judicial Conference
September 15, 2005

Chairman Krueger, Officers of the Conference, Executive Director Rohrs, judges, guests . . . it is my pleasure to be invited once again to deliver the annual State of the Judiciary message to the Ohio Judicial Conference.

At this time next year, the Conference will have selected a new executive director. On behalf of all of us at the Supreme Court who have worked with Kenn Rohrs during the past three years, I thank you, Kenn, for your diligent, committed service to the judges of Ohio.

We are grateful to you. We wish you much happiness and fulfillment as you begin a new chapter in your life. You leave the Judicial Conference with a clearly defined mission and highly professional personnel.

As in the past, we have enjoyed a constructive working relationship with the Judicial Conference. One example of the benefit produced by that relationship is the creation of the Joint Committee of the Supreme Court and the Conference on Judicial Liability and Immunity. The Committee will review the means of providing the most effective and economical plan for protecting the interest of judges in legal actions filed against them.

Our attention this week has been drawn to two historic events. Both present us with a view into the very soul of the institutions of American justice.

The first event had its roots in Philadelphia in 1787. The contemporary setting is an ornate hearing room in Washington, D.C., the space occupied by the Senate Judiciary Committee. The lights, the cameras, the sharply focused questions, present a drama to be observed by some—a grueling experience to be endured by Judge John Roberts, the prospective 17th Chief Justice of the United States.

The hearings have captured the attention of a nation that has been battered by natural disasters and disheartened by losses inflicted by insurgents and terrorists.

Citizens have kept a vigil at the Committee Hearing Room, with civics classrooms engaged in debate inspired by the proceedings. Commuters scan radio dials; office workers watch the uniquely American process on the Internet.

Indeed some questions posed to the nominee prove the speculation: Judge Roberts would be asked to answer questions that have not in the past and should not now be answered. But something else is occurring in the hearing room.

The cameras have captured a broader picture of the American judiciary—exploring the appropriate role of the judiciary in a constitutional democracy, the balance of power among the

three branches of government, the role of precedent in the creation of common law, judicial codes of conduct, the role of courts in protecting the liberties announced in the Bill of Rights, and judicial temperament.

The Senate Hearing Room is a classroom for a civics lesson. In some sense, all of us are in the Senate Hearing Room. The fundamental questions posed by Senators, the truly appropriate questions, are answered every day in courtrooms across this country.

And the level of attention to the hearings indicates that citizens continue to believe the courts are the preferred forum for settling their disputes.

Senator Lindsey Graham, a member of the Senate Judiciary Committee observed, “Most people get it. They do not want to take their case to a judge who is perceived as liberal or conservative.” He says they want someone who is right and fair. Here is what Senator Graham said to the American Bar Association last month:

“(It) Doesn't matter who you are, how much money you make, whether you're popular or not, it is a place where you can have your day and politics would never give you your day. It's a place where the unpopular can be heard, whether they be shut out in the political process. It's a place where the weak can take on the strong. And whatever political differences we have... need to be parked at the courthouse door.”

The Ohio Response to Katrina

I would like to leave that thought for a moment and examine the second historic event. With its roots imbedded in the birth of our profession, this event reflects our legacy of compassion. Lawyers and judges are responding to the tragedy of Hurricane Katrina with remarkable generosity and concern for others.

It is estimated that 5,000 – 6,000 lawyers, one-third of the lawyers in Louisiana have lost their offices, their libraries, their computers, and client files.

Some courts have no files; evidence is destroyed; and records relating to prisoners are under water or destroyed. The lives of clients are stymied.

The generous, concerned response to these stark realities by the Bar of Ohio will make a difference.

The Ohio State Bar Foundation and the Ohio State Bar Association have already contributed over \$100,000, and the Bar Foundation has established a legal relief fund to provide legal assistance to those in need. Local bar associations have committed substantial funds.

The Supreme Court of Ohio is working through the National Center for State Courts to offer such assistance as computers and keyboards and technical assistance to courts in the Gulf states.

Today I am pleased to announce on behalf of the Court that I have issued two orders to assist lawyers in Alabama, Mississippi, and Louisiana affected by Katrina. We will permit any lawyer practicing in Mississippi, Alabama, or Louisiana who has been displaced by Katrina to practice for six months from Ohio with an Ohio lawyer upon certifying that they are in good standing in their home state.

This action will enable lawyers in the affected states who no longer have adequate resources to practice there, to continue their practice from an office in Ohio.

At least four other states have adopted similar waivers of their lawyer registration and admission rules. I have discussed the feasibility of this action with several bar leaders, and all have assured me that Ohio lawyers will open their offices to lawyers displaced by the devastating hurricane.

It is difficult to imagine the challenges facing the courts of Louisiana, Mississippi, and Alabama for many months to come. Eventually, citizens of the region will find their way back home and it is likely that the effort to rebuild will produce conflicts to be resolved by the courts. As it has throughout the history of our country, the third branch of government will continue to provide stability and engender trust.

So it is in Ohio. In our state we continue to build and sustain our citizens' trust in the third branch of government. Since we last met, the Supreme Court and its related offices have settled into the Ohio Judicial Center. More than 18,000 visitors, two-thirds of them students, have toured our historic home. Later this year we will open a multi-media, cross-generational Visitor Education Center that will be second-to-none in the country.

Here are a few of our collective accomplishments during the past year.

We are close to our goal of providing court-connected mediation in every county in Ohio by the end of this year.

At our request, the General Assembly adopted legislation creating a warning system for lawyers overdrawing a client trust account. Banks must now notify the Disciplinary Counsel if an IOLTA account is overdrawn, which may indicate that the attorney is engaged in unethical behavior.

In the first nine months of this year, the Supreme Court Office of Court Security has conducted on-site security surveys at 32 courts, and consulted on the security aspects of architectural and design plans for five new or remodeled courts.

The Supreme Court and the Ohio Peace Officer Training Academy have collaborated to provide training for court bailiffs...a four-week session is held at the academy for bailiffs who have no previous law enforcement experience, and a one-week program is held for bailiffs with security experience. Both programs are offered at no cost to local courts.

A new Advisory Committee on Security and Emergency Preparedness, chaired by Justice Maureen O'Connor, will conduct its first meeting next month. The Committee is composed of

representatives of the judicial associations, court administrators, county commissioners, and others whose responsibilities bear on the security of our court facilities.

At the request of the National Center for Courts and Media at the National Judicial College, we have agreed with the Ohio State Bar Association to sponsor a seminar on media and courts. Similar workshops are being conducted in every state.

On Dec. 1, 20 invited judges and 20 invited journalists will meet in Columbus. The goal of the workshop is twofold: to educate judges on first amendment and media issues that sometimes occur in trials and other newsworthy court activities, and to help journalists improve their performance in covering the courts.

Many of you have served on various committees and task forces that assist us in improving the administration of Ohio's courts. I will highlight the work of only a few, recognizing that untold hours and personal resources have been contributed to the work of Supreme Court committees.

The first certification test of court interpreters will be administered next year to about 50 Spanish language interpreters, testing their language skills and their knowledge of court terminology and procedures. Those who pass the test will be the first interpreters to be certified by the Supreme Court of Ohio.

The Advisory Committee on Interpreter Services, chaired by Judge Ron Adrine, is developing a Bench Book on interpreter use, proposed rules of superintendence and a code of ethics for interpreters. The rules and bench book will apply to both language and sign language interpreters.

One-hundred and fifty court personnel have received training in the appropriate use of interpreters, and 340 language and sign language interpreters have received training in ethics, procedures and terminology.

To bridge the gap until all languages can be certified, the committee is developing training for court personnel on procedures that should be followed when a certified interpreter is not available.

The Task Force on Rules of Professional Conduct, chaired by Judge Peggy Bryant, has submitted its recommendations to the Court.

We will be considering the important recommendations of the Task Force in two sessions of the Court beginning this month. The prodigious work of this Task Force will enable us to adopt new Model Rules of Professional Conduct that will for the first time in recent history be generally consistent with the rules of all other states.

The Task Force on Pro Se and Indigent Litigants has addressed the very difficult issues created by insufficient legal services for those who cannot afford them. I expect the Task Force Report to be submitted to the Court by the end of this year.

The Supreme Court Committee on Professionalism, chaired by Judge David Sunderman, is developing a pilot project that will link every lawyer who passes the February 2006 bar examination with a lawyer who will act as a mentor for one year upon the new lawyer's admission to the Bar of Ohio. This is an exciting new project initiated by Justice Terrence O'Donnell that recognizes the gap between preparation to become a lawyer and the realities of being a lawyer.

The Court continues to adopt and amend rules necessary for the government of the Bar and the administration of our courts. Of particular interest to you is the creation of the Commission on the Rules of Superintendence for Ohio Courts. The Commission will establish an orderly process for the review and recommendation of changes to the Rules of Superintendence.

Each judicial association will be represented by at least two members of the association. I am pleased to announce that Justice Judith Ann Lanzinger will chair the Commission.

There has been no comprehensive review of the Rules of Superintendence since the report of an ad hoc committee chaired by Justice Alice Robie Resnick more than 15 years ago. The Commission will review all Rules of Superintendence, receive and consider proposed amendments, and recommend amendments to the Court.

We all continue to apply technology to our daily work in order to improve efficiency and access to the courts. Already, the Court posts decisions and opinions on our Web site; provides live and archived video streaming of oral arguments; and this year posted online, attorney registration information.

Today, we take the next step. I am pleased to announce that the entire Supreme Court docket is now available online. Anyone with an Internet connection will have access to the current status or disposition of every non-discipline case filed in the Ohio Supreme Court since 1985 and every discipline case since 1989. The data will be current; it will be entered by the Clerk's Office on the day of the filing of each document or Court entry.

Attorneys will know whether a notice of appeal has been filed, whether a motion to certify the record has been sustained, and whether the Court has rendered a decision on an issue of interest.

Parties to cases and others interested in cases, may use a case number, the style of a case, the name of a party in the case, an attorney of record in a case, or even a court of appeals case number to access the online information.

The General Assembly has provided us with the resources to continue the development of comprehensive case management and case information systems throughout the state.

If measured by your work, the state of the judiciary is strong. You are serving the citizens with distinction and honor.

I would like to return now to the topic that concerns me greatly. I realized at a meeting of Chief Justices in January that my concern is shared by many.

Since we met one year ago, courts and judges have been subjected to renewed attacks that cross the line of fair debate. Some persons holding public office and some narrowly focused organizations expect, even demand, that the courts adopt a certain point of law.

The Terri Schiavo case is perhaps the best example of the worst of circumstances. The trial judge who conducted the litigation received numerous death threats. Some call for a fundamental change in the jurisdiction and authority of both federal and state courts.

Should we be concerned? Justice Stephen Breyer has said that members of the Supreme Court feel “there is a problem” created by the level of rhetoric following court decisions on difficult matters. He adds that the criticism “puts an edge on a lot of issues” and threatens the independence of the judiciary.

Alexander Hamilton warned that the judiciary “is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches, because it is the weakest branch.” Hamilton borrowed from the teachings of Montesquieu when he wrote, “Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”

Let me be clear. No reasonable person or student of the American justice system suggests that court decisions should be immune from criticism. Disagree with a result, but respect the institution.

When the criticism is laced with suggestions of retribution and elimination of jurisdiction, the state of every judiciary is threatened. Despite all of our efforts to enhance trust, the words and actions of some foment distrust.

I wish I could offer some comfort by suggesting that these are passing phenomena engendered by issues that have been well settled and are now behind us. Of course, that is not the case.

The scope of controversial issues marching into our courts is only broadening. Imagine, if left unchallenged, the level of criticism as the courts are presented with cases that test our traditional definitions of life and security.

A comprehensive story in the *New York Times* on Aug. 28 observed this: “As Congress and the states pass legislation to address a host of futuristic issues, from the genetic enhancement of children to the use of brain scanning to identify criminal suspects, the laws will inevitably be challenged in court, raising novel and surprising questions about how to interpret our constitutional rights to privacy, equality, and free expression.”

Every day, courts struggle with issues of search and seizure. But imagine the complex litigation related to something called “brain fingerprinting,” technology that can detect brain activity related to certain events.

It is technologically possible for a prosecutor to stand before a jury with a video display of a defendant's brain scan that arguably proves the defendant was at the scene of a crime. But is it constitutionally permissible?

Genetic research will forever test the application of our constitutions. Genetic engineering offers the promise of selecting a baby's sex, height and eye color.

A legislator in Maine has proposed a bill that would ban abortions based on the sexual orientation of the unborn child. Courts will be urged to extend doctrines of privacy and autonomy. And regardless of the decision of a court on such issues, surely the word "activist" will be used to define the judge.

How many judges in the country are prepared to even understand the language of biomedicine, biotechnology, and other scientific concepts that produce legal issues? The theme of this Conference is "Evidence." How does a judge determine which evidence will be submitted to the fact finder when the judge has no experience in science?

Twenty Ohio judges have been selected from more than 90 applicants to acquire advanced science training in order to serve as resource judges in cases presenting novel and unique issues of science.

During the next five years they will be exposed to some of the leading scientists in the country initially, with judges from Maryland, California and federal courts.

The judges with advanced science training will design courses and help teach the next group of judges who desire to acquire the tools to meet challenges that will test the resilience of an independent, impartial judiciary.

At the first training institute to be conducted in early October, judges and scientists will meet to discuss topics such as the benchmarks of valid scientific research, life sciences emphasizing the way life works, dynamics of disease, stem cell diseases and therapies, environmental biotechnology and bioremediation, and dynamics and evidence of addictive disorders.

I am convinced that education, whether in the sciences or the rule of law, is the best preparation for the future. The harshest critics should remember that an independent judiciary is the only institution that can protect the initiatives of the majority while ensuring the rights of the minority; that courts decide controversies that have not been resolved in another forum; that courts represent the only institution of government in which profoundly important decisions are to be made independent of political or personal influences; that we should expect decisions to be controversial because the heat of the conflict does not dissipate when one party wins and one party loses; and that it is the expectation of impartiality that creates trust in the process and the judgment.

Judges, lawyers, and all who seek to preserve the impartiality of the courts must speak out; we must remind citizens that an independent judiciary is the best protector of our constitutional

democracy. We are judges; we must also be teachers. That is our legacy. I am honored to join you in protecting the legacy.