STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

MARQUETTE BUILDING
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March 15, 2011

PERSONAL AND CONFIDENTIAL

Hon. Elizabeth A. Weaver
5545 W River Rd
Glen Arbor, MI 49636-9702

Re: Hon. Maura D. Corrigan as to Hon. Elizabeth A. Weaver
File No. 0665/11

Dear Judge Weaver:

Enclosed please find a recent Request for Investigation received by this office. Hon. Maura D. Corrigan is the complainant.

Pursuant to MCR 9.113(A), please submit a written statement in duplicate within twenty-one (21) days from the date of mailing of this letter fully and fairly disclosing all the facts and circumstances pertaining to the allegations contained in the Request for Investigation.

Your failure to submit the statement requested may be considered misconduct under MCR 9.104(A)(7) and 9.113(B) and may subject you to disciplinary sanctions. Please note that we require **one (1) complete original and one (1) complete copy** of your answer and all materials.

Very truly yours

Ruthann Stevens
Senior Associate Counsel

RUS/rf
enclosure(s)

[00035777.DOC]

0665/11

Michigan Supreme Court

April 28, 2010

2010 APR 30 PM 1:50

Robert L. Agacinski, Grievance Administrator
Michigan Attorney Grievance Commission
243 W. Congress, Suite 256
Detroit, MI 48226

Dear Mr. Agacinski:

Canon 3B(3) of the Michigan Code of Judicial Conduct provides that a judge "should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." In light of this ethical responsibility, we are sending to you for consideration two documents, Justice Weaver's letter dated April 20, 2010 and our joint letter dated April 28, 2010. We believe that this exchange of correspondence is self explanatory. However, if you have any further questions, please feel free to contact us.

Sincerely,

Maura D. Corrigan
Justice

Robert P. Young, Jr.
Justice

Stephen Markman
Stephen J. Markman
Justice

cc: Justices of the Michigan Supreme Court

Michigan Supreme Court

April 28, 2010

Mr. James S. Brady
Mr. Bruce W. Neckers
Mr. Robert J. Dugan
Mr. William W. Jack
Mr. John D. Tully
Mr. Paul T. Sorensen
Ms. Janet A. Haynes
Mr. Robert L. Lalley, Jr.
Ms. Diann J. Landers

Mr. Jon R. Muth
Mr. Michael A. Walton
Mr. L. Roland Roegge
Mr. H. Rhett Pinsky
Mr. Joseph M. Sweeney
Mr. Fredrick D. Dilley
Mr. Dennis C. Kolenda
Mr. William S. Farr
Attorney Grievance Commission

Re: Justice Weaver's Request to Remit Disqualification, *Brady, et al. v AGC*, Docket No. 140409

Dear Sir/Madam:

By letter dated April 20, 2010, Justice Weaver communicated to the parties in this matter an acknowledgement of an ex parte communication between herself and Jon Muth made during the pendency of *Jon Muth, et al. as to Paul J. Fischer*, AGC file number 2075/08. She further requested that the parties to this action consider remitting her disqualification and allow her to participate in the case. By correspondence dated April 21, 2010, we asked the parties to delay final consideration of Justice Weaver's request pending the receipt of supplemental information. Before deciding whether to remit Justice Weaver's disqualification pursuant to Canon 3D and MCR 2.003(E), we believe that the parties should be provided a more complete recitation of the relevant facts made known to the members of the Supreme Court.

We express no opinion whether this is a matter that can be remitted, or whether it can be remitted without the Respondent's consent. We make this communication with the awareness of the following ethical authorities, without any determination regarding their specific applicability to this matter:

- Canon 2A provides that "A judge must avoid all impropriety and appearance of impropriety."

- Canon 3A(4) provides that "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding;" See also *In re JK*, 468 Mich 202 (2003).

- Canon 3A(6) provides that "A judge should abstain from public comment about a pending or impending proceeding in any court."

- Canon 3B(3) provides that "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."

- Canon 3C provides that "A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B)."

- MRPC 3.5 provides that "A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; [or] (b) communicate ex parte with such a person concerning a pending matter, except as permitted by law."

- MRPC 8.3(b) provides, "A lawyer having knowledge that a judge has committed a significant violation of the Code of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for office shall inform the Judicial Tenure Commission."

- MRPC 8.4(e) provides that it is professional misconduct for a lawyer to "knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law."

- MCR 9.126(E) provides that "Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the [attorney grievance] commission shall disclose the substance of information concerning attorney or judicial misconduct to the Judicial Tenure Commission, upon request. The commission also may make such a disclosure to the Judicial Tenure Commission, absent a request."

- AO 2006-8 provides, "All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority."

(1) On June 27, 2008, the plaintiffs, including Attorney Jon Muth, filed a request with the Attorney Grievance Commission (AGC) for an investigation of Paul Fischer, Executive Director and General Counsel of the Judicial Tenure Commission, concerning conduct that occurred when Fischer was investigating 63rd District Court Judge Steven Servaas.

(2) Attorney Jon Muth represented Judge Steven Servaas throughout the pendency of Servaas's disciplinary proceedings in *In re Servaas*, 484 Mich 634 (2009), and argued on behalf of Judge Servaas at oral argument.

(3) On March 4, 2009, this Court heard oral argument in *In re Servaas*. Paul Fischer's conduct in investigating Judge Servaas was discussed extensively at the argument. In response to a question asked by Justice Weaver, Paul Fischer advised the Court that "Judge Servaas had his attorneys and a number of others filed a grievance against me with the Attorney Grievance Commission. I've an attorney representing me there, we filed an answer, if the Attorney Grievance sees a problem, *it will work its way up here*. . . ." (emphasis added).

A copy of the relevant portion of the oral argument transcript is enclosed as attachment A.

(4) On July 31, 2009, this Court decided *In re Servaas*. In her lead opinion, Justice Weaver stated that the Court need not address the propriety of Paul Fischer's conduct because "the proper forum for the review of the JTC director's actions *is the Attorney Grievance Commission* (AGC)." *In re Servaas*, 484 Mich 634, 650 (2009) (emphasis added). In her concurring opinion, Justice Weaver stated, "I . . . request that this Court open an administrative file to investigate how this matter unfolded, including the events and actions of the Judicial Tenure Commission (JTC) and/or others responsible leading up to the JTC's recommendation of this case to this Court." *Id* at 654.

On September 11, 2009, the Court denied a motion for rehearing, and Chief Justice Kelly amended her opinion. *In re Servaas*, 485 Mich 869 (2009).

(5) In an AGC memorandum dated October 27, 2009, supplied to this Court in the appellate papers in this appeal requesting superintending control, Senior Associate Counsel Patrick McGlinn documented a conversation that McGlinn had with Judge Steven Servaas on October 26, 2009. According to the memorandum, Judge Servaas indicated that Jon Muth told him about a conversation that occurred between Justice Weaver and Jon Muth concerning the Supreme Court's decisional process in *Servaas*.

According to Judge Servaas:

- "Jon Muth is 'Weaver's attorney.'"
- "the Court was originally 6-1 to censure ONLY for the comments/doodles ('Marksman' [sic] being the one to remove for all allegations/findings)"
- "that most all wanted [Paul Fischer] to be investigated by the Court";
- "that somehow ([Judge Servaas] was not clear on this) politics came into play and the 'Engler Republicans' on the Court were not going to vote against one of 'their own' so they went with 'Marksman' [sic]."

A copy of Mr. McGlinn's memo is enclosed as attachment B.

(6) On November 17, 2009, the AGC dismissed the request for investigation of Mr. Fischer.

(7) On January 20, 2010, the above plaintiffs, including Jon Muth, filed a complaint for superintending control with the Michigan Supreme Court. *Brady v AGC.*

(8) On March 25, 2010, a Court Commissioner reported on plaintiffs' complaint for superintending control. The commissioner attached a copy of McGlinn's AGC memorandum to the report.

(9) On March 25, 2010, Chief Justice Kelly sent an e-mail to the other Michigan Supreme Court Justices, indicating that she had spoken to Justice Weaver to inquire whether the allegations referenced in Mr. McGlinn's memo were true:

> "I contacted Justice Weaver and asked her if the allegations were true. She informs me that she spoke with Jon Muth about the case, but only after the decision in the Servaas case had been finished and released to the public which, you'll recall, was July 31, 2009."

A copy of Chief Justice Kelly's e-mail is enclosed as attachment C.

(10) On April 20, 2010, Justice Weaver sent a letter to the parties in *Brady v AGC*, Docket No. 140409, acknowledging that on October 1, 2009, she had lunch with Jon Muth, one of the plaintiffs in the AGC matter, and discussed the Court's voting and decision making in *Servaas*. Justice Weaver's letter further acknowledges that she "should not have met with Mr. Muth."

Sincerely,

Maura D. Corrigan
Justice

Robert P. Young, Jr.
Justice

Stephen J. Markman
Justice

cc: Justices of the Michigan Supreme Court

MEMORANDUM

TO: Corbin Davis, Clerk of the Michigan Supreme Court
cc: Justices

FROM: Justice Elizabeth A. Weaver

RE: *In re Anonymous Judge*, #135650

DATE: January 23, 2008

Upon receiving the respondent's brief in this matter this morning, January 23, 2008, it came to my attention that Judge Servaas is represented by attorney Jon R. Muth. Pursuant to the Code of Judicial Conduct Canon 3(C):

> A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).

Attorney Jon Muth has represented me within the past year, for instance, as my attorney during the public hearing concerning the majority of four's adoption of the "Gag Order," Administrative Order No. 2006-08.

Although this Court has not established clear, thorough, open and fair rules for disqualification of justices, it is necessary to inform the Court and the parties of my association with attorney Jon Muth. I have no personal bias for or against Mr. Muth, or any of the parties, or other attorneys in this matter; nor have I discussed this case with anyone and am therefore willing to serve in this matter. However, if any party or attorney requests by January 29, 2008 that I not serve, I will recuse myself.

At today's judicial conference, I informed the justices of the above and requested that Corbin Davis, Clerk of the Court, send this statement to the parties and attorneys as promptly as possible.

MEMORANDUM

TO: The Justices
cc: Corbin Davis, Mike Schmedlen and Danilo Anselmo

FROM: Justice Elizabeth A. Weaver

RE: *In re Hon Steven R Servaas,* #135835 (AHV)
No. 9 on CR Agenda for April 2, 2008

DATE: March 26, 2008

This Court recently considered another matter concerning the Honorable Steven R. Servaas before it: *In re Anonymous Judge,* Docket No. 135650. On January 23, 2008, I circulated a memorandum to the justices, and requested that the Clerk of the Court notify the parties, that an attorney representing Judge Servaas, Jon R. Muth, has represented me within the past year.

As attorney Jon Muth is also representing Judge Servaas in this matter, Docket No. 135835, by this memo, I again repeat my statement made in *In re Anonymous Judge,* # 135650, attached hereto. I further request that the Clerk of the Court notify the parties that I plan to participate in *In re Hon Steven R Servaas,* #135835, having heard no objection to my participation in the earlier matter, *In re Anonymous Judge,* # 135650.

MICHIGAN SUPREME COURT

March 4, 2009

10/March 2009

#137633
In the Matter of:
Honorable Steven R. Servaas
Judge, 63rd District Court

Before the Judicial Tenure Commission

CHIEF JUSTICE KELLY: The last matter this morning is *In the Matter of the Complaint Against the Honorable Steven R. Servaas* by the Judicial Tenure Commission. Good morning Mr. Muth.

MR. MUTH: Good morning, Justices, and may it please the Court. My name is Jon Muth; I speak today on behalf of the Honorable Steven Servaas. This is a unique and significant case. First, it challenges the jurisdiction of the Judicial Tenure Commission. Secondly, it raises equally significant issues of due process. As to jurisdiction, in *Bowie v Arder*, this Court stated that when a Court lacks jurisdiction, any action that it takes other than to dismiss the case is void. The principal question here today is whether Judge Servaas vacated his office by moving from the northern division to the southern division within his district. Under art 6, §20 of the Constitution, a judge who moves his domicile beyond the limits of the territory from which he was elected vacates his office. This raises three separate questions. The first is what's the exclusive process to resolve a potential defect in the titled office. The answer to that we submit is clear; it is an action for quo warranto. Both statute and court rule require that any action against a person who does an act that works a forfeiture in his office must be brought in the Court of Appeals by the Attorney General. There is nothing in art 6, §30 that suggests that the Judicial Tenure Commission has any role in this process. Indeed, after the creation of the Commission, the Court of Appeals ruled in a challenge to the seating of Justice Lindemer on this Court, stating that an action to remove a sitting judge for a defect in the title to office must be brought as a quo warranto action. This Court also said in *Layo v Schnipky* (phonetic) that quo warranto as the exclusive remedy to try title to office. The second question is did Judge

MR. FISCHER: The Commission does not send me to discuss it with them.

JUSTICE WEAVER: Okay. So Mr. Fischer? Just a minute.

MR. FISCHER: This matter was seen differently -

JUSTICE WEAVER: Mr. Fischer?

MR. FISCHER: because -

JUSTICE WEAVER: You said the Commission is offering you -

MR. FISCHER: I'm trying to answer -

JUSTICE WEAVER: had the Commission decided to make that offer?

MR. FISCHER: The Commission -

JUSTICE WEAVER: Had the Commission - had you discussed it with the Commission? Had they made the decision? The Commission is offering you this opportunity to resolve this matter as quickly as possible and not bring any shame, proceedings, accusations, perjury against you. Had you discussed that with the Commission?

MR. FISCHER: Yes, the Commission had said -

JUSTICE WEAVER: And they did authorize that.

MR. FISCHER: The Commission was offering him the opportunity to resign because if he resigned the Commission would not pursue it. Although -

JUSTICE WEAVER: Now. Mr. Fischer?

MR. FISCHER: the Commission would still have jurisdiction over matters that occurred while he was a judge, the Commission would not pursue them afterward for what would be at most a public censure, the Commission was giving him the opportunity to resign or retire.

JUSTICE HATHAWAY: By nine o'clock the next morning.

MR. FISCHER: Yes, because as the Commission saw it he was no longer a judge. And as for the nine o'clock the next morning

when he said that he wanted to consult with counsel and counsel called me and I called counsel back a number of times, to determine whether they were going to represent him, and never heard back from them. You can check with the records, but I didn't file that document here until twelve o'clock maybe one o'clock because exactly that. Now the reason, again, I don't - and why I say with all due respect because it's not the time, the judge -

JUSTICE WEAVER: This is not a filibuster.

MR. FISCHER: but I'm trying to answer the question, Judge Servaas had his attorneys and a number of others file a grievance against me with the Attorney Grievance Commission. I've an attorney representing me there, we filed an answer, if the Attorney Grievance sees a problem, it will work its way up here. But -

JUSTICE CORRIGAN: But we have a *Withrow v Larkin* issue in front of us where there's a claim - I've never seen any merit to one of these before, but I'm very deeply concerned that there is an abuse of power going on here by the combination of these functions Mr. Fischer. This is a valid time to be considering the problem of what occurred when you visited Judge Servaas that day. It may also be a subject of Grievance Commission proceedings, but this is a valid time for us to be looking at what you did.

MR. FISCHER: But it's also not part of this record, so everything you've seen -

JUSTICE CORRIGAN: This Court decides what's in the record. The Commission may strike it, but we have the opportunity to determine whether something is appropriately in the record, and it's pertinent to the due process issue being raised. It isn't the Commission's decision what goes in the record Mr. Fischer, is it?

MR. FISCHER: But then what you have is you just have a tape, you don't have any of the background to how that came about, how it became -

JUSTICE YOUNG: You made the tape; you were (inaudible) it.

MR. FISCHER: I didn't make the tape, but you don't have any of how it was that the Commission decided to give him the opportunity, what were the circumstances surrounding it, you

From: Marilyn Kelly
To: JUSTICES
CC: Corbin R. Davis; JUSTICE-SECRETARIES; Michael Schmedlen
Date: 3/25/2010 1:52 PM
Subject: Brady v AGC 140409 (AHV)

My Colleagues,

I'd like to alert you to a matter that is contained in the commissioner's report in the case of *Brady v AGC*. This case will be going directly to conference because it is a request for superintending control. You will receive the commissioner's report today. The case was brought by Jon Muth and other attorneys from the Kent County area challenging the AGC's decision to dismiss a request for investigation of the conduct of Judicial Tenure Commission Executive Director and General Counsel Paul J. Fischer when he was investigating alleged misconduct by 63rd District Court Judge Steven R. Servaas.

The report includes a discussion of a document prepared by an AGC attorney that contains an allegation that Justice Weaver discussed this Court's deliberations in the Servaas case with attorney Jon Muth of Miller Johnson. Attachment B to the CR is the document in question. It is a memorandum from the AGC file chronicling a telephonic interview with Judge Servaas in October, last year. According to the AGC attorney, in the course of the interview, Judge Servaas "advised that Complainant Jon Muth is 'Weaver's attorney' and that Muth had a conversation with Weaver that Muth related to SS [Judge Servaas]." The memorandum goes on to describe what Justice Weaver allegedly told Muth about this Court's deliberations in the Servaas matter.

As soon as I became aware of this information, I contacted Justice Weaver and asked her if the allegations were true. She informs me that she spoke with Jon Muth about the case, but only after the decision in the Servaas case had been finished and released to the public which, you'll recall, was July 31, 2009. Justice Weaver is, I'm sure, willing to discuss this matter with us and answer any of our questions.

Marilyn

MEMORANDUM TO FILE

FROM: Patrick McGlinn, Senior Associate Counsel

RE: File 2075/08

DATE: October 27, 2009

Staff counsel interviewed Judge Steven Servaas by phone on 10/26 in the afternoon.

SS stated:

- He did not know that R was coming;
- He did not know that the JTC was looking at him;
- He did not know that the meeting was audiotaped;
- He definitely believed that R was trying to extort him;
- He did not make a criminal complaint against R because other local judges talked him out of it.

SS expressed:

- Considerable anger/disgust at R and the JTC and Judge Smolenski (often using profanity);
- His belief that Judge Smolenski and Carl Gromek conspired against him because they are for the restructuring of the 63rd District Court and its divisions. They sent or had a court administrator send a bogus complaint to the JTC. R and the JTC joined the "fix" by their actions against SS;
- His belief that maybe 2 tapes were made of the interview, one by R and one by the MSP detective, that or that R simply could not "get rid" of the tape and that is the only reason why it was ever produced.

SS denied:

- he did anything wrong;
- his comment was anything other than a simple joke;
- the doodles were either his or what the JTC said they were;
- his residency issue was a legitimate issue, but rather that it was simply something cooked up by the Smolenski/Gromek/JTC conspiracy to get him off the bench;

SS advised that Complainant Jon Muth is "Weaver's attorney" and that Muth had a conversation with Weaver that Muth related to SS. SS describes the conversation as:

- the Court was originally 6-1 to censure ONLY for the comments/doodles ("Marksman" being the one to remove for all allegations/findings);
- that most all wanted R to be investigated by the Court;
- that somehow (SS was not clear on this) politics came into play and the "Engler Republicans" on the Court were not going to vote against one of "their own" so they went with "Marksman".

MEMORANDUM

TO: Corbin Davis, Clerk of Court
cc: The Justices and Mike Schmedlen

FROM: Justice Elizabeth A. Weaver

DATE: April 20, 2010

RE: Disclosure statement in *Brady et al. v Attorney Grievance Commission*, #140409 (AHV) – Complaint for Superintending Control

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I request the Clerk of the Court, Corbin Davis, to promptly transmit the following statement to the parties (Brady *et al.* and the Attorney Grievance Commission) in this complaint, and that in the interest of moving this case along, the parties indicate to this Court whether they will exercise their right of waiver at their earliest convenience, but no later than 28 days from receipt of this statement. I also request the Clerk to please inform me as soon as he has transmitted this statement to the parties:

In this statement of disclosure to the parties involved in *Brady et al.*[1] *v Attorney Grievance Commission*, Docket No. 140409, I hereby raise the issue of

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[1] Plaintiffs Brady *et al.* consist of: James S. Brady, Jon R. Muth, Bruce W. Neckers, Michael A. Walton, Robert J. Dugan, L. Roland Roegge, William W. Jack Jr., H. Rhett Pinsky, John D. Tulley, Joseph M. Sweeney, Paul T. Sorensen, Frederick D. Dilley, Janet A. Haynes, Dennis C. Kolenda, Robert L. Lalley Jr., William S. Farr, and Diann J. Landers. This complaint for superintending control was filed by a group of Grand Rapids attorneys, including two former State Bar presidents and two former judges. One of the former State Bar presidents is Jon Muth, who was the attorney for 63rd District Court Judge Steven Servaas in *In re Servaas*, ___ Mich ___; 774 NW2d 46 (2009).

disqualification with regard to my participation[2] in this complaint for superintending control for the reasons disclosed below.

This complaint for superintending control, filed January 2010, arises from the Attorney Grievance Commission's (AGC) dismissal on November 17, 2009 of the plaintiffs' June 27, 2008 request for investigation of alleged attorney misconduct by Paul J. Fischer, Executive Director and General Counsel of the Judicial Tenure Commission (JTC), in the disciplinary proceeding against Judge Steven Servaas.[3] The disciplinary proceeding against Judge Servaas was reviewed and ruled upon by this Court in *In re Servaas* pursuant to the procedures set forth in Article 6, section 30 of the Michigan Constitution and the rules set forth by this Court in MCR 9.200, *et seq*.

I do not have actual bias or prejudice for or against any party involved in this complaint or Mr. Fischer. In fact, I personally know and like Mr. Fischer. I also personally know and like Jon Muth, a plaintiff in this complaint and my former attorney. In *In re Servaas*, Mr. Muth represented Judge Servaas, and I

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[2] I raise the issue of disqualification pursuant to the newly amended MCR 2.003(B), which provides that "[a] party may raise the issue of a judge's disqualification by motion or the judge may raise it."

[3] On January 20, 2010, the plaintiffs brought this complaint for superintending control pursuant to MCR 9.122(A)(2), which provides in pertinent part that "a party aggrieved by the dismissal may file a complaint in the Supreme Court."

disclosed his earlier representation of me to the parties in that case.[4] I now write to provide the parties in the instant complaint with the same disclosure.[5]

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[4] Please see the attached documents.

[5] When the *Servaas* matter initially came before this Court, I advised the parties by memo on January 23, 2008 as follows:

> Attorney Jon Muth has represented me within the past year, for instance, as my attorney during the public hearing concerning the majority of four's adoption of the "Gag Order," Administrative Order No. 2006-08 [See Administrative Order No. 2006-8 (AO 2006-8), including my dissent, attached hereto].

I note the fact that AO 2006-8, the "Gag Order," was immediately adopted on an emergency basis by a 4-3 vote in a secret executive session on December 6, 2006. The secret executive session excluded all Court staff and the "Gag Order" was adopted at that session without notice to the public and in fact without prior notice to some of the justices. The "Gag Order" was never retained pursuant to this Court's orders and procedures. Administrative Order (AO) No. 1997-11 addresses Supreme Court administrative public hearings. Under Section (B)(2) of AO 1997-11, "[u]nless immediate action is required, the adoption or amendment of rules or administrative orders that will significantly affect the administration of justice will be preceded by an administrative public hearing . . .." The "Gag Order" was adopted without first holding a public administrative hearing on December 6, 2006.

AO 1997-11(B)(2) further requires that "[i]f no public hearing has been held before a rule is adopted or amended, the matter will be placed on the agenda of the next public hearing, at which time the Supreme Court will hear public comment regarding whether the rule should be *retained or amended*." (Emphasis added.) Therefore on January 17, 2007, the "Gag Order" was presented for public comment at a public administrative hearing. The records of this Court show that after the January 17, 2007 public administrative hearing, the matter was "passed" to a later date and thus, no action was taken. There was no vote by this Court to retain or amend the "Gag Order" and to this day, there has been no vote. In fact, the court file was closed without a vote from the Court on February 27, 2007. Despite the fact that there never was a vote to retain or amend the "Gag Order," it

I write further to clarify the circumstances of and disclose a conversation that took place between myself and Mr. Muth in October 2009 regarding *In re Servaas*. This Court's opinions in *In re Servaas* were published for the public on July 31, 2009. On August 24, 2009 the JTC filed a motion for rehearing or clarification in this Court. On September 11, 2009 this Court issued an order denying a motion for rehearing and containing an additional statement by Chief Justice Kelly, which clarified by amendment her original opinion. Therefore, this Court's file in *In re Servaas* closed on September 11, 2009.

In mid-September 2009, I briefly encountered my friend and former attorney, Mr. Muth, at the State Bar of Michigan Fellows Reception in Dearborn. Given that the file in *In re Servaas* had already been closed, Mr. Muth and I agreed to meet in Traverse City for a visit over lunch when he would be passing

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was published in *Michigan Rules of Court—State*. Without any vote to retain or amend the "Gag Order," it has erroneously remained as an allegedly effective administrative order in our Court rules and on this Court's website.

I also advised the parties in the *Servaas* matter as follows:

> Although this Court has not established clear, thorough, open and fair rules for disqualification of justices, it is necessary to inform the Court and the parties of my association with attorney Jon Muth. I have no personal bias for or against Mr. Muth, or any of the parties, or other attorneys in this matter . . . .

I repeated my disclosure to the parties on March 26, 2008 when the case again came before this Court. The parties did not object to my participation in the *Servaas* matter. Mr. Fischer, representing the JTC, specifically waived any objection to my participation.

through town on October 1, 2009. At the time that we agreed to meet, and up until the time I received this Court's Commissioner Report in late March 2010, I did not remember that at the March 4, 2009 *In re Servaas* oral argument, Mr. Fischer stated that "Judge Servaas had his attorneys and a number of others file a grievance against me with the Attorney Grievance Commission." Mr. Fischer made this statement in response to questions about whether the JTC had authorized or encouraged him to proceed in the manner that he did while handling the *Servaas* matter and making an unannounced visit to confront Judge Servaas in his chambers.[6]

Because I did not remember Mr. Fischer's statement at oral argument, I did not realize that a file for a grievance against Mr. Fischer may have been opened and an investigation of his conduct may have been ongoing. Under MCR 9.126, such files are sealed.[7] Therefore, I had no official notice of any file's existence, and I had no notice of any file's status.

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[6] The record in *In re Servaas* contains an audio recording of Mr. Fischer's unannounced visit to Judge Servaas's chambers on January 16, 2008 and his threat to "drag [Judge Servaas's] name through the mud" unless he agreed to resign by 9:00 a.m. the following morning. The recording was made, apparently without the knowledge of Mr. Fischer or Judge Servaas, by the State Police Trooper accompanying Mr. Fischer on the unannounced visit to Judge Servaas's chambers. The recording was also made public in the media, and is available online at http://blog.mlive.com/grpress/2008/04/_by_john_tunison_the.html (last accessed April 20, 2010).

[7] MCR 9.126—Open Hearings; Confidential Files and Records, provides in pertinent part:

Mr. Muth and I did meet on October 1, 2009 for lunch in Traverse City. He indicated that he found this Court's result in *In re Servaas* strange, convoluted, and surprisingly close after what he had witnessed during the oral argument. I responded that his observation was correct and that the vote was originally 6-1 in Judge Servaas's favor. I told him my speculation was that the emphasis and the direction of some justices' positions perhaps shifted with recognition that the State Court Administrator and his office may have had more involvement in the *Servaas* matter than merely referring such allegations to the JTC for investigation and process according to JTC rules.

I reminded Mr. Muth that in my concurrence in *In re Servaas*, I called for an investigation of the JTC and any others possibly involved, but that no such investigation had occurred.[8] Instead, this Court published six (6) separate opinions, resulting in the convoluted decision that prompted a motion for rehearing or clarification by the JTC, required an amendment for clarification to one justice's opinion, and led to Mr. Muth's questions. Mr. Muth and I did not

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> (A) Investigations. Except as provided in these rules, investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public.

[8] In my concurring opinion in *In re Servaas*, I urged this Court to "open an administrative file to investigate how this matter unfolded, including the events and actions of the Judicial Tenure Commission (JTC) and/or others responsible leading up to the JTC's recommendation of this case to this Court." ___ Mich at ___ (Weaver, J., concurring). Justice Hathaway signed my concurring opinion.

discuss or mention any request for an AGC investigation of Mr. Fischer or the possibility of a complaint for superintending control, which is the underlying issue of the instant complaint. We did not discuss any possible allegations of attorney misconduct by Mr. Fischer, or the instant complaint, in any way.[9]

Although Mr. Muth was my attorney at one point in time, he was not my attorney at any time while *In re Servaas* was pending, nor when we met in October 2009. To clarify, Mr. Muth is not currently my attorney, and I have not discussed the instant complaint with him, nor have I had any communication with him since I learned a few weeks ago in late March 2010 that the instant complaint had been filed in this Court. The instant complaint, while related to the *Servaas* matter, is a separate and distinct case.

Before I agreed to have lunch with Mr. Muth, I should have remembered Mr. Fischer's statement at the *In re Servaas* oral argument that a grievance was filed against him by Judge Servaas's attorneys. Had I remembered, I would have

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[9] Of course, in October 2009 I could not have known of the instant complaint for superintending control because it did not exist given that the AGC had not yet dismissed the underlying request for investigation of Mr. Fischer's conduct. In fact, the AGC did not dismiss the plaintiffs' 2008 request until November 17, 2009, by a personal and confidential letter sent to plaintiffs and Mr. Fischer. The instant complaint for superintending control was not filed in this Court by Mr. Muth and the other plaintiffs until January 20, 2010. Because the AGC proceeding was kept secret from this Court until the filing of the instant complaint on January 20, 2010, I could not have been aware in October 2009, when I met with Mr. Muth, of the procedural steps leading up to the instant complaint in this Court. Nevertheless, in retrospect, I should not have met with Mr. Muth.

realized that any grievance filed against Mr. Fischer by Mr. Muth could be pending with the AGC, and I would not and should not have met with Mr. Muth. But I did not remember and we did meet. Therefore, I must recuse myself from participating in the instant complaint for superintending control because of the appearance of bias or impropriety[10] that my meeting with Mr. Muth may present.[11]

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[10] The test for determining whether an appearance of impropriety exists as laid out in *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252, 2255; 173 L Ed 2d 1208 (2009), is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Because of my meeting with Mr. Muth, it might appear to a reasonable person that I would not be impartial if I were to participate in this complaint.

[11] This Court recently amended MCR 2.003 to include an appearance of impropriety standard as a ground for disqualification of judges. The newly amended rule set forth in MCR 2.003(C)(1)(b) states: "The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as annunciated in *Caperton v Massey*, or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." (Citation omitted.)

My meeting with Mr. Muth took place before this Court amended MCR 2.003 to include an appearance of impropriety standard. The first opportunity for this Court to apply the newly amended MCR 2.003 was in *Pellegrino v Ampco Systems Parking*, Docket No. 137111, when the plaintiff in that case filed a motion for disqualification of Justice Markman based on campaign statements Justice Markman had made about the plaintiff's attorney nine years prior to this Court amending the rule to include the appearance of impropriety standard. When reviewing and deciding the disqualification motion filed against Justice Markman, I stated that I "will not apply the appearance-of-impropriety standard retroactively to statements made by a justice concerning a party or a party's attorney prior to the rule's amendment." *Id.* While I stated in *Pellegrino* that I will not apply the appearance of impropriety standard retroactively to other members of this Court, in this matter I will apply the standard retroactively to myself because since 2003 I have been calling for this Court to establish clear, written, and fair rules for

In light of the above information, I will only participate in this complaint if the parties, Brady *et al.* and the AGC, agree to waive my disqualification in accordance with MCR 2.003(E).[12]

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disqualification and have been addressing the issue of my participation when necessary, as I did in *In re JK*, 468 Mich 202; 661 NW2d 216 (2003), *Gilbert v Daimler Chrysler*, 469 Mich 883; 669 NW2d 265 (2003), *Henry v Dow Chem Co*, ___ Mich ___; 772 NW2d 301 (2009), *In re Servaas*, ___ Mich ___; 774 NW2d 46 (2009), and *Kyser v Kasson Twp*, 483 Mich 903; 761 NW2d 692 (2009).

[12] MRC 2.003(E) provides:

> Waiver of Disqualification. Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive the disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.

Michigan Compiled Laws Annotated Currentness
Administrative Orders of the Michigan Supreme Court

➞ ADMINISTRATIVE ORDER 2006-8. DELIBERATIVE PRIVILEGE AND CASE DISCUSSIONS IN THE SUPREME COURT

The following administrative order, supplemental to the provisions of Administrative Order No. 1997-10, is effective immediately.

All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

CREDIT(S)

Entered December 6, 2006, 477 Mich.

COMMENTS

Cavanagh, Weaver and Kelly, JJ., dissent.

Dissenting statements by Weaver and Kelly, JJ., to follow.

WEAVER, J. (dissenting). I dissent to the unscheduled and abrupt adoption of Administrative Order 2006-08 (AO 2006-08) by the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN[1] because it unconstitutionally restricts a justice's ability to perform his duty to the public by barring a justice from "giv[ing] in writing" his "reasons for each decision" and "the reasons for his dissent."[2] By adopting AO 2006-08 and ordering the suppression of my dissent in *Grievance Administrator v Fieger*, #127547, the majority of four are attempting to hide their own unprofessional conduct and abuse of power which has resulted in their failure to conduct the judicial business of the people of Michigan in an orderly, professional, and fair manner.

The majority's adoption of AO 2006-08 during an unrelated court conference, without public notice or opportunity for public comment, illustrates the majority of four's increasing advancement of a policy of greater secrecy and less accountability-a policy that wrongly casts "a cloak of secrecy around the operations" of the Michigan Supreme Court.[3]

Simply put, AO 2006-08 is a "gag order," poorly disguised and characterized by the majority of four as a judicial deliberative privilege. The fact is, no Michigan case establishes a "judicial deliberative privilege," nor does any Michigan statute, court rule, or the Michigan Constitution.

AO 2006-08-the "gag order"- has been hastily created and adopted by the majority of four, without proper notice to the public, and without opportunity for public comment, despite such requirements directed by Administrative Order 1997-11. Administrative Order 1997-11(B)(2) states:

Unless immediate action is required, the adoption or amendment of rules or **administrative orders that will significantly affect the administration of justice** will be preceded by an administrative public hearing under subsection

(1). If no public hearing has been held before a rule is adopted or amended, the matter will be placed on the agenda of the next public hearing, at which time the Supreme Court will hear public comment on whether the rule should be retained or amended. (Emphasis added.)

The adoption of AO 2006-08 was not preceded by an administrative public hearing. Further, AO 2006-08 was not shown on the notice of public administrative hearing scheduled for January 17, 2007 agenda that was circulated and published on December 14, 2006. After learning that AO 2006-08 was not placed on the next public administrative hearing agenda as required by AO 1997-11, I informed by memo of the same date (December 14) the justices and relevant staff, that AO 1997-11(B)(2) requires that AO 2006-08 be included in the notice for the next public administrative hearing on January 17, 2007. That AO 2006-08 significantly affects the administration of justice is obvious given that the majority of four relied on it to order on December 6, 2006, the suppression of my dissent in *Grievance Administrator v Fieger,* #127547, motion to stay. As of today, December 19, 2006, AO 2006-08 has not been placed on the January 17, 2007 public hearing notice and agenda.[4]

The majority has not publicly articulated any reason why AO 2006-08 should be adopted, nor any reason why immediate action without prior notice to the public or a public hearing was necessary. Article 6, § 6 of the Michigan Constitution requires in writing reasons for decisions of the Court. However, AO 2006-08 can be employed by any majority to impermissibly and unconstitutionally restrict the content of a justice's dissent or concurrence. Thus any present or future majority can in essence censor and suppress a dissenting or concurring justice's opinions.

The public has a vested, constitutional interest in knowing the reasons for a dissenting or concurring justice's divergence from a majority opinion.[5] The majority of four's efforts to censor and suppress the opinions of other justices significantly affect the administration of justice and violate the Michigan Constitution Art 6 § 6. The "gag order," AO 2006-08, is unconstitutional and unenforceable. As employed by the majority in *Grievance Administrator v Fieger,* #127547, the current majority is using AO 2006-08 to censor and suppress my dissent. I cannot and will not allow it to interfere with the performance of my duties as prescribed by the Michigan Constitution and with the exercise of my rights of free expression as guaranteed by both the Michigan Constitution and the United States Constitution.

The majority of four has adopted this "gag order" (AO 2006-08) in order to suppress my dissent in *Grievance Administrator v Fieger,* motion for stay, #127547. Finding no "gag rule" in the Michigan Constitution, statutes, case law, court rules and canons of judicial ethics, the majority of four has decided instead to legislate its own "gag order." The majority of four's "gag order" evidences an intent to silence me now, and to silence any future justice who believes it is his duty to inform the public of serious mishandling of the people's business.[6]

The majority's "gag order" purportedly protects the justices' deliberations under a so-called "judicial deliberative privilege" based on unwritten traditions.

But the Michigan Constitution, statutes, case law, and court rules do not establish a judicial deliberative privilege.[7] In fact, the closest thing to a "judicial deliberative privilege" in Michigan is contained within the Canons of the Code of Judicial Conduct. It is this so-called "judicial deliberative privilege" that I have understood for my entire 32-year judicial career, and by which I strive to abide.

As to a judge's ability to speak regarding "a pending or impending proceeding in any court," Canon 3A(6) provides:

A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.

Canon 3A(6) thus recommends against a judge speaking on a case that is pending or impending in any court; however,

Canon 3A(6) does not absolutely prohibit comment on such cases.[8]

As to a judge's "administrative responsibilities," Canon 3B does not even address, much less recommend or require, abstention from public comment. Canon 3 B(1) does state that

A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

One way to "facilitate the performance of the administrative responsibilities of other judges and court officials" is to inform the public when they need to know of a misuse or abuse of power, or know of repeated, unprofessional behavior seriously affecting the conduct of the people's business.

Certainly nothing in Canon 3 can be said to create any obligation of confidentiality or permanent secrecy like that adopted by the majority of four in AO 2006-08, and in the November 13, 2006, IOP. It should be noted that there have been instances both in the past and present, in which justices have made references in opinions to matters discussed at conference and in memorandum, and to actions before the Court.[9]

In determining when one must speak out, or abstain from speaking out, I am guided by the fact that, as a justice, I am accountable first and foremost to the public. The public expects to be informed by a justice if something is seriously wrong with the operations of the Supreme Court and the justice system. How else would the public know and be able to correct the problem through the democratic and constitutional processes? The public rightly expects the justices of this Court to act with courtesy, dignity, and professionalism toward one another. In matters of principle and legitimate public concern, however, the public does not expect a justice to "go along to get along." The public trusts, or should be able to trust, that the justices of this Court will not transform the Court into a "secret society" by making rules to protect themselves from public scrutiny and accountability.

Yet the public also expects that justices will exercise wise and temperate discretion when disclosing information regarding the operations of the Court and the justices' performance of their duties. The public does not expect, and likely would not tolerate, being informed every time a justice changes positions on a matter before the court, or every time a justice loses his temper with a colleague. The public expects justices to debate frankly, to be willing to change positions when persuaded by better argument, and to be willing to admit that they have changed their positions. Moreover, momentary, human imperfections do not affect the work of the Court. The public would lose patience with and not support a justice who recklessly and needlessly divulged such information for intemperate or political reasons. It is an elected or appointed justice's compact with the people that, whenever possible, a justice will make all reasonable efforts to correct problems on the Court from within.

But the public needs and expects to be informed by a justice when repeated abuses of power and/or repeated unprofessional conduct influence the decisions and affect the work of their Supreme Court and the justice system. I believe it is my duty and right to inform the public of such repeated abuses and/or misconduct if and when they occur.

I recognize that there is a federal judicial deliberative privilege of uncertain scope in federal common law, but that is not Michigan law and is not binding on this Court. Moreover, the deliberative privilege articulated in federal law does not prevent a justice from speaking out regarding matters of legitimate public concern. *Pickering v Board of Educ*, 391 US 563 (1968).

The federal deliberative privilege is narrowly construed and qualified and it does not apply to administrative actions. Furthermore, that privilege is not intended to protect justices, but rather operates to protect the public confidence in the integrity of the judiciary.

For such public confidence to be warranted, the Michigan Supreme Court must be orderly and fair and must act with

integrity, professionalism, and respect. In a pertinent case, the federal Fifth Circuit Court of Appeals addressed whether a judge could be reprimanded for publicly commenting upon the administration of justice as it related to a case in his court. Scott v Flowers, 910 F2d 201 (5th Cir 1990). The court cited *Pickering*, supra, in recognition that the deliberative privilege could not prevent the judge from truthfully speaking out regarding matters of legitimate public concern where the judge's First Amendment rights outweighed the government's interest in promoting the efficient performance of its function.

In light of *Pickering, supra*, the *Scott* court concluded:

Neither in its brief nor at oral argument was the Commission able to explain precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, *Scott* in fact furthered the very goals that the Commission wishes to promote. [*Scott, supra* at 213.]

The *Scott* court thus held that the judge could not constitutionally be reprimanded for making public statements critical of the court.

The federal deliberative privilege as defined in the federal common law does not extend to every utterance and action within the Court's conferences and communications. It does not protect actions taken on non-adjudicative matters involving administrative responsibilities. It also does not extend to actions or decisions of the Court, because the actions and decisions of the Court are not deliberations, they are facts that occur at the end of a deliberative period.

Further, any judicial deliberative privilege does not extend to repeated resort to personal slurs, name calling, and abuses of power, such as threats to exclude a justice from conference discussions, to ban a justice from the Hall of Justice, or to hold a dissenting justice in contempt. Nor does any judicial privilege extend to conduct such as refusing to meet with justices on the work of the Court as the majority of four have now twice done on November 13 and November 29, 2006. The privilege certainly does not extend to illegal, unethical, and improper conduct. Abuses of power and grossly unprofessional conduct are entirely unrelated to the substantive, frank, and vigorous debate and discussion of pending or impending adjudicated cases that a properly exercised judicial privilege should foster.

An absolute judicial deliberative privilege that the majority of four of this Court has wrongly created in AO 2006-08 does not exist in the Michigan Constitution, statutes, case law, court rules, or Code of Judicial Conduct, and should not be allowed to prohibit the publication of any justice's dissent or concurrence.

Perhaps further attempts to define the scope of the so-called "judicial deliberative privilege" in Michigan may be warranted. However, the privilege cannot effectively be expanded beyond that expressed within the Code of Judicial Conduct through the abrupt, unconstitutional adoption of Administrative Order 2006-08, "gag order."

Most importantly, any judicial deliberative privilege defined in any rule or order must not infringe on a justice's constitutional duties and rights. Const 1963, art 6, § 6 requires that

Decisions of the Supreme Court, including all decisions on prerogative writs, **shall be in writing** and shall contain a concise statement of the facts and **reasons for each decision** and reasons for each denial of leave to appeal. **When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.** (Emphasis added.)

Any new court rule or administrative order on deliberations that would force a dissenting or concurring justice to not include in his dissent or concurrence any or all of his reasons would interfere with the justice's duty under art 6, § 6. In effect, such a rule would allow the majority justices to re-write the dissent or concurrence, silence their opposition, and would be unconstitutional. AO 2006-08 is such an unconstitutional rule.

If the majority wanted to attempt to further define the so-called "judicial deliberative privilege" in Michigan, it should have done so by opening an administrative file on the issue and by inviting public comment before making a rash decision to adopt a "gag order" without public notice or comment and before implementing the "gag order" by ordering the suppression of a fellow justice's dissent. After all, any judicial deliberative privilege must serve the public's interest in maintaining an efficient and impartial judiciary, not the justices' personal interests in concealing conduct that negatively and seriously affects the integrity and operations of the Court. The public must, therefore, have a voice in defining the boundaries of any expanded so-called "judicial deliberative privilege" that the majority of this Court desires to legislate. I have already expressed in dissents on administrative matters (which the majority has refused to release) that the majority of four has repeatedly abused its authority in the disposition of and closure of ADM 2003-26, the Disqualification of Justices file. They have mischaracterized final actions as straw votes and failed to correct, approve and publish minutes, and my dissents thereto, for conferences on the Disqualification of Justices file, ADM 2003-26, dating back almost ten (10) months to March 1, 2006.

Regrettably, under the guise of promoting frank discussion, the majority of four has tried to erect an impermeable shield around their abusive conduct-itself the cause of the breakdown of frank, respectful and collegial discussion on this Court. No law or rule exists to support this idea, anywhere. The majority of four have precipitously and abruptly adopted AO 2006-08 without notice to fellow justices or the public, and without opportunity for public comment.

Over the past year and longer, the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, have advanced a policy toward greater secrecy and less accountability. I strongly believe that it is past time to end this trend and to let sunlight into the Michigan Supreme Court. An efficient and impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts." *Scott, supra.*

FOOTNOTES

1. On December 6, 2006, moved by Chief Justice TAYLOR, and seconded by Justices CORRIGAN and YOUNG, the majority of four adopted AO 2006-08. Justices CAVANAGH, WEAVER, and KELLY dissented. As adopted the order states:

The following administrative order, supplemental to the provisions of Administrative Order 1997-10, is effective immediately.

All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

~~CAVANAGH, WEAVER and KELLY, JJ., dissent.~~

Dissenting statements by Weaver and Kelly, J J., to follow.

2. Const 1963, art 6, § 6 requires that:

Decisions of the Supreme Court, including all decisions on prerogative writs, **shall be in writing** and shall contain a concise statement of the facts and **reasons for each decision** and reasons for each denial of leave to appeal. **When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.** (Emphasis added.)

3. *Scott v Flowers*, 910 F2d 201, 213 (5th Cir 1990).

4. Note that AO 2006-08 must be placed on the public hearing notice for January 17, 2007, by December 20, 2006, to conform to the 28 day notice requirement of AO 1997-11.

5. By requiring that justices give reasons for their decisions in writing, Michigan Constitution Art 6 § 6 gives the people of Michigan an opportunity to improve justice by providing a window to learn how their Supreme Court is conducting Michigan's judicial business. Furthermore, requiring written decisions from justices provides information and guidance for case preparation to future litigants, who may have similar issues to decided cases.

6. On November 13, 2006, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN voted to adopt an Internal Operating Procedure (IOP) of the Court, substantively identical to the "gag order" adopted by AO 2006-08. Justices CAVANAGH and KELLY abstained. I voted against the IOP/secret "gag rule." The majority of four adopted the IOP/secret "gag rule" in an unannounced executive session from which court staff were excluded. As adopted on November 13, the IOP/secret "gag rule" states:

All memoranda and conference discussions regarding cases or controversies on the CR and opinion agendas are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical or criminal conduct to the Judicial Tenure Commission or proper law enforcement authority.

IOPs are unenforceable guidelines adopted by majority vote, without public notice or comment, and can be changed at any time, without public notice or comment, by a majority vote. (See Supreme Court internal operating procedures at http://courts.michigan.gov/supremecourt/ (accessed on December 19, 2006), which provides in a disclaimer that the IOPs are unenforceable and only require a majority vote to be adopted.) The adoption of this IOP was never reported in the Supreme Court minutes. It appears that the majority found that the hastily adopted IOP "gag rule" would not be a proper vehicle to suppress my dissents because my dissents could not be suppressed by color of an unenforceable court guideline.

Thus, on November 29, 2006 the majority moved and seconded the adoption of an "emergency" Michigan Court Rule, another "gag rule," to suppress my dissents and concurrences. The majority discussed but tabled the new proposed emergency court rule that was substantively identical to AO 2006-08 "gag order" that was adopted on December 6, 2006.

Finally, on December 6, 2006, during an unrelated court conference, without public notice or opportunity for public comment, the majority adopted AO 2006-08, the "gag order." There was no notice given to the justices that an administrative order was to be considered, nor was the matter ever on an administrative agenda of this Court. Nonetheless, AO 2006-08 was adopted by a 4-3 vote by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. Shortly thereafter, it was moved, seconded, and adopted by a 4-3 vote, by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN to suppress my dissent in *Grievance Administrator v Fieger*, #127547, motion to stay. Justices CAVANAGH, WEAVER and KELLY dissented. Chief Justice TAYLOR then ordered the clerk of court, who was present, not to publish my dissent in Fieger.

7. In the order, AO 2006-08 states that AO 2006-08 is "supplemental to the provisions of Administrative Order 1997-10." I note that Administrative Order 1997-10 (AO 1997-10) does not prohibit a justice of the Supreme Court from disclosing information.

By its plain language, AO 1997-10 is inapplicable. It addresses *public* access to judicial branch administrative information. The order lists types of information that this Court can exempt from disclosure *when faced with a request from the public* for that information. Administrative Order 1997-10 is not relevant to and does not prohibit a justice of this Court from disclosing information, even information that might be considered deliberative, when disclosure involves matters of legitimate public concern.

8. To abstain is "[t]o refrain from something by one's own choice." Webster's New World Dictionary, 2nd College Edition (1982).

9. For example, most recently, in Justice CAVANAGH'S concurring statement in *In re Haley*, 476 Mich 180, 201 n 1 (2006), he stated:

This Court is currently engaged in a discussion about the proper procedure for judicial disqualifications, as well as the ethical standards implicated in such a procedure. Further, this Court will soon be asking for public comment and input to further this discussion in a more open manner.

In addition, in his dissent in *Grievance Administrator v Fieger*, 476 Mich 231, 327 n 17 (2006), Justice CAVANAGH stated:

Further, while I do not join in the fray between the majority and my colleague Justice WEAVER, I take this opportunity to note that three alternate proposals, two of which have been crafted by this majority, regarding how this Court should handle disqualification motions have been languishing in this Court's conference room for a substantial period of time. In the same way I will look forward to the dust settling from the case at bar, I will similarly anticipate this Court's timely attention to the important matter of disqualification motions. I take my colleagues at their word that the issue of disqualification will be handled in a prompt manner in the coming months.

Note that Justice CAVANAGH'S statements, published in his concurrence in *Haley* and his dissent in *Fieger*, were not objected to by any justice, including the majority of four.

In addition to these more recent references to matters discussed at judicial conferences, see in *In re Mathers*, 371 Mich 516 (1963).

Order Adding Administrative Order No. 2006-8 to the Public Hearing Scheduled on January 17, 2007, [order entered December 20, 2006]

On order of the Court, Administrative Order 2006-8 has been added to the public hearing scheduled for January 17, 2007. Such order, having been enacted by the Court as an emergency measure on December 6, 2006 for purposes of preserving the integrity and confidentiality of the Court's deliberative process and to reflect practices that have characterized the Michigan Supreme Court, and to the best of our knowledge every other appellate court within the United States, including the United States Supreme Court, since their inception, the Court is particularly interested in witnesses addressing the following question: Where a Justice violates or threatens to violate **Administrative Order 2006-8**, what means of enforcement and/or sanction, if any, are properly adopted by the Court?

WEAVER, J. (*concurring and dissenting*). I concur only with placing on the January 17, 2007 public administrative hearing the adoption of Administrative Order No. 2006-8 (AO 2006-8), adopted by a 4-3 vote on December 6, 2006, by Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN. I dissent from the remaining language in the order.

As stated in my dissent to AO 2006-8 (filed yesterday, December 19, 2006), AO 2006-8 must be placed on the January 17, 2007, public administrative hearing because it significantly affects the administration of justice as it can be used to order the censorship and/or suppression of any justice's dissents or concurrences, as the majority of four, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, did on December 6, 2006, by ordering the Clerk of the Court to suppress my December 5, 2006, dissent from *Grievance Administrator v Fieger*, Docket No. 127547 (motion for stay).

Censoring and/or suppressing a justice's written opinion is contrary to article 6, § 6 of the Michigan Constitution and the right to free expression as guaranteed by both the Michigan Constitution and the United States Constitution. Further, censoring and/or suppressing a justice's written opinion interferes with a justice's duty to inform the public of abuse of power and/or serious mishandling of the people's judicial business.

The issue that should be of most interest and given most attention at the January 17, 2007, public administrative hearing is the constitutionality of AO 2006-8.

KELLY, J. (*concurring in part and dissenting in part*). A bare majority of the justices adopted Administrative Order No. 2006-8 on an emergency basis without stating what emergency existed. That same majority now requests public comment on what sanctions are appropriate for violation of the order. AO 2006-8 contains no sanctions, and the hearing order lists none that might be appropriate. I can recall no other instance in which the Court has sought public comment without revealing such information.

The language that the majority does present to the public is a rule that it purports to be necessary to preserve the integrity and confidentiality of the Court's deliberative process. What interests me most is the community's view on whether this rule is necessary or even legal. I request comment on whether the rule unnecessarily or even unconstitutionally restricts the right of justices to speak out on matters crucial to the functioning of the judiciary. I am interested in hearing what good reasons exist to: (1) prevent release of information once a case has been finally decided, (2) prevent release of information about administrative matters, and (3) limit justices to disclosing certain information to only the Judicial Tenure Commission or a "proper authority," rather than to the public at large. I believe that full and frank discussion on this important new rule will be had only when these questions are addressed.

CAVANAGH, J., concurs with KELLY, J.

Administrative Order 2006-8, MI R ADMIN Order 2006-8

Current with amendments received through December 1, 2009.

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