



STATE OF CONNECTICUT
SUPREME COURT

CHAMBERS OF
DAVID M. BORDEN
SENIOR ASSOCIATE JUSTICE

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**Testimony of Senior Associate Justice David M. Borden
Judiciary Committee Public Hearing
April 9, 2007**

Senate Bill 1479, An Act Concerning Judicial Branch Openness

Thank you for the opportunity to speak today on behalf of the Judicial Branch regarding *Senate Bill 1479, An Act Concerning Judicial Branch Openness*. As I remarked just moments ago while testifying in opposition to the proposed constitutional amendment, I truly believe that we – the Legislative and Judicial Branches of government – have been good partners, consistently working together to ensure that our court system is open, transparent and accountable.

That being said, I must tell you that I oppose this bill. While I agree conceptually with the thoughts contained herein, the bill as drafted is massive and overly broad. It utilizes language that was never intended to be placed wholly in statute or rule. Simply put, it is unworkable.

The bill is also unnecessary. As I will detail in just a moment, the Judicial Branch has made extraordinary progress in implementing the myriad recommendations of the Judicial Branch's Public Access Task Force which I created last year.

I can assure you, however, if it is the will of this Committee to pass a bill on judicial openness, we would be pleased to work with you to craft a bill that is capable of being implemented.

As I said in January, when I came before this Committee to discuss *Senate Bill 126, An Act Adopting Certain Recommendations of the Judicial Branch Public Access Task Force*, and *House Bill 5258, An Act Adopting Certain Recommendations of the*

Governor's Commission on Judicial Reform the recommendations of the Judicial Branch's Public Access Task Force were written as policies and principles with the general intent of pointing the way for a more open Judicial Branch. They were debated, approved, and written within significant time constraints, and not with the intent of providing specific language suitable for either rule or statute. I urged you then, and I urge you again today, not to enact the recommendations into statutory law.

Turning more specifically to the language of the bill, I would like to separate my testimony into two parts; first I would like to generally address sections one through fifteen, as these sections are derived from the Branch's Task Force, and then address sections sixteen through twenty-six, as their genesis is from the Governor's Commission. Time does not permit me to detail my thoughts section by section, but I want to make it clear to you that my failure to comment on any particular section today should not be interpreted as acquiescence.

At the outset, I want you to know that I understand – and the Judicial Branch as a whole understands – the importance of making our courts open and accessible; this movement is not a flash in the pan. In fact, I am aware that Judge Chase Rogers appeared before you last Thursday and stated her intention to continue this initiative and to give it the highest priority.

Attached to my testimony today, you will find the most recent status report on the implementation of Task Force recommendations. Real and tangible progress has been made across the board on subjects contained within this bill. For instance:

- The Judicial Branch posts notices on our website of meetings, minutes, agendas, and a membership list of all meetings that are open pursuant to the Freedom of Information Act (FOIA) or pursuant to the recommendation of the Public Access Task Force;
- Members of the media and public are permitted to broadcast, televise, record, or photograph Judicial Branch meetings that are open to the public and scheduled in court facilities;

- Access to the daily criminal docket has been available on the Judicial Branch website since January 16th, 2007; and
- The Supreme Court has revised its protocol on the use of cameras to make the coverage of the Supreme Court more viewable under the current rules.

Furthermore, the justices of the Supreme Court and the judges of the Appellate Court have recently voted to expand electronic coverage of oral arguments.

These changes will go into effect on June 1st of this year.

Still other sections of this bill, in which we agree that a statutory change is necessary for implementation, were submitted by the Judicial Branch as part of our legislative package and can be found in *Senate Bill 1398, An Act Concerning Court Operations*. For instance, that bill contains provisions, which, if enacted would:

- Make alternate incarceration plans a matter of public record in cases where the defendant has been ordered as part of his or her sentence to participate in the program;
- Revise the procedure for sealing affidavits that are attached to search warrants; and
- Allow the disclosure of any contents of a competency examination that are used in court, and would require the judge in a competency hearing to state on the record the reasons for his or her finding that the defendant is or is not competent.

Very simply, my point is that we have received the message sent by the Legislature and public loudly and clearly. The Judicial Branch is moving speedily towards implementing the recommendations of the Public Access Task Force, including a rules change which would permit greater electronic coverage of civil and criminal matters. Statutorily codifying the recommendations, however, is not wise. Aside from the fact that it creates a redundancy, we have found in our own implementation of the recommendations that they require much thought and revision in order to be fully workable. Our own lawyers have diligently toiled for months in this pursuit.

As I stated in earlier testimony, our two branches of government have, for the greater part of nearly 200 years, worked together harmoniously. I implore you to let us continue this fine tradition. I truly believe that legislating when a camera may be brought into a courtroom to cover a judicial proceeding upsets this balance and opens the door to constitutional conflict. This conflict can easily be avoided by permitting the Branch to continue making the strides that have already begun. Under Judge Rogers leadership, I have absolutely no doubt that the progress that we have made these last several months in making our courts more open will only become more extensive.

Turning to the latter half of the bill, the portion derived from the Governor's Commission, I would first like to comment on section 16, which would open child protection proceedings to the public. As you know, child protection proceedings are very sensitive matters focusing on sickening examples of child abuse and neglect. I ask you today to please move carefully and deliberately on this matter.

I respectfully suggest that a reasonable alternative to enacting the language in this section would be to mandate that the issue be studied by a group of representatives from the branches, departments, agencies and advocacy groups that work in this area. This committee, commission or task force - whatever you wish to call it -- would thoroughly examine the benefits and detriments of opening child protection proceedings and submit a report, with a final recommendation, to the legislature.

Many of the subsequent sections of the bill are, in my opinion, policy considerations exclusively within the purview of the legislature. For instance, sections 19-23 repeal statutory provisions that provide for the sealing of certain court documents. As these provisions were statutory to begin with, it is clearly the legislature's decision as to whether it is time to amend these sections, and the Judicial Branch takes no position on these matters.

I am concerned, however, with section 18 of this proposal, which would allow the Judicial Review Council to disclose the fact that it is conducting an investigation of a judge, when such disclosure is deemed to be in the public interest. As a matter of fairness, I believe that these matters should not be disclosed until there has been a

finding of probable cause, just as I believe to be the case in matters concerning legislators and lawyers. I am also concerned that the meaning of “in the public interest”, which is not defined, is unclear.

Our state judges work hard every day in our courts, dispensing justice openly, conscientiously, and with fairness and dispatch. Disclosure of judicial review council proceedings prior to a finding of probable cause is patently unfair and would have a chilling effect on the judiciary. Judges must have the ability to rule fairly and impartially, with the comfort of knowing that specious and unfounded allegations about their conduct will not be in the public domain. That is not to say that judges can or should be shielded from deserved criticism. I believe that the current statutory mechanism strikes the correct balance.

Again, I want to thank this Committee for setting aside time to discuss these very meaningful issues, and for allowing me to comment on them. As I said at the outset, I strongly oppose many of these measures from being statutorily codified, and respectfully request that we be permitted to work with you to ensure that the final product is capable of being implemented.

I would be pleased to answer any questions that you may have.

**STATUS OF THE IMPLEMENTATION OF PUBLIC ACCESS TASK FORCE RECOMMENDATIONS
APRIL 9, 2007**

Recommendation #1 – Adopt the task force recommendations regarding the definition of a “meeting” and provide notice and access to the public of Judicial Branch meetings.

Most Judicial Branch meetings are open either pursuant to the Freedom of Information Act (FOIA) or pursuant to the recommendation of the Public Access Task Force. If the committee is engaged in the performance of administrative functions, it is subject to the FOIA; if it is not, it is subject to the Public Access Task Force recommendations. The Branch now posts notices of meetings, minutes, agendas, and a list of members on the Judicial Branch website.

Recommendation #2 – Adopt the task force recommendations setting forth procedures for closing a meeting in whole or in part.

This recommendation was adopted and meetings that are covered under the FOIA will follow those rules in connection with going into an executive session. Meetings that are not covered under the FOIA will follow the task force recommendations to go into a closed session.

Recommendation #3 – Allow broadcasting, televising, recording or photographing of Judicial Branch meetings that are open to the public and scheduled in court facilities.

Arrangements have been made for members of the media and the public to attend, photograph, and record public meetings in court facilities.

Recommendation #4 – Adopt a definition of administrative record.

The process of identifying all records that fit the definition of administrative record is ongoing.

Recommendation #5 – Confirm that attendance records of judges are open to the public.

These records are now open and have been made available to the public.

Recommendation #6 – Retain current statute and policies regarding access to Judicial Performance Evaluations.

The Task Force recommended that the statute governing access to Judicial Performance Evaluations remain unchanged.

Recommendation #7 – Establish a procedure for handling complaints received by the Judicial Branch regarding a particular judge.

Complaints received by the Office of the Chief Court Administrator regarding the conduct of a judge shall be reviewed by the Chief Court Administrator. After review, a complaint may be handled in one of three ways: the Chief Court Administrator may refer a complaint to the Judicial Review Council for further investigation; the Chief Court Administrator may determine that the complaint is without merit or not within the purview of the office; the Chief Court Administrator may counsel a judge and may issue an admonishment in accordance with the procedure set forth in Section 51-45a of the General Statutes, if appropriate.

Recommendation #8 – The Chief Court Administrator shall establish a retention schedule for all administrative records held by the Judicial Branch.

The process of identifying all records that fit the definition of administrative record and of reviewing and updating the existing records retention policy is underway. The recommendation for the updated schedule will include a description of the record, by whom it should be maintained, and for how long it should be maintained. This work should be completed by June 1, 2007.

Recommendation #9 – The Judicial Branch shall adopt a policy on access to court records.

The issues involved are complex and are the subject of discussions nationwide and must be resolved prior to any further action. Therefore, this recommendation is being addressed by the Identity Theft Committee, chaired by Judge Joseph H. Pellegrino. The committee is composed of representatives from the law enforcement and business communities, states' attorneys, a law professor, judges, and Judicial Branch staff. It has met three times, on November 8, 2006, on December 8, 2006, and on March 8, 2007.

Recommendation # 10 – Amend the Judicial Branch Mission Statement to include the word “open.”

This recommendation has already been implemented and the Mission Statement now reads: It is the mission of the Connecticut Judicial Branch to resolve matters brought before it in a fair, timely, efficient and *open* manner.

Recommendation #11 – Provide online access to the daily criminal docket.

Same day criminal docket information has been available on the Judicial Branch website since January 16, 2007.

Recommendation #12 – Review Judicial Branch-issued forms in connection with potential identity theft.

This recommendation is being addressed by the Identity Theft Committee. Staff is currently reviewing forms to identify those that require the inclusion of certain information, including, among others, social security numbers, dates of birth, and financial account numbers. Staff is also reviewing statutes and Practice Book rules that require the inclusion of this information in court files. Some of this information was presented to the Committee for review at its meeting in March, and the remainder of the information will be provided at the next meeting of the Committee.

Recommendation #13 – Provide online access to criminal conviction information.

Criminal conviction information will be made available on the Judicial Branch website following the posting of pending criminal case information. This will require extensive programming of the Criminal/Motor Vehicle computer system and will follow the implementation of Recommendation #19 below.

Recommendation #14 – Revise the form for sealing of arrest warrant affidavits.

The Rules Committee determined that this is not workable because the date of the defendant's arrest would not be known and, therefore, it would not be possible for a judge, when signing an order sealing an arrest warrant affidavit, to set a specific termination date for the order.

Recommendation #15 – Revise the procedure for sealing of search warrant affidavits.

The Rules Committee has determined that Section 54-33c of the General Statutes must be amended to implement this recommendation. Therefore, the Judicial Branch has submitted a legislative proposal to address this recommendation. Section 6 of Senate Bill 1398, *An Act Concerning Court Operations*, addresses this issue. This bill is currently pending before the Legislature.

Recommendation #16 – Permit public access to police reports used in determining probable cause.

The Rules Committee approved for public hearing a proposed practice book revision implementing this recommendation.

Recommendation #17 – Adopt a written policy allowing the use of handheld scanners.

On November 1, 2006, a memorandum was distributed to allow the use of handheld scanners to scan court documents.

Recommendation #18 – Suggest that the Legislature review the sealing of case files involving pre-trial diversion programs.

Justice Borden has not endorsed this recommendation as he believes it is a matter to be determined solely by the Legislature, therefore there has been no action.

Recommendation #19 – Provide online access to pending criminal information.

Efforts are underway to complete the necessary programming to enable the posting of pending criminal and motor vehicle case information on the Judicial Branch website.

Recommendation #20 – Revise procedure for handling competency evaluations.

The Rules Committee determined that Section 54-56d of the General Statutes must be amended to implement this recommendation. Therefore, the Judicial Branch has submitted a legislative proposal to address this recommendation. Sections 7 and 8 of Senate Bill 1398, *An Act Concerning Court Operations*, address this recommendation. The bill is currently pending before the Legislature.

Recommendation #21 – Provide access to alternate incarceration assessment reports if the plan is granted.

The Rules Committee has determined that a statutory change is needed to implement this recommendation. These changes are included in Section 5 of Senate Bill 1398, *An Act Concerning Court Operations*, which is currently pending before the General Assembly.

Recommendation #22 – To further study the issue of whether, and if so, how non-parties should be able to intervene in a case in order to seek or restrict access to information.

Recommendation #23 – To establish a committee charged with analyzing and making recommendations on remote access to court records.

These recommendations are being addressed by the Identity Theft Committee, chaired by Judge Pellegrino.

Recommendation #24 – The Judicial Branch should adopt a written policy that allows for an administrative waiver of fees for copies for an indigent individual and also conduct a study of the difficulties and costs faced by citizens in obtaining copies of judicial documents.

Senate Bill 1398, *An Act Concerning Court Operations*, is currently pending before the Legislature. The bill would allow copying fees to be waived for indigent persons in accordance with criteria established by the Judicial Branch.

Recommendation #25 – Develop a policy on requests for bulk distribution of information contained in court records.

Recommendation #26 – Develop a policy/rule on the correction of inaccurate information in court records.

These recommendations are being addressed by the Identity Theft Committee, chaired by Judge Pellegrino.

Recommendation #27 – Adoption of a definition of “media” for purposes of recommendations on access to proceedings.

Justice Borden has forwarded this recommendation to the Rules Committee. The Rules Committee has formed a subcommittee of its members that will make a recommendation to the full committee concerning the definition of “media.” The Rules Committee will submit a recommendation to the Superior Court judges concerning this recommendation at the annual meeting.

Recommendation #28 – Consideration of issues concerning the implementation of the definition of “media” on an ongoing basis.

The Judicial-Media Committee has been created and charged with fostering and improving relationships between the Judicial Branch of government and the media, both print and electronic. As part of its mission, the committee will consider issues concerning the implementation of the definition of “media” on an ongoing basis. The first meeting of the committee took place on March 1, 2007.

Recommendation #29 – Expand electronic media access to the Supreme and Appellate Courts.

The justices and judges of the Supreme and Appellate Courts have approved rules changes designed to increase electronic coverage of oral arguments in the Supreme and Appellate Courts. These rule changes will take effect on June 1, 2007. In addition, the Supreme Court has revised its protocols on the use of cameras to make the coverage of the Supreme Court more viewable.

Recommendation #30 – Implement a pilot program for electronic media access to criminal proceedings.

Recommendation #31 – Study the expansion of media coverage of arraignments.

Recommendation #32 – Expand electronic media access to Superior Court civil proceedings and trials.

The Rules Committee has had research done concerning what other states are doing with regard to cameras in the courtroom and has formed a subcommittee of its members that has recommended proposed revisions to the camera rules to the full committee in light of these recommendations. The Rules Committee has approved these proposals and will submit them to public hearing.

Recommendation #33 – Adopt rules for the creation of a record for off-site judicial proceedings.

The Rules Committee approved for public hearing a proposed new Practice Book Section concerning the recording of off-site judicial proceedings.

Recommendation #34 – The taking of notes in any courtroom shall be permitted.

On October 26, 2006, the Chief Court Administrator sent a letter to all Judges reminding them that note-taking by spectators is permitted in all courtrooms and judicial proceedings.

Recommendation #35 – Establish a Judicial-Media Committee.

The Committee has been established and is co-chaired by Appellate Court Judge Douglas S. Lavine and G. Claude Albert, managing editor of The Hartford Courant. The first meeting took place on March 1, 2007.

Recommendation #36 – The Judicial Branch should evaluate the implementation of the task force recommendations.

This evaluation process will begin on September 15, 2007, on the first anniversary of the report.

Recommendation #37 – Nothing in the Judicial Branch Task Force recommendations should be read or interpreted to impede or diminish a judge's obligation and authority to conduct fair and unbiased trials and proceedings.

This recommendation requires no action, but simply confirms the existing obligation and authority of a Judge to conduct fair and unbiased trials and proceedings.

Recommendation #38 – The provisions of the current practice book rule on the sealing of financial affidavits in family matters should be rescinded.

The Rules Committee has not yet taken final action concerning this recommendation.