

MEMORANDUM

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

FROM: Justice Elizabeth A. Weaver

SUBJECT: Dissent to Approval of Minutes for the  
Administrative Agendas of:  
March 1, 2006  
March 29, 2006  
April 19, 2006  
May 17, 2006  
May 24, 2006  
May 31, 2006  
June 7, 2006  
November 29, 2006

DATE: March 20, 2007

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Please attach my following substantially revised dissenting statement to the minutes for the conferences for the above-referenced dates.

Weaver, J. (*dissenting*). I dissent and file my revised dissenting statement to the minutes approved by the majority of four (Chief Justice Taylor, and Justices Corrigan, Young, and Markman) on March 14, 2007, because some of the approved minutes do not accurately and/or completely reflect what occurred concerning Administrative File (ADM) 2003-26,<sup>1</sup> the Rules for Justice

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<sup>1</sup> ADM 2003-26 is the second of at least two files that this Court has opened concerning Justice Disqualification. In March of 2003, this Court opened an administrative file to consider whether a justice who had participated in a Court of Appeals decision in a case that ultimately was appealed to this Court could sit on the Supreme Court case. The name of that administrative file was ADM 2003-

Disqualification file,<sup>2</sup> during the March 1, 2006 administrative conference, and succeeding conferences. This dissent should be attached to the minutes for March 1, 2006, and March 29, April 19, May 17, May 24, May 31, June 7, and November 29, 2006, because the minutes approved for these dates are inaccurate and/or incomplete. These incomplete and/or inaccurate minutes were part of the 60 sets of minutes dating back over a year, to March 1, 2006, slated for review and approval on the March 14, 2007 weekly administrative conference agenda (provided to the Justices on March 9, 2007).<sup>3</sup>

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24. Because ADM 2003-24 also concerned the issue of Justice Disqualification, it has sometimes been listed instead of, or along with, the subsequently opened file, ADM 2003-26. For example, over the last year, the Justice Disqualification issue has been referred to in multiple ways, sometimes as, “Supreme Court Disqualification Rule,” sometimes as “Disqualification of Supreme Court Justices: ADM 2003-24 and ADM 2003-26,” sometimes as “ADM 2003-24 Supreme Court Disqualification Policy,” sometimes as “Rules for Disqualification of Justices,” and sometimes as “ADM 2003-24/ADM 2003-26.” For purposes of my dissent and for clarity, my reference to ADM 2003-26 includes ADM 2003-24 as both files concern Justice Disqualification. Interestingly, while ADM 2003-26 was closed on September 7, 2006, ADM 2003-24 remains open.

<sup>2</sup> For nearly four (4) years, dating back to May 2003 in the *In re JK*, 468 Mich 202, 219 (2003) case, the Rules for Disqualification of Justices have been the subject of mostly secret conflict and dispute in this Court and during the last year (2006), have been secretly acted upon by the majority of four.

<sup>3</sup> Although the justices generally conference weekly, there had been no minutes for approval for an administrative conference agenda for over five (5) months, since October 11, 2006. Administrative agendas are prepared and distributed by the Clerk of the Court at the direction of the Chief Justice. Since March 1, 2006 there have been 34 weekly conferences for the justices to conduct administration business

This dissent reveals another example of the misuse and abuse of power,<sup>4</sup> and misconduct of the people's judicial business by the majority of four, Chief

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<sup>4</sup> In my dissent to the January 5, 2007 election of the Chief Justice, revealing misuse of power and misconduct of the judicial business of this Court, I stated:

[T]he majority of four (Chief Justice Taylor and Justices Corrigan, Young and Markman) has misused and abused the judicial power by suppressing, or attempting to suppress, dissent and has engaged in repeated disorderly, unprofessional and unfair conduct in the performance of the judicial business of this (Supreme) Court.

Referenced as another proof of the majority of four's attempt to suppress dissent, was the attempt by the majority of four to use the unconstitutional "Gag Order," Administrative Order (AO) 2006-08, to suppress my (and other justices') dissents, and to keep secret forever and unavailable to the people other important information on what, when and how justices conduct the business of the Court. This unconstitutional "Gag Order" (AO 2006-08) suppressing dissent, among other things, illustrates how the majority of four have attempted to prevent me from reporting the majority's misuse and abuse of power, and disorderly conduct of the people's judicial business. The unconstitutional "Gag Order" has still not been rescinded in the records of the Court.

On December 6, 2006, the majority of four, Chief Justice Taylor, and Justices Corrigan, Young and Markman, adopted Administrative Order (AO) 2006-08, "the gag order" to which I filed a dissent. AO 2006-08, which has not been rescinded and therefore remains in effect today, states:

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. [Administrative Order No. 2006-08, 477 Mich xcvi (2006)(Weaver, J. dissenting).]

As I stated earlier in my dissent to AO 2006-08, I restate today by adopting AO 2006-08, "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." [*Id* at xcix.]

Justice Taylor and Justices Corrigan, Young and Markman. The majority of four has used its power to secretly suppress and silence dissent. The deceptive and/or inaccurate, misleading, and incomplete minutes now approved by the majority illustrate the majority's attempt to deprive the people of Michigan of ever knowing, in a timely manner, what, when, and how decisions were made on Court administrative matters. By their approval, they reveal the majority of four's willingness to change and revise history by not recording the whole truth, or recording untruth, of the majority's formal actions.

What is harmful and important to the people about this misuse and abuse of power in the disorderly way of conducting the Court's administrative business is that it effectively can (and too often does) result in the following:

- keeps secret from the people important information of what the justices are discussing and deciding on the Court;
- keeps secret from the people important information of how the justices conduct the people's judicial business; and
- keeps secret from the people when the justices are conducting the people's judicial business.

This abuse of the minutes process makes it possible to attempt to mislead the people, or to confuse, deceive, misinform or not inform the people, about the

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My dissents are available to the public on my personally funded website, <[www.justiceweaver.com](http://www.justiceweaver.com)>.

conduct of the business of the Court, and thus deprive the people of sufficient, accurate information to judge the performance of the justices.

The minutes should be timely produced, acted upon, and made available to the public on the Supreme Court website. The minutes should memorialize this Court's conduct of the people's judicial business. They should be a window for the people to learn what, when, and how the justices perform one of this Court's core constitutional responsibilities, the supervision of the administration of the Michigan judiciary.<sup>5</sup>

Because the approval of these minutes makes it possible for the majority to suppress dissent and revise history, and to keep people in the dark by depriving them of important information as to how the justices conduct the judicial business of Michigan, I dissent to these minutes and insist that our present traditional system of processing, approving and publishing minutes end now. An efficient and impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts."<sup>6</sup>

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<sup>5</sup> Mich Const 1963 Art 6 § 4.

<sup>6</sup> *Scott v Flowers*, 910 F2d 201 (CA 5 1990).

**I. INCOMPLETE AND INACCURATE  
MARCH 1, 2006 MINUTES CONCERNING THE RULES FOR  
DISQUALIFICATION OF JUSTICES**

All but one of the inaccurate and incomplete minutes from which I dissent stem from formal actions taken by Chief Justice Taylor, and Justices Corrigan, Young, and Markman on March 1, 2006 concerning the controversial Justice Disqualification issue and file, ADM 2003-26 and ADM 2003-24. On March 1, 2006, during a regularly scheduled weekly administrative conference, in response to growing public pressure<sup>7</sup> to address the issue of standards governing the Disqualification of Justices, the majority of four voted to adopt an Internal Operating Procedure (IOP)<sup>8</sup> governing Justice Disqualification and publish it on the Supreme Court website.<sup>9</sup>

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<sup>7</sup> *Justices' wives: Questions about conflict of interest can't be ignored*, Detroit Free Press, January 25, 2006; David Shepardson, *High court justices refuse to step down from cases*, The Detroit News, February 1, 2006; Chris Christoff, *2 justices to stay on cases*, Detroit Free Press, February 1, 2006; *Court conflict*, Detroit Free Press, February 1, 2006; *Conflicted: Justices' defense of conflict of interest rules reveals weaknesses*, Lansing State Journal, February 3, 2006; *Justices refuse to disqualify themselves*, Michigan Lawyer's Weekly, February 6, 2006; Todd C. Berg, *Is it time for MSC to reform how it handles recusal motions?*, Michigan Lawyer's Weekly, March 14, 2006. *A Michigan Lawyer's Weekly Web poll results show that 80 percent of the Internet users who have chosen to participate voted "yes" on the question whether Justice Michael Cavanagh's proposed court rule is necessary.* <<http://www.milawyersweekly.com/poll/pollresults.cfm?poll=020606MIdisqualify>> (accessed March 14, 2006).

<sup>8</sup> The Michigan Court Rules are binding and enforceable. By contrast, this Court's IOPs are "general guidelines," which are not binding or enforceable. See Supreme Court internal operating procedures at <<http://courts.michigan.gov/supremecourt/>> (accessed March 14, 2007), which provides in a disclaimer that the IOPs are

The March 1, 2006 approved minutes incompletely and inaccurately state:

**There was discussion of this matter. Final action was deferred to a later conference.**

What the March 1, 2006 minutes should at a minimum state is:

**Motion made by Justice Weaver, seconded by Justices Kelly and Cavanagh to publish for comment a court rule governing the disqualification of justices as proposed by Justice Cavanagh in his statement in *Adair v State of Michigan*, \_\_\_ Mich \_\_\_ (2006). Motion failed by a 4 to 3 vote.**

**Motion made and carried by a 4 to 3 vote to adopt an Internal Operating Procedure (IOP) governing the disqualification of justices as proposed by Justice Young's February 28, 2006 memorandum to the justices and Court staff regarding the Supreme Court Disqualification Policy. Cavanagh, Weaver, and Kelly JJ, dissent. Weaver, J. dissenting and reserving the right to file statement dissenting to the adoption of the IOP. IOP to be published on Supreme Court website.**

**Chief Justice Taylor stated that the dissenting justices have two weeks (until March 15, 2006) to circulate their dissenting statements to be attached to the March 1, 2006**

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unenforceable. Because IOPs are unenforceable guidelines adopted by majority vote, without public notice or comment, they can be changed at any time, without public notice or comment. *Id.*

<sup>9</sup> The Internal Operating Procedure formally adopted the traditional procedure for Justice Disqualification—that each individual justice decide all recusal motions against him/her, at the justice's sole discretion, without the benefit of any standardized rules or checks or balances for alleged bias or prejudice. The IOP was never posted on the Court's website and its adoption has remained secret until this statement.

**minutes,<sup>10</sup> and the majority's responses are to be circulated by the following week, all statements to be completed by March 22, 2006.**

As there were in fact formal actions, the approved March 1, 2006 minutes stating “[f]inal action was deferred to a later conference,” are incorrect.

Proof of the incompleteness and inaccuracy and thus the misleading suppression of information about actions of the Court on the handling of the administrative business in the important issue of Rules for Disqualification of Justices, is found in the majority of four's own words, in written memoranda circulated by the majority of four.

Chief Justice Taylor, and Justices Corrigan, Young and Markman, in a memorandum dated March 15, 2006 circulated their statement for the March 1, 2006 administrative minutes memorializing the majority of four's March 1 adoption by formal vote of the Justice Disqualification IOP. That memo states:

We have voted today to codify our traditional disqualification procedure that has served this Court well during its existence and to publish this as an Internal Operating Procedure. <http://www.courts.michigan.gov>. We write here to explain our opposition to the disqualification rule proposed by Justices Cavanagh, Kelly and Weaver that has received recent attention on publication of *Adair v State of Michigan*, \_\_\_ Mich \_\_\_ (2006).

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<sup>10</sup> Typically, a justice's dissent is recorded in the minutes directly after the action from which the justice is dissenting. Dissenting statements, usually submitted after the conference, are typically attached to the minutes filed in the Clerk of the Court's office—available to the public only upon inquiry.

The fact that the majority of four formally adopted the IOP is further proven by Justice Corrigan's memorandums of March 15 and March 27, 2006, in which she acknowledges on March 15 that she concurs in the adoption of the IOP and when she later suggests on March 27 that the adopted IOP be rescinded in order to instead put Justice Young's adopted IOP as one of three disqualification proposals to be published for public comment. Pertinent portions of Justice Corrigan's March 15, 2006 memo are:

My statement *concurring in the adoption of our disqualification policy* follows. I have not yet had an opportunity to react to Justice Weaver's statement that was circulated a short time ago, but I plan to revise in response to her statement in my next draft.

\* \* \*

Corrigan, J. (*concurring*). I *concur fully in the adoption of the disqualification policy* for Supreme Court Justices. In accordance with this Court's longstanding tradition, it is appropriate that motions for recusal should be decided by each Justice and should not be subject to review by the Court . . . .

The pertinent portion of Justice Corrigan's March 27, 2006 memo is:

By way of clarification of my earlier memo today, I support publishing all of the proposals for comment. I agree that in the interim, we should retain the status quo practice on disqualification that this Court has followed for approximately 170 years. My suggestion *to rescind the IOP* was merely to allow Justice Young's proposal to be published along with the other proposals.

The majority of four's formal action to adopt the IOP was later untruthfully characterized as an informal "straw vote." On April 18, 2006, Justice Corrigan

circulated a memorandum stating that her March 1, 2006 vote to adopt Justice Young's proposed Justice Disqualification IOP didn't really count:

If my previous vote was understood as a vote to adopt Justice Young's proposal as an IOP, then I wish to withdraw that vote while we proceed to publish the proposals for comment.

Accurately recording the formal votes and the events of March 1, 2006, or any administrative conference, does not prevent the majority justices from changing their minds about actions that have been taken—it merely requires them to formally rescind prior votes for the record and the public's access. It allows the actual history to be recorded—to let the truth be told. Justices should not resist or refuse to formally rescind their formal votes on administrative matters that require written dissenting statements to be produced by other dissenting justices as it is normal and understandable that people change their minds from time to time. The harm of not accurately recording the actions of this Court is great since the minutes should be a written record of the justices' formal actions carrying out the people's judicial business. Without an accurate, complete, truthful, published record, the people are deprived of information for judging how the justices perform in conducting the people's business.

Although the majority of four voted on March 1, 2006 to publish the IOP on the Court's website, as of today, March 14, 2007 (more than 1 year later), the IOP has never been published on any Court website, nor has it ever been acknowledged in the Court's minutes. Thus, this important information has been

effectively made secret and suppressed—another example of misuse and abuse of the Court’s power, and misconduct of the Court’s business.

Further, the never published, secret March 1, 2006 IOP adopted by the majority of four should not be confused with a similar, but newly proposed IOP on Rules for Justice Disqualification as set forth in a memorandum circulated by Justice Young on March 14, 2007, after the administrative conference approving the March 1, 2006 minutes.

Governed by the direction of the Chief Justice, since March 1, 2006, the minutes for the March 1, 2006 administrative agenda haphazardly appeared only seven (7) times out of 34 subsequent weekly administrative conference agendas.<sup>11</sup>

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<sup>11</sup> The first time that the proposed minutes pertaining to consideration of ADM 2003-26 during the March 1, 2006 administrative conference appeared on an administrative agenda for approval was May 17, 2006. The administrative minutes listed for approval were for the following dates: January 5, 2006; January 25, 2006; March 1, 2006; and March 15, 2006.

After the May 17, 2006 administrative conference, the minutes pertaining to that May 17<sup>th</sup> conference were circulated. The minutes of the May 17<sup>th</sup> conference list which proposed administrative minutes were approved. Notably absent from the list of approved minutes were the minutes for March 1, 2006, despite the fact that the minutes for March 15, 2006 were approved. Until March 14, 2007, the minutes for the March 1, 2006 agenda had been listed for approval on six subsequent administrative agendas: May 17, May 24, May 31, June 7, June 14, and October 11, 2006. In every instance the minutes from March 1, 2006, were listed as "passed."

After June 14, 2006, there were administrative conferences on June 21, June 28, July 6, July 12, July 19, and July 21, 2006. No proposed minutes for approval were ever listed on any of these administrative conference agendas. It was not until the September 7, 2006 administrative agenda that proposed minutes appeared for approval. Again, notably absent from the September 7<sup>th</sup> list of proposed minutes for 14 administrative conferences from March 22, 2006 to July

## II. INACCURACIES IN MINUTES FOR ADMINISTRATIVE CONFERENCES SUBSEQUENT TO MARCH 1, 2006

In addition to the inaccuracies in the March 1, 2006 minutes, the minutes for other administrative conferences<sup>12</sup> are also inaccurate or incomplete because they mischaracterize or contradict the facts of what actually occurred during those conferences; therefore, those minutes are deceptive and misleading. All but one of the inaccuracies concern the Rules for Justice Disqualification file, ADM 2003-26. The following is a history of what occurred at each conference in question, what the proposed minutes for the conference state, and what the minutes for the conference should state:

*March 29, 2006* – The minutes for the March 29 administrative conference concerning ADM 2003-26 simply state that the item was

**Passed.**

This statement is false because it contradicts the fact that a final vote had already occurred on March 1, 2006, i.e., that the majority of four had adopted the IOP governing the Disqualification of Justices. The incorrect and inaccurate characterization of the status of ADM 2003-26 is also demonstrated by the agenda

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21, 2006, were proposed minutes for the March 1, 2006 conference pertaining to the disqualification of justices file, ADM 2003-26.

<sup>12</sup> Specifically, the minutes approved for March 29, April 19, May 17, May 24, May 31, June 7, and November 29, 2006.

for the March 29, 2006 administrative conference, which states that the “issue” regarding ADM 2003-26 to be addressed was:

**Further discussion of disqualification and whether to issue the Court’s recusal policy as an IOP.**

The error of this characterization is that the IOP *had already been adopted by a majority vote* at that time and, under this Court’s IOP, the new IOP was effective from the date of its adoption on March 1, 2006.

*April 19, 2006* – The minutes for the April 19, 2006 administrative conference concerning ADM 2003-26 simply state that the item was

**Passed.**

This statement is not only inaccurate and contradictory; it is different from the correct language first proposed by the Clerk of the Court by memo to the Court on April 20, 2006. The language first proposed stated:

**Motion made and carried unanimously to publish for comment alternate proposals for dealing with disqualification of the Justices.**

It is true that a motion was made and carried to publish for public comment three (3) proposals for Rules for the Disqualification of Justices. However, four and a half (4 ½) months later, when the minutes were circulated for approval for the September 7, 2006 administrative conference, the April 19 proposed minutes were changed to simply “passed,” without explanation.

Furthermore, to be accurate, the minutes for the April 19 conference regarding ADM 2003-26 should reflect that a motion was made, but not carried, to rescind the March 1, 2006 IOP. Thus, the minutes for April 19 should state:

**Motion made, but not carried, to rescind the IOP adopted March 1, 2006.**

**Motion made and carried unanimously to publish for comment three alternate proposals to amend the Court Rules for the Disqualification of the Justices.**

*May 17, 2006* – The agenda for the May 17, 2006 administrative conference included the question whether the Court would approve the minutes from several prior conferences, including the administrative conference of March 1, 2006.

Because the proposed March 1, 2006 minutes were untruthful and inaccurate, on May 16, 2006, I circulated a dissent to the impending approval of the proposed minutes for March 1, 2006. The failure of a majority to approve the March 1 minutes during the May 17, 2006 administrative conference is not referenced in the minutes for May 17. Therefore, the minutes for May 17 are incomplete. The minutes for May 17 should state:

**Consideration of the minutes of March 1, 2006, was deferred to a later conference.**

*May 24 and May 31, 2006* – The approval of the proposed March 1, 2006 minutes appeared again on the May 24 and May 31 administrative agendas. The minutes for those dates regarding whether to approve the minutes for March 1, 2006, state that the approval of the minutes was “passed.” However, the minutes

for those dates do not identify that the minutes up for approval were the March 1, 2006 minutes. The May 24 and May 31, 2006 minutes for should, therefore, state (as the minutes for the June 7 and June 14, 2006, conferences state):

**Consideration of the minutes of March 1, 2006, was deferred to a later conference.**

*June 7, 2006* – The approval of the now approved March 1 minutes appeared again on the June 7 administrative agenda and the June 7 minutes accurately state that

**Consideration of the minutes of March 1, 2006 was deferred to a later conference.**

However, the minutes for June 7<sup>13</sup> are incomplete because they should also record, but do not, that an *ad hoc* committee was spontaneously created by Chief Justice Taylor during the conference to address how the minutes from the Court's administrative conferences should be written, circulated, and approved. Chief Justice Taylor appointed Justices Weaver, Kelly, and Corrigan to the committee.<sup>14</sup> Further, the approval of the proposed March 1, 2006 minutes did not appear on an

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<sup>13</sup> See also *In re Haley*, 476 Mich 180 (2006). Also in July 2006, while the consideration of the Rules for Justice Disqualification file, ADM 2003-26, was still pending, the majority of four trivialized one of the most fundamental standards that govern judicial conduct and the disqualification of justices, the appearance of impropriety standard—a standard not included in the IOP adopted by the majority of four on March 1, 2006, nor in the new IOP proposed by Justice Young in his March 14, 2007 memorandum.

<sup>14</sup>On June 14, 2006, I circulated to all the justices and appropriate Court staff suggestions for improvements to the Court's minute-keeping practices for the *ad hoc* committee and all the justices to consider. See *infra* note 15.

agenda for the weekly conference after the committee was created until they appeared on the agenda of October 11, 2006.

*September 7, 2006* - The minutes for the September 7, 2006 administrative conference accurately reflect that the majority of four voted to close ADM 2003-26—the Rules for Disqualification of Justices file. The minutes further correctly state that Justices Cavanagh, Weaver and Kelly voted against closing the file. The minutes also accurately include Justice Weaver’s dissenting statement to the closure of the file.

However, the proposed minutes for the September 7, 2006 administrative conference were not included with the October 11, 2006 administrative agenda list of minutes slated for approval, nor were they listed on any later weekly agenda, but appeared for the first time, over six months later, on the March 14, 2007 agenda for the March 14, 2007 weekly conference.

#### **Inaccuracies in the November 29, 2006 Proposed Minutes**

On November 29, 2006, during a regularly scheduled administrative conference, the majority of four moved and seconded the adoption of an “emergency” Michigan Court Rule, a “gag rule,” to suppress my dissents and concurrences. The majority discussed but tabled the new proposed emergency court rule that was substantively identical to Administrative Order (AO) 2006-08, the “gag order” to suppress dissent that was adopted as an emergency on December 6, 2006. The proposed November 29, 2006 minutes do not make any mention of the majority’s actions. The minutes should record that the majority of

four moved, but ultimately tabled, a motion to adopt an “emergency” Michigan Court Rule, which became the basis for the December 6, 2006 “emergency court order.”

### **III. FIXING THE CURRENT TRADITIONAL SYSTEM OF PROCESSING MINUTES FOR MICHIGAN SUPREME COURT WEEKLY ADMINISTRATIVE CONFERENCES**

It is critical that the minutes of this Court’s weekly conferences on administrative matters be truthful and complete and that they reflect what actually occurred at each conference. For the public to be timely, accurately and fully informed about the justices’ conduct of the Michigan Supreme Court’s administrative work, the Court should have the most orderly, timely, accurate, and complete process for keeping and publishing minutes for its administrative conferences.<sup>15</sup> Presently it does not. The Court’s present system for

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<sup>15</sup> By memo dated June 14, 2006, I sent to all the justices proposals for the proper, accurate, complete, orderly, and timely preparation, processing, and publication of minutes for administrative conferences. The essential improvements required are:

\_ At the conferences, the moving justice or the Chief Justice should specify, before any vote, whether the vote on a motion before the Court is a straw vote or a final, recorded vote.

\_ All recorded votes should list the justice who moved that the action be taken, which justice seconded the motion, which justices voted in favor of the motion, which justices voted against the motion, and which justices abstained from voting.

\_ The proposed minutes should be circulated to the Court within two days of conference, for example, by 5 p.m. on the Friday following a Wednesday

approving and publishing minutes is disorderly and subject to manipulation. It allows for effectively silencing and secretly suppressing dissent on controversial administrative matters. This system allows for suppression of information on what, when, and how the justices perform their administrative duties on important administrative judicial business, for example, the Rules for Disqualification of Justices.<sup>16</sup>

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conference. The minutes from each administrative conference should be on the agenda for approval or correction at the following week's administrative conference.

— The approved minutes or the fact that the minutes have not been approved should be promptly posted onto the Court's website.

<sup>16</sup> Some background is essential to understanding why the minutes for March 1, March 29, April 19, May 17, May 24, May 31, and June 7 for the Judicial Disqualification file, ADM 2003-26, are incomplete or inaccurate.

In May 2003, I learned that the justices followed “unwritten traditions” when deciding whether to participate when the issue of their participation was raised. I was also informed that it was “tradition” for justices to decide the disqualification motions themselves and to not publicly reveal their reasons for participating or not participating in a case. See *In re JK*, 468 Mich 202, 219 (2003) (Weaver, J., nonparticipation statement). However, sometimes justices have followed procedures set forth in MCR 2.003, a court rule governing the disqualification of judges. I have argued and continue to believe that MCR 2.003, as written, applies to justices of the Supreme Court as it does to all judges. See *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 99-100; 693 NW2d 358 (2005) (Weaver, J., concurring). In sum, despite the fact that the participation of justices in certain cases can raise due process concerns, there are currently no agreed-upon rules governing a justice's decision to be disqualified from a case.

The past four years have exposed these inconsistencies in the standards that individual justices apply to themselves when making their decision to participate, or not to participate, in a case. Thus, there is clear need for reform. At times

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justices have applied the court rule governing the disqualification of judges, MCR 2.003, to themselves, and at times they have not. For example in *Adair v Michigan*, 474 Mich 1027, 1043 (2006), Chief Justice Taylor and Justice Markman stated that “[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied.” Justice Young concurred fully in this legal analysis. *Id.* at 1053. Similarly, in *Grosse Pointe Park v Michigan Municipal Liability & Prop Pool*, 473 Mich 188 (2005), then-Chief Justice Corrigan used the remittal of disqualification process of MCR 2.003(D). At other times, however, the same justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 889 (2003), then-Chief Justice Corrigan and Justices Taylor, Young, and Markman denied a motion for reconsideration of the Court’s order denying the motion for disqualification and did not refer the motion to the State Court Administrator for the motion to be assigned to another judge for review *de novo*, as would be proper under MCR 2.003(C)(3).

Since May 2003, I have called for this Court to reform its disqualification practices and to adopt fair and enforceable court rules concerning the participation or disqualification of justices. See, e.g., *In re JK*, *supra* at 220-221 (Weaver, J., nonparticipation statement proposing amendments to MCR 2.003), *Gilbert*, *supra* at 890 (statement by Weaver, J.), *Advocacy Org for Patients & Providers*, *supra* at 96 (Weaver, J., concurring), *Harter v Grand Aerie Fraternal Order of Eagles*, 693 NW2d 381 (2005) (Weaver, J., dissenting), *Grievance Administrator v Fieger*, 472 Mich 1244, 1245 (2005) (Weaver, J., dissenting), *Scalise v Boy Scouts of America*, 473 Mich 853, 855 (2005) (Weaver, J., dissenting), *McDowell v Detroit*, 474 Mich 999, 1000 (2006) (Weaver, J., dissenting), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006) (Weaver, J., dissenting), *Heikkila v North Star Trucking, Inc*, 474 Mich 1080, 1081 (2006) (statement by Weaver, J.), *Lewis v St John Hosp*, 474 Mich 1089 (2006) (Weaver, J., dissenting), and *Grievance Administrator v Fieger*, 476 Mich 231, 344 and n 38 (2006) (Weaver, J., dissenting).

Since May 2003, there have been eleven public hearings on other administrative matters in which the rules governing the disqualification of justices could have been, but were not, addressed: September 23, 2003, January 29, 2004, May 27, 2004, September 15, 2004, January 27, 2005, May 26, 2005, September 29, 2005, January 25, 2006, May 24, 2006, September 27, 2006, and January 17, 2007.

Clear, fair, enforceable court rules for the disqualification of justices are essential to the public’s trust and confidence in the Michigan Supreme Court and in the entire judiciary.

Formal actions taken on administrative matters, for example when a majority of justices formally vote on a matter, must be recorded as such so that there is no question that the action took place, and no opportunity for a justice, or justices, to later claim that the formal vote was a straw vote in an attempt to revise the history of prior actions taken by justices. *See supra* p 9-10.<sup>17</sup> Revising history, and/or delaying or depriving the people of information that is important to the people for evaluating how justices conduct the people’s judicial business, is a misuse and abuse of power.

By tradition, proposed minutes for judicial conferences are currently randomly circulated, typically in large batches covering a dozen or more conferences, on an undefined date, sometimes weeks—more often months—after a conference takes place. The Chief Justice controls the agenda of the conference meetings, and the Court employees prepare the agendas at the direction of the Chief Justice. After the proposed minutes have been circulated, they are placed on a future undetermined administrative agenda for approval. To my knowledge during my twelve-plus years as a justice, the judicial conference minutes have rarely, if ever, been available before the next scheduled conference, nor have they been placed on the next week’s agenda, as they should be.

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<sup>17</sup> Specifically, a formal vote by a justice during an administrative conference cannot properly be later mischaracterized as a “straw vote” simply because that justice has changed his or her opinion. A formal vote is a definitive action and must be recorded as such.

The now-approved March 1, 2006 minutes are an extreme example of how the present system can be manipulated and therefore subject to abuse. The March 1, 2006 minutes were up again for approval on March 14, 2007—more than a year after the March 1, 2006 conference occurred.<sup>18</sup> It is a disorderly and unprofessional way to conduct the administrative business of the Court. It is essential to the integrity of the judiciary to have timely, accurate, and orderly minutes, promptly processed, approved, and published for the public's access.

For example, the March 14, 2007 agenda contained 60 proposed minutes for review and action, dating back for more than a year from March 1, 2006 to January 4, 2007. Proposed minutes for the remaining three (3) conferences in January 2007 have still not been circulated.

Further, the lag times between the conferences and the circulation of their proposed minutes make it unnecessarily difficult for a justice to accurately compare the contents of the minutes to the actions taken at the conferences. Nevertheless, during my more than 12 years on the Court, up to the March 1, 2006 minutes, there was never a dispute about proposed minutes; the current traditional and disorderly system for recording, processing, and approving minutes seemed to work. But the disorderly tradition has proven unworkable, unacceptable and dangerous, as demonstrated by the more than year-long dispute regarding the truth

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<sup>18</sup> It is illogical to assume that the events of March 1, 2006, could be remembered more accurately on March 14, 2007, than they could have been a year ago.

of what actually happened during the March 1, 2006 administrative conference concerning the Rules for Disqualification of Justices.

Additionally, there are no rules governing what happens when all justices do not agree with what the proposed minutes should say. Historically, a dissenting justice would file a dissent with the Court, to be attached to the minutes and placed in the Clerk of the Court's office. However, at the discretion of the Chief Justice, minutes for select conferences can be omitted from the administrative agenda for approval, seemingly indefinitely. For incredibly long periods, select minutes can, and have been, kept off the administrative agenda of the Court, thereby secretly silencing and suppressing any discussion or dissent to what occurred on the date in question.

#### **IV. CONCLUSION**

The current traditional minutes processing system makes it possible for a power block of four justices, acting secretly and unaccountably, and as an unrestrained, super-legislature, to conduct the people's business in a disorderly, unprofessional, unfair, and haphazard manner. Consequently the present system must be reformed because the justices of the Supreme Court should instead be a group of seven impartial, independent, fair justices conducting the people's business in a most self-disciplined, restrained and just manner, with common sense.

It is critical that the minutes of this Court's weekly conferences on administrative matters be truthful and complete and that they record what actually

occurred at each conference. The Michigan Supreme Court should have the most orderly, timely, accurate, and complete process for keeping and publishing minutes for its administrative conferences. Presently it does not. The minutes should be timely produced, acted upon, and made available to the public on the Supreme Court website. The minutes should memorialize this Court's conduct of the people's judicial business. They should be a window for the people to learn what, when, and how the justices perform one of this Court's core constitutional responsibilities, the supervision of the administration of the Michigan judiciary

An efficient and impartial judiciary is “ill served by casting a cloak of secrecy around the operations of the courts.”<sup>19</sup>

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<sup>19</sup> *Scott v Flowers*, 910 F2d 201 (CA 5 1990).

Appendix A

**ADMINISTRATIVE AGENDA**

**March 14, 2007**

**Update from Chief Justice**

**1. Approval of Minutes**

March 1, 2006 (Opinions/CRs)	July 19, 2006 (ADMs)
March 1, 2006 (ADMs)	July 21, 2006 (Opinions/CRs)
March 22, 2006 (Opinions/CRs)	July 21, 2006 (ADMs)
March 22, 2006 (ADMs)	July 24-28, 2006 (Opinions/CRs & ADM)
March 29, 2006 (Opinions/CRs)	September 7, 2006 (Opinions/CRs)
March 29, 2006 (ADMs)	September 7, 2006 (ADMS)
April 19, 2006 (Opinions/CRs)	September 13, 2006 (Opinions/CRs)
April 19, 2006 (ADMs)	September 13, 2006 (ADMs)
April 27, 2006 (Opinions/CRs)	September 20, 2006 (Opinions/CRs)
May 10, 2006 (Opinions/CRs)	September 20, 2006 (ADMs)
May 10, 2006 (ADMs)	September 27, 2006 (Opinions/CRs)
May 17, 2006 (Opinions/CRs)	September 27, 2006 (ADMs)
May 17, 2006 (ADMs)	October 11, 2006 (Opinions/CRs)
May 24, 2006 (Opinions/CRs)	October 11, 2006 (ADMs)
May 24, 2006 (ADMs)	October 18, 2006 (Opinions/CRs)
May 31, 2006 (Opinions/CRs)	October 18, 2006 (ADMs)
May 31, 2006 (ADMs)	October 25, 2006 (Opinions/CRs)
June 7, 2006 (Opinions/CRs)	November 1, 2006 (Opinions/CRs)
June 7, 2006 (ADMs)	November 1, 2006 (ADMs)
June 14, 2006 (Opinions/CRs)	November 8, 2006 (Opinions/CRs)
June 14, 2006 (ADMs)	November 8, 2006 (ADMs)
June 21, 2006 (Opinions/CRs)	November 15, 2006 (Opinions/CRs)
June 21, 2006 (ADMs)	November 22, 2006 (Opinions/CRs)
June 28, 2006 (ADMs)	November 29, 2006 (Opinions/CRs)
July 6, 2006 (Opinions/CRs)	November 29, 2006 (ADMs)
July 6, 2006 (ADMs)	December 6, 2006 (ADMs)
July 10, 2006 (Opinions/CRs)	December 20, 2006 (Opinions/CRs)
July 12, 2006 (Opinions/CRs)	December 20, 2006 (ADMs)
July 12, 2006 (ADMs)	January 4, 2007 (Opinions/CRs)
July 19, 2006 (Opinions/CRs)	January 4, 2007 (ADMs)