

Judicial Council Meeting Minutes

**JUDICIAL COUNCIL
MINUTES
January 24, 2000
Judicial Council Room - Matheson Courthouse
450 South State - Salt Lake City, Utah

Chief Justice Richard C. Howe, Presiding

Members Present:

Hon. Richard C. Howe, Chief Justice
Hon. Lyle Anderson
Hon. Russell W. Bench
Hon. Lynn Davis
Hon. L.A. Dever
Hon. Michael Glasmann
Hon. Ronald Hare
Hon. Scott Johansen
Hon. Kay A. Lindsay
Hon. Clair Poulson
Hon. Anne M. Stirba
Hon. Stan Truman
Scott Daniels, Esq.

Staff Present:

Daniel J. Becker (*via telephone*)
Myron K. March
Matty Branch
Holly Bullen
Peggy Gentles
Brent Johnson
D. Mark Jones
Richard H. Schwermer
Tim Shea
Ray Wahl
Cathie A. Montes

Excused: Hon. Leonard H. Russon

Guests: Jerry Howe, *Office of Legislative Research and General Counsel*

Welcome/Approval of Minutes

Chief Justice Howe welcomed all those in attendance. The minutes of the Council's December meeting were reviewed, and a motion was made.

Motion

A motion was made to approve the minutes of the Council's December meeting. The motion was seconded and carried unanimously.

Report from the Chairman

Chief Justice Howe presented his report to the Council. He reported that he delivered his second State of the Judiciary address to the Legislature on the opening day of the legislative session, Monday, January 17th. He indicated that, as part of his remarks, the Legislature was informed of the January, 2000, retirements of Justices I. Daniel Stewart and Michael D. Zimmerman. Both justices received standing ovations from the House and the Senate. Justice Stewart was retired from the court as of January 17th, and Justice Zimmerman's last day is January 31st. A farewell reception was held for Justice Stewart on January 13th, at the Matheson Courthouse, 5th Floor rotunda. A similar reception will be held for Justice Zimmerman on January 31st, at the same location.

Chief Justice Howe announced that the Senate confirmed the nominations of Judge Michael Wilkins, of the Utah Court of Appeals, and Judge Matthew Durrant, of the Third Judicial District. This confirmation took place on Friday, January 21st. Judge Wilkins will be sworn in on January 27th at 12:30 p.m.. Judge Durrant is scheduled to be sworn in on February 8th.

Administrator's Report

Myron March presented the administrator's report on behalf of Dan Becker, who was out of town. Mr. March noted that Mr. Becker would participate in the Council's executive session by phone later in the meeting. He continued by distributing to the Council a copy of Chief Justice Howe's State of the Judiciary address, and the Annual Report to the Community. He then discussed the following:

- He commented that the remarks of the Chief Justice, who also received a standing ovation from both the House and the Senate, were well received by the Legislature. The theme of the address was transition: both in the Supreme Court, with the departure two of its justices, as well as throughout the courts. The Chief Justice reported to the Legislature on the innovative ways in which the judiciary is dealing with the issues that are brought before the court, e.g., victim and child welfare mediation,

specialty courts, and volunteerism. He also noted the work of the Racial and Ethnic Fairness Task Force, and the creation of the Standing Committee on Children and Family Law.

- Regarding the Annual Report, Mr. March pointed out that the same format was used. This condensed format focuses on programs and developments within the courts rather than on statistics, and serves as an introduction to the courts' website, which provides detailed information on all the programs as well as statistical information.
- Notices of vacancies in the Court of Appeals and the Third District Court will be released on January 25th, following the Senate's confirmation of Judges Wilkins and Durrant. The deadline for both applications is February 25th.
- The Governor has appointed the nominating commission for the Sixth District, thus continuing the selection process for Judge Tervort's position. The deadline for application was January 8th.
- The Information Services department has compiled case filing statistics in the court system. Filings have decreased during the first half of the current fiscal year. An average decrease of five percent was reported for the district courts; civil cases (with the exception of domestic cases) have increased by two percent. Criminal cases decreased seven percent. Traffic cases decreased by 24 percent. Initial statistics for the juvenile court reflect an overall decrease of 12.6%. The largest areas are status offenses and misdemeanors. These statistics are currently being finalized.

The Commission on Criminal and Juvenile Justice (CCJJ) has hired an out-of-state consultant to review statewide crime statistics. With two exceptions, the consultant has found a decrease in crime in the State.

- The process is moving forward in seeking an alternative funding source through IV-D funds. These are federal funds which may be applied as reimbursement toward cases involving child support matters. This initiative was authorized by the Council at its August planning session. AOC staff members have met with staff members from the Office of Recover Services (ORS) to discuss entering into a cooperative agreement. It is hoped that draft language for this agreement which is mutually agreeable between the AOC, ORS, and the federal government can be completed by the end of January. Reimbursement funds can be paid for court commissioner and clerk time, and some data processing time. The federal regulations do not provide for reimbursement of judges' time. Another funding source which is being explored is IV-E funding, which would assist the Guardian Ad Litem program. These funds are linked to foster care services, and would be disbursed through a similar cooperative agreement with the Department of Human Services (DHS).
- The Council received a copy of an article co-authored by Dr. Diane Cowdrey which appeared in the November/December issue of Judicature. The topic of the article is educating judges for adjudication of new life technologies.
- The issue of the proposed legislation regarding judicial retention was briefly discussed. The Council was informed that HB18 was voted out of committee last week, with an amendment to lower the retention rate to 55%. The sponsor of the bill has requested that this bill be placed on hold pending further notice. Richard Schwermer and Mark Jones will provide more information later in the meeting.

Subcommittee Reports

Management Committee: Judge Anne M. Stirba reported to the Council that the Management Committee met on January 11th. Most of the items which the committee discussed are on the Council's agenda. However, the following items were noted in particular:

- The "Parent to Parent" video which the Council viewed at its December meeting was selected as a finalist in the International Film and Video Festival, in the category of public service. No notice has been received regarding the outcome.
- The committee discussed the issue of how the funding for drug courts would be best controlled and disbursed. The following options were discussed: 1) a direct appropriation of all funding to the courts; 2) an appropriation to an executive branch agency, e.g., DHS or CCJJ; 3) an appropriation to the Utah Substance Abuse and Anti-Violence Coordinating Council (USAAV). USAAV serves as an advisory board, and is involved with matters other than drug-related issues. It was noted that the CCJJ represents all agencies involved with the criminal justice system. The committee expressed a preference for the second option, which is consistent with the position the Council has previously taken. Dan Becker has discussed this matter with the Executive Director of CCJJ, and the matter is to be discussed at the CCJJ's next meeting. No action was taken, and no change has been made in the approach which is being taken by the AOC staff.

- Two issues were raised regarding the justice courts. First, concerns have been raised by the Board of Justice Court judges regarding complaints received about investigations conducted by the Judicial Conduct Commission. Richard Schwermer informed the committee that he will discuss this matter with and relay those concerns to the executive director on an informal basis.

The second issue deals with the question of age limit for re-certification of active senior justice court judges. The committee was informed that there is currently a rule pending before the Utah Supreme Court which provides for a change to impose a limit of 75 years of age for said status. This would be consistent with the age limits set in the district and juvenile courts.

There was discussion on whether a statutory change should be considered regarding drug courts. Of particular concern is the statute's current provision with respect to pleas in abeyance, and the 30-day time period which runs from the time a plea is entered. It was stated that no legislative changes are being considered at this time. However, other concerns have been expressed relating to ethical issues pertaining to judges operating outside the traditional role of the courts. A motion was made pursuant to this discussion.

Motion

A motion was made to direct the general counsel for the Administrative Office of the Courts to examine the legal issues involved regarding the suggestion of a statutory change which will provide for drug courts.

Considerable discussion followed regarding ex parte communications by judges, after which time an amended motion was made.

Amended Motion

An amended motion was made to direct staff counsel to observe the operations in the 3rd District's drug court, and to examine the legal and ethical issues surrounding the drug court as it pertains to pleas in abeyance, and report to the Council whether an ethics opinion should be requested, and whether a statutory change should be recommended. The following issues should be considered:

- The legal issues with regard to a plea in abeyance and the point at which the 30-day time period begins;
- The ethical issues relating to ex parte communications between judges and defendants in drug courts, since the role of the judge in drug court differs from the traditional role of a judge.

Further, the written direction regarding the Council's charge to explore the aforementioned issues will be given to staff counsel by Judge Lyle Anderson and Judge Stirba, respectively.

The amended motion was seconded and carried unanimously.

Judge Glasmann presented the report of the Policy and Planning Committee. The committee met on January 14th. He reported on the following items:

- Proposed change re: transcript format rule. The changes proposed are 1) to establish a standard form for a transcript page. Current court reporting software does not allow for proportional spacing, which in turn increases the number of pages in transcripts. 2) a proposed rate increase. The committee extensively discussed this issue. Their concern was for consumers potentially feeling as though the courts are charging for excessive paper used in transcripts. The committee is still considering the second issue, but feels the proposed rule change is timely. The rule will be advanced to the Council for its approval to publish for comment.
- Confidential records: There was a suggestion for use of GRAMA only, and to repeal the rules implemented by the Council to clarify which records are and are not confidential. The committee was of the view that the matter was sufficiently reviewed, and a suggestion was made to improve the differentiation between judicial and administrative records, and to provide clearer clarification than currently exists. A majority voted that no further consideration should be given to further use of GRAMA to regulate access to judicial branch records. Tim Shea will present his proposed changes to the rules at the next meeting, and will work with the clerks of court to ensure compliance with confidentiality requirements.

Judge Bench offered a brief report on behalf of the Liaison Committee. He is currently assisting the committee on Justice Russon's behalf. The committee has held weekly meetings in advance of and during the legislative session. Positions have been taken in support of a number of bills, most of them having been generated by the Council. The committee has opposed HB18 (re judicial retention). He reported on HB204, which deals with release of information in the Voter Information Pamphlet. This bill would require the Council to release a statement identifying all cumulative sanctions and types of same, and an explanation of each complaint which resulted in

each sanction ordered by the Supreme Court. Both bills have the same sponsor, and the second bill discussed remains in committee. Another piece of legislation is still being considered which concerns the Judicial Conduct Commission. However, the exact content of the legislation is unknown at this time.

Scott Daniels presented his first report to the Council on Bar Commission activities and developments. He noted the passing of former State Bar president James Clegg, then proceeded to report on legislative matters of interest to the State Bar. The Bar has advanced one bill to the Legislature, which is HB75. This bill would allow the Bar access to criminal records in order to conduct background checks for Bar admissions. The Council was informed that the Bar will oppose HB18, and will oppose HB204 as is written as of this meeting. The Commission is of the view that private sanctions are an important tool for the Commission's use. The Commission has recommended amendments to the bill, and may support the legislation if said amendments are made. Another bill of some concern to the Commission is HB65, which creates or defines a cause of action against child care providers. The legislation would re-define the term "cause of action", as well as other legal terms, which could confuse the law generally in other cases. He stated that the Commission has authorized the Bar President to act on its behalf during the legislative session, as it may not be possible for the Commission to meet as a body if necessary. The Commission is hopeful that it will be more effective in the Legislature than it has been in the past.

He continued by reporting on the recent work of the Courts and Judges Committee. This group has investigated complaints from Bar members regarding problems experienced in some districts, primarily the Third District. These problems involve access to judges, inability to reach court clerks, and scheduling problems. A report was released by the committee, which contained its findings and recommendations. Mr. Daniels reported that the committee chair, and Charles Brown, president of the Bar, have both met with Third District Presiding Judge Frank Noel to discuss the report and recommendations.

Mr. Daniels restated that the State Bar will hold its 2000 Annual Meeting in San Diego, California. Although the Bar is aware of the Council's prior decision not to hold its July meeting in conjunction with the Annual Bar conference, Mr. Daniels expressed the Bar's hope for a strong attendance by members of the judiciary. The Council was asked to consider sending a letter to judges encouraging their attendance at the Annual Meeting.

Mr. Daniels concluded his report by stating that the State Bar is examining issues which revolve around public trust and confidence in the courts, and in the legal system. This topic is among the agenda items to be discussed at this year's annual meeting. Another issue on which the Bar will focus is interdisciplinary practice. The legal community has observed that accounting firms have begun to assume certain functions which have traditionally been handled by attorneys. Attorneys have been unable to compete with these firms because of ethical restrictions placed upon them. Mr. Daniels informed the Council that this will be a major issue with which the Bar will be involved.

Pro Se Initiative

Peggy Gentles presented a follow-up to the Council on an item which the Management Committee discussed at its January 11th meeting. Ms. Gentles recalled for the Council its earlier discussion of and decision to pursue initiatives related to enhancing public trust and confidence in the courts. The first of these initiatives was judicial outreach, which has already begun in some districts. The second is the issue of more effectively addressing pro se litigation. Toward this end, a team consisting of 2 judges (including Chief Justice Howe), 2 AOC management staff, a Clerk of Court, and a representative of the Bar, attended a conference on pro se litigation in November. During this conference, the team identified efforts which it felt the courts could undertake in dealing with some of these issues. Those efforts identified were: 1) to have a better idea of the nature of pro se litigation in Utah; and 2) to empower and legitimize the role of court staff in providing court information to the public.

With respect to the first effort, Ms. Gentles said the team recommended that the Council authorize the employment of a consultant to study the nature of pro se litigation within the state, the impact of pro se litigation on the state court system, and various other issues. The Council was informed that the State Justice Institute has established a special grant cycle to fund projects which resulted from the November conference. The Management Committee has authorized, subject to its further review, the preparation by AOC staff of a grant proposal for the purpose of seeking and enlisting the services of a consultant. The deadline for submission of concept papers is the end of March.

Regarding the second effort, Ms. Gentles stated that the team recommended development of training programs in this area for court clerks, as well as examining rules which other states' court systems have established to safeguard against the unauthorized practice of law. The Management Committee directed AOC staff to research the rules from other states and present a follow-up report. Chief Justice Howe informed the Council that in the State of Arizona, it is estimated that nearly 80% of all domestic cases are pro se, and that pro se litigation is increasing in other case types as well. He pointed out that while the public should be able to access the courts system, there are problems that could be encountered similar to the problems which are being experienced in the small claims court. It was clarified that the study should not include the small claims court, as this court was established for the purpose of self-representation.

The Council noted that this presentation was informational in nature, and any action will be deferred to such time as the grant proposal is prepared for review.

Contract Court Sites

This issue was discussed by the Management Committee and advanced to the Council for further discussion. Myron March and Holly Bullen presented this matter. The State is obligated to cover actual expenses incurred by local governments to operate contract site courts. These are sites wherein counties provide clerk services for the district court in their localities. Said expenses include personnel, data processing, materials/supplies, and leases. There are a total of 12 contract sites statewide, and the contracts are similar to the bailiff contracts entered into between the state and counties. The Management Committee directed Brent Johnson to compare the difference between the two contracts, in order to determine what the courts' financial obligations were regarding these court sites. Upon reviewing the contracts, Mr. Johnson found that some differences do exist, although both contract situations ultimately depend on legislative appropriation, which would make these pass-through costs.

The statute on county contracts provides for reimbursement to the counties by the state for their expenses; this is contingent upon legislative funding. However, the counties retain the discretion for personnel salary increases. Mr. March said that historically, a 5% across the board increase has been given to contract court sites to cover the increase costs. The statute further states that the counties are responsible to submit written notification to the Judicial Council, the Governor and the Legislature of their projected expenses for the next year. This notification must be given by May 1st. The courts request this information from the counties each year, but it is never received. The courts subsequently request from the Legislature each year an increase in the general fund; the amount requested has been 5% to the base budget. However, the Legislature has not granted this request. Consequently, turnover savings have been used to cover this increase. Because of the budget constraints with which the courts were faced during the past year, no savings were used for this purpose.

In November, the counties held a meeting wherein a request was made for the Council to consider advancing to the Legislature a request for a 5% supplemental increase. The amount of this increase equals approximately \$39,000. Such a request would be a competing interest, and would have to be built into the next fiscal year's budget request, with an additional 5% incorporated into the request. The new amount would then total to \$60,000. At its August planning session, the Council agreed to examine the budget projections in the spring of 2000 to determine whether there are sufficient turnover savings to grant either a 5% or 2.7% increase to the counties. Mr. March pointed out that, by statute, if the counties grant a 10% salary increase, the courts are obligated to reimburse for actual costs. He reiterated, however, that the counties are not in compliance since they have failed to provide the information as so obligated.

Mr. March said the recommendation to the Council is to wait until later in this fiscal year to review the budget and identify any money which may be used to turn over to the counties. The counties' request could then be included in the budget request advanced by the Council at its next planning session. It is also recommended that no request for a supplemental should be advanced this legislative session. A motion was made following brief discussion by the Council.

Motion

A motion was made to follow the recommendation as outlined above. The motion was seconded and carried unanimously.

Certification of Justice Court Judges

A portion of this issue was briefly discussed by Judge Clair Poulson. After summarizing the item Judge Poulson discussed, the Council deferred further discussion until such time as Richard Schwermer, Justice Court Administrator, could impart any additional information.

Other Business

Myron March distributed a copy of an editorial which appeared in the Deseret News. The editorial addressed the legislation contained in House Bill 18 (judicial retention).

Following this distribution, a motion was made.

Motion

A motion was made for the Council to convene in an Executive Session, for the purpose of reviewing information on certification of judges. The motion was seconded, carried unanimously, and the Council moved into its Executive Session.

Legislative Update

Following its Executive Session, the Council heard from Mark Jones and Richard Schwermer, who provided an update on the legislative session. Mr. Schwermer began by confirming that the Executive Appropriations Committee acted by decreasing the budgets of all state agencies by one percent. This amount equates to an \$849,000 decrease in the courts' budget. No new developments have been reported.

Mr. Schwermer reported that HB18 (judicial retention legislation) remains circled at the sponsor's request. This means that the bill could be called for discussion or vote at any time. The sponsor is the only person who can uncircle the bill.

Mr. Schwermer and Mr. Jones then discussed HB204, and informed the Council of what is provided for in this legislation. As currently drafted, the bill:

- does away with any private reprimands by the Judicial Conduct Commission;
- provides a description of the nature of any reprimand and any explanation in the Voter Information Pamphlet;
- the information lasts for the duration of a judge's career on the bench.

The Bar and the committee chair have both opposed the first provision contained in the legislation. A suggestion has been made for a fiscal note, thus requiring additional hearings on the matter. However, Mr. Schwermer indicated this bill has more support than the legislation concerning judicial retention. The matter was discussed in detail, and some Council members support the description of reprimands in the pamphlet, along with a set, limited period of time for the reprimands to be published. Scott Daniels said that to the best of his understanding, the Bar Commission may support the legislation if it is amended to remove the section requiring disclosure of private reprimands and establish a reasonable length of time to publish any reprimands. He added that in general, the Bar would not oppose the disclosure of more information to the public regarding judges who stand for retention.

Other bills which were discussed were as follows:

- HB52 - Admissibility to polygraph evidence. This is a statutory rule of evidence. Bill states that polygraph evidence is inadmissible. The Liaison Committee opposed this bill on a procedural level for the time being, and will wait to hear from the Evidence Advisory Committee.
- DUI bills: These bills will deal with second-offense DUIs.
- Retention elections
- Weapons restrictions for mentally ill persons
- HJR2: Resolution regarding victims' rights
- Civil stalking bill: This is the same legislation which was advanced last year, with a few minor amendments. The bill has been recalled by the House for amendments. A filing fee of \$75 has been included.
- Administrative traffic courts. Some legislators have determined that this bill would have an adverse fiscal impact on the state. Those cities who have begun these courts have petitioned for a "grandfather provision"; however, this will likely not be supported.

Re-Certification of Municipal Justice Courts

Richard Schwermer discussed this issue with the Council. Every four years, all justice courts must be re-certified as being in compliance with the standards promulgated by both the Council and the Legislature. The Council received and reviewed a list advanced by the Standards Committee of all the municipal courts it found to be in compliance with the aforementioned standards. Two courts were discussed in particular: Aurora, and Big Water. As of January 18, the Aurora justice court had not submitted a security plan, and the Big Water court had not responded to requests for re-certification information. Judge Stan Truman stated he would abstain from voting, since his court was one of the courts up for re-certification.

Mr. Schwermer reported that the justice court judge in the Big Water court resigned some two months earlier and no new judge had been selected. He was then contacted by Colin Winchester, the Kane County Attorney. Mr. Winchester is the acting city attorney in Big Water. He indicated that Big Water City remains interested in retaining its justice court. Accordingly, Mr. Winchester faxed to the Administrative Office all the necessary information required for re-certification. The city is now in full compliance, and is contracting with the Kanab Municipal Court Judge for his assistance with the Big Water Court. Mr. Schwermer recommended re-certification of all the courts, with the exception of the Providence court. With respect to the Providence court, he suggested re-certification upon receipt of their application and agreement. The term for the Providence court expires the first week of February.

A motion was made following a brief discussion by the Council.

Motion

A motion was made to re-certify the municipal courts, consistent with the staff's recommendation. The motion was seconded and carried with one abstention.

Certification of Justice Court Judges

Richard Schwermer presented this item to the Council for its information, discussion and action. He informed the Council that BCI checks have been successfully completed on all the applicants. He recommended that certification be approved upon receipt of a letter from each city attorney indicating the compliance of each applicant with the statutory requirements. This is a procedure set forth by both statute and Council rule. Mr. Schwermer clarified that the five applicants are new, and the certification process only applies to new justice court judges.

A motion was made after discussion by the Council.

Motion

A motion was made to adopt the recommendation for certification the five justice court applicants whose names were advanced to the Council, subject to staff's receipt of the required documentation. The motion was seconded and carried unanimously.

The Council was asked whether there were any objections to those items placed on the consent calendar. There being no discussion of any of said items, and there being no other business, the following motion was made.

Motion

A motion was made to adjourn the meeting. The motion was seconded, carried unanimously, and the meeting was then adjourned.