

## Judicial Council Meeting Minutes

### JUDICIAL COUNCIL MINUTES

Friday, August 20, 1999

Utah Law & Justice Center  
645 South 200 East  
Salt Lake City, Utah

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Chief Justice Richard C. Howe, Presiding

#### **Members Present:**

Chief Justice Richard C. Howe  
Hon. Leonard H. Russon  
Hon. Russell W. Bench  
Hon. Robert Braithwaite  
Hon. Anthony Schofield  
Hon. Michael K. Burton  
Hon. Michael Glasmann  
Hon. Ronald Hare  
Hon. Scott Johansen  
Hon. Kay Lindsay  
Hon. John Sandberg  
Hon. Anne M. Stirba  
Hon. Stan Truman  
Scott Daniels

#### **Staff Present:**

Daniel J. Becker  
Myron K. March  
Holly M. Bullen  
Matty Branch  
Peggy Gentles  
Tim Shea  
D. Mark Jones  
Richard Schwermer  
Jan Thompson  
Cathie A. Montes

#### **Guests:**

Sharon Hancey, *Court Executive, First District*  
Mary Boudreau, *Utah Children*  
Patrick Fleming, *UT Dept. of Human Services*  
Jeff Hunt, *Esq.*  
Mike O'Brien, *Esq.*  
Scott Sorensen, *Child Abuse & Neglect Advisory Council*

#### **Welcome/Approval of Minutes**

Chief Justice Howe welcomed all those in attendance, at which time the minutes of the Council's June 30<sup>th</sup> meeting were reviewed. Following the review, a motion was made.

#### **Motion**

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

#### **Report of the Chairman**

Chief Justice Howe presented his report to the Council. He recommended that one of the Council's objectives to be carried forward in the coming year should be that of furthering public trust and confidence. He reiterated that this is an issue being addressed nationwide, and that much time and effort are being invested by groups such as the ABA, the Conference of Chief Justices, and the League of Women Voters. He continued by saying that the opportunity exists to enhance the public's understanding of the judiciary, and that if this is done, public trust and confidence in the judiciary should follow. He concluded by saying that, as part of this process, the Utah judiciary would be encouraged to take the opportunity to meet with local communities whenever possible in an effort to educate the public on judicial processes.

#### **Administrator's Report**

Dan Becker reported to the Council on three matters: the Crime Reduction Task Force, specialty courts, and pro tem judges in justice courts. Mark Jones and Rick Schwermer, respectively, assisted in presenting on the first two matters. Mark Jones began by informing the Council that the Crime Reduction Task Force, formed by the Legislature, is focused on substance abuse and related crimes; specifically, money is being placed into treatment programs for parolees, and those on probation. There is a high percentage of crimes linked to some form of alcohol or substance abuse. The Commission on Criminal and Juvenile Justice, surveyed police chiefs and sheriffs on what they believe to be the crime-related issues of most concern. The survey results pointed to drug issues.

Rick Schwermer presented on the issue of weapons legislation. He indicated that it is unlikely that a special session of the Legislature would be convened, and reviewed two matters currently being examined by the Interim Committee: the first dealt with one requirement of the Brady law and its relation to existing state statute. The other major focus was on which crime convictions prohibit the purchase of firearms. He explained that some of the

issues -- e.g., information subsequently placed in the courts' databases -- have implications for justice court reporting technology, previously discussed by the Council. Mr. Schwermer indicated that other issues will be addressed by the Legislature during its general session.

The possibility exists for the Council to address some justice court needs with fiscal note money resulting from gun legislation; however, the issue is what type of reporting must be done.

Mr. Becker stated that it would be a positive step for the Council to advance the issue of justice court reporting.

The issue of pro tem judges in justice courts was also discussed. Mr. Schwermer continued by noting a provision in the Code of Judicial Administration which states that if a district's presiding judge wishes to do so, the district may defer jurisdiction of small claims cases to a justice court. This has already been done in some districts, primarily because of clerk time involved in small claims filings. As a result, the idea is being pursued to shift these cases to justice courts while allowing pro tem judges hear them. The matter has, in one previous instance, been examined by the Council and the Supreme Court at the request of the Third District. Mr. Schwermer said that it was discovered that two different rules seem to apply, and that these rules conflict, with one rule permitting and the other not permitting such a shift. The issue has once again arisen in Washington County, and requires action as to whether, as a policy matter, the existing procedure should be allowed to remain in place. This issue is not necessarily a Council issue, but rather a Supreme Court issue. Previously it was determined that certain elements of policy and administration were within the Council's purview, but that the ultimate execution remains with the Supreme Court. Following discussion of this matter, the following motions were made.

### **Motion**

A motion was made to recommend and request that the Supreme Court approve the continued use of pro tem judges in justice courts to hear the same cases they currently hear. The motion was seconded and carried with one abstention.

### **Motion**

A motion was made to recommend that the Supreme Court direct its respective advisory committees review the rules which may conflict with one another for definitive purposes. The motion was seconded and carried unanimously.

Following this discussion and action, Mr. Becker informed the Council that Ray Wahl, Juvenile Court Administrator, will be sworn in as President of the American Probation and Parole Association. Mr. Wahl has been actively involved in this organization for some time, and he will be sworn in for a two-year term.

### **Subcommittee Reports**

Management Committee: Judge Schofield indicated that he had nothing further to report per his review of the minutes of the Management Committee's last meeting.

Policy and Planning Committee: Judge Braithwaite indicated that the minutes of the Policy and Planning Committee were accurate, and that he had nothing further to report.

Liaison Committee: Justice Russon reported that some discussion of upcoming legislation is already underway. Some items which will be forthcoming will be discussed later in the Council's meeting.

Family Law Workgroup: Judge Glasmann reported that the deadline for the upcoming Family Law Workshop is approaching. He reminded the Council that the workshop will be held on September 24<sup>th</sup> at the Matheson Courthouse, and encouraged attendance by the Council. The Boards of District and Juvenile Judges will also attend. He continued by offering a synopsis on the family law matter for those new members to the Council, following which he requested the Council's continued input on how the workgroup is proceeding. He reviewed the program proposal which was included in the meeting materials. The points reviewed were as follows:

The plan for the workshop agenda was outlined, and Judge Glasmann said the group would choose five to six topics for discussion at breakout sessions. Some suggested topics are: mediation, intercommunication between the district and juvenile courts; statutory changes (e.g., UCCJA) which would allow for improved communication between the two courts; increased involvement by the Guardian Ad Litem program; and streamlining resolution of custody disputes. The breakout groups would report back to the group as a whole, then target the issue of implementation. The suggestions from the breakout groups could be formulated into a written work product and submitted to the Boards of Judges as well as the Council. These same suggestions could be shared for their feedback with those groups who have presented to the Council. The Council could then consider and act upon those recommendations. Tim Shea added that throughout the workshop and subsequent work product which is developed, the focus will be to submit an analysis without a bottom line. The Council was supportive of the direction being taken by the workgroup.

At its next meeting, the list of prioritized discussion topics will be finalized. The issue of transition was raised with respect to those Council members whose terms will expire, and whether possible new members will have adequate

notification of the September 24<sup>th</sup> workshop. Chief Justice Howe indicated that both outgoing and incoming Council members are invited to return and participate in the workshop.

### **Public Trust and Confidence Update**

Dan Becker presented to the Council a brief follow-up from the Council's last meeting. At its last meeting, the Council set an objective relating to the issue of public trust and confidence, that of judicial outreach. He reported two short-term developments: 1) one of the sessions during the Annual Judicial Conference -- the afternoon session of September 16<sup>th</sup> -- will be devoted to this issue. A panel discussion will be held, moderated by Seaborn Jones, President of the National Conference of Bar Presidents. Mr. Jones is actively involved in the public trust and confidence effort on a national level. The Bar membership has also been invited to attend this session. Other panelists include: Hon. Tyrone Medley, Hon. Ray Harding, Sr., and Scott Daniels. Brent Johnson, General Counsel for the Administrative Office of the Courts, will present on the ethical considerations with respect to public outreach.

Mr. Becker next reported that the Board of District Judges met with Bar president-elect David Nuffer. Criticism of the judiciary was discussed, as well as the matter of Bar assistance as it relates to the issue of public trust and confidence in the judiciary. Mr. Nuffer is interested in the issue and is supportive of the public outreach effort.

For the long term, Mr. Becker said the Education Standing Committee has formed a subcommittee to develop an education program specifically aimed at training judges on effective public outreach, ethical issues to be considered, and what form said outreach might take.

### **Sealing Court Records**

Tim Shea presented this issue, which was previously presented to the Council in the spring. It was precipitated by a complaint that some Third District judges had completely sealed court records in some cases, thereby denying access to public information. The Council, acknowledging that any resolution would be applied statewide, referred this matter to the Policy and Planning Committee. The committee, in turn, directed Mr. Shea to research the law to determine possible options to resolve this matter, and to discuss this matter with the Boards of Judges as well.

Mr. Shea indicated that there are statutory provisions that have never been tested; that further, the Code contains a statute directing that cases in the district court are accessible to the public. His conclusion was that hearings and records in district court cases should be open. He then requested direction from the Council on two options identified for ensuring the application of law: 1) an "omnibus" rule that accounts for the various statutory provisions and constitutional principles, and develops a process by which a court would close records; or 2) rely on existing law or develop a subsection in the judges' benchbook and a subsequent education program so that judges may be updated on the public access laws. If the option to develop the education program is chosen, there is a question of the interpretation of the relationship between the GRAMA statute and the court rule. The Council's rule-making has distinguished between administrative and judicial records, but no conceptual definition exists.

Jeff Hunt, who presented to the Council at its May meeting, appeared on behalf of the local chapter of the Society of Professional Journalists. He offered a second presentation, recalling that this issue was initially brought to the Council's attention because of the difficulty in finding case names and numbers, as well as names of parties to actions filed which would ordinarily be a matter of public record. This problem at times resulted in difficulty in some service of motions on opposing counsel. He indicated that a proposed rule, patterned after a Texas rule, was submitted to the Policy and Planning Committee; however the committee opted not to follow the proposed rule, preferring the option of a bench memo for purposes of education.

He indicated that while there is no opposition to the bench memo, that two points be considered to be included in the bench memo: 1) the constitutional right of access to civil records; and 2) GRAMA and the right of access to court records. GRAMA encourages more privacy than does the constitutional law. With respect to GRAMA, he said the court does not need to formulate a rule that resolves the ambiguity between GRAMA and court records. Among the reasons, he said the courts' rules currently deal with the distinction. He added that he did not believe the Legislature intended for all the GRAMA classifications to deal with records filed in a public court.

There was detailed discussion on the matter with respect to the types of cases which might be affected. The concern was expressed that there were two competing viewpoints on this matter and that because of the conflict, either another rule should be written or the current rule clarified. Tim Shea indicated that the distinction should be resolved before the content of an approved education program can be developed. He added that any memos to the benchbook would be presented to the Council.

Following additional discussion, a motion was made.

### **Motion**

A motion was made to proceed with the benchbook memo for purposes of education and training effort of judges. The motion was seconded and carried unanimously.

With regard to the application of GRAMA, Tim Shea was asked to develop a statement of the competing positions and considerations for future use in rulings by judges on a case by case basis. Following this, a second motion was made.

### **Motion**

A motion was made that no further action be taken on this matter, and allow the judicial process, in appropriate times and cases to resolve the issue. The matter was seconded and carried unanimously.

### **Specialty Courts**

Rick Schwermer presented to the Council for its discussion the issue of "specialty courts". He offered background on these courts and listed the various types of specialty courts in existence, e.g., the drug court currently in operation in the Third District. He emphasized that these courts are not courts, per se. Rather, they take a different approach to disposing of specific types of cases. This approach has also been referred to as "therapeutic justice". The Conference of State Court Administrators have as one of their committees a group similar to the Council's Policy and Planning Committee. This group is chaired by Dan Becker. This issue was discussed at their annual meeting. To facilitate their discussions, Mr. Becker and Mr. Schwermer prepared a report entitled the, "White Paper on Therapeutic Justice".

Mr. Schwermer described the term "therapeutic justice" as an approach where a judge is a part of a therapeutic team involved in a specific problem such as substance or tobacco abuse, or domestic violence, which requires therapy. In "therapeutic justice", the judge takes a more active role in the treatment/rehabilitation of offenders.

One positive aspect of therapeutic justice is that the judge develops a relationship with the participant, or offender (one judge-one defendant). In this type of court there are immediate consequences; for example, in a drug court, if deemed necessary, a judge can order a defendant to undergo drug testing. If the results are unfavorable, the defendant may face incarceration or similar penalty. If favorable, positive reinforcement would follow.

Mr. Schwermer continued by explaining programs underway in Utah. Reports were submitted by each district and same were distributed to the Council. There is currently a drug court in Third District, over which Judge Dennis Fuchs currently presides. There is evidence that this court, like others in the country, are meeting with some success. There is also a Domestic Violence Court in Third District. Fourth District is in the process of establishing a drug dependency court. There is no activity in this area in the Sixth District. There are a total of 15 specialty courts in Utah which are either established or to be established. He indicated that last year the Legislature gave \$400,000 to the Department of Human Services to assist in funding truancy and drug courts. In turn, the Department contacted state agencies and organizations regarding possible interest in receiving a portion of this money to plan a specialty court. A response was received from the First District; however, this has not yet been developed.

Other courts which will likely come into operation are: mental health courts (weapons issue would addressed in this court); peer courts; truancy courts (such a court exists in the Fourth District); DUI courts, and gun courts.

Mr. Schwermer indicated that there is a desire to have statewide drug courts and tobacco courts. One aspect of these courts would be tobacco cessation programs.

- resources (judicial/court resources)
- cost

Emphasized judicial role in these courts is different.

LHR: concern that rule of law may succumb to "rule of man" - **law** applied with neutrality to all equally. Therapeutic justice lends to personalization over neutrality.

One reason for success: emphasize concern for outcome in these cases; better outcome auth. invested assures better outcome.

Recommendation: to assert leadership role in attempt to define role of specialty courts. Exec.branch supportive of concept and will likely continue to advance.

Courts haven't been in leadership; no, courts SHOULD lead philosophical discussion.

Mgmt.Cmte. formulate an ad hoc committee (include persons directly involved in spec. cts.)

DB & staff prepare questions Council wants to ask itself; decide what is to be accomplished. acknowledge, study & evaluate.

Two major issues: tobacco sett. \$; Gov's. support - higher priority svn. 2 implmt. statewide courts re drug

MOTION: to set aside significant amt. of time to discuss at next meeting. Invite opp./prop. To address Council.  
Seconded and carried unanimously.