

Judicial Council Meeting Minutes

JUDICIAL COUNCIL MINUTES

**SEPTEMBER 12, 2000 - 9:00 A.M.
MAYBIRD ROOM, CLIFF LODGE
SNOWBIRD SKI RESORT - SNOWBIRD, UTAH**

Chief Justice Richard C. Howe, Presiding

Members Present:

Chief Justice Richard C. Howe
Hon. Lyle Anderson
Hon. Russell W. Bench
Hon. Lynn Davis
Hon. L. A. Dever
Hon. Ronald Hare
Hon. Scott Johansen
Hon. Kay A. Lindsay
Hon. Clair Poulson
Hon. Anne M. Stirba
Hon. Stan Truman
Hon. Michael J. Wilkins
Debra Moore

Staff Present:

Daniel J. Becker
Myron K. March
Marilyn Branch
D. Mark Jones
Richard H. Schwermer
Holly Bullen
Brent Johnson
Tim Shea
Ray Wahl
Jan Thompson
Peggy Gentles
Jennifer Yim
Diane Cowdrey
Cathie A. Montes

Excused:

Hon Rodney Page

Guests:

Michael D. Zimmerman, *Chair, Racial and Ethnic Fairness Task Force*
Hon. Tyrone Medley, *Co-Chair, Racial and Ethnic Fairness Task Force*
Jennifer Yim, *Director, Racial and Ethnic Fairness Task Force*
Steven Stewart, *Executive Director, Judicial Conduct Commission*

Welcome/Approval of Minutes

Chief Justice Howe welcomed all those in attendance. The Council was informed that the September meeting would be the final meeting for outgoing Council members, Judge Kay Lindsay and Judge Stan Truman. Judge Rodney Page, who was excused from the meeting, is also retiring from the Council. He noted that Cathie Montes has accepted a position with the Utah Court of Appeals. Approval of the minutes of the Council's August business meeting, and the budget and planning session, was deferred to the October meeting.

Report of the Chairman

Chief Justice Howe reported to the Council on the following matters:

- Both Chief Justice Howe and Myron March met with the Fourth District Nominating Commission in Provo on September 11th. This meeting begins the selection process to fill the vacancy created by the retirement of Judge Ray M. Harding, Sr., from the bench. There were 26 applicants, 12 of which will be interviewed on or about September 21st.
- The following individuals will receive awards during the Annual Judicial Conference luncheon on Thursday, September 14th:
 - **Meritorious Service Award** (honoring judicial branch employees):
 - Krista Aram (Probation Officer, Second District Juvenile Court); Sharon Madsen, Assistant Clerk of Court (Second District); Bernice Placentia, Deputy Court Clerk (Fourth District).
 - **Amicus Curiae**: Lane Beattie, former Utah Senate President; and Wayne Riches, Managing Attorney, Utah Legal Services, Inc.
 - **Quality of Justice Award**: Hon. Stan Truman (Emery Co. Justice Court)
 - **Judicial Administration Award**: Larry Gobelman, Court Executive (Third District)

Report from the Policy and Planning Committee

Judge Scott Johansen began his report by reminding the Council to review the items advanced by the Policy and Planning Committee for placement on the consent calendar. He then deferred the presentation and discussion of judicial performance evaluation to Tim Shea.

Report: Judicial Performance Evaluation Committee

Tim Shea presented this matter to the Council for its discussion and action. The Judicial Performance Evaluation Committee has, for the past several months, extensively discussed issues related to judicial performance evaluations, per a referral from the Policy and Planning Committee. The Council received a report containing recommendations from the performance evaluation committee, and subsequently discussed the following issues individually:

Reassessment of the general retention question: The general retention question asked of lawyer has been a part of the lawyer survey since 1988, and asks whether a judge should be recommended for certification for election. The general retention question asked of jurors has been part of the juror survey since 1997, and asks whether a juror would be comfortable having his or her case tried before the judge presiding over the trial wherein that juror participated. Answers to these questions are opinions only, and do not address an area or areas of performance. These answers are considered by the Council only if a judge fails one of the certification standards. Mr. Shea clarified that for this year, the answers to the general retention questions will be included in the Voter Information Pamphlet. Following a review of this question, the Policy and Planning Committee recommended eliminating this question from the survey. A motion was made after a brief discussion.

Motion

A motion was made to eliminate the general retention question from the survey. The motion was seconded and carried unanimously.

The timing of the January and February Council meetings, while sufficient to meet the needs of the evaluation program and the judges, is not in accord with the rule:

In the past the Council has certified judges at its January meeting, and this practice continues. The certification process contained within Rule 3-111 sets a deadline for filing declarations of candidacy between March 7 -17 of even-numbered years. Currently the Council holds a regular February meeting which, while is in sufficient time to notify judges of ultimate decisions it renders regarding certification, does not comply with meeting deadlines. The Policy and Planning Committee recommends that the Council amend Rule 3-111 to conform to the practice. There being no questions or discussion, the following motion was made:

Motion

A motion was made to approve the recommendation advanced by the Policy and Planning Committee, and accordingly amend Rule 3-111. The motion was seconded and carried unanimously.

Judges declaring an intent to retire can opt out of the evaluation process:

Mr. Shea indicated that the current policy is to permit judges who intend to retire to opt out of the final evaluation cycle. However, the Utah Supreme Court has amended the senior judge rule to require that these judges must, in their final surveys, have scores which meet the minimum qualifications for certification, regardless of retirement. The Policy and Planning Committee recommends that the Council should eliminate the discretion of judges to opt out of surveys prior to retirement. A motion was then made.

Motion

A motion was made to approve the recommendation as advanced by the Policy and Planning Committee. The motion was seconded and carried unanimously.

Investigate the circumstances in which a judge may campaign for retention election if the Council does not certify the judge: This item was deferred for discussion later in the meeting.

Use of private reprimand reports from the Judicial Conduct Commission, and whether the private information becomes public when filed with the Judicial Council:

HB285 requires the Council to receive from the Judicial Conduct Commission reports of both private and public reprimands or sanctions against judges. However, the question of the use of this information by the Council still exists. The Policy and Planning Committee recommends that private reprimands should be considered by the Council as part of the judicial certification process, to determine whether a judge is in substantial compliance with the Code of Judicial Conduct. Any decisions regarding judicial certification will be made in a public session.

Following brief discussion, a motion was made:

Motion

A motion was made that this recommendation should be read as meaning the Council would consider private reprimands in its decisions regarding judicial certification, but that private reprimands will remain private and that if necessary, the Council's consideration of same will not be released. The motion was seconded and carried unanimously.

Juror surveys, as lawyer surveys, run for a four-year period to give judges results for purposes of self-improvement before administering the surveys used for certification:

Mr. Shea explained that jury surveys for district judges would be administered during the middle two years of a judge's term of office, and would be administered for self-improvement purposes but not made available to the public. During the final two years of a judge's term of office, the surveys would be administered for certification purposes and the results would be published in the voter information pamphlet. The Policy and Planning Committee recommends that this practice continue.

The Council discussed this matter, after which time a motion was made.

Motion

A motion was made to defer the question of the use of jury surveys to the Board of District Court Judges for its consideration as to whether modification or clarification of the rule regarding said surveys is appropriate. The motion was seconded and carried unanimously.

There was discussion of the expense involved in continued use of the jury surveys. The committee was of the view that the cost is not great, and that public input should not be curtailed, nor should it be perceived as being curtailed; therefore, the surveys should continue to be used.

An additional motion was then made.

Motion

A motion was made to approve the recommendation of the Policy and Planning Committee that the jury survey continue to be conducted in off years. The motion was seconded and carried unanimously.

Reassessment of the role of the Judicial Council in the evaluation and certification of judges: Tim Shea reviewed the current policy and its objective. The program is designed for judges to be certified by meeting certain standards. These standards are published, and measuring mechanisms are in place to determine whether a judge has met those standards. If the standards are met, there is an irrebuttable presumption that the judge will be certified for retention election. This model is not used in other states. Mr. Shea reported that other states investigated use a more discretionary model. A third model was considered, but was neither supported nor recommended by the committee.

The committee recommended that the Council use a more discretionary model whereby there would be no presumption for certification. The Council would have more discretion not to certify a judge, despite sufficient attorney survey scores under the current model. This concept would, presumably, apply to the other standards. If there are mitigating circumstances, the Council could exercise its discretion to either certify or withhold certification. This model is used in Arizona, Alaska, and Colorado. However, the nature of the public statements regarding a judge's qualification differs in those states.

There was discussion on the circumstances where discretion would be used not to certify. It was pointed out that the model recommended by the committee is better to use in cases of sanctions. Concerns were expressed regarding certification with combined use of the attorney survey. Preference was expressed for separating that poll from the program, and staff stated that such a separation would be difficult. The Council discussed this matter in further detail, and a suggestion was made that the committee's recommendation be discussed with the Boards of Judges for informational purposes. A suggestion was also made to consider a process whereby judges' input could be sought. The Council was informed that the State Bar is interested in the use and implementation of a more discretionary model, and a more meaningful, effective process. The following motions resulted from the Council's discussion and consideration:

Motion

A motion was made that the Council approve in concept the recommendation by the Policy and Planning Committee that the Council exercise greater discretion in the certification of judges, beginning with the 2002 election cycle. That further, as part of that concept, the Boards of Judges should receive the meaningful information that the Council is considering, and should be given a meaningful opportunity to contribute input into any changes which will be made, with the explanation that the Council is moving from an irrebuttable to a rebuttable presumption in those circumstances where that becomes evident in the Council's process for certification. The motion was seconded and carried unanimously.

Motion

A motion was made to direct staff to prepare a presentation to the Boards of Judges, for informational purposes, which contains information given to the Council which has led the Council to take the action in the aforementioned motion. The motion was seconded and carried unanimously.

Reassess the role of the Council beyond certification: Information was presented on self-improvement practices used in other states. The Policy and Planning Committee discussed several models used in other states. The committee was of the view that steps should be taken on a local level, e.g., on a district level by the presiding judge, to receive self-improvement and certification information on judges standing for retention election. That further, the presiding judge should meet with judges whose performance is in question as opposed to this type of action being handled at the Council level. The presiding judge would then report to the Council on the results of those meetings, and offer additional input. The presiding judge would consider the performance of the district judges and the impact on said performance on the courts. The board chair would assume this responsibility in the event of questions existing regarding the performance of the presiding judge.

The aforementioned recommendation was discussed, and a suggestion was made to accept said recommendation as advanced by the Policy and Planning Committee. A motion was made following additional discussion.

Motion

A motion was made to approve in concept the recommendation as advanced by the Policy and Planning Committee, and implement a rule change, if necessary, which would allow the presiding judge to receive self-improvement and certification information on judges and authorize said presiding judge to meet with judges at a local level, at the request of either the presiding judge or the judge to be certified. That further, this concept should be included in the information to be presented to the Boards of Judges and should be implemented with specific guidelines which will be developed as needed.

Reassess the substantial compliance standard: Tim Shea stated that currently, the only reporting mechanism with respect to compliance is the judge's self-declaration. The Policy and Planning Committee recommends that substantial compliance should be left as the standard to be considered by the Council, and that self-declaration should continue. However, the Council should also have the discretion to consider public and private reprimands, and any other information available regarding ethical conduct which may be available. This combined information would be considered as part of the certification process. Regarding the Code of Judicial Administration, the committee recommends a re-examination and identification of the requirements for judges currently listed within the Code, in order to determine which of those requirements should be retained for use in the certification process. A motion was then made.

Motion

A motion was made to approve in concept the aforementioned recommendation, and to attach same to the previous concepts approved for presentation to and review by the Boards of Judges, and for subsequent implementation.

Description of the public information sanction for inclusion in the Voter Information

Pamphlet: The committee recommends, as a starting point, the use of the summary of the sanction created by the Judicial Conduct Commission, and to amend said statement as may be necessary. The judge in question would then have the opportunity to offer, in writing, any suggested changes. The judge in question would have no authority to amend the statement. The Council would then review, consider, and make a final decision for the statement to be included in the Voter Information Pamphlet. It was recommended that the current standard should be followed this year. Brief discussion followed, and a motion was made.

Motion

A motion was made to approve the aforementioned recommendation as advanced by the Policy and Planning Committee. The motion was seconded and carried unanimously.

Judicial campaign finance reform: There are currently no laws governing this issue outside of the provisions in the Code of Judicial Conduct. Mr. Shea reiterated that the Council, at its last meeting, approved a draft statute to be advanced to the Legislature at its upcoming session. However, a further recommendation was made to the Utah Supreme Court to amend Canon 5 to require a judge to declare when a contributing lawyer appears in that judge's court on a case. This requirement should be effective from the time a judge forms a campaign committee until six months after the election, and should apply when contributions of more than \$50 are made. There was brief discussion of this item, at which time a motion was made.

Motion

A motion was made to adopt the aforementioned recommendation of the Policy and Planning Committee. The motion was seconded and carried unanimously.

Develop circumstances regarding disqualification of a Council member regarding voting on certification: The committee recommended that the Council not regulate this issue by rule, but that this should

be left to the discretion of the individual Council member. It was clarified that Council members currently do not vote on their own names. This practice will continue. There was no further discussion, and a motion followed.

Motion

A motion was made to approve the recommendation as advanced by the Policy and Planning Committee. The motion was seconded and carried unanimously.

The Council emphasized its commitment to the concepts it approved, and it was recognized that the process should begin with a translation and development of these concepts into a proposed model for the certification process. The model will take into consideration concerns of the trial judges as well as the State Bar. Presentations will be made by staff to the Boards of Judges for review, consideration, discussion, and input for subsequent development of those concepts into rules which will be workable for all concerned, and will involve either or both the Policy and Planning Committee and the Judicial Performance Evaluation Committee. Staff will also present a report of the Council's action to the Judiciary Interim Committee.

Report from the Judicial Conduct Commission

Steven Stewart, Executive Director of the Judicial Conduct Commission (JCC), presented his quarterly report to the Council. He reviewed the changes which the commission made to its internal rules, noting several in particular. With respect to the definitions outlined in the commission's Rule 595-1-1, a suggestion was made to add a definition of judicial misconduct which violates either the Code of Judicial Conduct or the Utah constitution.

Mr. Stewart also explained the rationale behind the rule with respect to jurisdiction over former judges. He next reviewed recent decisions on judicial disciplinary matters across the country. He opined that, in his capacity as a member of the Board of Directors of the AJDC, the State of Utah has an outstanding judiciary. He added that the single most complaint received about the judiciary is that of arrogance from the bench. He stated that the guidelines for commission members were established to impose parameters similar to those for judges. He briefly discussed the guidelines regarding confidentiality, and emphasized that the commission maintains confidentiality at all times, particularly with respect to media inquiries. He also listed the current commission members, as follows: Judges Gordon Low (commission chair) and William Bohling; Senators Michael Waddoups and Pete Suazo; Representatives Gary Cox and Katherine Bryson; Sylvia Bennion; Ken Warnock; Dane Nolan; Sharon Donovan; and Denise Dragoo.

Administrator's Report

Dan Becker reported to the Council the following items:

- Presentations continue regarding the formation of justice courts. These presentations are scheduled for the Board of Appellate Court and Justice Court Judges, and to the Clerks of Court. The court executives were already presented with this information.
- The Online Court Assistance Program (OCAP) has been extensively tested in the Third District, having been reviewed by a group of judges and commissioners. The program will formally be released on the Internet on or about September 28th. A press release concerning the launch will be scheduled, and will include those legislators who have been supportive of and instrumental in the development and release of this program. Senator Michael Waddoups secured funding for the development of this phase of the program, and Sen. Hull, along with Reps. Arent and Allen were members of the steering committee.
- Second Language Stipend: There are 50 employees statewide who have been tested and are eligible to receive this stipend. With the exception of one district, judicial districts statewide have eligible employees, meaning that at least one court employee will use a second language in the course of his or her work.

Management Committee: Judge Anne Stirba presented to the Council the following report on behalf of the Management Committee:

- The committee discussed the process used by the Council to prioritize its budget requests. It was determined and recommended that no changes are necessary to the process.
- Kathy Elton, director of the courts' Alternate Dispute Resolution program, presented an update on ADR programs. There has been a substantial increase in the number of cases resolved through ADR. The newest program is a truancy mediation program, which is already successful.
- The committee recommended for placement on the consent calendar the appointments to the Judicial Performance Evaluation Committee and the Judicial Branch Education Standing Committee, and the Facilities Standing Committee.
- Dr. Diane Cowdrey presented information regarding a name change and the development of a logo for the education department. That department will now be known as the "Utah Judicial Institute", and the logo will be released during the Annual Judicial Conference.

Neither the Liaison Committee nor the Bar Commission has met since the Council's last meeting. Debra Moore clarified that she will present to the Bar Commission a report on the Council's meetings.

Approval of Justice Courts

Richard Schwermer presented this matter to the Council for its consideration and action. West Valley City, Holladay, and Salt Lake City have each made application for status as municipal justice courts. The Council is requested to review the applications for compliance with the standards promulgated in the Code and the requirements for the creation of these courts. Mr. Schwermer began with the application from Salt Lake City. Information was presented regarding the composition of that city's justice court staff. The city seeks no waiver of time to establish its justice court; therefore, the court will officially begin operation on July 1, 2002. The location for the court has not yet been firmed. However, the City has established a requirement that the court should be located within one block of the Matheson Courthouse. It was noted that no provisions have been made with respect to court interpreters. While this is not a part of the requirements, concern was expressed this need may not be sufficiently addressed. A finding was made that the application of Salt Lake City to establish a justice court, beginning operations on July 1, 2002, is in compliance with the statutory requirements. A motion was made pursuant to this finding.

Motion

A motion was made to approve the application of Salt Lake City for a justice court, authorizing operation of said court to begin operation on July 1, 2002. This authorization is conditional upon Salt Lake City's compliance with its proposed plan included in the application. The motion was seconded and carried unanimously.

Mr. Schwermer next reviewed with the Council the application for establishment of a justice court submitted by West Valley City. Included in the city's application was a request for a waiver of time in which to begin operations. West Valley City proposes to begin operation on July 1, 2001. It was also noted that the city has not included a detailed court certification affidavit, although said affidavit is not required at this time. Like Salt Lake City, the location for operations is unknown at this time. However, the city is still in conformance with the requirements. There was brief discussion of the application, and a motion followed.

Motion

A motion was made to approve the application of West Valley City for a justice court and to grant its request for a waiver of time, thus allowing the court to begin operation on July 1, 2001. This approval is subject to the city filing all required documents per statutory requirement. The motion was seconded and carried unanimously.

Holladay is the third city having submitted an application to establish a justice court. Mr. Schwermer indicated that the city is not listed in the Code, and the Council therefore has more discretion to deny the request. The informal standard has been to examine and assess the need for a justice court in a city so requesting. Creation of a justice court in Holladay would slightly impact the Salt Lake County Justice court, and would have no impact on the district court. The city has included in its application a request for a six-month waiver of time, and proposes to begin operation on January 1, 2001. A location for the court is also firmed. There was additional discussion of the application, followed by a motion.

Motion

A motion was made to approve the application of the city of Holladay for establishment of a justice court, and to grant a waiver, thus allowing operation of that justice court to begin on January 1, 2001. The motion was seconded and carried.

Dan Becker informed the Council that the city of Layton is seriously considering the establishment of a justice court, as well as Ogden.

Recognition of Outgoing Council Members

Chief Justice Howe and the Council recognized and commended two of its outgoing members, Judge Kay Lindsay (Fourth District) and Judge Stan Truman (Emery County Justice Court). Both were commended for their service and contribution to the Council, and both expressed their appreciation for the opportunity to serve as members of the Council.

Report and Final Recommendations: Racial and Ethnic Fairness Task Force

The Council formally received the final report and recommendations of the Racial and Ethnic Fairness Task Force, as presented by Michael D. Zimmerman and Judge Tyrone Medley, task force co-chairs, and Jennifer Yim, Executive Director of the task force. Judge Medley began by thanking both past and present Council members for their ongoing support for the task force and its efforts. He indicated that the state's Sentencing Commission and the Utah State Bar have each approved the recommendations advanced by the task force, and are advancing their respective plans for implementation of many of those recommendations. Law enforcement agencies are doing likewise, as are the Board of Pardon and Parole and the Department of Corrections. The task force as a whole desires to remain intact in order to focus on implementation efforts.

Judge Medley listed those members of the judiciary who participated in the task force's efforts: former Chief Justice Michael D. Zimmerman, Judge Lynn Davis, Judge Glenn Iwasaki, Judge Jody Petrie, Judge William Thorne, Judge Andrew Valdez, Judge Mark Andrus, senior Judge Raymond Uno, Judge Brent West, Judge Michael Kwan, Judge Shauna Graves Robertson, Judge Joanne Rigby, and Judge Deborah Ridley of the Ute Tribal Juvenile Court,

and Judge Medley himself. The Council was asked to formally approve the report of the task force and continue its leadership role. The Council was not asked to assume a sole ownership role. Regarding implementation, Judge Medley indicated that the Commission on Criminal and Juvenile Justice is supportive of the report and recommendations, but is unable to take on the additional responsibility associated with implementation. Former Chief Justice Zimmerman offered additional remarks, and concluding remarks were made by Jennifer Yim. The three then fielded questions from the task force.

Judge Anne Stirba and Judge Lynn Davis shared their observations of the evolution of the efforts and advances made by the task force. Positive results have been noted as a result of the process. It was noted that the proposed process is the means by which momentum may be maintained within the criminal justice system as relates to the work which has been generated by the task force. The administrative staff were thanked for their efforts, and Jennifer Yim was particularly recognized for all her efforts throughout the duration of the task force. A motion was made at the conclusion of the remarks and questions.

Motion

A motion was made to approve the final report of the task force, to adopt the recommendations and continue the leadership role undertaken by the Council. The motion was seconded and carried unanimously. The amount requested for the project coordinator, per the Council's action at its August budget planning session, is reserved as a building block request.

Jury Inclusiveness Analysis

Tim Shea presented to the Council information regarding the jury inclusiveness analysis. Information was presented from 1998 and was compared with information for this year. It is the Council's obligation to consider, on a biannual basis, including within the master jury list all persons over the age of 18 in each county in the state. There is currently a sizeable difference between the names on the jury list and the master list on the adult population. The objective is to consider the availability of other source lists. Staff recommends pursuing the goal of definitive address information. An additional recommendation was made to pursue better data before pursuing more records.

Use of postal lists was discussed; however, it was felt that this is problematic, since these lists show households rather than adult members. A recommendation from the Racial and Ethnic Task Force was also noted, which is for a more diverse jury pool and additional sources which might assist in implementation of this recommendation. This was presented for informational purposes.

Informal Opinion 00-5

Brent Johnson presented this to the Council as an informational item. The Ethics Advisory Committee has issued an informal opinion per the Council's request. This opinion addresses two questions regarding judicial retention elections. First, whether a decision by the Council to deny a judge certification for retention election constitutes active public opposition. Second, whether a judge who is certified for retention election but receives either a lower than average survey score or a sanction by the JCC faces active public opposition.

The Ethics Advisory Committee's opinion was that if a judge is not certified, said judge may campaign for office. However, the committee was of the view that receiving a lower than average survey score or a sanction does not constitute active public opposition. Mr. Johnson reviewed four scenarios which might allow a judge to operate a campaign.

Mr. Johnson reiterated that the Council has the option, on its own motion, to discuss and issue as formal these informal opinions, as well modifying or rejecting same. He also clarified that this opinion will be made available to judges and will be posted on the courts' website.

Other Business

The Council was informed that a retirement reception is being planned in the Fifth District for Judge Joseph Jackson. The reception will be held on November 10th in Cedar City, at Milt's Restaurant.

Clarification was sought on a consent calendar item: the recommendation for reappointment of Judge Gregory Orme to serve a third term on the Judicial Performance Evaluation Committee. It was clarified that the Court of Appeals concurred in its approval of Judge Orme for a third term on that committee. There was no further discussion of this item.

There being no further business, a motion was made to adjourn the meeting. The motion was seconded, carried unanimously, and adjourned immediately thereafter.