

JUDICIAL COUNCIL MEETING

Minutes
Monday, October 29th, 2007
Matheson Courthouse

Chief Justice Christine Durham, Presiding

ATTENDEES:

Chief Justice Christine Durham
Hon. Ronald Nehring
Hon. Gary D. Stott
Hon. Michael D. Lyon
Hon. Judith Atherton
Hon. Mark Andrus
Hon. William Barrett
Hon. Michael Kwan
Scott Sabey, esq.
Hon. Hans Chamberlain
Hon. Jody Petry
Hon. Brendan McCullagh
Hon. Michael Westfall

STAFF PRESENT:

Daniel J. Becker
Tim Shea
Debra Moore
Ray Wahl
Holly Frischknecht
Matty Branch

ABSENT:

Judge Gregory Orme

GUESTS:

Judge James Davis (for Judge Orme)

1. WELCOME AND APPROVAL OF MINUTES:

Chief Justice Durham welcomed everyone to the meeting. Chief Justice Durham welcomed Judge Westfall, Judge Atherton, and Judge McCullagh to the Council. Judge Orme is also a new member of the Council but is unable to attend the meeting today and Judge Davis is attending for him.

Motion: Judge Petry motioned to approve the minutes, Judge Barrett seconded the motion, the motion passed unanimously.

2. CHAIR'S REPORT: (Chief Justice Christine Durham)

Chief Justice Durham reported the following:

-The Judicial Selection and Retention Task Force has met twice since the last Judicial Council meeting. The Task Force heard from a think tank out of Colorado that reported on Colorado's proposal for judicial performance evaluations. The Task Force then began drafting legislation that models the Colorado program. Mr. Shea provided alternative legislation and a comparison data sheet that assisted in deciphering the differences in the

court's draft versus the Task Force's draft. The Task Force went line by line and made most of the judiciary's suggested changes in the proposed legislation. The legislation creates a Commission made up of representatives from all three branches of the government that would determine the quality of performance by judges in order to help educate the public in the voter information guide. The Executive Director of CCJJ would also sit on the Commission. Sitting judges or sitting legislators would not serve on the Commission. The performance evaluation process would be completely removed from the judiciary. The Commission would recommend retention, or recommend no retention, in the voter information pamphlet. The funding of the Commission is still unknown and will be discussed further during the next meeting. It is unclear where the justice courts will fit in the evaluation process by the Commission. Judge Stott highlighted how much the Task Force has switched focus and how helpful Mr. Shea's comparison of the legislation was. The Task Force discussed potential locations for the Commission to be housed. The Lt. Governor's Office and CCJJ were each mentioned. Final action on the proposed legislation will take place in the next month. The Judiciary Interim Committee could then review the legislation. Chief Justice Durham, Judge Stott and Judge Chamberlain reported that if the Commission is truly independent, adequately staffed and represented, the evaluation process could be improved. It is possible the Commission would then further review the layout of the voter information pamphlet as was originally intended for the Task Force.

-The Nominating Commission process has recently been reviewed by a representative committee of previous Commission members and by the Governor's Office. Tawni Downing, the Governor's Legal Counsel has been seeking input from previous Commission members. The input received has been extremely positive about the current nominating process. The courts Review Committee's report will be heard later in the Council meeting.

3. ADMINISTRATOR'S REPORT: (Daniel J. Becker)

Mr. Becker reported the following:

-Alyn Lunceford has been offered the position of Director of Facilities and will replace Gordon Bissegger in December. Mr. Lunceford comes from DFCM and has had years of experience with state facilities.

-The Sanpete Courthouse bond will be voted on next week. The local newspaper has covered the courthouse extensively and it appears there is now support for the location south of town. Business, government, and community leaders support the new courthouse and the County Commissioners have worked tirelessly for the new building. Brent Bowcutt, the TCE from 6th District wrote a letter to the editor of the Sanpete Messenger that addressed community concerns and clarified many of the issues.

-Justice Nehring recently presented the justice court study proposal to the Commission on Criminal and Juvenile Justice. The Judicial Council will hear the final proposal at their meeting in November.

-Chief Justice Durham and Mr. Becker will meet with the Governor on November 6th to discuss the Council's budget priorities, the justice court study proposal and the Judicial and Retention Task Force.

-It is possible the Executive Compensation Committee will not be named this year. The Citizen Compensation Committee will meet next month to determine their approach for salaries during this upcoming session.

-The Facilities Committee has created a priority list of 29 buildings for a total of \$1.3 billion. The 2nd District Juvenile Courthouse is ranked 13 on the list.

-Mr. Schwermer reported that there is a proposed amendment before the Constitutional Revision Committee to change Article I, Section 14 of the Fourth Amendment that states the rights offered in the section are the same as those in the United States Constitution and not available for interpretation by the Utah Supreme Court. An additional reform is also proposed that relates to the writs of habeas corpus in death penalty cases. The CRC has discussed that the Supreme Court has ignored the post conviction reform amendments and a possible solution is to take the habeas corpus ability from the Court. Two handouts were provided outlining the proposed changes. The question was raised as to whether the Council feels this is a judiciary issue and if there is a need to comment from the Council's perspective. It was observed that a Council statement is representative of the entire judiciary and not just of the Supreme Court. The possibility of having representatives from the constitutional law section of the Bar attend the CRC meeting to speak to the issue was discussed. A straw vote was taken over whether the Council agreed to make a statement that there was not a need to amend Article I, Section 14.

Motion: Judge Stott motioned that a provision be drafted voicing the Council's opposition to the proposed constitutional amendments. Judge Westfall seconded the motion, the motion passed with Judge Andrus voting against the motion.

4. REPORTS:

MANAGEMENT: (Chief Justice Christine Durham)

Chief Justice Durham referred the Council to the Management Committee minutes.

POLICY AND PLANNING: (Judge Gary Stott)

Judge Stott reported the Policy and Planning Committee has not met since the last Council meeting.

LIAISON COMMITTEE: (Justice Ronald Nehring)

Justice Nehring reported the Liaison Committee has been reviewing draft legislation via email but have not met since the last Council meeting.

BAR COMMISSION: (Scott Sabey)

Mr. Sabey reported that the mentoring committee report will be available in January and the long term planning report will be finalized in November. The Bar will admit 272 new members who will be sworn in this week. Mr. Sabey indicated that the Legal Match contract will be canceled. The Fall Forum held in November will focus on un-bundling services. The Southern Utah Community Legal Council is now open in St. George. Mr. Sabey also reported there has been very little feedback on the Rusty Vetter letter.

5. JUDICIAL COUNCIL COMMITTEE ASSIGNMENTS: (Chief Justice Durham)

Chief Justice Durham reported that the Management Committee has proposed the following Committee members:

Management Committee:

Chief Justice Christine Durham, Chair
Judge Gary Stott, Vice Chair
Judge Judy Atherton
Judge Hans Chamberlain
Judge Jody Petry

Policy and Planning Committee:

Judge Bill Barrett
Judge Brendan McCullagh
Judge Greg Orme
Scott Sabey
Judge Michael Westfall

Liaison Committee:

Judge Mark Andrus
Judge Michael Kwan
Judge Michael Lyon
Justice Ron Nehring

Motion: Judge Andrus motioned to accept the committee members as proposed by the Management Committee. The motion was seconded and passed unanimously.

6. COURT INTERPRETER COMMITTEE: (Judge Lynn Davis)

Judge Davis has been the chair of the Court Interpreter Committee for the past nine years. Judge Davis indicated that the Committee has recently created a helpful reference sheet for the bench and provided an oath to administer to Court Interpreters. Judge Davis reviewed the members of the Court Interpreter Committee.

Judge Davis reported that the Committee recently made a recommendation that an American Sign Language representative become an official voting member of the Committee. The Committee is also working with the BYU Linguistics program to offer services to individuals needing interpretation for rare languages. Mr. Johnson recently provided the Committee with a memo that addressed additional fees being charged to parties for court interpreters. The opinion states that if a fee is incurred it can only be done when services for the interpreter is needed. The Committee prefers that a fee never be charged but recognize that some situations require it when an interpreter is scheduled and the parties do not appear in court. The Council discussed that a rule could be adopted addressing the concern over the fee. Judge Davis will take this suggestion back to the Committee. Mr. Shea indicated that the Committee is looking forward to the partnership with BYU and this will help in testing approved interpreters. Training has also been greatly improved throughout the state due to Rosa Oaks' efforts. This training has contributed greatly to the passing rates of interpreters. A class at Salt Lake

Community College is being offered for Interpreter training. A pilot program for long distance education is also being done with judges from more rural areas to provide interpretation from off-site.

The Interpreter Committee has recommended that each district have an interpreter coordinator that works through Groupwise, CARE and CORIS to schedule and share interpreters. Judge Davis encouraged each Council member to express their appreciation to the interpreters in their courtroom. Chief Justice Durham thanked Judge Davis for his tireless efforts.

7. JUDICIAL OPERATIONS BUDGET INCREASE: (Daniel J. Becker)

Mr. Becker reported that per the request of the Board of District Court Judges, the Management Committee and Council has reviewed the amount received by each judge from the judicial operations budget to help fund law-related subscriptions and education. The Management Committee reviewed five options and suggested that the second be chosen.

Under the proposed option, all judges and commissioners would have \$500 to use for educational costs and an additional \$400 to put towards costs accumulated when attending the Bar Midyear and Annual Conference.

This proposal is the most consistent with the Board of District Court Judges request. Judge Davis reported that he feels the \$900 should be given to all judges for all education programs, not just for Bar activities. Justice Nehring reported that there are other good organizations judges should engage in that is not covered by this increase. The Council discussed why there was a \$250 limit on subscriptions and registrations.

Motion: Justice Nehring motioned that the Council adopt the second option which allows \$500 to be used for any law related organizational membership or educational material and eliminate the current \$250 limit. Judges will also be able to have \$400 to put towards Bar conferences. Judge Stott seconded the motion and the motion passed unanimously.

Mr. Becker reported that Mr. March and Mr. Jayne will change the current policy wording to match the Council's recommendation and that this change will be effective in January.

8. JURY YIELD REPORT: (Tim Shea)

Mr. Shea indicated the jury yield numbers are not yet available on the website and it is still being determined how much of this information will be helpful to the public. Jury Yield is a measure of the courts efficiency, or a measure of the courts imposition on the public's lives when they serve on the jury. Mr. Shea reported this survey demonstrated great improvement over last year and he was encouraged by the results. The reliability of the juror data has been greatly improving over the last few years and the mind set of the court must change in order to respond to the improved data. Mr. Shea reviewed the breakdown of all issues that affect the jury management system and administration.

Mr. Shea reported that this information has been presented to all jury clerks. This report demonstrates that the courts are potentially calling too many individuals to report for jury duty and that the need for a complete jury could be met without calling so many people. All of the effort spent calling in additional jurors takes a large amount of clerical time. Mr. Shea indicated

that he relies on jury clerks input to confirm this data. Mr. Shea discussed the importance of having the jury clerk accept only appropriate excuses for missing jury duty. Mr. Shea will continue working with the jury clerks to determine a method to improve the jury selection process.

The Judicial Council requested that Mr. Shea post the jury yield results online and that information should be given that explains some of the lapses in data.

9. INITIATIVE ON CHILDREN IN FOSTER CARE: (Katie Gregory)

Ms. Gregory reviewed the mission and history of the Initiative on Children in Foster Care (IOU) and the membership of the Committee. The sub-committees and services they provided were also reviewed. The Pew Commission on Children in Foster care focuses on the permanence and well-being for children in foster care by supporting reform in Federal child welfare financing and working to strengthen court oversight of children in foster care.

Ms. Gregory discussed that IOU is an opportunity for the courts to be a leader in the child welfare system by involving influential individuals throughout the community who can help educate the public on the issues foster care children face. Those issues include health, education, minority services, volunteer efforts, media outreach and youth and judges perspectives. Ms. Gregory reported that four IOU Subcommittees work to address these issues, they are the Public Information and Awareness Subcommittee, the Community Support for Kinship Care Givers Subcommittee, the Support for Transition to Adult Living Subcommittee and the Federal Funding Subcommittee.

The Public Awareness Subcommittees has worked to create an immersion program where community members observe the child welfare process at DCFS or in juvenile court. The Kinship Subcommittee have worked with other children's services to create a web site for kin and those who serve as kinship care providers. The Transition to Adult Living Subcommittee has worked to collect goods for move-in kits that are given to children aging out of foster care. The IOU Committee has also worked close with legislators to get the Medical Recommendation for Foster Children passed in 2006. A mentoring program has also been created through First Presbyterian Church of Salt Lake to assist foster care children.

Chief Justice Durham thanked Ms. Gregory and spoke to the valuable services the IOU Committee is offering the community.

10. FINAL RULES FOR ACTION: (Tim Shea)

Mr. Shea reviewed that three rules recommended for Council approval. They are: CJA 04-403, CJA 04-405, CJA 04-409. Judge Atherton expressed concern over CJA 04-409 regarding the Problem Solving Courts and asked that the discussion on this rule be continued. The Council agreed to consider this rule during their next meeting.

The Council discussed the use of the signature stamp on orders prepared by the court and reviewed situations when having that option is valuable.

Motion: Judge Stott motioned that CJA 04-403 and CJA 04-405 be approved. The motion was seconded by Judge Lyon and the motion passed unanimously

11. PROBATE LAW AND PROCEDURES: (Judge Sheila McCleve)

Chief Justice Durham welcomed Judge McCleve who is the chair of the new Probate ad hoc committee that was formed at the recommendation of the Policy and Planning Committee. Judge McCleve reviewed the membership of the Committee and the time-line they will work under. The Committee hopes to make recommendations to the Council in 2008 and establish rules in 2009.

The Committee is currently working on a program to assign an attorney to a ward. The roster of attorneys will be administered by the Supreme Court. Funding is still being considered. The definition of incapacity is also being reviewed by the Committee and they are planning to move away from the definition that includes mental and medical disability and instead focus on the function of the individual.

The Committee is also working on setting a realistic limit on limited guardianships. Currently plenary appointments are often relied on, but a more rigorous process should be established for protection of the wards.

Chief Justice Durham thanked Judge McCleve and Mr. Shea for their work and leadership of the Committee so far.

12. JUDICIAL COUNCIL RESOLUTION

Mr. Shea provided a draft of the proposed resolution the Council agreed to send the Constitutional Revision Committee supporting that no changes be made to Article I, Section 14 of the Fourth Amendment.

Judge Lyon expressed that he has some concerns with the Judicial Council opposing a Constitutional amendment that would allow two bodies of Constitutional law to operate in the state of Utah. Judge Lyon questioned why law enforcement and judges must follow both state and federal law if they had the option to only follow one. Judge Lyon explained he perhaps does not understand the reason behind the perception of departure from federal law in interpreting the United States Constitution.

Chief Justice Durham discussed that the dual Constitutional system in the United States allows both the Federal and State Constitution to be enforced. Chief Justice Durham indicated that if uniformity on search and seizure laws is the intent of the CRC, then the provisions in the Utah Constitution should be repealed instead of placing Utah Courts in the position of having no independent power to construe their own language and their own Constitution. If Utah citizens do not have a separate and independent right, it should be removed from the State Constitution. If the Utah courts are forced into lock step with the Federal courts in interpreting the language of Article 1, Section 14, the Utah courts are unable to articulate the meaning for Utah citizens and the federal courts become the source of meaning for Utah language.

Judge Lyon agreed that the Utah Supreme Court has the right to define language when there has been no pronouncement under the United States Supreme Court. Chief Justice Durham indicated that this was not clear in the proposed amendment. Judge Lyon indicated under the current section, the Utah Supreme Court could identify different standards than the United States Supreme Court, which somewhat concerns him. Chief Justice Durham reported that when the search and seizure laws in other states had been created to be more restrictive, this law was of no effect because the Federal protection kicked in. Chief Justice Durham discussed the history of the dialogue between the United States Supreme Court and the state courts. One of the things that is lost when state courts are in lock step with the U.S. Supreme Court is the dialogue that is

possible when different interpretations of law are determined in the states. Chief Justice Durham discussed the primacy approach, and the dual sovereignty approach of other states. Another concern with the proposed change is that it gives the Legislature power to make statutory exemptions which could cause a lack of uniformity as well.

Judge Westfall expressed concern that when a state begins to interpret their laws identical to the Utah Supreme Court, it becomes easier to always follow federal interpretation. If a provision is allowed in the state Constitution, it should be the right of the state courts to interpret them.

Chief Justice Durham encouraged Council members to express their thoughts on this topic and indicated that the Council should represent the judiciary and not get away from what the collective view of the courts would be throughout the state.

Judge Davis expressed that the Appellate Courts are similar to the Supreme Court and rarely see a separate state argument, however he supports the states right for judicial independence and believe the resolution should be signed.

Justice Nehring indicated that the idea that if the occasion should arise there is a separate understanding of Article I, Section 14, cuts against one of the principal reasons why the Supreme Court has decided to take de novo review. To the degree possible, the State Supreme Court attempts to set out understandable guidelines for law enforcement. If a dual track of jurisprudence is developed, the law is very difficult to understand. For these reasons, Justice Nehring feels the argument of uniformity has some merit. However, Justice Nehring expressed agreement that this argument is about piecemeal surrender of Utah Constitutional rights.

Motion: Judge Barrett motioned to adopt the resolution opposing the amendments to Article I, Section 14, Scott Sabey and Judge Kwan seconded motion. The motion passed with Judge Andrus opposing.

This resolution will be forwarded to the Constitutional Revision Committee.

13. JUDICIAL APPLICATION REVIEW COMMITTEE: (Daniel J. Becker)

Mr. Becker reported that a Judicial Application Review Committee made up of former members of Nominating Commissions met to discuss the application process that is required for judicial positions. Questions had come from the Legislature about the necessity and length of the current application. Chief Justice Durham also charged the Committee with reviewing the role and interaction the Chief and the Governor's Office has with each Commission.

The Review Committee felt strongly that the application process not be shortened, and reported that more comprehensive responses should be provided by applicants in the short answer portion of the application to give the Commission a better sense of their experiences. The Committee felt that Nominating Commissions don't need the applicants personal information and suggested that a separate information sheet be created that only HR will see. The Committee also suggested re-formatting the application to make it more user friendly, but did not want any of the application content to change. Discussion took place about making the application process double blind so the Commission would not have the name of the application they were reviewing. Chief Justice Durham reported the Review Committee had not considered that idea.

Mr. Becker indicated that the recommendations from the Committee will be forwarded

back to the Legislature.

14. 2008 JUDICIAL COUNCIL SCHEDULE

After reviewing the 2008 Judicial Council schedule, the following motion was made:

Motion: Judge Westfall motioned to accept the Council dates for 2008. The motion was seconded and passed unanimously.

15. EXECUTIVE SESSION

Motion: A motion was made to move into executive session to discuss personnel information. The motion was seconded and passed unanimously.

Motion: A motion was made to move out of executive session. The motion was seconded and passed unanimously.

Judge Gary Stott reported that Chief Justice Durham and Justice Nehring had now joined the Council meeting and had left the room and did not participate in executive session. Judge Stott indicated that additional information is needed from Brent Johnson and this item will be further discussed in the November Council meeting.

Motion: A motion was made to adjourn the meeting. The motion was seconded and passed unanimously.