

## Judicial Council Meeting Minutes

### JUDICIAL COUNCIL MEETING MINUTES

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January 26, 1998  
Administrative Office of the Courts  
230 South 500 East, Suite 300  
Salt Lake City, Utah  
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*Hon. Pamela T. Greenwood, Presiding*

#### **Members Present:**

Hon. Pamela T. Greenwood  
Hon. Stephen Van Dyke  
Hon. Kent Nielsen  
Hon. Robert Braithwaite  
Hon. Anthony W. Schofield  
James C. Jenkins, Esq.  
Hon. Stanley Truman  
Hon. Kay A. Lindsay  
Hon. Leonard H. Russon  
Hon. Michael K. Burton  
Hon. Michael Glasmann  
Hon. Anne M. Stirba

#### **Staff Present:**

Daniel J. Becker  
Myron K. March  
Timothy Shea  
Marilyn Branch  
Jan Thompson  
Raymond Wahl  
Holly M. Bullen  
Peggy Gentles  
Brent Johnson  
D. Mark Jones  
Richard H. Schwermer

#### **Members Excused:**

Chief Justice Michael D. Zimmerman

#### **Guests:**

Steve Hayden

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#### **Welcome:**

Judge Greenwood welcomed guests, members and staff to the meeting.

Chief Justice Zimmerman is in Alabama at the Conference of Chief Justices. The Chief Justice will participate by conference call during the discussion of "Certification of Judges for Retention Election" scheduled today at 10:15 a.m.

Judge Greenwood extended a special welcome to Raymond Wahl. Mr. Wahl is the newly hired Juvenile Court Administrator.

#### **Approval of Minutes:**

The minutes of December 17, 1998 were amended as follows:

Page five, second paragraph, last sentence, will read as follows: The Committee is requesting that the savings be used for the Juvenile Court information system.

Page thirteen, last paragraph, last sentence, will read as follows: You cannot have a local security plan which permits carrying weapons outside an official capacity in the courthouse.

Page thirteen, second full paragraph, will read as follows: A motion was made by Judge Schofield that the effective date of this presumption be 90 days from final action on the rule. The motion was seconded by Judge Van Dyke and carried unanimously.

#### **Motion:**

A motion was made by James Jenkins to approve the minutes as amended. The motion was seconded by Judge Stirba and carried unanimously.

#### Report from Co-Chair:

Judge Greenwood indicated that she did not have any issues on which she was going to report.

#### State Court Administrator's Report:

Raymond Wahl has been appointed as the Juvenile Court Administrator and began work with the Administrative Office on January 19, 1998. Previously, Mr. Wahl was the Division Director of Field Operations (AP&P). Mr. Wahl brings a great deal of senior administrative abilities to this position.

Mike Phillips has announced his retirement. Deputy Administrator responsibilities have been divided into two positions, delinquency and child welfare. This change was made to better serve the Juvenile Court system since one half of the Juvenile Court's business now deals with child welfare. It is anticipated that the delinquency position will be filled within the next two-three weeks. The child welfare position will be filled within the next six weeks.

John Greene, Eighth District Court Executive, has been appointed as the new Court Executive in the Second Judicial District. Mr. Greene will begin his duties in the Second District on February 9, 1998. Until a replacement is found for the Eighth District, Mr. Greene will cover both districts.

The Legislative Session began on January 19, 1998. The Executive Appropriation Committee assigned the court's Appropriation Sub-Committee \$315 million. This amount of money is to be distributed among the Courts, Adult and Youth Corrections, Public Safety and all elected offices in State Government. Currently, all of these agencies have a combined base budget of \$305 million. The Executive Appropriation Committee has only assigned an additional \$10 million more than what is currently being spent. The subcommittee's ability to address programs will be implemented by agency reductions in the base budgets and some new money.

The legislative analyst's report on the court's budget will be on February 4, and the court's response will be on February 6. The analyst has raised three budgetary questions which include requests for: a) an accounting of the Matheson Courthouse; b) an accounting of state supervision monies; and c) explanation of Third District Court consolidation.

The court's request for new judgeships was the first bill in the Senate Judiciary today. Judges Andrus, Backman, and McCleve were present to support the request. Senate President Lane Beatty is the sponsor of the bill. The bill reported out of the Senate Judiciary favorably.

The court's Annual Report for 1998 has been mailed to all judges along with a cover memorandum and Chief Justice Zimmerman's State of the Judiciary Address. This report is very different from past years. The 1997 Legislature passed language in the appropriation budget that removed a certain amount of agency printing budgets. The Legislature then asked that agencies produce summary reports via the Internet. With the Legislature's direction, the court's decided to take an entirely different approach with the Annual Report for 1998.

The Annual Report is in a new format which is very inexpensive. The Report is not intended to provide detailed information. However, it is an index to the court's new home-page where additional information may be obtained. The home-page contains a great deal more information than has ever been provided in printed form. The Report may be reproduced on a quarterly basis because it will be easy to update and inexpensive.

The moving schedule for various departments into the Scott M. Matheson Courthouse is still on target. The Utah Supreme Court and Court of Appeals will move during the first and second week of March. It is anticipated that all departments will be in the new courthouse by mid-June. The dedication for the Courthouse is scheduled for Friday, March 27, 1998, at 2:30 p.m.

#### **Management Committee Report:**

The Judicial Council's Planning Meeting is scheduled for August 26-27, 1998. Members of Management Committee expressed a desire to hold the meeting in Park City due to the fact that the Homestead was not available.

The Commission on Criminal and Juvenile Justice has been notified that the state will receive \$400,000 more in Byrne funding for 1998 than was expected. A proposal for using Byrne funding for a Domestic Violence Program has been submitted for consideration.

Roger Cutler, Salt Lake City Attorney, recently telephoned Dan Becker and voiced his concern about the Justice Court Study Task Force. Mr. Becker responded by saying that the jurisdictional changes which had been considered were not being advanced.

#### **Policy and Planning Committee:**

Judge Burton reported that the Policy and Planning Committee discussed court commissioner sick leave/retirement. Court commissioners have expressed a desire to have their salary increases tied to judicial increases. After discussion, it was determined that Chief Justice Zimmerman will write a letter to court commissioners explaining how this issue has been addressed in the past and the reasons.

Peggy Gentles presented a proposed change to the Judicial Council rulemaking process . Ms. Gentles suggested eliminating Council approval for publication for comment and having the Committee function similarly to the Supreme Court's Advisory Committees. The Council believes that there are advantages in having the Judicial Council make the initial review.

### **Certification of Judges for Retention Election:**

Judge Greenwood proposed that the process for certification of judges for retention election begin with Tim Shea's explanation and then discussion, after which members of the Judicial Council will go into an executive session. Following the executive session the Council will go back on the record to vote.

There are several Judicial Council members standing for retention election. These minutes reflect that each of those judges abstained from voting upon their own qualifications. However, that does not disqualify the judges from voting on the qualifications of others.

The evaluation program consists of three parts for the district court judges, two parts for other courts of record, and one part for justice court judges. The common denominator throughout the evaluations is the self declaration information. The evaluation has been accomplished in the past by exception. Judges are presumed to be certified for retention election as long as they have met all of the certification standards. Those judges who have failed to meet one or more of the certification standards are presumed not to be certified. The opportunity for those judges presumed not to be certified is to provide members of the Judicial Council with a written explanation. The Council could then consider the explanation sufficient and vote for certification. A judge can be certified even though that judge has failed to meet one of the retention standards. However, if it is determined that the written explanation is not satisfactory the judge has the option of requesting a meeting with the Judicial Council.

The information compiled is public information and will be published in the voter information packet, including any judge who fails to meet one of the certification standards. That information is published even if the Judicial Council chooses to certify that particular judge. Public sanctions by the Judicial Conduct Commission are also published.

Chief Justice Zimmerman joined this part of the meeting via conference call.

### **Motion:**

A motion was made by Judge Van Dyke to move into an executive session. The motion was seconded by Judge Glasmann and carried unanimously.

Following the executive session, members of the Judicial Council went back on the record.

### **Motion:**

A motion was made by James Jenkins that the issue of whether a process should be developed to assist judges whose judicial evaluations indicate some problems exist be considered by the Management Committee. The motion was seconded by Judge Glasmann and carried unanimously.

### **Motion:**

A motion was made by Judge Schofield that all judges of courts of records that are standing for certification, i.e., supreme court, court of appeals, district court, and juvenile court judges, be certified. The motion was seconded by James Jenkins and carried with three opposing votes.

### **Motion:**

A motion was made by Judge Lindsay that the Council defer all judicial certifications until the next meeting of the Judicial Council. The motion was seconded by Judge Stirba.

James Jenkins expressed his concern with waiting to certify judges of courts of record when a majority of the Council is not opposed to certification.

### **Withdrawal of Second to Previous Motion:**

Judge Stirba withdrew her second to the previous motion.

### **Subsequent Second to Motion & Vote:**

Judge Burton seconded Judge Lindsay's motion. After a tie breaking vote by Judge Greenwood, the motion failed with six votes for and seven votes against.

### **Motion:**

A motion was made by James Jenkins to defer certification of justice court judges. Specifically, that further information be obtained by the Management Committee on two justice court judges. The motion was seconded by Judge Schofield and carried with three opposing votes.

**Tobacco Court Update:**

Judge Joseph Anderson provided members of the Judicial Council with a Tobacco Court update. Judge Anderson introduced Steve Hayden, State Dept. of Health, and Eric Crankshaw, Salt Lake City & County Dept. of Health.

Approximately 1,200 people die each day from smoking related causes. There are 3,000 teens who begin smoking each day. An estimated 90% of smokers begin smoking before they are 18 years old and 60% begin before they are 13 years old. There are 53% of seniors who smoke one half package a day have tried to quit but have been unable to do so. The 1994 survey of smokers in the United States show that 27,000 youth in Utah smoke.

Tobacco is generally the substance that promotes teen involvement with marijuana, cocaine, etc. The statistics bear this out, i.e., teens between the ages of 12-17 who smoke are 100 times more likely to use marijuana and 30 times more likely to use cocaine than those who do not smoke. Utah's response to the smoking problem has been implementation of a statute that makes possession by a minor a Class C Misdemeanor. There are also statutes that address retailer compliance with regard to restrictions of selling to minors. In 1996 there were in excess of 10,000 tobacco citations issued to juveniles within the state; 5,000 of those citations were within the Third Judicial District.

On October 14, 1997, a proposal was made to the Justices of the Utah Supreme Court requesting modification of the rule governing the appointment of pro tempore judges to conduct "Tobacco Court". The Supreme Court Justices generally endorsed the concept but requested that definition be given to the scope of authority of the proposed pro tempore judges and that the proposal be presented to the Board of Juvenile Court Judges and the Judicial Council. On December 12, 1997, the Board of Juvenile Court Judges voted unanimously to support the proposal.

After a lengthy discussion about the feasibility of the "Tobacco Court" the following motion was made.

**Motion:**

A motion was made by Judge Burton that the Judicial Council approve the concept of the use of pro tempore judges for the "Tobacco Court" for a one year pilot program with the presumption that pro tempore judges will not be used in the future. In addition, that a determination be made of the resources required, what the benefits are, so that it can be determined whether or not this program can be main streamed into the judiciary, and that the pilot program have a sunset date of one year. The motion was seconded by Judge Lindsay. The motion carried with two opposing votes.

**Justice Court Study Committee Update:**

The Justice Court Study Committee has authorized a state representative who is also a Committee member to sponsor legislation that would accomplish three things the Committee recommended. First, that the jurisdictional provision in the code scheduled to end in July of 1998, be extended indefinitely. This would allow the jurisdiction between the district court and justice courts to remain status quo. Second, the legislation would adopt the provision of the report that authorizes the creation of municipal justice courts in Class 1 & 2 cities upon two years notice to affected entities but without a needs test. Class 3 & 4 cities could create justice courts upon one year's notice but the needs test would still need to be satisfied. Finally, the proposed legislation would adopt the for-cause standard for retention of municipal justice court judges. Municipal justice court judges would be entitled to a presumption of retention unless the appointing agency, i.e, mayor and city council, have good cause for non-retention of a judge.

The Justice Court Study Committee will meet again in April to address other questions i.e., jurisdiction. Currently, no entity is satisfied with the line of jurisdiction between district courts and justice courts.

**Liaison Committee Report/Legislative Update:**

Judge Schofield indicated that the Liaison Committee met on January 16, 1998, and considered a number of bills. The Judicial Conduct Commission Bill would add a second judge from a court of record to the Conduct Commission. The Liaison Committee voted to support the Judicial Conduct Commission Bill. The second was HB 189, which proposes to treat English as the official language of the state. There is an exception in that proposed legislation which would allow the court to continue to conduct business when other languages are appropriate and provide interpreters. The Liaison Committee did not take a position on this bill.

Next, Judge Schofield reported on HB 197. This bill would omit the right to a jury trial in any case involving Class B or C Misdemeanors that are filed under the traffic code. The purpose of the bill is to ultimately take away the right to a jury trial in a DUI case. The Liaison Committee took no position on this bill. However, the Liaison Committee noted that the Board of District Court Judges took a position in favor of the bill, except for DUI's. The Board of Justice Court Judges voted with 4 in favor of the bill and 3 opposed.

There is also a proposed modification to the murder and manslaughter statutes which would create a new area called Special Mitigation. This modification would allow murder and manslaughter convictions to be mitigated down, i.e., capital to a first degree; aggravated murder to murder, etc. Special mitigations are circumstances such as when the actor causes the death of another under the influence of extreme emotional distress for which there is

a reasonable explanation or excuse, when the actor causes the death of another and the actor reasonably believes he had legal justification when it is subsequently discovered he did not have legal justification for the act, etc. The Liaison Committee took no position on this bill.

A bill has been proposed that sheriffs be allowed to give credit for good behavior. The Liaison Committee took no position on this bill.

H.J.R. 1 is a Resolution Amending the Rules of Evidence. The resolution attempts to amend Rule 404 (b) which already exists and create Rule 404 (c). Rule 404 (b) addresses character evidence. The Liaison Committee took no position on Rule 404 (b), or Rule 404 (c). . The Bar Commission voted to oppose this legislation. Richard Schwermer requested direction from members of the Judicial Council on the proposed Resolution.

Judge Stirba indicated that if opposed, the Council's position should not be based upon legal analysis. Next, the judge stated that if the Resolution is opposed, it should be on a procedural basis.

**Motion:**

A motion was made by James Jenkins that the Judicial Council oppose H.J.R. 1, Resolution Amending the Rules of Evidence. The motion was seconded by Judge Stirba and carried unanimously.

Richard Schwermer addressed H.B. 298, State Court Administrator Salary. Mr. Schwermer indicated that this bill would significantly reduce the salary of any future State Court Administrator. The Liaison Committee voted to oppose this bill because with a reduced salary, the State of Utah would be limited in the ability to compete for qualified administrators on a national level.

**Motion:**

A motion was made by Judge Braithwaite that the Judicial Council oppose H.B. 298, State Court Administrator Salary. The motion was seconded by Judge Van Dyke and carried unanimously.

Richard Schwermer reported that the Judiciary has two bills which it is sponsoring. First, is S.B. 122 which requests appointments of judges in the Second and Third Judicial Districts. The other bill is H.B. 133, Quick Court. This bill allows for technologies other than stand alone kiosks.

The Judicial Conduct Commission is sponsoring a bill which would allow another judge to serve on the Commission.

D. Mark Jones and Richard Schwermer explained the legislative budget process. Mr. Jones and Mr. Schwermer stressed that there is a distinct difference between advancing budget items and fiscal notes. Next, examples of these differences were presented to members of the Council.

Members of the Judicial Council expressed their appreciation to Mr. Jones and Mr. Schwermer for their presentation.

**Customer Service Number:**

The Courts' Customer Service Number will be operational February 2, 1998. The number is 1-888-640-Court. A part time employee was hired to fill the position and will work three full days a week under the direction of Peggy Gentles. Ms. Gentles will answer the Customer Service Number the remaining two days. The number is an attempt to provide a forum for problem solving. Software will be used which will track the number of calls, the nature of the calls, and how calls are resolved. The software can also identify systematic problems. A memorandum will be sent to judges and clerks indicating that this does not take the place of clerks providing customer service. Its intended use is for those questions which clerks cannot answer. This service is a pilot project which will last for a period of one year and at that time there will be a determination of continued need.

**Informal Opinion 97-9:**

Informal Opinion 97-9 is the opinion in which the Ethics Advisory Committee said that judges and court employees could not participate in the CASA juror donation program. Brent Johnson was asked by the Judicial Council to obtain information on whether other states have implemented similar programs. After having researched this issue; Mr. Johnson has found that the practice of having juror checkoff lists is becoming more widely accepted throughout the nation. Mr. Johnson drafted a proposed Ethics Advisory Opinion that reflects the attitude that juror donation programs are becoming more widely accepted so as not to be considered unethical.

**Motion:**

A motion was made by Judge Braithwaite that the Judicial Council not reconsider Informal Opinion 97-9. The motion was seconded by Judge Van Dyke. The motion carried with four opposing votes.

The effect of not reconsidering Informal Opinion 97-9 makes it an informal opinion that stands but that is not binding on the Judicial Conduct Commission.

**Formal Opinion 98-1:**

Brent Johnson provided a draft copy of Formal Opinion 98-1 to members of the Council. During the Council's last meeting Mr. Johnson had been requested to incorporate the New York Rule into Formal Opinion 98-1.

**Motion:**

A motion was made by Judge Burton that Formal Opinion 98-1 be approved by the Judicial Council. The motion was seconded by James Jenkins.

**Amended Motion:**

Judge Glasmann made a motion to amend Judge Burton's motion by omitting the second to the last sentence in the opinion. The motion was second by James Jenkins. The amended motion carried with three opposed.

**Request for Permission to Film in the Courtroom of Judge Valdez for Documentary "Gangsters in the Valley":**

Tim Shea presented two issues regarding courtroom filming for consideration by Council members. The first question is whether or not Mr. Gibbons, an independent film maker, should be given permission to film in Judge Valdez's courtroom per his written request. The second question addresses what process should be undertaken to gain approval to film in the courtroom. The operative language in Rule 4-401. Media in the courtroom is "court approved public information programs."

Mr. Gibbons has already received permission from Judge Valdez to film live from within the courtroom and he has also provided a briefing description of the project. The Council noted that most juvenile court proceedings are not open to the public and that Mr. Gibbon's project would likely violate that confidentiality.

**Motion:**

A motion was made by James Jenkins that the Judicial Council deny the request. The motion was seconded by Judge Schofield.

**Motion:**

A motion was made by Judge Stirba that the issue of filming in courtrooms and the procedure by which that might be allowed be referred to the Policy and Planning Committee for review and that the Committee make a recommendation back to the Judicial Council. The motion was seconded by James Jenkins. The motion carried unanimously.

**Final Resolution of SB 132:**

After the Judicial Council meeting on December 17, 1997, the Policy and Planning Committee was asked to review drafts of Rule 3-414 and to incorporate the decisions made by the Council at that time.

The amendments other than those regarding weapons were approved by the Judicial Council. There appeared to be no amendments to Rule 3-414 that conflicted with the decisions made during December's meeting. The provisions that were further changed from the December draft include that a local security plan could regulate weapons more strictly than the Judicial Council rule but an individual judge and/or commissioner could not. The local security plan could regulate the judges with a SB 132 certificate, as well as the other groups that would be permitted to carry a weapon. If a local district wanted to exclude weapons carried by a judge with a SB 132 certificate that would be permissible. The presumption is that courthouses would be weapons free and that it would take some affirmative action on part of the local district to enable people to carry weapons. If a district decides to remain silent on the question, this rule governs and weapons would be excluded; including bailiffs' weapons. The mechanism by which judges would accomplish this is through their local security plan and by a vote of the majority of judges.

A statement was made that some of the larger districts have more than one security plan and the security plans are connected to specific facilities. A question was raised about those judges who do not sit at a specific site being able to vote on that site's security plan. All of the judges within a specific district are ultimately accountable for the security within the entire district and it is imperative that all of the judges participate in that vote. Otherwise, there will be a disparity on the policy of security in courthouses. The recommendation of the Policy and Planning Committee is that judges of each district make the decision for each individual courthouse. Some thought that meant that judges of the district was intended to mean of all court levels.

After discussion, a request was made that there be a clarification of how judges within a district are to vote, i.e., should it be by building; by district; or by court level? A suggestion was made that each facility should have a security plan and the judges who regularly sit in that facility, all of the judges of all court levels who regularly sit in that facility, be allowed to vote.

**Motion:**

A motion was made by Judge Schofield that each facility have a security plan and that the judges of all court levels who regularly sit in that facility be allowed to vote. If the courthouse is a co-located facility in the district, that the

judges of all courts decide upon a security plan for that courthouse. For ancillary sites, such as Murray, Sandy, etc., the security plans will be voted on by all judges of the district at that court level. The motion was seconded by Judge Van Dyke and carried unanimously.

The issue of facility requirements cited in Rule 3-414 (C) were discussed and Mr. Shea indicated that the rule on its face has always applied to justice courts and best efforts should be exercised to meet those standards for certification purposes. The Policy and Planning Committee has suggested that this particular section of the rule be considered as soon as possible. However, the applicability of this rule will be reviewed by the Board of Justice Court Judges on February 6, 1998.

The Judicial Council's action will affect the approach taken by Jeff Rose on Justice Court Security Plans.

**Adjourn:**

There being no further business, Judge Greenwood adjourned the meeting.