

STATE OF THE JUDICIARY ADDRESS 2012

*Holding the balance nice, clear and true:
Steps to building public trust and confidence*



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Annual Meeting of the Wisconsin Judicial Conference

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Lake Geneva, Wisconsin

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Good morning. Welcome to Lake Geneva and the 2012 Meeting of the Wisconsin Judicial Conference. Our thanks to Judges Craig Day of Grant County and Jennifer Weston of Jefferson County, our program co-chairs, as well as to the Program Committee and the staff of the Office of Judicial Education for developing what promises to be another excellent conference.

I begin this State of the Judiciary Address, following tradition, by noting the changes that have occurred within our judicial family since our last conference in November 2011.

We express our sadness at the passing of the following individuals who served the people of the state of Wisconsin long and well:

- Judge Thomas J. Curran, U.S. District Court
- Judge Richard J. Dietz, Brown County Circuit Court
- Judge John Shabaz, U.S. District Court
- Judge Patrick Sheedy, Milwaukee County Circuit Court

While there is sadness in losing colleagues, there is also joy in welcoming new ones. In keeping with another tradition, the new circuit court judges had breakfast this morning with the Supreme Court Justices. I ask each new judge to stand until all the names of the new judges are read.

Our new Court of Appeals judges are:

- Mark D. Gundrum - District II

¹ “Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.” Tumey v. Ohio, 273 U.S. 510 (1927) .

- Jo Anne F. Kloppenburg - District IV
- Mark A. Mangerson - District III

Our new circuit court judges are:

- Ellen K. Berz - Dane County
- Michael H. Bloom - Oneida County
- Timothy D. Boyle - Racine County
- Jennifer R. Dorow - Waukesha County
- Thomas B. Eagon - Portage County
- Lindsey C. Grady - Milwaukee County
- Tammy Jo Hock - Brown County
- Phillip A. Koss - Walworth County
- Barbara W. McCrory - Rock County
- James A. Morrison - Marinette County
- Michael J. Piontek - Racine County
- Frank D. Remington - Dane County
- Jason A. Rossell - Kenosha County
- Mark A. Sanders - Milwaukee County
- Rebecca Rapp St. John - Dane County
- Carolina Stark - Milwaukee County
- Thomas J. Walsh - Brown County
- John M. Yackel - Lincoln County
- John P. Zakowski - Brown County

Please give these judges a hearty welcome to the Wisconsin judicial family.

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The annual State of the Judiciary Address is the Chief Justice's report on the challenges, opportunities and accomplishments of the last year. In years past, I noted that our most formidable challenges grew from fiscal pressures to do more with less—to fulfill our constitutional responsibilities and manage a growing and ever-more-complex caseload in the

face of shrinking budgets. I assure you those pressures have not abated. We are still doing more with fewer financial resources.

Furthermore, judges and court staff are losing ground as salaries stagnate and as personal contributions toward health insurance and retirement have grown. In a departure from past practice, we are seeking judicial compensation increases in the coming biennium budget. We are requesting that Wisconsin's circuit court judges be compensated at the national average for trial judges. Thus, we are asking for a 6.54 percent increase in compensation for circuit court judges, with similar increases for court of appeals judges and Supreme Court justices. Judicial compensation must be such that we attract and retain highly qualified judges.

Furloughs in the past and increased contributions to health care and retirement benefits have taken their toll on the compensation of court staff. The executive branch recently has had the opportunity to reward its employees with merit increases. Our budget submission for the upcoming biennium seeks to ensure equal pay treatment for judicial branch employees. It is critical to maintain an equitable compensation structure for judicial staff. We must be able to attract and retain highly qualified staff. We must commit to working hard to make our case for increased compensation to the legislative and executive branches, just as we must continue to work efficiently and effectively for the people whom we serve.

Working efficiently and effectively means not only deciding cases but also undertaking creative programs—many of which are aimed at making our communities safer. The Milwaukee and Eau Claire County criminal justice evidence-based programs are proving to be models for the nation. Circuit courts have increased our collaboration with state and local governments and community organizations. Problem-solving court programs grow each year. More counties have created criminal justice coordinating councils—teams of top decision-makers who work together to solve problems that cannot be addressed by any one department or group. New public outreach programs give judges tools to educate the public about the legal system and to engage with their communities in a new way. And the Children's Court Improvement Program has rolled out an exciting new project—a training video featuring candid comments from 10 young adults who were involved in the child protection system. The video was created to give judges new insights into what we do well, and where we might improve to help children and families.

All these programs require the leadership of the circuit court and court of appeals judges—as does the critical work of our Planning and Policy Advisory Committee (PPAC) and the numerous other committees that work on Forms, Benchbooks, Jury Instructions, Judicial Education and Legislation. The judicial system needs your participation, and I encourage you to continue to volunteer for committee service.

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I now turn my attention to other challenges the court system faces. These are challenges for every court in the nation. I speak of these challenges because they have the potential to erode the very foundation of fair, neutral, impartial and non-partisan justice.

The public's trust and confidence in our ability to "hold the balance nice, clear and true," as the U.S. Supreme Court memorably put it in 1927, is at risk. In states across the nation, we are seeing what can be described only as an alarming pattern of well-funded, highly coordinated

attacks against judges by single-issue ideologues from the far ends of both sides of the political spectrum. They view an independent judiciary as a threat, rather than a promise. The polarizing partisan politics of the other branches of government are trying to find a foothold in the judiciary.

Just last month, Bill Moyers aired a segment on his TV show called “Justice, Not Politics.” Moyers warned of “a movement afoot to punish judges for decisions that offend political partisans.” At the same time, *The Atlantic* magazine published a series that looked at threats to fair and impartial justice, including heavy campaign spending. The series concluded: “Politicians come and go. So do campaigns and causes, policies and priorities. But once the integrity of the judiciary is stripped away, once the independence of judges is undermined by the most powerful . . . , there may be no going back.”

Judges are being targeted by political partisans who seek to replace independent decision makers. As they move from target to target, the potential for collateral damage to the entire judiciary grows. For surely somewhere, some judge will lose his or her courage. And then the bullies will have won.

Here’s a snapshot of what is happening across the country. Many of the examples relate to supreme court justices, but the message for all judges is this: Make a decision that is viewed unfavorably by well-funded, polarized political partisans, and you could be a target.

In Iowa, a 2010 election battle resulted in the ouster of three justices of the Supreme Court in a retention election because they joined a unanimous decision upholding same-sex marriage. A fourth member of that court has been targeted in this election cycle. These attacks have been funded and coordinated not by Iowans but by national organizations.

In the middle of the Iowa election battle, retired United States Supreme Court Justice Sandra Day O’Connor told a gathering of Iowa attorneys: “We have to address the pressures that are being applied to that one safe place, the courtroom. . . . We have to have a place where judges are not subject to outright retaliation for their judicial decisions.”

In Florida, three Supreme Court justices have been targeted in a retention election based on their votes in a case related to the national health care law. The coordinated, well-funded attack prompted one of the targeted justices to issue the following statement:

What is going on now is much larger than any one individual. This is a full-frontal attack . . . on a fair and impartial judicial system, which is the cornerstone and bedrock of our democracy.

Win or lose, the justices in Iowa and Florida remind us that we can expect the battle against both trial and appellate judges to continue in states across the nation. Nor have justices of the United States Supreme Court, including Chief Justice John Roberts, been spared. The fallout of a war against any one judge will be collateral damage to all judges, and to every person who hopes to find fair, neutral, impartial and non-partisan judges at every courthouse—judges who will weigh the evidence without fear or favor.

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What is happening across the nation is also happening here in Wisconsin, where all our judges, trial and appellate, face politically motivated criticism for controversial decisions.

Politicians of every stripe are misleading the public about a judge's role. Judges are not here to strike a blow on behalf of, or against, anyone's political agenda. Our task is to interpret and apply the law and, only when necessary under the federal or state constitution, to strike down a law, popular or unpopular, that is unconstitutional. But judges risk being mistaken for politicians unless and until we shore up the safeguards that help us to hold the balance, to protect fair, neutral, impartial and non-partisan justice.

A candid discussion about shoring up the safeguards must touch upon four interrelated topics: recusal, judicial elections and campaign contributions and expenditures, judicial discipline, and responding to attacks on judges.

1. Recusal/Judicial Disqualification

One safeguard lies in the area of recusal or judicial disqualification. The duty of a judge to be impartial and to appear impartial is basic to our legal system. That's true at the Supreme Court. It's true at the Court of Appeals. And it's true in every circuit court and every municipal court—every court everywhere. No decision a judge makes is more important than the decision about whether to sit on the case. We must not remain on cases in which our impartiality can reasonably be questioned, but we must not use disqualification as a way to duck a difficult or controversial case. Recusal decisions are not easy, as we all know.

The rules that govern recusal are a hot topic across the nation, among judges, lawyers, academics, the public, and leading legal associations such as the American Bar Association, the Conference of Chief Justices and the American Judicature Society. The American public's faltering faith in the U.S. Supreme Court has been linked to what some see as "The Supreme Court's Recusal Problem." Court watchers across the country sounded an alarm after justices sat on cases in which some argued they appeared to have conflicts of interest.

Chief Justice Roberts responded to the growing criticism of the Court's practice of allowing each justice to decide for himself or herself whether to sit on a case by devoting nearly all of his 2011 Year End Report to a defense of the Court's current recusal practice. Some agreed with what he had to say; others disagreed. He concluded as follows: "Judges need and welcome guidance on their ethical responsibilities, and sources such as the Judicial Conference's Code of Conduct provide invaluable assistance. But at the end of the day, no compilation of ethical rules can guarantee integrity. Judges must exercise both constant vigilance and good judgment to fulfill the obligations they have all taken since the beginning of the Republic."

Effective recusal rules are critical to keeping a strong and independent judiciary. It's important for judges to study and discuss the potential grounds of disqualification and the considerations we must weigh. It's particularly important right now, for in the past five years Wisconsin has added 90 new judges to its ranks. Ninety new judges. That's a turnover of about one-third of our state judiciary in five years. We can expect a high rate of turnover to continue. Many judges are eligible to retire in the coming years. And if recusal is a difficult issue for long-serving judges, it's often more complicated for those who are newer to the bench and who are making the adjustment from advocate to neutral decision-maker.

I shall ask the Judicial Education Committee at its December meeting to consider developing a day-long seminar on judicial disqualification and recusal, and I shall ask the chief judges to consider discussing recusal at district meetings. I hope you will send us examples of situations you would like discussed.

I shall also suggest that the two Wisconsin law schools consider hosting a public symposium on the issues of judicial recusal. Unless we can reassure the public that every judge is cognizant of the importance of being fair, neutral, impartial and non-partisan, we will lose the trust and confidence of the people. We must defeat what some see as the growing perception that judges' decisions in the courtroom are influenced by partisan political concerns and—in the 39 states like Wisconsin that elect judges—judicial campaign spending. I stand before you today to say this: We can and must do better.

2. Judicial Elections, Campaign Contributions and Expenditures

Recusal has become intertwined with the selection of judges.

Judicial election campaigns raise a number of recusal concerns specifically tied to campaign contributions and endorsements. In 2008, Justice at Stake conducted a poll of 600 likely voters in Wisconsin. Respondents revealed a strong split on numerous issues. But on a handful of questions, the respondents were united. A full 90 percent, for example, said they believe that campaign contributions influence judges' decisions. The American Bar Association has just circulated proposals that make aggregate contributions in support of, or in opposition to, a judge's campaign a reason for recusal.

There is no perfect system for selecting judges. Any elective or appointive process may be hijacked.

The elective system has been controversial in Wisconsin since its creation. Edward Ryan, a delegate to the 1846 Wisconsin constitutional convention who later became Chief Justice of the Wisconsin Supreme Court, articulated why judicial elections, at least superficially, seem at odds with the concept of judicial independence. The function of the judiciary is interpretation, he said, and "interpretation cannot be a representative function." The judiciary, Ryan stated, "represents no man, no majority, no people. It represents the written law of the land; . . . it holds the balance, and weighs right between man and man, between the rich and the poor, between the weak and the powerful . . ."

Like every other state that elects judges, Wisconsin struggles with low voter turnout in these races, and difficult issues related to campaign fundraising. Public financing of judicial elections has been advocated as a palliative, but recent U.S. Supreme Court decisions have raised questions about the feasibility of meaningful public financing of judicial races.

The Wisconsin legislature adopted public financing in the Impartial Justice Bill, but the Democracy Trust Fund designed to provide public financing for Supreme Court races was eliminated in the very next budget.

I support the non-partisan election of judges in Wisconsin. I believe that judicial elections encourage judges to get out and meet the public. We speak at schools and churches and civic events and bar functions. We ride along with police officers. We spearhead initiatives to

improve the justice system. We are involved and engaged with the communities we serve. And yes, some non-elected judges do all of these things. But my experience suggests not as many, and not as often. And most importantly, election campaigns can and should be used to talk with the people about the practice of judging, to listen to their concerns, and to boost public support for an independent judiciary.

Private funding will continue to play a significant role in judicial races for the foreseeable future and will affect the public's view on the impartiality of judges. We must combat any perception that the person who contributes gets favorable treatment.

One key is to make our recusal process as fail-safe and transparent as possible. Partiality of judges has serious consequences for litigants, of course, but also for judges. When a circuit court judge erroneously fails to recuse himself or herself, the supreme court has voided the circuit court's judgment. Judges have been subjected to discipline for failing to recuse themselves.

3. Judicial Discipline

An independent discipline system is critical to protecting the integrity of the judicial process. A well-functioning discipline system begins with a strong, fair and neutral Wisconsin Judicial Commission, the entity that brings charges against judges for violations of the Code of Judicial Conduct. The Supreme Court created the first Judicial Commission 40 years ago in 1972, and after the 1978 constitutional amendments the Legislature shaped that model into the current Commission. The Commission has functioned well for four decades, but no system runs forever without periodic tune-ups. And right now, if we are to continue to hold the balance nice, clear and true, important tune-ups are needed in two critical areas.

First, in the interest of every judge and every person in this state who cares about a fair, neutral, impartial and non-partisan Judicial Commission, we have to reexamine the process by which the Supreme Court appoints four of the Commission's nine members. To dispel any perception that justices are influencing the work of the Commission by altering the Commission's membership, I have proposed that the Court appoint Commission members in public sessions to assure the people of the state that Judicial Commission appointments are based solely on an applicant's qualities of integrity, intelligence, experience and commitment. The Court declined to seek public comment and denied the petition. So we must find another way to move forward. Safeguarding the integrity of the Judicial Commission and promoting public trust and confidence in the judiciary are too important to continue on our present path.

Second, the process for handling Judicial Commission charges against Supreme Court justices must be changed. The last two cases involving Supreme Court justices have revealed weaknesses in the system. First, an equally divided Supreme Court could not rule on the decision of a Court of Appeals panel involving one justice, and now, the charge is made that the Supreme Court apparently lacks a quorum (because of recusals) and is unable to rule on another justice's case.

Wisconsin deserves a system that allows every Judicial Commission case to follow a logical process through to a conclusion, whatever it may be, without forcing colleagues to sit in judgment of one another. Many court observers have weighed in on the shortcomings of our

current system. The current system jeopardizes collegiality, compromises accountability and drives the public perception of a dysfunctional court. And so I propose today that the Wisconsin Supreme Court and the Wisconsin Judicial Commission seek amendments to the state Constitution and the statutes that would avoid these situations. We can begin by examining what other states do. The flaws that have been revealed in our present system must be repaired.

4. Responding to Attacks on Judges

Improving our systems for recusal, judicial selection, and judicial discipline will go a long way toward building the public's trust and confidence in the impartiality of our elected justices and judges. But there is one final piece—one that I raised in my 2011 State of the Judiciary speech and raise again today. We can, and must, stand up to criticism and attempts to intimidate judges with a strong, unified response. Last year and just this fall, some judges have been the subjects of personal, intimidating attacks by politicians and political groups unhappy with judicial rulings. Elsewhere around the state, circuit court judges have felt the heat of criticism for calls they made in criminal cases. These circuit court judges have stood strong in the face of threats and personal hostility.

And why have these trial judges been subjected to personal attacks? Because they have done their jobs. And certain parts of those jobs—setting bail, sentencing criminal defendants, rendering decisions in highly charged civil disputes—have always sparked criticism. Criticism is valid. But too frequently in recent years, critical comments have become threats and attempts at intimidation not only by angry litigants and fringe groups, but also by other elected officials.

Though we may be constrained from speaking out on individual cases, judges, lawyers and members of the public can and must speak out against cynical attempts to politicize the judiciary.

On October 24, 2012, just a few weeks ago, Chief Judge Jeffrey Kremers of Milwaukee County devoted a substantial part of his State of the Milwaukee County Judiciary remarks to this very point. His words bear repeating:

I am not saying that judges do not make mistakes or that the public must agree with every decision we make I am particularly concerned about personal attacks leveled against individual judges that are often so inaccurate, baseless and unfair I am dismayed when I see lawyers and elected officials from the other branches criticize a judge or a decision, not on the strength of the substance of the issue but rather on their perception or belief as to that judge's politics. . . . We have had too much of that this year. . . . It is a dangerous and slippery slope we are on and I fear where we are headed.

For a second year in a row, I seek the State Bar's assistance. If the State Bar does not act, I shall follow another path to establish an independent Task Force on Fair and Impartial Justice, composed of a diverse group of judges, lawyers, non-lawyers and community leaders. The Task Force will track personal, intimidating attacks on Wisconsin judges and develop responses to these attacks.

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My comments would be incomplete without a reference to the challenges facing the Supreme Court itself. There is no need for me to recount history. The people of the State need to be confident that the Supreme Court is doing its job. The Supreme Court has had three successful months of oral argument, including oral argument in Monroe, Green County. Our Monroe trip was the 23rd Justice on Wheels trip since the program was initiated in 1993.

Those who have watched our recent oral arguments have seen an active bench that questioned counsel closely and fairly, a bench that comported itself well with respect to the litigants and each other. We have also recently agreed on rule changes in open, transparent administrative conferences. Our discussions in the conference room and in open administrative conferences have been pointed, but that is hardly novel for our court or any appellate court.

For what it's worth, I note that our court is not alone in being contentious. Much has been made of reports that recent decisions have left some United States Supreme Court justices "livid" with others.

Our job in deciding cases and working on administrative matters is to try to reach agreement, but when the seven elected men and women on this Court working together cannot agree—and that is inevitable at times—we must disagree civilly and openly. We must develop the law in a way that makes the law more understandable and more accessible to the people of the State.

Our court's term is still new. We have nearly eight months to go. We are best judged—and we should be judged—at the conclusion of the term on our conduct and decisions throughout the term. For now, I look forward to hope triumphing over history.

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In closing, I salute the judges across the state, for your courage, your strength and your hard work. You have not been intimidated. And you will not be. You have not caved in to threats. You will not in the future. Nor shall I. Wisconsin judges will hold the balance nice, clear and true. We shall remain fair, impartial, neutral and non-partisan. The people of the state deserve no less.

I close as I do every year, saying I welcome your thoughts. I am in the book: 608-266-1885.

Let's have a terrific conference!