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Annual Meeting of the Wisconsin Judicial Conference

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Enduring Values in Changing Times

Welcome to Madison and to the 2002 Wisconsin Judicial Conference. Our thanks to the program chair, Jean DiMotto, Milwaukee County Circuit Court Judge, as well as the conference program committee. The chair, the committee and the staff of the Office of Judicial Education have developed what promises to be an 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.

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

George A. Burns Jr., Milwaukee County, 1970-1996
John J. Crosetto, Kenosha County, 1973-1974
Michael G. Eberlein, Menominee/Shawano Counties, 1970-1983
John C. Jaekels, Brown County, 1969-1988
Thomas T. Lindsey, Bayfield County, 2001-2002
Joseph A. McDonald, Douglas County, 1983-2002
Stanley Miller, Milwaukee County, 1992-2001
Walter T. Norlin, Bayfield County, 1969-1975
David Sebora, Calumet County, 1955-1980

John Reynolds, U.S. District Court for the Eastern District of Wisconsin, former attorney general and governor of this state

Robert O. Uehling, Wisconsin Supreme Court Clerk, 1973-1978

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 circuit court judges are:

William Brash, Milwaukee County
Louis Butler Jr., Milwaukee County
Faye Flancher, Racine County
Michael Gableman, Burnett County
Molly GaleWyrick, Polk County
George Glonek, Douglas County
James R. Habeck, Menominee/Shawano Counties
Kendall Kelley, Brown County
Robert A. Kennedy Jr., Forest/Florence Counties
Gerald Laabs, Jackson County
Paul Malloy, Ozaukee County
Richard Nuss, Fond du Lac County
John Priebe, Bayfield County
Timothy Witkowiak, Milwaukee County

To the new judges, on behalf of the entire judicial family, I say: "Welcome. May your judicial careers be rewarding to you and may you serve the people of Wisconsin well."

I also want to extend a special welcome to someone who is decidedly *not* new, Director of State Courts J. Denis Moran, who has returned after a six-month medical leave.

We meet this year in Madison, the state capital. From this convention center we look down Martin Luther King Jr. Boulevard to see the majestic capitol building, the seat of Wisconsin government and home to all three branches of government. We welcome you and your guests to visit our quarters on the ground and second floors of the East Wing.

In May 1998, in honor of the 150th anniversary of Wisconsin's statehood, crowds gathered on the capitol lawn to celebrate our people, our traditions and our quality of life. The state had much to celebrate.

This year we celebrate another sesquicentennial. September 2002 marked the 150th anniversary of the election of the first three justices of the Wisconsin Supreme Court. Those justices took office in 1853, and so, in the year 2003, we shall celebrate the 150th anniversary of the creation of a separate Wisconsin Supreme Court. The court is five years younger than the rest of the state government because the 1848 constitution kept the territorial appellate system in place during those early years.

Thus from 1848 to 1852, the five trial judges met once a year in Madison and reviewed their own decisions. I hear murmurs of approval from the circuit judges. It is said that the chief justice of the territorial court—a quirky fellow from Fond du Lac named Alexander Stow—called his fellow justices "consummate blockheads" when they

dared to reverse a decision he had made as trial judge. Remember those words. They might come in handy some day.

The year 2003 will also mark the 25th anniversary of the creation of the Wisconsin Court of Appeals and the 125th anniversary of the creation of the State Bar of Wisconsin. The Court of Appeals is essential to the operation of appellate review. The history of the Court of Appeals will be part of the Presidential Showcase program at the State Bar convention in May. The State Bar plays an important role in maintaining a learned and independent bar, which is essential to the sound operation of a legal system.

We shall celebrate these anniversaries in 2003 without a special automobile license plate, although we could use the money from any sales. We shall celebrate these anniversaries without blocking off the Capitol Square for a celebration, although a party sounds like a good idea. Rather, the court system will mark this milestone and honor our history by examining the enduring values of our legal system. The last 150 years have brought many changes, yet through them all the core values of our judicial system have endured.

The disputes handled in the courts at any given time reflect society's economic and social development. Wisconsin has seen economic booms and economic busts during the past 150 years, all affecting the business of the courts.

During the latter part of the 19th century, logging and milling were important economic activities in Wisconsin and influenced the development of agriculture, transportation, construction, trade and finance. During the logging and lumber era, civil actions in circuit courts, as illustrated in a study of the Chippewa County court, concerned mostly contracts, real and personal property, and tortious damage to property. The number of family matters in the court ebbed and flowed in the 19th century before starting on an upward trend that lasted throughout the 20th century.

The 20th century was characterized by the increasing intervention of state and national governments in people's lives. These shifting patterns of legislative and administrative activities were, as you might expect, accompanied by changes in the work of the courts.

Changes in technology were reflected in the business of the courts. The introduction of automobiles brought new personal and property damage cases, and the automobile initiated economic and social changes that affected the business of the courts.

What will the 21st century hold in store? What are the ethical and philosophical questions, the social and scientific issues that might confront us as a society and drive the future work of the courts? Genetic engineering? Cloning? Cyberterrorism? Sensors implanted under our skin to improve health and security?

In the year 2000, there were 5.36 million people in Wisconsin. The projections are for an increase of one million people in this state by the year 2030. Non-English speaking

people have played an important role in this state since territorial days. We can expect that they will continue to do so as the ethnic make-up of our population continues to change, as does the age of the population, where people live, and how they earn a living. These and many more factors will continue to shape the work of the courts in ways we cannot fully imagine.

Yet the pace of demographic change is glacial compared to the pace of technological change. It is hard to believe that just five years ago, the courts did not have a Web site. We "went live" in March 1998, and just last month the Web site was accessed about 37,000 times a *day*. The site—and indeed the World Wide Web in general—has become an indispensable tool for judges, lawyers, court staff, litigants, jurors, the media, educators and the general public. Videoconferencing and the Internet are part of our daily lives, and access to these tools will continue to be integrated into our courtrooms. Even the beautifully restored historic Supreme Court Hearing Room in the Capitol is fitted with state of the art technology.

Along with changes in our population and technology is the significant increase in the number of lawyers licensed in Wisconsin—over 20,000 at last count. At the same time more people are representing themselves in court. In Dane County alone, a two-month snapshot of family court filings in 2002 revealed that in 60 percent of the cases, both litigants were self-represented. Both parties were represented by counsel in only 13 percent of Dane County family court cases. The court system is designed to operate with lawyers. And so just as our caseload changes to reflect society's current issues, so must our way of doing business adapt to meet the needs of self-represented persons.

This is why the Supreme Court in April 2002 unanimously adopted a rule giving clerks of court guidelines for helping the many self-represented people who show up at the front counter with questions that require better answers than: "I can't tell you that."

Judges, staff and lawyers in various counties have established creative programs to assist self-represented litigants. We can and must work toward ensuring access to justice for all.

Over the last 150 years much has changed. But the core values of the legal system remain the same. Our judicial system provided then, as it provides now, a forum for the resolution of disputes in a fair, efficient manner according to the laws of the state. Enduring values in changing times.

The early justices of the Supreme Court were well acquainted with change and with challenge. Justices Abram Smith of Milwaukee, Samuel Crawford of Mineral Point and Edward Whiton of Janesville comprised the first official state Supreme Court. These men were elected when judicial elections were partisan affairs. Non-partisan elections were yet to come. Funds were so meager for the court that one of the justices, Abram Smith, also acted as official reporter.

In 1853, these three justices of the Wisconsin Supreme Court decided cases involving everyday events in the lives of everyday people, just as we do today. The first case reported as decided by the Supreme Court appears in 1 Wisconsin at page 2. It is entitled Winne v. Nickerson. It involved $10.40 in damages and $14.36 in costs. That's about $25, or the equivalent of about $500 today. The issue in the case was the admissibility of a "horse account" (whatever that is), when two sets of accounting books apparently existed. Although the legality of accounting practices has special importance these days, the case is noteworthy only because it is the first reported case.

In the 1850s, the Wisconsin Supreme Court decided 206 contract cases. Fifty-four dealt with land. Many of the other contract cases dealt with sales of horses, sheep, oxen and the cash crop, wheat, rather than manufactured goods. In contrast, during the last decades, many of the contract cases in the Supreme Court involved insurance policies.

But the three justices on the new court also had to decide cases involving the great social and political issues of the day. In the 1850s slavery was a major political and social issue and the Wisconsin Supreme Court was called upon to decide the validity of the federal Fugitive Slave Act in Ableman v. Booth in 1854.

The Wisconsin Supreme Court decided by a 2-1 vote that the Fugitive Slave Act was unconstitutional. Justices Smith and Whiton were the two justices in the majority. New justices on a new court had taken on the federal government and had defended the rights of African-Americans, individuals who then had few rights under the law. At a memorial service for Abram Smith, Justice Orsamus Cole described Justice Smith as follows:

> He had an abiding love for and devotion to the great principles of civil liberty and natural justice; I believe it was the strongest desire of his soul that every human being, however degraded, should enjoy his natural rights.

Justice Smith understood that a truly independent judiciary protects us all against the violation of anyone's civil rights and guaranteed liberties. An independent judiciary protects every individual, every business, every association, regardless of the power or volume of its voice in the political arena. Justice Smith became one of the central figures in the debate between federalism and states' rights, a debate that continues up to this very day. Justice Smith was an early leader of the judiciary.

Leadership in meeting old and new challenges is valued within our system. Judges and staff must continue to be leaders in the courthouse and outside the courthouse for fair and impartial justice.

Justice Samuel Crawford was the sole dissenter in Ableman v. Booth. He could have kept quiet; he could have ducked the issue, but he did not. He fulfilled his judicial role honestly and forthrightly. Justice Crawford expressed personal distaste for the

Fugitive Slave Act but concluded that on the basis of his study of constitutional precedents the Act was constitutional. Justice Crawford noted:

> The force of argument . . . has failed to produce that conviction which should justify a court, or judge to pronounce a legal enactment void, because unconstitutional, and I am therefore unable to concur in the opinion that this law is unconstitutional.

Judge Crawford, in the face of great public clamor and excitement, called it like he saw it.

In 1855, Justice Crawford, who had drawn the short straw and had only a two-year term, was defeated at the polls. An admittedly honest and capable sitting judge, while still in his physical and intellectual prime, was defeated in an election, probably on the basis of his decision in the fugitive slave case.

In the infancy of this court system, Justice Crawford upheld the value of judicial independence. He had honestly decided a case in the face of contrary popular opinion. He decided a case despite his personal dislike for the law in question. He fulfilled his duty by making a decision based on his understanding of the law, not on the basis of public opinion, personal whim or will, prejudice or fear, free from interference from the legislative or executive branches or private citizens or groups.

The tale of Ableman v. Booth and Justice Crawford does not end here. In 1859 the U.S. Supreme Court upheld Justice Crawford's dissenting decision and reversed the Wisconsin Supreme Court. As Justice John Winslow wrote, the Wisconsin Supreme Court's Ableman v. Booth decision was "magnificent but it was not law." The U.S. Supreme Court returned the case to the Wisconsin Supreme Court. The justices of the Wisconsin Supreme Court grappled with their duty to file the U.S. Supreme Court's mandate with which they disagreed.

Justice Luther Dixon voted to file the mandate of the U.S. Supreme Court, concluding that although he disliked the decision, the state court cannot overrule the federal court. Unpopular decisions of the U.S. Supreme Court had to be followed, wrote Justice Dixon.

Justice Dixon's vote to accept the mandate of the U.S. Supreme Court was unpopular. His vote was an act of political courage, because his vote did not matter. Regardless of his vote, the mandate of the U.S. Supreme Court was not going to be filed in the Wisconsin Supreme Court. There were not enough votes to file the mandate. Justice Dixon did not duck. He honestly cast his vote despite popular opinion and despite his personal opinion of the law. He fulfilled his duty by making a decision based on his understanding of the law. Just a few months after his unpopular decision Justice Dixon faced an election. And Justice Dixon won.

Justices Crawford and Dixon remind us of two enduring Wisconsin values: the election of judges and judicial independence. Justice Crawford and Justice Dixon abided by the words uttered in the public debate in the 1840s on the proposed Wisconsin constitutional provision for electing judges:

> [W]e should look with more of hope and confidence than of doubt and apprehension to the working of an elective judiciary.
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> [T]he people will support [judges] who oppose their wishes on the bench when such opposition is exercised conscientiously. Boldness men admire, even when opposed to their will.

The basic, underlying safeguard for judicial independence is popular support for the concept. We value judicial independence not because it protects lawyers and judges from accountability—which it should not—but because it protects the integrity of the judicial process for all persons—which it must. As individual judges and as an institution we must continue to uphold the enduring value of judicial independence. I have no doubt we shall.

The third justice of the 1853 Wisconsin Supreme Court was Edward Whiton, who was elected by the people as chief justice. He served from 1853 until 1859. Justice Whiton sat on Ableman v. Booth, but is best known for his role in Barstow v. Bashford, a contested election case decided in 1856. The disputed election was for governor of Wisconsin. I will spare you the elaborate legal maneuverings, other than to say that the legal challenges were lengthy and messy. The case is of historical importance for two reasons. First, the Supreme Court established its role as the final interpreter of the law, and second, the people of the state peacefully accepted the Court's decision in the contested election.

Governor Barstow challenged the jurisdiction of the Wisconsin Supreme Court, asserting that the executive branch was the final judge of the election of its own members and that the board of canvassers, not the judicial branch, was the final authority. On behalf of the court, Chief Justice Whiton rejected these challenges to the power of the judiciary. Governor Barstow warned that he would repel with all the force of the executive branch any infringements upon the rights and powers he exercised under the constitution. Arms were known to be stored in the Capitol, and this threat carried significant ramifications.

After lengthy hearings and testimony, the Supreme Court ruled that the challenger, Bashford, was the duly elected governor of this state. Barstow resigned, and Bashford took office without further incident. According to reports, "the only thing that prevented catastrophe in our capitol at that time was the unfaltering trust and complete veneration which the people had in the ability, integrity, courage, and firmness of Chief Justice Whiton." May we all strive to gain the trust of the people of this state in our ability, integrity, courage and firmness, enduring values in our judicial system.

The first Wisconsin Supreme Court and the first three justices have many lessons to teach us. I have spoken of only a few. We celebrate the 150th anniversary of the Wisconsin Supreme Court with pride.

Changing times will continue to test the judiciary and the administration of the courts. We are all painfully aware of the financial conditions facing the State of Wisconsin. The most recent estimate shows that the state is facing a deficit of nearly $3 billion. This deficit remains in spite of the cuts already sustained by state agencies and the court system in the current budget cycle.

The cost containment measures we have implemented, such as limiting the use of reserve judges, reducing the number of meetings, reducing travel within the state, eliminating state funding of travel outside the state, and allowing vacancies in critical positions, have been important in our meeting the fiscal challenge. These efforts have saved almost $1.5 million.

We shall do everything possible to identify savings to the extent we can, but we are committed to carrying out our constitutional role. We shall continue to provide a fair, effective, efficient judicial system for the people of the state.

The judges and staff have worked hard to ensure that the important business of the court system continues for the people of the state with minimal disruption. I know it has not been easy. I commend you for your efforts.

Because of your efforts we have made great strides in our court system to serve the people of this state better despite fiscal challenges. Just read *The Third Branch* to learn about the initiatives that judges and staff have undertaken during the year. Let me touch on some of our statewide accomplishments.

Courthouse Safety. The Wisconsin Courthouse Safety Training Program started with the simple idea of producing a court security manual for sheriffs and judges. We did that. This simple idea grew into a series of 10 training programs around the state for representatives from all branches of government. This program is recognized as a national model and was recently awarded the 2002 National Association of Court Management Justice Achievement Award as the outstanding justice program in the country.

The program was developed in partnership with the Wisconsin Sheriff's and Deputy Sheriff's Association, the U.S. Marshal's Office, and Fox Valley Technical College, and was supported by a $167,000 grant from the Office of Justice Assistance (OJA). Our partners are interested in pursuing the next step in the development of this initiative—a courthouse safety and security resource center that can provide technical assistance on an on-going basis.

Interpreter Training. According to the U.S. census, between 1990 and 2000, Wisconsin's Hispanic and Asian populations doubled. Many other immigrant populations

also grew, and are continuing to grow, at a rapid rate. As a result, the Wisconsin courts increasingly must find qualified interpreters who can speak not only Spanish and Hmong, but also Russian, Laotian, Vietnamese, Punjabi, Hindi, Arabic, Somali, Polish, and more.

Our efforts have resulted in a change in state law concerning the reimbursement rate for interpreters, a Supreme Court rule on interpreter ethics and now five training sessions around the state for individuals interested in learning more about court interpretation. The training sessions, which are being funded with a federal grant through the Department of Workforce Development's Office of Refugee Services, are designed to give participants an overview of the needs and expectations of the courts.

To assist us in working with interpreters the conference program includes a session on this topic. We are proud of our progress in providing qualified interpreters, but we have a long way to go.

Legislative Changes. The cut in appropriations was not the only item in the budget bill that will have an impact on every court in Wisconsin. The budget bill included major criminal code revisions as part of truth in sentencing and enacted the Adoption and Safe Families Act.

The Office of Judicial Education is offering two seminars in January 2003 to address the changes in truth in sentencing. In order to get the most out of these January seminars you should plan on attending the truth in sentencing session on Friday morning.

The Court Improvement Program is designing district training session for judges in the coming year on the Adoption and Safe Families Act.

PPAC Subcommittee on Court Funding. The Planning and Policy Advisory Committee (PPAC) has created a Court Financing Subcommittee, chaired by Chief Judge Mike Rosborough. This subcommittee will work to ensure that the courts have an active role in any future discussion of court funding. Court funding may very well be part of future discussions on shared revenue. The new subcommittee will examine how responsibility for funding the circuit courts is divided between the counties and the state and identify stable, responsible, and effective funding mechanisms that promote efficient and uniform court services for all the people of the state.

Tribal Court-State Court Relations. Representatives from the four Chippewa tribes in northern Wisconsin and judges in the 10th Judicial District began the year 2002 with an agreement on a protocol for handling cases in which the tribal and state courts share jurisdiction. The protocol is believed to be the first of its kind in the nation and has been the focus of discussions at national conferences.

This agreement is an example of the benefits of opening a productive dialogue between the tribal courts and state courts.

To further these efforts, the State/Federal/Tribal Court Forum continues to examine ways to promote this dialogue. You will note on your conference agenda that the Forum is meeting this afternoon. I encourage all who are interested in this topic to attend the meeting to hear about future cooperative initiatives, including regional meetings within the state between tribal and state court judges.

New Law Library. Another notable development at the beginning of the year was the Wisconsin State Law Library's move to its permanent home. The library is on the second and third floors of the new Risser Justice Center on the Capitol Square, just one block from the convention center. For the first time in many years, the library's entire book collection is housed in one place. I encourage all of you to visit the new library during your visit in Madison. The library is an important resource for all of us.

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I am concerned, as you all are, about the judiciary's ability in years of fiscal pressure to perform its constitutional obligations as a co-equal, independent, and impartial branch of government. At some point, neglecting the needs of the judicial branch may endanger judicial independence and our ability to provide a fair, effective, efficient judicial system. The judiciary's role is indispensable in good times and bad, in times of peace and in times of national crisis and state financial difficulty.

As debate begins on the next budget, we will be vigilant in our communication with the executive and legislative branches. The message will be this: we understand the state's financial situation; we are committed to seeking efficiencies where we can; but we cannot jeopardize our ability to do what the constitution requires us to do. The Supreme Court has the constitutional responsibility for the operation of the judicial branch. We are accountable, ultimately, to the five million people of this state. We cannot and shall not compromise the delivery of justice in this state.

We must continue our efforts to maintain the judicial system envisioned by the framers of the Wisconsin constitution without compromising that system's independence or integrity.

Our mission for this coming year and future years: Let us work together to ensure that the values established by our predecessors will continue to endure. I am counting on you. You can count on me.