

**STATE OF THE JUDICIARY
ADDRESS
2013**

Back to the Future



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Annual Meeting of the Wisconsin Judicial Conference

November 6, 2013

Wisconsin Dells, Wisconsin

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“Back to the Future”

Good morning. Welcome to the Wisconsin Dells and the 2013 Meeting of the Wisconsin Judicial Conference. Our thanks to Judges Jane Carroll and Gregory Gill, 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.

Our Judicial Education Office, as you know, completed its work on this year’s conference without the invaluable participation of Director David Hass, who passed away suddenly on August 28 of this year. Dave served as Director of Judicial Education from 1997 until August 2013. At the Thursday evening program, we shall remember and honor Dave’s friendship and his many contributions to the Wisconsin judicial system.

Dona Everingham, Tammy Hennick, Karla Baumgartner and Carol Koschel of our Judicial Education Office deserve our special thanks for continuing the fine work of that office.

In keeping with tradition, I shall note other changes that have occurred within our judicial family since our last conference in November 2012. We honor and remember:

- Judge John L. Coffey – U.S. Court of Appeals for the Seventh Circuit; Wisconsin Supreme Court; Milwaukee County Circuit Court.
- Justice Donald W. Steinmetz – Wisconsin Supreme Court; Milwaukee County Circuit Court.
- Judge Robert A. P. Kennedy – Forest/Florence County Circuit Court.

While there is sadness in losing colleagues, there is also joy in welcoming new ones. I ask each new judge to stand until all the names of new judges are read.

- Judge Lisa K. Stark – District III Court of Appeals
- Judge Michael Bitney – Barron County
- Judge Kristina M. Bourget – Eau Claire County

- Judge Rebecca G. Bradley – Milwaukee County
- Judge Bernard “Ben” Bult – Marquette County
- Judge LaMont Jacobson – Marathon County
- Judge Rhonda L. Lanford – Dane County
- Judge Thomas J. McAdams – Milwaukee County
- Judge Mark R. Rohrer – Manitowoc County
- Judge Robert R. Russell – Lincoln County
- Judge Joseph G. Sciascia – Dodge County
- Judge David C. Swanson – Milwaukee County
- Judge Joseph W. Voiland – Ozaukee County
- Judge David J. Wambach – Jefferson County

Please give these judges a hearty welcome to the Wisconsin judicial family. May they serve the people of the state long and well.

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Almost 30 years ago, Hollywood released a film that introduced us all to Marty McFly, a character whose work-a-day life in the year 1985 was turned upside down when he experimented with a time machine. He landed in the year 1955. He spent much of the movie attempting to go “Back to the Future”—that is, to return to safe and predictable 1985 and to avoid taking any action in 1955 that would alter the course of events in 1985.

At the end of the film, as the crew blasts off in a nuclear-powered flying car headed for the sequel and the future—2015—the mad scientist roars triumphantly, “Where we’re going, we don’t need roads!”—a line that found its way into President Ronald Reagan’s 1986 State of the Union Address. The President said: “Never was there a more exciting time to be alive. As they said in the film ‘Back to the Future’: ‘Where we are going, we do not need roads.’”

Well, here we are on the brink of the future that Michael J. Fox and his movie cohorts stumbled through. No flying cars for us yet, but we are zipping through a raft of issues we could not have imagined in 1985—issues driven by advances in technology that promise to transform our lives in myriad ways we cannot begin to comprehend, just as we could not know in 1985 what the Internet would mean.

Advances in nanotechnology, biomedicine, brain imaging, information technology, and so on are fueling court cases—cases that present us with complex questions about surrogacy contracts, alternative energies, identity theft, GPS tracking of individuals and cars, and more.

What we are learning is the same lesson those fearless flyers learned in “Back to the Future.” It’s what gave the film so much heart. The lesson is this: Times change, but human nature is constant—for better or worse—as the longer-serving judges among us will be quick to confirm. And so the most important tools we can bring into the future are the ones that do not come from scientists or laboratories. The important tools are the ones our staff and judges already have: commitment, creativity and courage.

Commitment to work collaboratively with justice system colleagues, including social workers, treatment professionals, defense counsel, prosecutors, law enforcement and trained volunteers to find solutions to seemingly intractable problems.

Creativity to try techniques learned from other professions—such as motivational interviewing from psychology—that might improve our effectiveness in the courtroom.

And courage to adopt new procedures and practices—to incorporate evidence-based practices that allow us to mine past cases and apply the lessons they hold—even when those lessons run counter to our long-held beliefs.

Commitment, creativity and courage allow us to put cutting-edge technology and new information to good use. Certainly we still must ask, “What have we done in the past?” Precedent always has an important role. The future depends on this next question, “. . . and how well did past practices work?” But that’s just the start. Evidence-based practices don’t just measure past efforts. Evidence-based practices are about a detailed examination of every step in the justice process to answer this next question: “How can we do it better?” This morning I shall show you how we are answering that question.

Before we go back to the future, I must go back to the past, the immediate past, to discuss issues that will continue to challenge us in the years to come. These issues are judicial selection and recusal. I said when I stood before you one year ago that there is no perfect system for selecting judges. Any elective or appointive process may be hijacked.

Like every other state that elects judges, Wisconsin struggles with low voter turnout in these races and difficult issues related to campaign speech, fundraising, and judicial recusal.

One thing is certain. Wisconsin conducts non-partisan judicial elections in which independent groups (some identified with political parties) have begun to expend substantial sums of money. These sums invariably raise issues of the appearance of partiality and recusal standards, and the public is concerned. Recent poll results show that more than 80% of respondents believe that campaign financing influences court decisions.

If meaningful public financing of judicial elections is in the future, the road there is not visible.

So I return to the question I asked last year: What assistance might we find to address issues of judicial recusal?

No decision a judge makes is more important than the decision about whether to sit on the case. We must not remain on cases when a reasonable person could question our impartiality, but we must not use recusal as a way to duck a difficult or controversial case. Recusal decisions are not easy, as we all know.

I called upon our Office of Judicial Education, the two law schools—the University of Wisconsin and Marquette University—and the State Bar to develop education programs related to recusal.

Recusal was on the Judicial College agenda this past summer, and the Judicial Education Committee is considering ways the subject may be approached at seminars and at district meetings.

Marquette University Law School took an important step when last month it invited Yale Law Professor Heather Gerken, an election law expert, to deliver the Boden Lecture on money and politics. I asked Professor Gerken about the effect of campaign contributions and expenditures on judicial campaigns. She replied as follows:

[J]udicial elections are one of the places where money is likely to have the most corrosive effect. The obvious reason, of course, is that we have a different sense of the position (hence all the objections about judicial elections generally). But I have an additional worry that stems from my experience in election law. In most instances, big money funds races between the two major parties. There, at least, voters have some background sense of the politics of the candidates, which means that money may have less of an effect. In . . . judicial elections [however] . . . , the money may matter more because we lack . . . a . . . “shorthand” [like an identification with a political party] to guide our votes.

I have recently repeated my request to the deans of the two law schools to host symposia for the bench, bar and public on the issue of judicial recusal.

Last year I asked the State Bar to help protect judicial independence by responding to personal, partisan, intimidating attacks on judges. This year the Bar is in the process of working on a strategic plan to address challenges to a fair, impartial, neutral and non-partisan judiciary, including the challenge presented by outright attacks on the judiciary.

The State Bar has proposed a state constitutional amendment to elect Supreme Court justices for one 16-year term. The proposal is designed to ensure that justices do not have to run

for re-election, in the hope that they will be perceived as more independent. The Bar is to be applauded for taking on this difficult and important issue of judicial selection. It is important that this proposal engender public debate.

So what are the next questions? Here are two: How does a single, 16-year term address the issue of transparency in campaign contributions and expenditures and recusal? To what extent may a retired justice take advantage of his or her “insider” knowledge in pursuing post-retirement employment opportunities?

Last year I said I would communicate with the Judicial Commission about seeking amendment to the state constitution and the statutes to attain effective discipline for appellate court judges and justices. The Judicial Commission has declined to undertake this project.

I have told you what I seek: Better, more transparent, more fail-safe recusal standards; a judicial discipline system that works at all court levels; continuing judicial and public education about recusal; and an organized system for responding to intimidating personal attacks on judges. No laboratory is going to produce a solution to these problems. This task lies with lawyers, judges and the public. And it will take every bit of commitment, creativity and courage we all can muster over many years.

* * * *

I began this address by looking back at 2012. Now let’s spend a moment in 2013. This has been a busy year, one that has seen the creation of new drug and alcohol court programs; new programs for veterans; new mental health court programs; new initiatives from criminal justice coordinating councils; new projects to help self-represented litigants; joint programs with tribal courts; foreclosure mediation programs; a guardianship project focused on developing monitoring and training tools to protect the public and assist guardians, court staff and judges; and much more. There is a lot happening, and much to be proud of.

But it’s also been a very difficult year. Formidable challenges come from fiscal pressures on the judicial system to do more with less. This year, we grappled with a proposed \$17 million lapse, which threatened our ability to carry out our core constitutional responsibilities. Quite simply, we could not absorb a lapse of that magnitude and continue to function effectively for the people of this state. Fortunately, the lapse was reduced to \$11.8 million—still an enormous number that will be difficult to manage. We continue to explore options for meeting this requirement without endangering the delivery of justice in Wisconsin.

2013 was also a difficult year for judges and court staff. Unfortunately, just as our judicial system is losing ground, our people are also losing ground as salaries stagnate and individual contributions toward health insurance and retirement grow.

This year, as part of our ongoing effort to produce a more equitable compensation structure, we requested in the budget that the court system be included in the new Discretionary Merit Compensation system that was created to give executive branch employees access to pay raises for merit, equity and retention. Our request was denied. We also asked for increases to judicial compensation, and asked that judges' salaries be tied to the national average. That, too, was denied.

I do not recall a time, in my 37 years on the bench, when public service was lucrative. Still, we must be mindful of the need to compensate judges and court staff adequately, or risk losing our best and brightest to other, more attractive opportunities. The efficient and effective operation of the state courts rests ultimately on a highly qualified judiciary, on the best and brightest clerks of circuit court, and on court staff whose knowledge, experience and commitment to service enable us not only to meet but also to exceed the expectations of the public.

* * * *

Now back to the future.

First, criminal justice initiatives that hold the offender accountable while reducing costs and reducing recidivism.

Second, initiatives focusing on children and families. In 2012, there were nearly 56,000 new family, paternity, juvenile CHIPS and TPR cases filed—2,000 more than in 2011 and 3,000 more than in 2008. The need for better interventions is clear.

Criminal Justice Initiatives

The big news in the criminal justice system is the continued application and refinement of effective justice strategies. CCAP's data-collection system coupled with the Department of Corrections' COMPAS data have given us something that might have seemed impossible just a few years ago: better numbers on recidivism to evaluate alternative sentencing approaches. We now know better what works and what does not work.

And so, in counties across the state, our judges are demonstrating their commitment, creativity and courage by applying this new knowledge, and by working with justice system partners to develop strategies to enhance public safety, reduce recidivism and address criminal and addictive behaviors.

Milwaukee County has been a leader in the state and in the nation on the use of evidence-based practices. This year, a new project, in which the Department of Corrections is an enthusiastic partner, is testing the notion of "dosage" sentencing. Through the use of evidence-based assessment tools and specialized training for probation agents, probation will be based on

the amount and type of programming a defendant needs, rather than the one-size-fits-all approach that is the current norm.

Eau Claire County has also been a leader. The county's policy team on evidence-based decision making has mapped the justice process, identified targets for change, and established five focus areas where evidence-based practices are being incorporated. Every step in the process, from arrest to pretrial release to charging, sentencing, and probation supervision has been carefully evaluated and altered to include practices that the evidence has shown to be successful. The new approach has changed the landscape in a multitude of ways. Judge Michael Schumacher is chair of the policy team; here's how he describes the change:

We have learned what is proven to reduce recidivism and now we are doing it. Phrases like "risk assessment" and "criminogenic needs" are a normal part of the conversation. Those in the criminal justice system have accepted that this is no fad. Evidence-based decision making is here to stay in Eau Claire County.

But cutting-edge initiatives are not confined to our larger counties. At the top of the state, in Vilas County, a unique drug court program opened for business this year. The "Healing to Wellness Court" in Vilas County is a joint project of the state and tribal courts that grew from our long-standing program to improve cooperation between the two justice systems. Chief Judge Chip Nielsen and Lac du Flambeau Tribal Court Chief Judge Garold Smith worked hard to make this court a reality.

In counties across the state, we have seen amazing growth in 2013 in the number and type of problem-solving courts. Each is unique, but all represent the hard work of local judges, clerks of court and justice system partners who looked to the future and asked one key question: How can we do better? These initiatives are drawing a road map that may guide the rest of us.

Family and Children Court Initiatives

Our work with children and families saves lives, improves communities, and builds a brighter future for the entire state. A new model court process in Milwaukee County Children's Court aims to improve outcomes for children and families by bringing together the many players in the system to identify roadblocks. Judge Marshall B. Murray initiated the project, which emphasizes judicial leadership, multi-system collaboration, child-focused outcomes and system accountability.

The lessons Milwaukee teaches will yield important "next questions" to be asked as we continue to improve, refine and replicate this model in other parts of the state.

Another new resource called the Wisconsin Judicial Committee on Child Welfare will develop, pilot and promote projects that showcase best practices for judicial officers. The

committee recently went through an extensive strategic planning process to align the activities of our federally funded Children's Court Improvement Program with the following three goals:

1. Children remain in their home safely and their families are strengthened with collaborative systems of support.
2. Children in out-of-home care and their families are provided appropriate opportunities to become successful and socially competent.
3. Children in out-of-home care achieve timely permanence with enduring connections maintained and promoted whenever possible.

Members of the committee are Judges Marshall Murray, Mary Triggiano and Chris Foley of Milwaukee County; Judge Shelley Gaylord of Dane County; Judge Ramona Gonzalez of La Crosse County; Judge Ann Knox-Bauer of Taylor County; Chief Judge Scott Needham of St. Croix County; Judge Todd Ziegler of Monroe County; Director of State Courts John Voelker; District Court Administrator Patrick Brummond and Children's Court Improvement Program Director Michelle Jensen-Goodwin.

Nothing is more important to our future than our work with children. And once again, there are no roads where we are going. Mapping the best route to safe, permanent homes for the most vulnerable people in the state will take every ounce of our creativity, commitment and courage. With this team in place, I am confident we shall meet the challenge.

As we sharpen our focus on improving the processing of child welfare cases, I am happy to report that Wisconsin has been selected in a competitive process as one of seven states to take part in the *Three Branch Institute on Child Social and Emotional Well-Being*. This is a year-long initiative that aims to engage all branches of government as well as the broader community and Native American tribes to develop trauma-informed institutions and communities to improve the well-being of children in foster care.

The project is sponsored by the National Governors Association's Center for Best Practices, in collaboration with Casey Family Programs, the National Conference of State Legislatures, the National Center for State Courts and the National Council of Juvenile and Family Court Judges.

The project harnesses new brain research that shows more clearly than ever before the toxic effects of neglect and abuse experienced by infants and young children and the long-term implications of this stress on emotional, behavioral and cognitive development. Our state team traveled to Philadelphia in July to begin developing its action plan. Judge Mary Triggiano is the judicial leader on the team.

Closer to home, and set for release in December, is the first-ever e-learning project from the Children's Court Improvement Program. It's self-directed, online, and approved for judicial

education credit. Its three modules are designed to address the many factors involved in processing child abuse and termination of parental rights cases. A court team developed the content and tested it with focus groups of judges and court commissioners. Fox Valley Technical College programmed the modules to be user-friendly. You will hear more about how to access this exciting distance learning opportunity in the very near future.

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Justice is an imperfect science. We may try many approaches before we settle on one that works, and that one may work only when conditions are just right. But it is in this trial-and-error phase that we learn to ask the right questions and to understand how to interpret and apply the answers. It is in this phase, as we quest for one perfect solution even as we know there is no such thing, that we find the myriad possible solutions upon which we build a better criminal justice system, improve how we work with children and families, and find our way to a system for selecting judges that safeguards against the encroachment of partisan politics and special interests.

There is a great deal of hope, inspiration, and talent in this room. We are well equipped for the task at hand.

The movie “Back to the Future” ended with an intriguing promise. The screen flashed “TO BE CONTINUED . . .” I leave you with those same words today. We shall continue to be committed to equal justice for all, to creatively use new methods and ideas, and to move courageously into the future. Where we’re going, we can’t use existing roads. We’ll make our own.

I close as I do every year, saying I welcome your thoughts. You can reach me at 608-266-1885.

Let’s have a great conference.