

# Agenda

## Policy and Planning Committee

September 9, 2016

12:00 – 1:30 p.m.

Council Room  
Matheson Courthouse  
450 South State Street  
Salt Lake City, Utah 84111

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Reed Parkin
12:05	CJA 3-111. Performance evaluation of senior judges and court commissioners.	Discussion/ Action	Tab 2	Keisa Williams
12:10	CJA 2-212. Communication with the Office of Legislative Research and General Counsel.	Discussion/ Action	Tab 3	Keisa Williams
12:40	CJA 3-201. Court commissioners.	Discussion/ Action	Tab 4	Keisa Williams
1:20	Other Business			Judge Reed Parkin

**Committee Web Page:** <http://www.utcourts.gov/intranet/committees/policyplan/>

**Meeting Schedule:** Meetings are held in the Matheson Courthouse, Judicial Council Room, from 12:00 to 1:30 unless otherwise stated.

September 9, 2016

October 4, 2016 (held during Annual Judicial Conference in Park City)

November 4, 2016

December 2, 2016

# Policy and Planning Committee Meeting Executive Summary - Focus Sheet

September 9, 2016

Issue	Scope	Status	Assignments	Notes
Approval of Minutes		Action/Vote	Read August minutes for accuracy and approval.	
<b>CJA Rule 3-111. Performance evaluation of senior judges and court commissioners.</b>	Consider amendments to Rule 3-111 regarding commissioner evaluations when commissioners serve in more than one district.	Discussion	Review the rule 3-111 proposals and be prepared to discuss them.	<p>Brent Johnson proposed two possible amendments for commissioner evaluations when a commissioner serves two districts.</p> <p>Version 1 requires the presiding judge in each district to prepare separate performance evaluations.</p> <p>Version 1 requires only one performance evaluation in which both presiding judges consult with one another.</p>
<b>CJA Rule 2-212. Communication with the Office of Legislative Research and General Counsel.</b>	Consider amendments to Rule 2-212 regarding the provision of notice of Judicial Council rule amendments to the Office of Legislative Research and General Counsel.	Discussion	Review the rule 2-212 proposal and be prepared to discuss it.	Brent Johnson is proposing amendments to this rule to make it compatible with current practices by limiting the notice requirement from the AOC to the Office of Legislative Research and General Counsel and eliminating notice to the Judicial Rules Review Committee. These amendments also change the timing for notice of draft rules from the date they are submitted to the Council, to the date they are published for public comment.

# **Policy and Planning Committee Meeting Executive Summary - Focus Sheet**

**September 9, 2016**

<p><b>CJA Rule 3-201. Court commissioners.</b></p>	<p>Consider amendments to Rule 3-201 regarding the use of electronic signatures.</p>	<p>Discussion</p>	<p>Review the rule 4-403 proposals and be prepared to discuss them.</p>	<p>Brent Johnson is proposing several amendments to this rule:</p> <ul style="list-style-type: none"> <li>• (3)(C) – Clarify that the word “court” refers to the site and not the entity.</li> <li>• (3)(C) – Proposes the creation of a commissioner nominating manual because we no longer control the judicial nominating process.</li> <li>• (3)(D) – Limits the number of judges serving on the committee when a commissioner serves multiple districts.</li> <li>• (3)(G) – Requires voting by the nominating committee to be by confidential ballot and provides a process for reconsidering a candidate.</li> <li>• (3)(J) – Clarifies that votes for nominees require a majority of judges in each district if the commissioner is serving more than one district.</li> <li>• (4)(D)(ii) – Allows publication to be by press release or other public notice rather than newspaper.</li> <li>• (4)(G) – Requiring names</li> </ul>
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**Policy and Planning Committee Meeting  
Executive Summary - Focus Sheet**

**September 9, 2016**

				<p>associated with public comments be redacted prior to dissemination to the candidate.</p> <ul style="list-style-type: none"><li>• (5) - Change the word “remove” when referring to the Council &amp; district courts’ decision not to retain a commissioner at the end of their term and attempts to clarify discipline and certification.</li><li>• (6) - Requires the preparation of performance plans and includes the time requirements listed on the forms so that they are given the force of rule.</li><li>• (7) - Attempts to clarify that there are separate processes for discipline and retention.</li></ul>
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Next Meeting: Tuesday, October 4, 2016 at 10:00 a.m. at the Annual Judicial Conference in Park City, UT.

# Tab 1

**Policy and Planning Committee**  
Matheson Courthouse  
Council room  
450 South State St.  
Salt Lake City, Utah 84111

August 5, 2016

**Draft**

**Members Present**

Hon. Marvin Bagley  
Hon. Ann Boyden  
Hon. Mary Noonan  
John Lund – by phone

**Members Excused**

Hon. Reed S. Parkin  
Hon. Mark DeCaria  
Hon. Derek Pullan

**Staff**

Nancy J. Sylvester  
Keisa L. Williams

**Guests**

**(1) Approval of minutes**

Judge Reed Parkin was unable to attend the meeting. Judge Ann Boyden presided and welcomed the members to the meeting. The committee then addressed the June 24 minutes.

Judge Boyden moved to approve the June 24 minutes. Judge Bagley seconded the motion and it passed unanimously.

**(2) CJA 3-104. Presiding Judges.**

**CJA 11-201. Senior Judges.**

Judge Boyden stated that Rules 3-104 and 11-201 were approved by the Policy and Planning Committee, were approved for public comment by the Judicial Council, and the public comment period has now expired and are before the Committee for final approval. Nancy Sylvester noted there were no comments received for either rule.

Judge Mary Noonan moved to recommend CJA 3-104 and CJA 11-201 as written to the Judicial Council. John Lund seconded the motion and it passed unanimously.

**(3) CJA 4-403. Electronic Signature and Signature Stamp Use.**

Keisa Williams reviewed the discussion the committee had about this rule at the June 24<sup>th</sup> meeting. Brent Johnson made an edit based on the committee's feedback and has resubmitted the rule for consideration. Mr. Johnson suggested when clerks are using a judge's e-signature they should always use their first and last name, but when using a judge's wet signature (stamp) a clerk can use full name or initials. Judge Boyden

wanted further confirmation as to how the clerks are signing for a judge electronically. Judge Marvin Bagley noted it was not a uniform system if there are full names required on one and initials on another.

Judge Noonan said she believes CARE allows the same signature each time once it has been established. Ms. Sylvester stated this has been a problem for several departments and Kim Allard and her department raised the issue with Brent. Judge Noonan and Judge Boyden would like clarification from Brent and the court clerks about the exact issue and need for this rule change, including how it looks in each system: justice courts, juvenile courts, district courts, and appellate courts (if applicable).

The committee agreed to table this issue until a future meeting where Brent Johnson and perhaps Kim Allard can attend to discuss this further.

#### **(4) CJA 9-301. Record of Enhancement Warning.**

Nancy Sylvester stated she spoke with Brent Johnson who believes Rule 9-301 should be repealed because the more important consideration is what is in Criminal Procedure Rule 11. Rule 9-301 contains much of the same language and also some unnecessary and onerous requirements. The committee discussed the fact that justice courts are not a court of record. Judge Bagley noted rule 11 conflicts with this rule; therefore he is in favor of repealing this rule.

Judge Boyden said she believes this should be addressed by Judge Parkin with the Justice Court Board. The committee agreed to table CJA 9-301 until the next meeting.

#### **(5) CJA 4-503. Pro-se e-filing.**

Regarding Rule 4-503, Ms. Sylvester noted that a pro-se litigant received special permission to file electronically and has now asked that permission be expanded to all pro se litigants. Ms. Sylvester said the system is not ready for this to happen on a regular basis. Ms. Sylvester said Ron Bowmaster (IT Director) had discussed this issue with her and had said that pro se e-filing would be part of the CORIS re-write, but that it could be mandated by rule as long as the Council did so with a 1 year to 18 months time frame. Ms. Sylvester noted that part of the CORIS rewrite would include a process to walk pro-se litigants through the judicial system and e-filing. Judge Noonan expressed concern that this will have a ripple-type effect with the other courts since CORIS is only used in district courts. Judge Boyden said there are several reasons at this time why pro-se litigants are not required to efile. The committee discussed concerns about pro-se litigants attempting to speed up or circumvent the implementation of the system. Judge Boyden opined that there is no need to create a rule now when the system is not set to accommodate this.

Judge Noonan asked how pro-se litigants are filing in juvenile and justice courts. Ms. Sylvester stated only attorneys are e-filing in the juvenile courts and the justice courts

are just barely starting efilng. Judge Boyden stated she thinks this request should start with a different level, not Policy & Planning because there needs to be more discussion with other committees on this issue. Ms. Sylvester will contact others to get their input.

The committee agreed to move this issue to a future meeting after contact is made with other committees and departments.

**(7) Other business**

Judge Boyden noted September 9 is the next meeting. Judge Boyden said any new members to this committee would start October 14. Judge Noonan moved to adjourn the meeting. Judge Bagley seconded the motion and it passed unanimously.

There was no other business and the meeting was adjourned at 1:30 pm.



# Tab 2



Nancy Sylvester &lt;nancyjs@utcourts.gov&gt;

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## Rule 3-111

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**Brent Johnson** <brentj@utcourts.gov>

Tue, Jul 19, 2016 at 10:56 AM

To: Nancy Sylvester &lt;nancyjs@utcourts.gov&gt;, Keisa Williams &lt;keisaw@utcourts.gov&gt;

Attached you will find proposed amendments to rule 3-111. I am attaching two potential versions. During a recent review of commissioner evaluations, a question was raised as to whether, when a commissioner serves two districts, the presiding judges should both prepare performance evaluations, or at least the presiding judge in the district the commissioner primarily serves should at least consult with the other presiding judge. (I'm guessing that perhaps they already do this?) My opinion is that both presiding judges should prepare evaluations, because I think the performance in each district is important. However, the rule does not specifically state that.

The alternative proposal is that the presiding judge in one district simply consult the judge in the other district. The drawback to that is the presiding judge in the other district may not have performed the specific duties required in the evaluation form, such as surveying judges and court personnel, and reviewing at least five of the commissioner's cases. In any event, I am tossing it out for your discussion.

Thank you. I think this might be the last rule proposal in my queue.

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### 2 attachments



**3-111 (7-18-16 version) (version 1).pdf**  
50K



**3-111 (7-18-16 version) (version 2).pdf**  
50K

### **Rule 3-111 Performance evaluation of senior judges and court commissioners.**

#### **Intent:**

To establish a performance evaluation, including the criteria upon which senior judges and court commissioners will be evaluated, the standards against which performance will be measured and the methods for fairly, accurately and reliably measuring performance.

To generate and to provide to senior judges and court commissioners information about their performance.

To establish the procedures by which the Judicial Council will evaluate and certify senior judges and court commissioners for reappointment.

#### **Applicability:**

This rule shall apply to presiding judges, the Board of Justice Court Judges and the Judicial Council, and to the active senior judges and court commissioners of the Court of Appeals, courts of record and courts not of record.

#### **Statement of the Rule:**

##### **(1) Performance evaluations.**

(1)(A) On forms provided by the administrative office, the presiding judge of the district a court commissioner primarily serves shall complete an annual evaluation of the court commissioner's performance. If a commissioner serves multiple districts, the presiding judge of each district shall complete an evaluation.

(1)(B) On forms provided by the administrative office, the presiding judge of the Court of Appeals shall complete an evaluation of the appellate senior judge's performance every eighteen months starting after the senior judge's initial term.

(1)(C) On forms provided by the administrative office, the presiding judge of the district an active senior judge primarily serves shall complete an evaluation of the senior judge's performance every eighteen months starting after the senior judge's initial term.

(1)(D) On forms provided by the administrative office, the chair of the Board of Justice Court Judges shall complete an evaluation of the active senior justice court judge's performance every eighteen months starting after the senior judge's initial term.

(1)(E) The presiding judge shall provide a copy of each commissioner evaluation to the Judicial Council.

(1)(F) If a senior judge receives an overall "Needs Improvement" rating on the performance evaluation, the evaluator shall provide a copy of the evaluation to the Judicial Council.

(2) Active senior judges and court commissioners shall be evaluated and certified upon the following criteria:

(2)(A) demonstration of understanding of the substantive law and any relevant rules of procedure and evidence;

(2)(B) attentiveness to factual and legal issues before the court;

(2)(C) adherence to precedent and ability to clearly explain departures from precedent;

(2)(D) grasp of the practical impact on the parties of the commissioner's or senior judge's rulings, including the effect of delay and increased litigation expense;

(2)(E) ability to write clear judicial opinions;

(2)(F) ability to clearly explain the legal basis for judicial opinions;

- (2)(G) demonstration of courtesy toward attorneys, court staff, and others in the commissioner's or senior judge's court;
- (2)(H) maintenance of decorum in the courtroom;
- (2)(i) demonstration of judicial demeanor and personal attributes that promote public trust and confidence in the judicial system;
- (2)(J) preparation for hearings or oral argument;
- (2)(K) avoidance of impropriety or the appearance of impropriety;
- (2)(L) display of fairness and impartiality toward all parties;
- (2)(M) ability to clearly communicate, including the ability to explain the basis for written rulings, court procedures, and decisions;
- (2)(N) management of workload;
- (2)(O) willingness to share proportionally the workload within the court or district, or regularly accepting assignments; and
- (2)(P) issuance of opinions and orders without unnecessary delay.
- (3) Senior judges shall also be evaluated on their ability and willingness to use the court's case management systems in all cases.
- (4) Standards of performance.
- (4)(A) Survey of attorneys.
- (4)(A)(i) The Council shall measure satisfactory performance by a sample survey of the attorneys appearing before the senior judge or court commissioner during the period for which the senior judge or court commissioner is being evaluated. The Council shall measure satisfactory performance based on the results of the final survey conducted during a court commissioner's term of office, subject to the discretion of a court commissioner serving an abbreviated initial term not to participate in a second survey under Section (2)(A)(vi) of this rule.
- (4)(A)(ii) Survey scoring. The survey shall be scored as follows.
- (4)(A)(ii)(a) Each question of the attorney survey will have six possible responses: Excellent, More Than Adequate, Adequate, Less Than Adequate, Inadequate, or No Personal Knowledge. A favorable response is Excellent, More Than Adequate or Adequate.
- (4)(A)(ii)(b) Each question shall be scored by dividing the total number of favorable responses by the total number of all responses, excluding the "No Personal Knowledge" responses. A satisfactory score for a question is achieved when the ratio of favorable responses is 70% or greater.
- (4)(A)(ii)(c) A court commissioner's performance is satisfactory if:
  - (4)(A)(ii)(c)(1) at least 75% of the questions have a satisfactory score; and
  - (4)(A)(ii)(c)(2) the favorable responses when divided by the total number of all responses, excluding "No Personal Knowledge" responses, is 70% or greater.
- (4)(A)(ii)(d) The Judicial Council shall determine whether the senior judge's survey scores are satisfactory.
- (4)(A)(iii) Survey respondents. The Administrative Office of the Courts shall identify as potential respondents all lawyers who have appeared before the court commissioner during the period for which the commissioner is being evaluated.
- (4)(A)(iv) Exclusion from survey respondents.
- (4)(A)(iv)(a) A lawyer who has been appointed as a judge or court commissioner shall not be a

respondent in the survey. A lawyer who is suspended or disbarred or who has resigned under discipline shall not be a respondent in the survey.

(4)(A)(iv)(b) With the approval of the Management Committee, a court commissioner may exclude an attorney from the list of respondents if the court commissioner believes the attorney will not respond objectively to the survey.

(4)(A)(v) Number of survey respondents. The Surveyor shall identify 180 respondents or all attorneys appearing before the court commissioner, whichever is less. All attorneys who have appeared before the senior judge shall be sent a survey questionnaire as soon as possible after the hearing.

(4)(A)(vi) Administration of the survey. Court commissioners shall be the subject of a survey approximately six months prior to the expiration of their term of office. Court commissioners shall be the subject of a survey during the second year of each term of office. Newly appointed court commissioners shall be the subject of a survey during the second year of their term of office and, at their option, approximately six months prior to the expiration of their term of office.

(4)(A)(vii) Survey report. The Surveyor shall provide to the subject of the survey, the subject's presiding judge, and the Judicial Council the number and percentage of respondents for each of the possible responses on each survey question and all comments, retyped and edited as necessary to redact the respondent's identity.

(4)(B) Survey of presiding judges and court staff. The Council shall measure performance of senior judges by a survey of all presiding judges and trial court executives of districts in which the senior judge has been assigned. The Administrative Office of the Courts shall distribute survey forms with instructions to return completed surveys to the Surveyor. The Surveyor shall provide to the subject of the survey, the subject's presiding judge, and the Judicial Council the number and percentage of respondents for each of the possible responses on each survey question and all comments, retyped and edited as necessary to redact the respondent's identity. The Judicial Council shall determine whether the senior judge's survey scores are satisfactory.

(4)(C) Case under advisement standard. A case is considered to be under advisement when the entire case or any issue in the case has been submitted to the senior judge or court commissioner for final determination. The Council shall measure satisfactory performance by the self-declaration of the senior judge or court commissioner or by reviewing the records of the court.

(4)(C)(i) A senior judge or court commissioner in a trial court demonstrates satisfactory performance by holding:

(4)(C)(i)(a) no more than three cases per calendar year under advisement more than 60 days after submission; and

(4)(C)(i)(b) no case under advisement more than 180 days after submission.

(4)(C)(ii) A senior judge in the court of appeals demonstrates satisfactory performance by:

(4)(C)(ii)(a) circulating no more than an average of three principal opinions per calendar year more than six months after submission with no more than half of the maximum exceptional cases in any one calendar year; and

(4)(C)(ii)(b) achieving a final average time to circulation of a principal opinion of no more than 120 days after submission.

(4)(D) Compliance with education standards. Satisfactory performance is established if the senior

judge or court commissioner annually complies with the judicial education standards of this Code, subject to the availability of in-state education programs. The Council shall measure satisfactory performance by the self-declaration of the senior judge or court commissioner or by reviewing the records of the state court administrator.

(4)(E) Substantial compliance with Code of Judicial Conduct. Satisfactory performance is established if the response of the senior judge or court commissioner demonstrates substantial compliance with the Code of Judicial Conduct, if the Council finds the responsive information to be complete and correct and if the Council's review of formal and informal sanctions lead the Council to conclude the court commissioner is in substantial compliance with the Code of Judicial Conduct. Under Rule 11-201 and Rule 11-203, any sanction of a senior judge disqualifies the senior judge from reappointment.

(4)(F) Physical and mental competence. Satisfactory performance is established if the response of the senior judge or court commissioner demonstrates physical and mental competence to serve in office and if the Council finds the responsive information to be complete and correct. The Council may request a statement by an examining physician.

(5)(A) At its meeting in August, the Council shall begin the process of determining whether the senior judges and court commissioners whose terms of office expire that year meet the standards of performance provided for in this rule. The Administrative Office of the Courts shall assemble all evaluation information, including:

(5)(A)(i) survey scores;

(5)(A)(ii) judicial education records;

(5)(A)(iii) self-declaration forms;

(5)(A)(iv) records of formal and informal sanctions;

(5)(A)(v) performance evaluations, if the commissioner or senior judge received an overall rating of Needs Improvement; and

(5)(A)(vi) any information requested by the Council.

(5)(B) Prior to the meeting the Administrative Office of the Courts shall deliver the records to the Council and to the senior judges and court commissioners being evaluated.

(5)(C) In a session closed in compliance with Rule 2-103, the Council shall consider the evaluation information and make a preliminary finding of whether a senior judge or court commissioner has met the performance standards.

(5)(D) If the Council finds the senior judge or court commissioner has met the performance standards, it is presumed the Council will certify the senior judge or court commissioner for reappointment. If the Council finds the senior judge or court commissioner did not meet the performance standards, it is presumed the Council will not certify the senior judge or court commissioner for reappointment. The Council may certify the senior judge or court commissioner or withhold decision until after meeting with the senior judge or court commissioner.

(5)(E) A presumption against certification may be overcome by a showing of good cause to the contrary. A presumption in favor of certification may be overcome by:

(5)(E)(i) reliable information showing non-compliance with a performance standard; or

(5)(E)(ii) formal or informal sanctions of sufficient gravity or number or both to demonstrate lack of substantial compliance with the Code of Judicial Conduct.

(5)(F) At the request of the Council the senior judge or court commissioner shall meet with the Council in September. At the request of the Council the presiding judge shall report to the Council any meetings held with the senior judge or court commissioner, the steps toward self-improvement identified as a result of those meetings, and the efforts to complete those steps. Not later than 5 days after the August meeting, the Administrative Office of the Courts shall deliver to the senior judge or court commissioner being evaluated notice of the Council's action and any records not already delivered to the senior judge or court commissioner. The notice shall contain an adequate description of the reasons the Council has withheld its decision and the date by which the senior judge or court commissioner is to deliver written materials. The Administrative Office of the Courts shall deliver copies of all materials to the Council and to the senior judge or court commissioner prior to the September meeting.

(5)(G) At its September meeting in a session closed in accordance with Rule 2-103, the Council shall provide to the senior judge or court commissioner adequate time to present evidence and arguments in favor of certification. Any member of the Council may present evidence and arguments of which the senior judge or court commissioner has had notice opposed to certification. The burden is on the person arguing against the presumed certification. The Council may determine the order of presentation.

(5)(H) At its September meeting in open session, the Council shall approve its final findings and certification regarding all senior judges and court commissioners whose terms of office expire that year.

(5)(I) The Judicial Council shall communicate its certification decision to the senior judge or court commissioner. The Judicial Council shall communicate its certification decision for senior judges to the Supreme Court and for court commissioners to the presiding judge of the district the commissioner serves.

### **Rule 3-111 Performance evaluation of senior judges and court commissioners.**

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To establish the procedures by which the Judicial Council will evaluate and certify senior judges and court commissioners for reappointment.

#### **Applicability:**

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(2)(C) adherence to precedent and ability to clearly explain departures from precedent;

(2)(D) grasp of the practical impact on the parties of the commissioner's or senior judge's rulings, including the effect of delay and increased litigation expense;

(2)(E) ability to write clear judicial opinions;

(2)(F) ability to clearly explain the legal basis for judicial opinions;



- (2)(G) demonstration of courtesy toward attorneys, court staff, and others in the commissioner's or senior judge's court;
- (2)(H) maintenance of decorum in the courtroom;
- (2)(i) demonstration of judicial demeanor and personal attributes that promote public trust and confidence in the judicial system;
- (2)(J) preparation for hearings or oral argument;
- (2)(K) avoidance of impropriety or the appearance of impropriety;
- (2)(L) display of fairness and impartiality toward all parties;
- (2)(M) ability to clearly communicate, including the ability to explain the basis for written rulings, court procedures, and decisions;
- (2)(N) management of workload;
- (2)(O) willingness to share proportionally the workload within the court or district, or regularly accepting assignments; and
- (2)(P) issuance of opinions and orders without unnecessary delay.
- (3) Senior judges shall also be evaluated on their ability and willingness to use the court's case management systems in all cases.
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- (4)(A)(ii)(b) Each question shall be scored by dividing the total number of favorable responses by the total number of all responses, excluding the "No Personal Knowledge" responses. A satisfactory score for a question is achieved when the ratio of favorable responses is 70% or greater.
- (4)(A)(ii)(c) A court commissioner's performance is satisfactory if:
  - (4)(A)(ii)(c)(1) at least 75% of the questions have a satisfactory score; and
  - (4)(A)(ii)(c)(2) the favorable responses when divided by the total number of all responses, excluding "No Personal Knowledge" responses, is 70% or greater.
- (4)(A)(ii)(d) The Judicial Council shall determine whether the senior judge's survey scores are satisfactory.
- (4)(A)(iii) Survey respondents. The Administrative Office of the Courts shall identify as potential respondents all lawyers who have appeared before the court commissioner during the period for which the commissioner is being evaluated.
- (4)(A)(iv) Exclusion from survey respondents.
- (4)(A)(iv)(a) A lawyer who has been appointed as a judge or court commissioner shall not be a

respondent in the survey. A lawyer who is suspended or disbarred or who has resigned under discipline shall not be a respondent in the survey.

(4)(A)(iv)(b) With the approval of the Management Committee, a court commissioner may exclude an attorney from the list of respondents if the court commissioner believes the attorney will not respond objectively to the survey.

(4)(A)(v) Number of survey respondents. The Surveyor shall identify 180 respondents or all attorneys appearing before the court commissioner, whichever is less. All attorneys who have appeared before the senior judge shall be sent a survey questionnaire as soon as possible after the hearing.

(4)(A)(vi) Administration of the survey. Court commissioners shall be the subject of a survey approximately six months prior to the expiration of their term of office. Court commissioners shall be the subject of a survey during the second year of each term of office. Newly appointed court commissioners shall be the subject of a survey during the second year of their term of office and, at their option, approximately six months prior to the expiration of their term of office.

(4)(A)(vii) Survey report. The Surveyor shall provide to the subject of the survey, the subject's presiding judge, and the Judicial Council the number and percentage of respondents for each of the possible responses on each survey question and all comments, retyped and edited as necessary to redact the respondent's identity.

(4)(B) Survey of presiding judges and court staff. The Council shall measure performance of senior judges by a survey of all presiding judges and trial court executives of districts in which the senior judge has been assigned. The Administrative Office of the Courts shall distribute survey forms with instructions to return completed surveys to the Surveyor. The Surveyor shall provide to the subject of the survey, the subject's presiding judge, and the Judicial Council the number and percentage of respondents for each of the possible responses on each survey question and all comments, retyped and edited as necessary to redact the respondent's identity. The Judicial Council shall determine whether the senior judge's survey scores are satisfactory.

(4)(C) Case under advisement standard. A case is considered to be under advisement when the entire case or any issue in the case has been submitted to the senior judge or court commissioner for final determination. The Council shall measure satisfactory performance by the self-declaration of the senior judge or court commissioner or by reviewing the records of the court.

(4)(C)(i) A senior judge or court commissioner in a trial court demonstrates satisfactory performance by holding:

(4)(C)(i)(a) no more than three cases per calendar year under advisement more than 60 days after submission; and

(4)(C)(i)(b) no case under advisement more than 180 days after submission.

(4)(C)(ii) A senior judge in the court of appeals demonstrates satisfactory performance by:

(4)(C)(ii)(a) circulating no more than an average of three principal opinions per calendar year more than six months after submission with no more than half of the maximum exceptional cases in any one calendar year; and

(4)(C)(ii)(b) achieving a final average time to circulation of a principal opinion of no more than 120 days after submission.

(4)(D) Compliance with education standards. Satisfactory performance is established if the senior

judge or court commissioner annually complies with the judicial education standards of this Code, subject to the availability of in-state education programs. The Council shall measure satisfactory performance by the self-declaration of the senior judge or court commissioner or by reviewing the records of the state court administrator.

(4)(E) Substantial compliance with Code of Judicial Conduct. Satisfactory performance is established if the response of the senior judge or court commissioner demonstrates substantial compliance with the Code of Judicial Conduct, if the Council finds the responsive information to be complete and correct and if the Council's review of formal and informal sanctions lead the Council to conclude the court commissioner is in substantial compliance with the Code of Judicial Conduct. Under Rule 11-201 and Rule 11-203, any sanction of a senior judge disqualifies the senior judge from reappointment.

(4)(F) Physical and mental competence. Satisfactory performance is established if the response of the senior judge or court commissioner demonstrates physical and mental competence to serve in office and if the Council finds the responsive information to be complete and correct. The Council may request a statement by an examining physician.

(5)(A) At its meeting in August, the Council shall begin the process of determining whether the senior judges and court commissioners whose terms of office expire that year meet the standards of performance provided for in this rule. The Administrative Office of the Courts shall assemble all evaluation information, including:

(5)(A)(i) survey scores;

(5)(A)(ii) judicial education records;

(5)(A)(iii) self-declaration forms;

(5)(A)(iv) records of formal and informal sanctions;

(5)(A)(v) performance evaluations, if the commissioner or senior judge received an overall rating of Needs Improvement; and

(5)(A)(vi) any information requested by the Council.

(5)(B) Prior to the meeting the Administrative Office of the Courts shall deliver the records to the Council and to the senior judges and court commissioners being evaluated.

(5)(C) In a session closed in compliance with Rule 2-103, the Council shall consider the evaluation information and make a preliminary finding of whether a senior judge or court commissioner has met the performance standards.

(5)(D) If the Council finds the senior judge or court commissioner has met the performance standards, it is presumed the Council will certify the senior judge or court commissioner for reappointment. If the Council finds the senior judge or court commissioner did not meet the performance standards, it is presumed the Council will not certify the senior judge or court commissioner for reappointment. The Council may certify the senior judge or court commissioner or withhold decision until after meeting with the senior judge or court commissioner.

(5)(E) A presumption against certification may be overcome by a showing of good cause to the contrary. A presumption in favor of certification may be overcome by:

(5)(E)(i) reliable information showing non-compliance with a performance standard; or

(5)(E)(ii) formal or informal sanctions of sufficient gravity or number or both to demonstrate lack of substantial compliance with the Code of Judicial Conduct.

(5)(F) At the request of the Council the senior judge or court commissioner shall meet with the Council in September. At the request of the Council the presiding judge shall report to the Council any meetings held with the senior judge or court commissioner, the steps toward self-improvement identified as a result of those meetings, and the efforts to complete those steps. Not later than 5 days after the August meeting, the Administrative Office of the Courts shall deliver to the senior judge or court commissioner being evaluated notice of the Council's action and any records not already delivered to the senior judge or court commissioner. The notice shall contain an adequate description of the reasons the Council has withheld its decision and the date by which the senior judge or court commissioner is to deliver written materials. The Administrative Office of the Courts shall deliver copies of all materials to the Council and to the senior judge or court commissioner prior to the September meeting.

(5)(G) At its September meeting in a session closed in accordance with Rule 2-103, the Council shall provide to the senior judge or court commissioner adequate time to present evidence and arguments in favor of certification. Any member of the Council may present evidence and arguments of which the senior judge or court commissioner has had notice opposed to certification. The burden is on the person arguing against the presumed certification. The Council may determine the order of presentation.

(5)(H) At its September meeting in open session, the Council shall approve its final findings and certification regarding all senior judges and court commissioners whose terms of office expire that year.

(5)(I) The Judicial Council shall communicate its certification decision to the senior judge or court commissioner. The Judicial Council shall communicate its certification decision for senior judges to the Supreme Court and for court commissioners to the presiding judge of the district the commissioner serves.

# Tab 3



Nancy Sylvester <nancyjs@utcourts.gov>

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## Rule 2-212

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**Brent Johnson** <brentj@utcourts.gov>

Thu, Jul 14, 2016 at 1:47 PM

To: Nancy Sylvester <nancyjs@utcourts.gov>, Keisa Williams <keisaw@utcourts.gov>

I am attaching rule 2-212 with proposed amendments. The basis for the proposal is that we are not currently following the rule, and there is no legitimate reason to change our practices. The rule requires our office to send rules to the Office of Legislative Research and General Counsel as well as the Chair of the Judicial Rules Review Committee. I don't think we have been doing this for years. Arguably we have been sending rules to the Office of Legislative Research and General Counsel because the attorneys in that office are members of the Bar and would receive our general email to the Bar, but we have not been sending them to the Judicial Rules Review Committee (and that committee might not even exist anymore).


It appears that one of the important portions of the rule is paragraph (2) which allows a legislator or a representative of legislative research to attend a meeting of the Council at which a rule of the Council is discussed. The rule gives them the right to comment at the meeting, instead of through other comment mechanisms. I considered proposing a repeal of the rule but because this is an important purpose of the rule, we should keep it. I am also proposing that we eliminate the references to the Boards of Judges and Standing Committees because all the rules are ultimately Council rules and it is the Administrative Office of the Courts that sends the rules to all attorneys.


Let me know if you have questions or concerns.

Thank you.

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### 2 attachments

 **2-212 (7-11-16 version).wpd**  
5K

 **2-212 (7-11-16 version).pdf**  
33K

## **Rule 2-212. Communication with the Office of Legislative Research and General Counsel.**

### **Intent:**

To provide the Legislature, through the Office of Legislative Research and General Counsel, with notice of Council rules and opportunity to comment upon them.

To provide the Legislature, ~~and~~ through the Office of Legislative Research and General Counsel with notice of Council action upon Council rules.

### **Applicability:**

This rule shall apply to the Council, the Boards of Judges, the standing and ad hoc committees of the Council, and the Administrative Office.

### **Statement of the Rule:**

(1) ~~The principal staff person assigned to the Council, the Boards of Judges, and the standing and ad hoc committees of the Council~~ Administrative Office of the Courts shall send to ~~the Director of the Office of Legislative Research and General Counsel and the chair of the Judicial Rules Review Committee~~ the a draft rule of the Council, ~~Board, or committee~~ at the same time the draft rule is ~~submitted to the Council~~ published for public comment.

(2) A legislator or representative of the Office of Legislative Research and General Counsel may attend any meeting of the Council at which a rule of the Council is under consideration, and may comment upon the rule.

(3) ~~The State Court Administrator~~ Administrative Office of the Courts shall notify ~~the chair of the Judicial Rules Review Committee and the Director of the Office of Legislative Research and General Counsel of the Council's final action on any rule~~ published for comment or adopted the Council adopts.

# Tab 4





Nancy Sylvester <nancyjs@utcourts.gov>

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## Rule 3-201

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**Brent Johnson** <brentj@utcourts.gov>

Thu, Jul 14, 2016 at 2:22 PM

To: Nancy Sylvester <nancyjs@utcourts.gov>, Keisa Williams <keisaw@utcourts.gov>

And finally (for today) is the big one. (Excuse any typos or other issues. In the interest of time I only edited this once.)

Attached you will find rule 3-201 with proposed changes. The changes appear to be fairly extensive, but much of it is simply an attempt to clarify existing practices. The changes result from recent issues that arose during the Second District Court Commissioner approval process and they result from a review I conducted when presenting to the presiding judges and trial court executives on commissioner evaluations. There is at least one set of changes that I feel strongly about.

The proposed changes that I feel most strongly about are the changes that deal with districts and the Judicial Council being able to "remove" a commissioner at the end of the commissioner's term of office. I don't think that these actions should be considered "removal." They should instead be decisions on whether to retain the commissioner. Using the word remove may create an expectation that a commissioner has a right to a next term. Just like judges, there is no right to a next term. Commissioners should be subject to retention, the same as judges.

I will provide a brief explanation of some of the proposals. The change to paragraph (3)(c) reflects confusion that arose about whether judges on the selection committee would come from each court site or if "court" meant something else. As you know, the word court can refer to the entity and it can mean a site. Typically when court is used in a rule or statute it means the entity and not the site. But there has been confusion. The distinction is important because the rule later states that the majority of judges in each court the commissioner serves must approve the commissioner. This would effectively give veto authority to one judge if a commissioner only serves one site such as is the case in Morgan County. I am proposing that at least in this first instance it refer to a court site. But perhaps it truly means the entity and we just need to educate the districts.

In the next change, I propose that a commissioner nominating manual be created, similar to the nominating manual used for justice court judges. The rule currently refers to the procedures of the judicial nominating commissions. This made sense when the judicial nominating commissions were housed in the judiciary, but because we no longer control the judicial nominating process or we should have our own internal procedures. Perhaps everything can be spelled out in a rule, rather than a manual, but I am at least proposing this for discussion. We can use the justice court manual as a starting point.

The next proposal relates to the issue that arises about the number of judges that serve on the committee when the commissioner serves multiple districts. I am proposing that the number of judges be limited because I don't think that every judge that serves on the single committee should serve on the joint committee, because that could get unwieldy. However, again, that is just thrown out for discussion. The next area specifically states that voting shall be by confidential ballot. This was a problem in the recent process. If the committee agrees to creating a nominating manual then that could be instead addressed in the manual. The next line also addresses a process for reconsidering a candidate and is intended to address recent problems. The change in (j) addresses the problem about whether the vote is from judges at each court site or the total judges in the district. The next change is on press releases and recognizes that using newspapers of general circulation is an outdated concept and there should be other means of notifying those who are interested.

The next section addresses public comments and recognizes that there is currently a gap. In another section the rule states that comments will go to a candidate, but there is nothing in the rule stating that comments should go to a sitting commissioner. Also, there is a question about whether the comments given to the commissioner should include the names. During the recent process, candidates were given the names of commenters and one of the candidates confronted an individual who provided a negative comment. The person complained to this office and suggested that if names are given to the candidates and commissioners fewer people will comment out

of fear of retaliation.

The proposed changes that begin in (5) deal with the previously mentioned clarification on removal or retention. They also attempt to clarify the circumstances involving discipline. The first changes address Judicial Council certification. As I looked at the rules, there wasn't anything that specifically equated certification with the commissioner automatically receiving a new term. I think making this clear is important. Under the process for judges, if JPEC does not certify a judge the judge can still be retained if the judge receives enough votes. It appears that the Judicial Council's process for certification means that the commissioner will not have a new term, but it isn't clear. Perhaps we should eliminate the concept of certification, which is a carryover from the days when the Judicial Council certified judges, and more directly state that the Judicial Council votes on whether to retain a commissioner.

The changes in the next section deal with performance evaluations and performance plans. There are other rules that discuss performance plans by presiding judges, but I believe it is also important to refer to performance plans in this rule because the performance plans and performance evaluations are tied together. The other changes in that area incorporate requirements from the forms that are distributed to presiding judges and trial court executives. The forms impose time and other requirements, but the forms do not seem to have the force of rule. The forms are not referenced in the rule and therefore I think it is important to put the requirements in the rule itself so it is clear that the Judicial Council is the entity that is imposing those requirements.

The changes in section (7) again address the differences between discipline and not being retained. At the present time some of the concepts appear to be confused and this is an attempt to clarify that there is one process for discipline and there is a different process for retention. Hopefully I have captured that distinction.

I would certainly be happy to attend a Policy & Planning meeting to further discuss my reasoning and the language, but hopefully I have at least provided a starting point.

Thank you.

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## 2 attachments



**3-201 (7-14-16 version).pdf**  
53K



**3-201 (7-14-16 version).wpd**  
21K

**Rule 3-201. Court commissioners.**

Intent:

To define the role of court commissioner.

To establish a term of office for court commissioners.

To establish uniform administrative policies governing the qualifications, appointment, supervision, discipline and removal of court commissioners.

To establish uniform administrative policies governing the salaries, benefits and privileges of the office of court commissioner.

Applicability:

This rule shall apply to all trial courts of record.

Statement of the Rule:

(1) Definition. Court commissioners are quasi-judicial officers established by the Utah Code.

(2) Qualifications.

(A) Court commissioners must be at least 25 years of age, United States citizens, Utah residents for three years preceding appointment and residents of Utah while serving as commissioners. A court commissioner shall reside in a judicial district the commissioner serves.

(B) Court commissioners must be admitted to practice law in Utah and exhibit good character. Court commissioners must possess ability and experience in the areas of law in which the court commissioner serves.

(C) Court commissioners shall serve full time and shall comply with Utah Code Section 78A-2-221.

(3) Appointment - Oath of office.

(A) Selection of court commissioners shall be based solely upon consideration of fitness for office.

(B) When a vacancy occurs or is about to occur in the office of a court commissioner, the Council shall determine whether to fill the vacancy. The Council may determine that the court commissioner will serve more than one judicial district.

(C) A committee for the purpose of nominating candidates for the position of court commissioner shall consist of one judge from each court site that the commissioner will serve, three lawyers, and two members of the public. Committee members shall be appointed by the presiding judge of the district court of each judicial district. The committee members shall serve three year terms, staggered so that not more than one term of a member of the bench, bar, or public expires during the same calendar year. The presiding judge shall designate a chair of the committee. All members of the committee shall reside in the judicial district. All members of the committee shall be voting members. A quorum of one-half the committee members is necessary for the committee to act. The committee shall act by the concurrence of a majority of the members voting. When voting upon the qualifications of a candidate, the committee shall follow the ~~voting procedures of the judicial nominating commissions~~ established in a commissioner nominating manual.

(D) If the commissioner will serve more than one judicial district, the presiding judges of the districts involved shall select representatives from each district's nominating committee to form a joint nominating committee with a size and composition equivalent to that of a district committee-, except that a maximum of two judges from each district shall serve on the joint

45 nominating committee. If the commissioner will be serving one district more than seventy  
46 percent of the time, only one judge from the other district shall serve on the committee.

47 (E) No member of the committee may vote upon the qualifications of any candidate who is the  
48 spouse of that committee member or is related to that committee member within the third degree  
49 of relationship. No member of the committee may vote upon the qualifications of a candidate  
50 who is associated with that committee member in the practice of law. The committee member  
51 shall declare to the committee any other potential conflict of interest between that member and  
52 any candidate as soon as the member becomes aware of the potential conflict of interest. The  
53 committee shall determine whether the potential conflict of interest will preclude the member  
54 from voting upon the qualifications of any candidate. The committee shall record all declarations  
55 of potential conflicts of interest and the decision of the committee upon the issue.

56 (F) The administrative office of the courts shall advertise for qualified applicants and shall  
57 remove from consideration those applicants who do not meet minimum qualifications of age,  
58 citizenship, residency, and admission to the practice of law. The administrative office of the  
59 courts shall develop uniform guidelines for the application process for court commissioners.

60 (G) The nominating committee shall review the applications of qualified applicants and may  
61 investigate the qualifications of applicants to its satisfaction. The committee shall interview  
62 selected applicants and select the three best qualified candidates. All voting shall be by  
63 confidential ballot. The committee shall receive public comment on those candidates as provided  
64 in paragraph (4). Any candidate may be reconsidered upon motion by a committee member and  
65 upon agreement by a majority of nominating committee members.

66 (H) When the public comment period has closed, the comments shall go to the nominating  
67 committee. If any comments would negatively affect the committee's decision on whether to  
68 recommend a candidate, the candidate shall be given notice [with the names redacted] and an  
69 opportunity to respond to the comments. If the committee decides not to recommend a candidate  
70 based on the comments, the committee shall select another candidate from the interviewed  
71 applicants and again receive public comment on the candidates as provided in paragraph (4).

72 (I) The chair of the nominating committee shall present the names, applications, and the results  
73 of background investigations of the nominees to the judges of the courts the court commissioner  
74 will serve. The committee may indicate its order of preference.

75 (J) The judges of the courts the court commissioner will serve shall select one of the nominees by  
76 a concurrence of a majority of judges voting. If the commissioner will serve more than one  
77 judicial district, the concurrence of each court independent of the others a majority of judges in  
78 each district is necessary for selection.

79 (K) ~~The presiding judge of the district court of the district~~ the court commissioner will primarily  
80 serve shall present the name of the selected candidate to the Council. The selection shall be final  
81 upon the concurrence of two-thirds of the members of the Council. The Council shall vote upon  
82 the selection within 45 days of the selection or the concurrence of the Council shall be deemed  
83 granted.

84 (L) If the Council does not concur in the selection, the judges of the district may select another of  
85 the nominees or a new nominating process will be commenced.

86 (M) The appointment shall be effective upon the court commissioner taking and subscribing to  
87 the oath of office required by the Utah Constitution and taking any other steps necessary to  
88 qualify for office. The court commissioner shall qualify for office within 45 days after the

concurrence by the Council.

(4) Public comment for appointment and retention.

(A) Final candidates for appointment and court commissioners who are up for retention shall be subject to public comment.

(B) For final candidates, the nominating committee shall be responsible for giving notice of the public comment period.

(C) For court commissioners, the district in which the commissioner serves shall be responsible for giving notice of the public comment period.

(D) The nominating committee or district in which the commissioner serves shall:

(i) email notice to each active member of the Utah State Bar including the names of the nominees or court commissioner with instructions on how to submit comments;

(ii) ~~publish~~ issue a press release and other public notices listing the names of the nominees or court commissioner with instructions on how to submit comments in a newspaper of general circulation; and

(iii) allow at least 10 days for public comment.

(E) Individuals who comment on the nominees or commissioners should be encouraged, but not required, to provide their names and contact information.

(F) The comments are classified as protected court records and shall not be made available to the public.

(G) When the public comment period closes on a commissioner, the comments shall be given to and reviewed by the presiding judge of each district the commissioner serves. If any comments would negatively affect the presiding judge's decision on whether to discipline or remove the commissioner from office, the commissioner shall be provided the comments [with the commenters' names redacted] and the commissioner shall be given an opportunity to respond to the comments.

(5) Term of office. The court commissioner shall be appointed until December 31 of the third year following concurrence by the Council. At the conclusion of the first term of office and each subsequent term, the court commissioner shall be retained for a term of four years unless the judges of the courts the commissioner serves ~~remove~~ vote not to retain the commissioner in accordance with paragraph (6)(C) or unless the Judicial Council does not certify the commissioner for retention under rule 3-111. The term of office of court commissioners holding office on April 1, 2011 shall end December 31 of the year in which their term would have ended under the former rule.

(6) Performance evaluation and public comments.

(A) The presiding judge of ~~the~~ each district the commissioner serves shall prepare an evaluation of the commissioner's performance on an annual basis, on forms provided by the administrative office. The presiding judge shall provide copies of the evaluation to the Judicial Council. The presiding judge shall also prepare an annual performance plan in accordance with rule 3-105(3)(M). ~~A copy~~ Copies of the performance plans and ~~any subsequent~~ evaluations shall be maintained in the ~~official~~ commissioner's personnel file in the administrative office. Court commissioners shall comply with the program for judicial performance evaluation, including ~~any recommendations made in the evaluation~~ expectations set forth in a performance plan.

(B) The presiding judge shall complete the annual performance evaluation by January 31 of each year. The presiding judge shall survey judges and court personnel on a quarterly basis seeking

133 feedback for the evaluation. During the evaluation period, the presiding judge shall review at  
134 least five of the commissioner's active cases. The review shall include courtroom observation or  
135 a review of recorded hearings.

136 (7) Removal, retention, and sanctions.

137 (A) During a commissioner's term, if the commissioner's performance is not satisfactory, the  
138 presiding judge, or presiding judges if the commissioner serves multiple districts, with the  
139 concurrence of a majority of the judges of that jurisdiction in each district the commissioner  
140 serves, may discipline sanction the commissioner in accordance with paragraph (7)(D) or remove  
141 the commissioner from office. If the commissioner disagrees with the presiding judge's decision,  
142 the commissioner may request a review of the decision by the Management Committee of the  
143 Council.

144 (B) During a commissioner's term, the court commissioner may be removed by the Council:

145 (i) as part of a reduction in force;

146 (ii) for failure to meet the evaluation and certification requirements; or

147 (iii) as the result of a formal complaint filed under rule 3-201.02 upon the concurrence of  
148 two-thirds of the Council.

149 (C) At the end of a commissioner's term, the Council shall review materials on the  
150 commissioner's performance during the commissioner's office and the Council shall vote on  
151 whether the commissioner should be retained for another term in accordance with rule 3-111.

152 ~~(C)(D)~~ At the end of a commissioner's term, the court commissioner may be removed without  
153 cause by the judges of the courts districts the commissioner serves at the conclusion of a term of  
154 office may vote not to retain the commissioner for another term of office. Removal under this  
155 paragraph The decision not to retain is without cause and shall be by the concurrence of a  
156 majority of all the judges of in each district the courts the commissioner serves. A decision not to  
157 remove retain a commissioner under this paragraph shall be communicated to the commissioner  
158 within a reasonable time after the decision is made, and not less than 30 60 days prior to  
159 termination the end of the commissioner's term.

160 ~~(D)(E)~~ The court commissioner may be sanctioned by the Council as the result of a formal  
161 complaint filed under rule 3-201.02. or by the presiding judge, or presiding judges of the if the  
162 commissioner serves multiple courts, with a concurrence of a majority of the judges in each  
163 district the commissioner serves the commissioner serves may sanction the commissioner if the  
164 commissioner's performance is not satisfactory. Sanctions may include but are not limited to  
165 private or public censure, restrictions in case assignments, mandatory remedial education,  
166 suspension for a period not to exceed 60 days, and reduction in salary.

167 (8) Salaries and benefits.

168 (A) The Council shall annually establish the salary of court commissioners. In determining the  
169 salary of the court commissioners, the Council shall consider the effect of any salary increase for  
170 judges authorized by the Legislature and other relevant factors. Except as provided in paragraph  
171 (6), the salary of a commissioner shall not be reduced during the commissioner's tenure.

172 (B) Court commissioners shall receive annual leave of 20 days per calendar year and the same  
173 sick leave benefits as judges of the courts of record. Annual leave not used at the end of the  
174 calendar year shall not accrue to the following year. A commissioner hired part way through the  
175 year shall receive annual leave on a prorated basis. Court commissioners shall receive the same  
176 retirement benefits as non-judicial officers employed in the judicial branch.

177 (9) Support services.  
178 (A) Court commissioners shall be provided with support personnel, equipment, and supplies  
179 necessary to carry out the duties of the office as determined by the presiding judge.  
180 (B) Court commissioners are responsible for requesting necessary support services from the  
181 presiding judge.