

Policy and Planning Committee

Executive Dining Room
Matheson Courthouse
450 S. State St.
Salt Lake City, Utah 84111

January 6, 2017

Members Present

Hon. Reed S. Parkin - Chair
Hon. Marvin Bagley - by phone
Hon. Ann Boyden
John Lund
Hon. Mary Noonan - by phone
Hon. Derek Pullan - by phone

Staff

Nancy J. Sylvester
Keisa L. Williams
Jeni Wood – recording secretary
Rick Schwermer

Members Excused

Guests

Mark Buchi (Holland and Hart)
Steve Young (Holland and Hart)
Commissioner Rebecca Rockwell (Tax Commission)
Michelle Alig Lombardi (Attorney General's Office)
John McCarrey (Attorney General's Office)
Kelly Wright (SL County District Attorney's Office)
Tim Bodily (SL County District Attorney's Office)
Brad Johnson (SL County District Attorney's Office)
Tom Peters (Peters Scofield)

(1) Approval of minutes.

Judge Reed Parkin welcomed the members and guests to the meeting. Each guest introduced themselves. Judge Parkin then addressed the December 2, 2016 minutes. There being no changes to the minutes, John Lund moved to approve the December 2, 2016 minutes. Judge Ann Boyden seconded the motion and it passed unanimously.

(2) CJA 6-103(6). District Court Tax Judges

Judge Parkin again welcomed the guests to the meeting and invited someone to introduce the issue. Steve Young briefly addressed the committee, explaining the relationship between property taxes and the counties. Mr. Young said there is a

frequent conflict between the proper balance of confidential information and open courts. They would like to see a judicial rule that would make the process more efficient and protect taxpayers' information.

Mark Buchi next discussed his role in dealing with confidentiality. He has a long history dealing with tax issues: since the beginning of his career when he was a law clerk at the Tax Commission. Mr. Buchi stated currently the state tax system is quite efficient with approximately 750 employees. Mr. Buchi said one of the key factors is the honor system with self-reporting. People self-report because they know their information is protected and will not be widely disseminated. But Mr. Buchi said business owners are concerned with people getting their business records. They are confidential at the tax commission, but the minute they come to the courts, everything is made public. Mr. Buchi expressed concern about the amount of money that has been spent on litigating which records should remain private or protected. He said they are hopeful in bringing this to the Policy & Planning Committee that they will not affect due process rights but instead provide more confidentiality to tax payers. Mr. Buchi said the tax payers have asked that he and Mr. Young seek a fix to this issue. Mr. Young added that this proposal was a joint effort with the Tax Commission and Salt Lake County.

The representatives from Salt Lake County said they are very concerned about this issue, noting that courts are open and there should not be blanket confidentiality in these cases, especially where property tax and equalization of property values are concerned. But Tim Bodily said he thinks the proposed rule balances the public's right to know with the due process rights of the tax payer. Mr. Bodily said the parties usually reach an agreement as to what should be considered confidential, but it can take a long time. This proposal builds in an agreement: although the records are protected throughout the case, if a member of the public requests access to a tax payer's records, the tax payer has 30 days to provide the records or request that they be made private, protected or safeguarded, or sealed.

Thomas Peters, who represents most of the counties outside of Salt Lake, then addressed the committee and thanked the members for allowing this discussion. Mr. Peters said he also believes the rule does strike the necessary balance needed to accommodate all parties, the public, and the courts. Judge Boyden asked if Mr. Peters felt that there were other issues outside of Salt Lake County that have not been addressed with this proposal. Mr. Peters stated this hasn't been discussed extensively with all 28 counties but in his experience and through the conversations he has had he believes the issues are the same. It was noted that one case alone could affect multiple counties and that this was taken into consideration with the proposal. Mr. Young said many of the guests present have been involved in cases involving multiple counties. The cases typically go through an extensive administration process before they go to the

courts. The guests would like to see this process through rule versus statute because the issue is one of judicial procedure.

Judge Derek Pullan then addressed the guests. Judge Pullan said he has four concerns: 1) that the proposal makes too broad a brush stroke: the cases would now be closed as to all information, not just commercial information; 2) litigation over what is commercial information would now be at the end, rather than at the beginning of the case, which doesn't seem to fall in line with the cost savings theory; 3) the rule is tied to non-appealable final orders, which means these cases could be closed for years; and 4) striking commercial information from a published opinion could render them unintelligible.

Mr. Young addressed the published opinions and said he doesn't believe much information would end up being redacted. Mr. Lund asked if there was an alternate option. Judge Pullan said once a decision to redact is made it's important that the facts are clear. Mr. Young stated that they have been dealing with redacting information since 1996 and it hasn't been much of an issue. Mr. Young noted that in the past the parties have gotten protective orders in their cases to protect their information. Judge Pullan stated he has seen cases where competitors are involved in a case and the parties agree to protective orders. He surmised that if the protective order system is working well then there should not need to be a rule. Mr. Buchi argued that the protective order process has become more cumbersome and costly over the years.

Mr. Lund discussed how the federal system automatically imposes protective orders in cases like these. Mr. Buchi confirmed that that was what they were trying to do here, too. Mr. Lund asked for clarification on how long the information would be protected. Mr. Buchi said most cases tend to resolve any need for protection issues at the end; much of the information becomes outdated and irrelevant by that point. Mr. Lund noted that the media would request access in high-profile cases. He wondered how the rule addressed that situation. Mr. Young explained that just like any other member of the public, they would submit a request and the parties would need to either release the records or ask the court to seal, make private, protect, or safeguard the records. This would all be done within 30 days. There was further discussion about concerns regarding protecting information at the beginning or at the end of a case.

Judge Pullan believes the general rule that the public has access should remain. Mr. Young said Utah Code § 59-1-404 lays out very clearly what is allowed to be disclosed to the public. Mr. Young said this is a significant concern but they think the rule balances the openness and uniformity concerns. Concerns were discussed about how the media would know what to request access to. Keisa Williams suggested that there could be an amendment to proposed paragraph (c)(i) making it more broad, such as "if a request for **access to the file or for** a specific record is made...." It was noted that the court docket is public so someone would know what specifically to request access to.

Even when a document is listed as private, the title is still available. Mr. Lund noted that proposed paragraph (c)(ii) discusses that at the end of the case, all records are released unless the court orders specific records to be classified as sealed, private, protected, or safeguarded. This could be amended to state “released upon request.” The committee briefly discussed the potential changes to (c)(ii).

Mr. Buchi said in his experience judges have ultimately almost always granted requests to protect information. He said it's not very cost effective for litigants to pay their attorneys to review every document to decide what should be protected and what shouldn't be. He further noted it can take months just to get a protective order in place. In the past judges simply granted the request in court, however, in the last several years or so this has changed considerably. It was noted that in some cases the entire files may end up completely protected. But there is concern from the State that tax payers are over-designating and wanting everything private. Noting the concern, Mr. Buchi said he believes businesses will not fight property tax cases if they don't believe there is protection. He thinks the courts will be used less. Mr. Lund said he understands the need for a default protection. Mr. Lund noted again that in the federal court there is a standard order of protection and wondered if there could be the same in the state courts. Mr. Young said he believes this proposed rule is tantamount to that order. The committee continued to express its concerns that a general protective order won't be specific enough and that courts have an obligation to remain open.

On a final note, the guests wanted to make sure the committee understood the proposal would still give judges control of what is protected, which is captured in proposed paragraph (10)(a) in the language “except as otherwise ordered by the court.” Judge Pullan expressed his appreciation for having experts in the area come to the meeting to discuss the proposal with them. Judge Parkin summarized the goals that were discussed and also expressed his appreciation for the guests. He then explained Policy & Planning’s processes to the guests. Mr. Young stated they would like approximately 14 days to modify their proposal based on the discussion and submit a revised version. Staff noted that they would not need them to come back for further discussion.

Judge Pullan suggested the committee take this issue back to their own districts’ tax judges. The committee agreed to put the issue on next month’s agenda for further discussion.

The guests were thanked for their time and excused.

(3) CJA 3-201 and 3-111. Court commissioners.

Ms. Sylvester suggested that the committee defer discussion on this issue until its March meeting and the committee agreed.

(4) CJA 9-301. Record of Conviction.

Ms. Sylvester gave a brief explanation of the recommendation to repeal the rule in its entirety. The committee had previously voted to repeal paragraphs (1) and (2) and were still considering paragraph (3). Ms. Sylvester stated she discussed this proposal with Brent Johnson and he noted that courts are not required to collect fingerprints; they are only required to send the defendant to get fingerprinted (see CJA Rule 4-609(5)). The rest of paragraph (3) regarding executing a written and signed judgment of conviction and forwarding the information on is already provided for statutorily (see Utah Code § 53-10-208.1).

Judge Boyden said she is concerned about the language in Rule 4-609(5) about instructing the defendant to go immediately to the jail for booking and release. In Salt Lake County currently, the jail's appointments are six weeks out. Judge Boyden was concerned with the word "immediate." Judge Pullan said if the defendant follows his instructions and is unable to get in immediately, that defendant has still complied with his order. Judge Boyden said Rule 4-609(5) may need a fix to address this limitation with the jails. But Rick Schwermer said what's most important is that the defendants get an OTN (Offense Tracking Number). Ms. Williams noted that Third District is getting its own fingerprinting machine, so this concern may go away in light of that news. The committee agreed to address rule 4-609 at a later date if it was needed.

Mr. Lund moved to repeal rule 9-301. Judge Bagley seconded the motion and it passed unanimously.

(6) Other Business.

CJA 4-202.02 and AIS

Ms. Sylvester noted that the concern the appellate courts had brought up with respect to 4-202.02 and the AIS system had gone away (see November 2016 minutes). The concern was about juvenile records being made public once the new public interface went live. The appellate courts had determined that the issue was best addressed with a business (programming) rule rather than a CJA rule.

Chairmanship

Judge Parkin thanked the committee for their support during his chairmanship but noted that his term is now up and the committee needed to vote for a new chair. Before a new chair was nominated, Judge Boyden expressed her gratitude for everyone's hard work and noted how difficult their roles can be at times. They are tasked with working toward policies for the judiciary as a whole while coming from specific areas of the courts that have their own needs. It can at times be difficult to work toward the former when the latter plays a big role in their day-to-day. Judge Noonan then nominated Judge Pullan to be the new chair. John Lund seconded the motion and it passed unanimously.

The next meeting is February 3 in the west conference room at 10:00 am. There being no other business, the meeting adjourned at 11:50 am.