

Policy and Planning Committee

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

February 3, 2017

Members Present

Hon. Derek Pullan, Chair
Hon. Ann Boyden
Hon. Mary Noonan

Members Excused

Hon. Marvin Bagley
John Lund
Hon. Reed S. Parkin

Staff

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

Guests

Kim Allard
Rick Schwermer

(1) Approval of minutes.

Judge Derek Pullan welcomed the members to the meeting. There being no quorum, Judge Pullan delayed action on the January minutes.

(2) CJA 4-202.09. Miscellaneous and CJA 6-103(6). District Court Tax Judges

Judge Pullan handed the time over to Nancy Sylvester to discuss the genesis of the proposal from the tax attorneys. Ms. Sylvester said there was a proposal last year to statutorily address the issue of tax records being public in district court proceedings, but Rick Schwermer encouraged the tax attorneys to pursue a fix by court rule instead. What follows is a timeline of the court's involvement based on email exchanges:

1. On September 29, 2016, Mark Buchi contacted Rick Schwermer about amending Rule 4-202.02(5) regarding records of tax cases appealed to the district court pursuant to section 59-1-601 and amending Rule 6-103(6) regarding taxpayers being able to redact tax case opinions.
2. On September 30, Mr. Schwermer contacted Keisa Williams who she said she would put the item on the November agenda since the October agenda was full and the meeting was a mere days away. A short time later, Ms. Sylvester contacted Rick and said she could squeeze the item on the October meeting agenda for purposes of preliminary discussions.
3. The Policy and Planning Committee discussed the preliminary proposal at its October 4 meeting, including commentary from several tax judges based on an email circulated by Debra Moore. The committee voted to invite the tax attorneys to attend the next meeting.

4. On October 7, Ray Wahl again circulated the proposal to those who had attended a Tax Judge meeting on October 6 and requested their feedback.
5. Mr. Schwermer contacted the tax attorneys on October 24 and asked if they could attend the November 4 meeting. They said they could not and inquired about the date of the next meeting. They also said they would contact the government attorneys about their proposal.
6. Ms. Sylvester contacted both the private and government attorneys on October 25 about attending Policy and Planning on December 2 or January 6. The tax attorneys agreed on December 2.
7. On November 23, the tax attorneys requested more time because they were in the middle of discussions on a joint proposal. Ms. Sylvester moved the item to January 6.
8. On December 28, the tax attorneys emailed Ms. Sylvester their proposal.
9. On January 5, Ms. Sylvester spoke with attorney Steve Young about the proposal and requested clarification on several points. She brought up some concerns that the Policy and Planning Committee might raise at the January 6 meeting. Mr. Young emailed those concerns to the tax attorney group so that they could be prepared to discuss them.
10. On January 6, the tax attorneys presented their proposal to and engaged in discussions with the Policy and Planning Committee for over an hour. The Policy and Planning Committee asked that the tax attorneys revisit their proposal based on the discussions and return it within two weeks to Ms. Sylvester.
11. Ms. Sylvester received the new proposal on January 19 and on January 20 requested clarification on several amendments. The tax attorneys provided some explanation.
12. On January 23, Judge Pullan met with Brent Johnson, Ms. Williams, and Ms. Sylvester to go over the new proposal in preparation for the February 3 Policy and Planning meeting.

Ms. Sylvester noted that the reason the Policy and Planning Committee was going over the timeline was because a suggestion had been made that the judiciary was not acting on the tax attorneys' proposal.

Judge Pullan next reviewed the proposal to rule 4-202.09. Judge Pullan proposed that the committee pick a record classification for these cases, rather than having the court "deny public access," which was concerning language in light of the open courts provision of the constitution. Nonetheless, he expressed concern about everything filed being protected when the case involved commercial information. Judge Pullan read the statutory definition of "commercial information," noting that the court records themselves may not even contain the commercial information. The committee discussed the pros and cons of protecting the records up front.

Judge Pullan then noted his concerns about the rule addressing a situation when a member of the public sought case information from either a party or the court. He thought the rule should only address information requested from the court. The other members agreed. Judge Pullan then discussed the 30 day requirement for producing requested records. Judge Ann Boyden said in other settings, the parties typically have 10 days to respond. Judge Pullan suggested changing the 30 days to 14 days. Judge Boyden said the reason for the 30 days may be because the cases are so complex, but she agreed that 14 days seemed appropriate.

Judge Pullan said he was originally concerned that those wanting access to the records would have to wait for a final non-appealable order to see them. But, he noted, the tax attorneys' proposal includes a process for the public's requesting the records prior to the final order. Judge Boyden said the rule proposal turns the presumption of public court records on its head. Typically one starts from the presumption of public with the ability to classify as other than that. But this rule would start from the presumption of protected when commercial information is present.

Judge Pullan said although he is concerned about the rule generally, he said he can see the argument about the chilling effect on appeals to district court since tax cases are all private at the tax commission level. Judge Noonan and Judge Boyden agreed. Judge Boyden noted that she thought subsection (d), which discussed that no specific record shall be classified as sealed, private, protected, or safeguarded unless the court ordered it did not fit well within the rule because the presumption was that the records were protected unless requested by the public. She recommended that the paragraph be removed since (c)(i) already addressed the classification of records when a public request for them was made. There was brief discussion on this section. The committee then discussed the differences between protected and safeguarded. Ms. Sylvester reviewed rule 4-202.03 with the committee, which discusses who has access to each type of classification.

Judge Pullan then discussed the issue the tax attorneys raised about how much money it can cost to litigate over which documents had to be protected. He said he was not persuaded by that argument but was somewhat persuaded that a taxpayer's appeal right from the tax commission was chilled by the records classification issue. Judge Boyden noted that in some sections of the proposal, a party would be asking to classify a record as sealed, private, protected, or safeguarded, but having "protected" in that list didn't make sense if the initial presumption in these cases was "protected." After some discussion the committee agreed to keep the phrase "protected" in those sections because the need to classify a document that way would arise when the presumption switched to public access at the end of the case or when the public requested a document or documents in the middle of a case.

The committee reviewed what case types are currently listed as protected. The committee then discussed who should have the burden in the classification of these cases: the plaintiff in being required to ask the court to designate their case as protected, or the court with a rule that states all of the tax cases are automatically protected.

Ms. Williams noted that bringing in Kim Allard to see discuss how the courts would handle this new private case type if the rule passes would be really helpful. Rick Schwermer invited Kim Allard into the meeting. Ms. Allard said she had already discussed the rule with her staff and they thought the change would be relatively simple since cases like divorces are automatically marked as private but their orders are public. Ms. Allard said Xchange would not show the documents but they would list the title and be identified as private. Judge Boyden asked Ms. Allard if she has ever used “safeguarded.” Ms. Allard said she had not. Ms. Allard said there are two types of private, one is divorce and the other is for all other case types. In divorce cases, the orders are public while everything else is private. Judge Pullan noted that since IT treats private and protected the same, perhaps the term didn’t matter. But Ms. Allard noted one difference: protected cases are available to governmental agencies. So the difference between protected and private is who is allowed access. The committee noted that because these tax cases originated from the Tax Commission, the “protected” designation seemed to make sense.

The committee members then discussed their discomfort with the tax attorneys’ proposal to amend Rule 6-103(6) regarding tax opinions and struck it from the proposal.

Judge Boyden moved to recommend rule 4-202.09 as amended to the Judicial Council for public comment. Judge Boyden seconded the motion. Judge Pullan asked Ms. Sylvester to distribute the rule by email for final approval by the other members.

(5) Other Business.

The next meeting is March 3 in the executive dining room at 10:00 am. There being no other business and the meeting adjourned at 11:40 am.