

Agenda
Policy and Planning Committee
March 3, 2017
10:00 a.m. – 12:00 p.m.
Scott M. Matheson Courthouse
450 South State Street
Executive Dining Room W18A

10:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Derek Pullan
10:05	CJA 3-201. Court commissioners. And CJA 3-111. Performance evaluations of senior judges and court commissioners.	Discussion/ Action	Tab 2	Nancy Sylvester
11:45	Other Business			Judge Derek Pullan

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.

April 7, 2017

May 5, 2017

June 2, 2017

July 7, 2017

August 4, 2017

September 1, 2017

October 6, 2017

November 3, 2017

December 1, 2017

**Policy and Planning Committee Meeting
Executive Summary - Focus Sheet
March 3, 2017**

Issue	Scope	Status	Assignments	Notes
Approval of Minutes		Action/Vote	Read February minutes for accuracy and approval.	
CJA 3-201. Court commissioners. And CJA 3-111. Performance evaluations of senior judges and court commissioners.	Continue reviewing amendments to Rule 3-201 regarding court commissioners and also review possible amendments to Rule 3-111.	Discussion/ Action	Review the proposals in the memo and be prepared to discuss them.	Note statute, Utah Code § 78A-5-107 , that discusses performance plans.

Next Meeting: Friday, April 7, 2017 at 12:00 p.m. in the Judicial Council Room at Matheson.

Tab 1

Policy and Planning Committee

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

February 3, 2017

Draft

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.

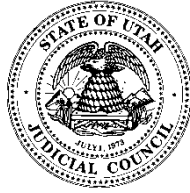
The committee members then discussed their discomfort with the tax attorneys’ proposal to amend Rule 6-103(6) regarding tax opinions and struck it from the proposal.

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.

Tab 2



Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Policy and Planning Committee
From: Nancy Sylvester *Nancy D. Sylvester*
Date: February 24, 2017
Re: CJA 3-201 and 3-111

At the [November meeting](#), the committee left off on Rule 3-201(7)(A)(iii).

- You asked me to bring in the language from Rule 3-104 regarding resolving disputes before the Management Committee when a court level or district disagrees with a decision to remove a commissioner. The language there is a modified version of 3-104(3)(C)(iv). Because paragraph (7) now deals with sanctions and removal during a term of office and does not seem like an appropriate place to also deal with retention, I created a new paragraph (8) to deal with retention.
- In new paragraph (8), Brent proposes changing the word “remove” when referring to the Council & district courts’ decision not to retain a commissioner at the end of their term and attempts to clarify discipline and certification.
- His proposal clarifies that there are separate processes for discipline and retention.
- Returning to paragraph (6), Brent added a time frame for presiding judges to do performance evaluations and also added in the language from the performance evaluations currently in use starting at line 112. I propose moving much of this over to Rule 3-111 since it is redundant, but keeping some flags about the requirements of 3-111.
 - Since 3-111 was sent to the Council on a different matter at the Council’s November meeting (see lines 18-19), I have held it back from publishing for comment so that we can examine these other issues and then send it out as a whole package.
- I added a new paragraph (4)(G) in rule 3-111 to address performance plans. They have not previously been addressed by rule, but have been available on the intranet along with the performance evaluations.

The mission of the Utah judiciary is to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law.

Performance evaluations are addressed in Utah Code § 78A-5-107, but appear to leave some discretion to the judiciary as to when they will be used.

- The committee should consider adding language to Rule 3-201(7)(A)(ii) and (7)(B)(ii)(a) to address how performance plans come into play with removal decisions.
- Should performance plans generated as a result of “needs improvement” be provided to the Judicial Council? See Rule 3-111(1)(A)(iii), (4)(G), and (5)(A).

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 the presiding judge or designee from each court level and judicial district 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 the 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 nominating committee.

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

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

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

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

(I) The chair of the nominating committee shall present the names, applications, and the results of background investigations of the nominees to the judges of the courts the court commissioner will serve.

The committee may indicate its order of preference.

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

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

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

(M) The appointment shall be effective upon the court commissioner taking and subscribing to the oath of office required by the Utah Constitution and taking any other steps necessary to 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 for a commissioner closes, 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 all 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~~ performance plan.

(A) The presiding judge of ~~the each district or court level the commissioner serves~~ shall prepare an evaluation of the commissioner's performance and a performance plan in accordance with Rule 3-111. ~~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 feedback for the evaluation. During the evaluation period, the presiding judge shall review at least five of the commissioner's active cases. The review shall include courtroom observation or a review of recorded hearings.~~

(7) ~~Sanctions or removal during a commissioner's term.~~ Removal and sanctions.

(A) Sanctions.

(A)(i) The court commissioner may be sanctioned by the Council as the result of a formal complaint filed under rule 3-201.02.

(A)(ii) If the commissioner's performance is not satisfactory, the commissioner may be sanctioned in accordance with paragraph (7)(A)(iii) by the presiding judge, or presiding judges if the commissioner serves multiple districts or court levels, with the concurrence of a majority of the judges of that jurisdiction, in either district or court level the commissioner serves, may discipline the commissioner.

(A)(iii) Sanctions may include but are not limited to private or public censure, restrictions in case assignments, mandatory remedial education, suspension for a period not to exceed 60 days, and reduction in salary.

(B) Removal.

Comment [NS1]: The struck out words were Brent's proposal. I moved most of this section over to 3-111 since it's redundant, but kept some flags about Rule 3-111's requirements in it. Brent added this because it was what's in the performance evaluations we have on the Intranet.

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

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

(B)(i)(b) for failure to meet the evaluation ~~and certification~~ requirements; or

(B)(i)(c) as the result of a formal complaint filed under rule 3-201.02 upon the concurrence of two-thirds of the Council.

(B)(ii)(a) ~~or~~ If the commissioner's performance is not satisfactory, the commissioner may be removed by the presiding judge, or presiding judges if the commissioner serves multiple districts or court levels, only with the concurrence of a majority of the judges in each district or court level the commissioner serves. ~~remove the commissioner from office.~~

(B)(ii)(b) If the commissioner serves multiple districts or court levels and one district or court level contests a commissioner removal decision made by the other district or court level, the Management Committee will review the decision for final determination.

(C) If the commissioner disagrees with the ~~presiding judge's~~ decision to sanction or remove, the commissioner may request a review of the decision by the Management Committee of the Council.

-

~~(B) The court commissioner may be removed by the Council:~~

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

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

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

(8) Retention

(A) The Council shall review materials on the commissioner's performance ~~during~~ prior to the end of the commissioner's term of office and the Council shall vote on whether the commissioner should be retained for another term in accordance with rule 3-111.

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

~~(D)(E) The court commissioner may be sanctioned by the Council as the result of a formal complaint filed under rule 3-201.02, or by (The presiding judge, or presiding judges of the if the commissioner serves~~

~~multiple courts, with a concurrence of a majority of the judges in each district the commissioner serves the commissioner serves may sanction the commissioner if the commissioner's performance is not satisfactory. Sanctions may include but are not limited to private or public censure, restrictions in case assignments, mandatory remedial education, suspension for a period not to exceed 60 days, and reduction in salary.~~

(98) Salaries and benefits.

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

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

(109) Support services.

(A) Court commissioners shall be provided with support personnel, equipment, and supplies necessary to carry out the duties of the office as determined by the presiding judge.

(B) Court commissioners are responsible for requesting necessary support services from the presiding judge.

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)(i) Court commissioners. On forms provided by the administrative office, the presiding judge of the-a district a court commissioner primarily serves shall complete an annual evaluation of the court commissioner's performance by January 31 of each year.¹

(1)(A)(ii) If a commissioner serves multiple districts, the presiding judge of each district shall complete an evaluation.² The presiding judge shall survey judges and court personnel on a quarterly basis seeking feedback for the evaluation. During the evaluation period, the presiding judge shall review at least five of the commissioner's active cases. The review shall include courtroom observation or a review of recorded hearings.³

(1)(A)(iii) The presiding judge shall provide a copy of each commissioner evaluation to the Judicial Council. Copies of the performance plans under paragraph (4) and all evaluations shall also be maintained in the commissioner's personnel file in the administrative office.

(1)(B) Appellate senior judges. 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 This is from Brent's.

² The committee already adopted these changes and they went to the Council consent calendar in November for submitting for comment. Because I am proposing bringing over some of Brent's edits from 3-201 to here, this rule would go back to the Council next month for purposes of requesting again that this be sent out for comment.

³ This was copied over from Brent's edits to 3-201.

(1)(C) District and juvenile court senior judges. 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) Justice court senior judges. 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 ~~(42)~~(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.

91 (4)(A)(iv)(a) A lawyer who has been appointed as a judge or court commissioner shall not be a
92 respondent in the survey. A lawyer who is suspended or disbarred or who has resigned under discipline
93 shall not be a respondent in the survey.

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

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

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

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

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

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

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

123 (4)(C)(i)(a) no more than three cases per calendar year under advisement more than 60 days after
124 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.

(4)(G) Performance plans.

(4)(G)(i) Court commissioners.

(4)(G)(i)(a) The presiding judge of the district a court commissioner serves shall prepare a performance plan for a new court commissioner within 30 days of the court commissioner's appointment. If a court commissioner serves multiple districts, the presiding judge of each district shall prepare a performance plan. The performance plan shall communicate the expectations set forth in paragraph (2) of this rule.

(4)(G)(i)(b) If a court commissioner receives an overall "Needs Improvement" rating on the court commissioner's annual performance evaluation, the presiding judge shall prepare a new performance plan. The new performance plan shall set forth specific ways in which the court commissioner can improve in deficient areas.

158 (4)(G)(ii) Active Senior judges. The person responsible for preparing a senior judge's performance
159 evaluation under subsection (1) shall also prepare a performance plan if the senior judge receives an
160 overall "Needs Improvement" rating on the senior judge's performance evaluation. The performance plan
161 shall set forth specific ways in which the senior judge can improve in deficient areas.

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

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

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

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

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

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

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

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

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

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

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

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

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

189 (5)(F) At the request of the Council the senior judge or court commissioner shall meet with the
190 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.

78A-5-107 Court commissioners -- Qualifications -- Appointment -- Functions governed by rule.

- (1)
 - (a) Court commissioners are quasi-judicial officers of courts of record and have limited judicial authority as provided by this section and rules of the Judicial Council.
 - (b) Court commissioners serve full-time and are subject to the restrictions of Section 78A-2-221, which prohibits the practice of law.
- (2)
 - (a) The Judicial Council shall appoint court commissioners with the concurrence of a majority of the judges of trial courts in the district the court commissioner primarily serves.
 - (b) The Judicial Council may assign court commissioners appointed under this section to serve in one or more judicial districts.
- (3) A person appointed as a court commissioner shall have the following qualifications:
 - (a) be 25 years of age or older;
 - (b) be a citizen of the United States;
 - (c) be a resident of this state while serving as court commissioner;
 - (d) be admitted to the practice of law in this state; and
 - (e) possess ability and experience in the areas of law in which the commissioner will be serving.
- (4) A court commissioner shall take and subscribe to the oath of office as required by Article IV, Sec. 10, Utah Constitution, prior to assuming the duties of the office.
- (5) Court commissioners shall:
 - (a) comply with applicable constitutional and statutory provisions, court rules and procedures, and rules of the Judicial Council;
 - (b) comply with the Code of Judicial Conduct to the same extent as full-time judges; and
 - (c) successfully complete orientation and education programs as required by the Judicial Council.
- (6) The presiding judge of the district the commissioner primarily serves:
 - (a) shall develop a performance plan for the court commissioner and annually conduct an evaluation of the commissioner's performance, and shall provide the plan and evaluations to the Judicial Council upon request; and
 - (b) is responsible for the day-to-day supervision of the court commissioner.
- (7) The Judicial Council shall:
 - (a) establish by rule procedures for the investigation and review of complaints and the discipline and removal of court commissioners; and
 - (b) evaluate court commissioners under the requirements of Subsection 78A-2-104(5).
- (8) The Judicial Council shall make uniform statewide rules defining the duties and authority of court commissioners for each level of court they serve. The rules shall not exceed constitutional limitations upon the delegation of judicial authority. The rules shall at a minimum establish:
 - (a) types of cases and matters commissioners may hear;
 - (b) types of orders commissioners may recommend;
 - (c) types of relief commissioners may recommend; and
 - (d) procedure for timely judicial review of recommendations and orders made by court commissioners.

Renumbered and Amended by Chapter 3, 2008 General Session