

## **Policy and Planning Committee**

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

May 5, 2017

### **Members Present**

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

### **Members Excused**

### **Staff**

Nancy J. Sylvester  
Keisa L. Williams

### **Guests**

Rick Schwermer  
Jennifer Valencia  
Jeff Hunt  
David Reymann

### **(1) Approval of minutes.**

Judge Derek Pullan welcomed the members to the meeting and asked if anyone had edits to the March 3, 2017 minutes. Judge Pullan addressed one change on page two. There being no further changes to the minutes, Judge Reed Parkin moved to approve the March 3, 2017 minutes. Judge Ann Boyden seconded the motion and it passed unanimously.

Judge Pullan welcomed the guests to the meeting. The guests introduced themselves.

### **(2) CJA 4-202.02 Criminal dismissals and record access.**

Rule 4-202.02 was circulated for comment, the proposed amendments of which would have made dismissals in criminal cases private except in limited circumstances. Jennifer Valencia, appearing on behalf of the Utah Commission on Criminal and Juvenile Justice (CCJJ), introduced the issue and discussed the interplay between criminal case dismissals and public access to records. She said that landlords and employers are using all criminal history, not just convictions, to deny both housing and employment. It's creating real barriers, she said, to reintegration for an accused person. She noted that this issue came up during discussions at the legislature this year regarding Senate Bill 12, which amended areas of the Expungement Act. She said recent policy decisions have been made to restrict the ability of the Sentencing Commission to use charged-

only cases in its determinations. Ms. Valencia then talked about how they are looking at this from a security risk perspective. Ms. Valencia said the courts records are fairly easily accessible, whereas the BCI records are more secure. The court records are the ones landlords and employers are pulling from to deny housing and employment, which is why CCJJ approached the judiciary about amending its rules. She said the Good Landlord program in Weber County is an example where this has been encouraged in some ways.

Jeff Hunt, appearing on behalf of the Utah Media Coalition, next discussed the constitutional policy implications of the rule and the remedies that already exist to address these issues. Mr. Hunt said the public interest in knowing why the charge was dismissed is just as important as why the charge was initiated. Mr. Hunt said the Salt Lake Tribune reports on why cases are being dismissed. Mr. Hunt noted the media and the public do not have access to records when a case is dismissed like they do when the case is initiated. Mr. Hunt said the public assumes the worst due to a natural fear of not being able to accept something they can't see. Mr. Hunt said reporting information to the public is important and reporters must have access to do their jobs. Mr. Hunt noted the records are presumed to be public. Mr. Hunt said transparency and accountability is important since the courts are all public officials discharging public duties. The public has a right to hold public officials accountable and that can only be accomplished by having records accessible. Mr. Hunt said a rule making an entire category of cases private does not comport with judges' critical role to make individual rulings in individual cases. Judge Pullan asked him to clarify what he meant since the judiciary has made more than a few categories of cases private. Mr. Hunt clarified that criminal cases are different in that they demand a higher level of public scrutiny than other case types. And, he said, the burden should not be put on the person seeking access to request it in what should be public records. He said this flips that presumption on its head. Mr. Hunt stated if people are being unlawfully discriminated against as a result of access to court records then the laws should be enforced. He said the bill Ms. Valencia worked on this session is a workable statute. Mr. Hunt then noted that rule 4-202.03 also provides an avenue for parties to request reclassification of records. Mr. Hunt said this is an acceptable process because it is done on a case by case basis.

Rick Schwermer asked Ms. Valencia to share her thoughts on the expungement process. Ms. Valencia said the right to a speedy and public trial is a citizen's right to be proven guilty in a court of law. After the process is complete and the expungement process begins, it is often too late to repair a person's reputation. Mr. Hunt said he understands the process cannot completely repair a person's reputation, but he also believes the presumption of openness is critical.

Judge Mary Noonan said that there are pleadings in a case that are protected but they still show up in the docket. She asked if the media would prefer to have the docket state which documents are protected, which would be a signal to request it. Mr. Hunt

said it would depend on how detailed the docket would be; certainly the docket would not be as complete as the document itself. Mr. Schwermer asked what the guests thought about limiting it to only cases dismissed with prejudice. Mr. Hunt said that it would not be acceptable because the same policy concerns would be there. David Reymann noted that keeping cases more public would hold prosecutors and other officials accountable.

Ms. Valencia then focused on how the information is often used. There was concern that people don't have the financial ability to seek remedies. Ms. Valencia said the ACLU has initiated plenty of cases in which individuals accused of crimes have been denied housing.

Jennifer Valencia, Jeff Hunt, and David Reymann were thanked for their time and excused.

The committee discussed the proposed rule changes and agreed that transparency holds the judiciary accountable, as well as attorneys, prosecutors, and law enforcement officers. It discussed *State v. Archuleta*, in which the Utah Supreme Court held that the public has a "qualified, or presumptive, right of access to public records under the First Amendment." 857 P.2d 234, 237 (Utah 1993). But that right of access "exists only if (1) there has been a tradition of accessibility to the information desired, and (2) public access would play a significant positive role in the functioning of the process in question." *Id.* The committee also discussed the other tools already available to the defendants, such as the Expungement Act and Rule 4-202.04 (request to classify a record associated with a case).

Mr. Schwermer stated the better route was to probably leave the rule as is since the judiciary's records classifications rules already provide an individually tailored avenue for making records private. The committee agreed.

Judge Marvin Bagley moved to recommend no further action on the rule proposal due to the existing remedies currently available, but with an explanation to the Council as to the reasoning behind the committee's decision. Judge Mary Noonan seconded the motion. One member abstained due to lack of knowledge. Judge Pullan and Ms. Sylvester will draft and present a memorandum to the Council.

### **(3) CJA 2-212. Communication with the Office of Legislative Research and General Counsel.**

The committee then discussed the amendments to Rule 2-212, which would have limited and changed the timing of the court's draft rule notices to the Office of Legislative Research and General Counsel. Judge Pullan noted that over time, the practice of communication between the courts and the Judicial Rule Review Committee had changed from what was delineated in Rule 2-212. Therefore, this rule change was

proposed. But the legislature commented that it did not think that the rule should change, but instead that the practices in the original rule language should be restored. The committee discussed how the Office of Legislative Research and the General Counsel is comprised and discussed at what stages draft rules should be made public. The committee expressed concern about early drafts being too public and too subject to outside scrutiny.

Ms. Sylvester noted that the Criminal and Civil Procedure Committees make their materials and early drafts public on the courts website, but the Juvenile Procedures Committee does not, nor does the Rules of Evidence Committee (the Appellate Rules and Rules of Professional Conduct Committee meeting materials are also public).

The committee put this rule on next month's agenda to track it. In the meantime, Mr. Schwermer and Ms. Sylvester will discuss this with the Supreme Court. The Court's next conference is May 16.

Judge Bagley moved to refer the rule back to staff to explore options for protecting the rule making process of the judiciary. Judge Noonan seconded the motion and it passed unanimously.

#### **(4) CJA 1-205. Standing Committee on Court Forms.**

##### **CJA 3-117. Forms committee charge.**

Judge Pullan next discussed the two comments received on the Forms Committee rules. Rule 1-205 created a new Judicial Council Standing Committee on Forms and provided committee composition. The rule was expedited under Rule 2-205. Rule 3-117 is new and established the charge for the new Committee on Forms. It was also expedited under Rule 2-205.

Judge Pullan agreed with the comment that the court needs to review and delete forms that are not in use. Keisa Williams said her forms subcommittee just had its first meeting and discussed removing forms that are not being used. Judge Boyden said she would like to see the forms presented to the Council and not just on the Council's consent calendar. The committee then discussed adding the task of specifically declaring some forms obsolete and removing them. This will involve the Forms Committee comparing the forms to current statutes and rules. The committee also discussed adding a provision to address those forms that should be translated into different languages.

Regarding the committee composition rule, CJA 1-205, it was noted that the committee may be too large. Ms. Williams noted that the subcommittees, though, are fairly small, and that is where much of the work will be done. The committee discussed whether having both the Self-Help Center and the Law Library on the committee made sense. Mr. Schwermer noted that both bring different things to the table, and they both have

extensive contact with pro se litigants. Ms. Williams noted that Brent Johnson and both the Self Help Center and the Law Library had members on the more informal forms committee in existence before the rule, so there were at least historical reasons for it.

John Lund moved to recommend the rules to the Council with the two edits to the committee's charge in Rule 3-117. Judge Reed Parkin seconded the motion and it passed unanimously.

**(5) CJA 4-202.09. Records in tax cases.**

The committee reviewed the proposal to amend Rule 4-202.09. The amendments provide that records in property and use tax cases involving commercial information as that term is defined in Utah Code § 59-1-404 are protected. If a request is made to access a record or records, the records will be released within 14 days, except for specific records ordered by the court as sealed, private, protected, or safeguarded. 30 days after the court issues a non-appealable, final order, all records will be public, except as otherwise classified.

Members noted that because stakeholders on both sides jointly presented to the committee, the proposal received no further comments. The committee agreed to recommend the amendments to the Judicial Council.

Judge Noonan moved to recommend Rule 4-202.09 as amended. Judge Boyden seconded the motion and it passed unanimously.

**(6) CJA 4-103. Orders of dismissal.**

**CJA 9-301. Record of arraignment and conviction.**

The committee discussed the amendments to Rules 4-103 and 9-301. Pursuant to *Cannon v. Holmes*, 2016 UT 42 and Civil Rule 41, Rule 4-103 will require that all orders of dismissal entered under the rule must contain the language "without prejudice."

Rule 9-301 will be repealed since the Court of Appeals has determined that failure to follow the rule does not affect the validity of a plea or conviction with respect to enhancements. *State v. Gonzales*, 2005 UT App 538, 127 P.3d 1252. The rule is also redundant to other rules and statutes. See, e.g., URCRP Rule 11, CJA Rule 4-609, UTAH CODE § 53-10-208.1.

Neither rule received comments.

John Lund moved to recommend the rules as amended to the Council. Judge Noonan seconded the motion and it passed unanimously.

**(7) Other Business.**

The next meeting is scheduled for June 2 at 12 p.m. in the Council Room. Ms. Williams noted that committee staffing assignments have changed and she will now be the primary staff person for the committee. Judge Pullan thanked Ms. Sylvester for her work. There being no other business, the meeting adjourned at 2:00 pm.