

Agenda

Policy and Planning Committee

June 2, 2017
 12:00 p.m. – 2:00 p.m.
 Scott M. Matheson Courthouse
 450 South State Street
 Judicial Council Room

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Derek Pullan
12:05	Update on Rule 2-212. Communication with the Office of Legislative Research and General Counsel.	Discussion	Handout	Nancy Sylvester
12:15	CJA 1-201. Judicial Council Membership – Election.	Discussion/ Action	Tab 2	Keisa Williams
12:40	CJA 3-201. Court commissioners. And CJA 3-111. Performance evaluations of senior judges and court commissioners.	Discussion/ Action	Tab 3	Nancy Sylvester
1:45	Other business and rescheduling July meeting			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.

June 2, 2017
 July 7, 2017
 August 4, 2017
 September 1, 2017
 October 6, 2017
 November 3, 2017
 December 1, 2017

Tab 1

Policy and Planning Committee

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

May 5, 2017

Draft

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.

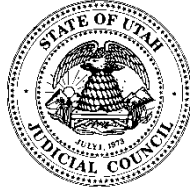
Neither rule received comments.

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.

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: Keisa L. Williams *Keisa L. Williams*
Date: May 31, 2017
Re: CJA Rule 1-201. Membership – Election.

At the May 9, 2017 Management Committee meeting, the committee discussed proposed amendments to CJA Rule 1-201. This rule establishes the manner of election of Judicial Council members. Currently, CJA Rule 1-201(1) states, “The term of office of all elected Council members shall begin with the October meeting of the Council.” Subsection (2) states, “Election of Council members from courts of record shall take place at the annual judicial conference.”

These two provisions have created an issue with the terms of office for new judicial council members because oftentimes the annual judicial conference elections take place after the October council meeting. The Management Committee recommends the proposed amendments to CJA 1-201 at lines 15-16, which would change the start of a new term of office from the October council meeting to the council meeting directly following the annual judicial conference.

Encl. CJA 1-201

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.

1 Rule 1-201. Membership - Election.

2 Intent:

3 To establish the manner of election of Council members as authorized by statute.

4 To establish the procedure for filling a vacancy on the Council as authorized by statute.

5 Applicability:

6 This rule shall apply to all elected members of the Council. This rule shall not apply to
7 the Chief Justice of the Supreme Court.

8 This rule shall apply to the Boards of Judges and the Board of Commissioners of the
9 Utah State Bar.

10 As used in this rule, unless the context indicates otherwise, "Board" includes the Boards
11 of Judges and the Board of Commissioners of the Utah State Bar.

12 Statement of the Rule:

13 (1) The composition of the Council, the term of office of elected Council members, and
14 the electorate of elected Council members shall be as prescribed by law. The term of
15 office of all elected Council members shall begin with the ~~October~~ Council meeting of
16 the Council immediately following the annual judicial conference.

17 (2) Election of Council members from courts of record shall take place at the annual
18 judicial conference. Election of Council members from courts not of record shall take
19 place at the annual spring training conference of the justice court judges. Election of the
20 representative of the Utah State Bar shall take place at a regularly scheduled meeting of
21 the Board of Commissioners.

22 (3)(A) If a judicial member of the Council who represents a trial court is unable to
23 complete a term of office, the Board for the court represented by that member shall
24 appoint a judge to serve on the Council until the next judicial conference or the next
25 spring training conference as the case may be. At such conference, the judges shall
26 elect a member to the Council to serve for the unexpired portion of the original term. If a
27 judicial member of the Council who represents an appellate court is unable to complete
28 a term of office, the members of that court shall appoint a judge to serve on the Council
29 until the expiration of the vacated term.

30 (3)(B) If the representative of the Utah State Bar is unable to complete a term of office,
31 the Board of Commissioners shall elect a member or ex officio member of the Board of
32 Commissioners to serve for the unexpired portion of the original term.

33 (3)(C) No person shall serve on the Judicial Council for more than two consecutive
34 terms and the remainder of a predecessor's term.

35 (4) The Boards shall develop procedures for the nomination and election of Council
36 members and shall certify to the Council the names of the members elected. The
37 Boards shall give due regard to geographic representation, security of the election,
38 timely publication of Council vacancies or expired terms, and ease of administration.

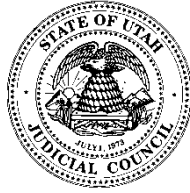
39 (5) When a judicial member of the Council is unable to attend a Council meeting, that
40 member may designate a judge from the same level of court to attend the Council
41 meeting and observe the proceedings. When the representative of the Utah State Bar is
42 unable to attend a Council meeting, that member may designate a member or ex officio
43 member of the Board of Commissioners to attend the Council meeting and observe the
44 proceedings. The designee shall be provided with a copy of the Council agenda and
45 other meeting materials, and may attend the open and closed sessions of the meeting.
46 The designee may participate in the general discussion of agenda items but may not
47 make motions or vote on Council issues.

48 (6) Council members or their designated substitutes may be reimbursed for actual and
49 necessary expenses incurred in the execution of their duties as Council members.

50 (7) Council members shall not be eligible to serve as voting members of a Board of
51 Judges of a trial court or to serve as members of the standing committees of the
52 Council. The representative of the Utah State Bar may vote at meetings of the Board of
53 Commissioners if permitted to vote under rules governing the conduct of the Board of
54 Commissioners.

55
56 Effective May 1, 2016

Tab 3



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: May 26, 2017
Re: Commissioner Rules

At our March meeting, the committee left the commissioner rules in my hands to do a review and some clean up. As a reminder, Brent proposed some changes to Rule 3-111 to address the issues that have arisen when commissioners serve more than one district or court level. There was also an issue to address regarding redacting the names of commenters, and dealing with performance evaluations and performance plans. The committee spent several months working through this language and some of it had to be moved to Rule 3-201.

As part of my review and clean up, I focused in each rule on bolding/editing headings, working on indentations, and looking closely at language use and flow.

During the course of that process, I came across a few issues in Rule 3-201:

- 1) Paragraph (3)(H) addresses how comments are handled with applicants. But we inserted a new paragraph (4)(G) about how they are handled with commissioners (this was an edited version of paragraph (6)(B)). Paragraph (4) is the comment period paragraph, but it seems like new (4)(G) should be put back in paragraph (6), which speaks mostly of performance review. The comment period is basically another form of performance review. If (3)(H) isn't in paragraph (4), I don't think amended paragraph (6)(B)/new paragraph (4)(G) should be in there either. We want the *effect* of the comment period to be separate. So I revised the paragraph (6) heading and added amended (6)(B) back in.
- 2) The language of reviewing negative comments by applicants in Rule 3-201(3)(H) doesn't match the language of amended paragraph (6)(B)/new paragraph (4)(G). We allow commissioners to review all comments, but applicants to only review negative ones. I'm not sure why there would be a difference.

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.

Rule 3-111:

Regarding 3-111, the big clean up issue here was addressing what a subsequent performance plan would look like. In consulting with HR, “corrective action plan” seemed to be the best term to describe this process. That is now found in (3)(G)(ii). I also separated out paragraph (4) a bit more and added headings. Please review the headings for accuracy and flow.

Among the two rules, we have a discrepancy in numbering. 3-111 uses the full citation in each paragraph, but 3-201 does not. My personal preference is 3-201’s system, which I think is less distracting, but we should come to a resolution on the two and pick one or the other.

I have included both redline and clean versions of each rule in the packet. Before we meet, it would be helpful if each committee member read through the rule completely looking just for rule flow. I think that will be a good starting point, rather than jumping straight to the edits.

Policy and Planning Committee

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

March 3, 2017

Members Present

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

Members Excused

Hon. Marvin Bagley

Staff

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

Guests

(1) Approval of minutes.

Judge Derek Pullan welcomed the members to the meeting. Judge Parkin addressed the February 3, 2017 minutes. There being no changes to the minutes, Judge Ann Boyden moved to approve the February 2, 2017 minutes. John Lund seconded the motion and it passed unanimously.

(2) CJA 3-201. Court Commissioners.

CJA 3-111. Performance Evaluations of Senior Judges and Court Commissioners.

Ms. Sylvester addressed her memorandum regarding Rules 3-201 and 3-111. She focused first on new paragraph (7) in Rule 3-201, which deals with sanctions and removal. In the process of reviewing this rule at past meetings, the committee had requested that the process for both be clarified and separated from retention. Ms. Sylvester reviewed the changes she had made.

Ms. Sylvester then reviewed (7)(C) and, at the committee members' request, updated the paragraph to remove "presiding judge" and insert "district or court level," which was an update from earlier in the rule. Judge Pullan then asked if it has historically been the practice to reduce a commissioner's salary as is proposed on line 135 of the rule under "sanctions." Ms. Sylvester said yes it has always been the rule, however, she has not heard of this happening in the past. Judge Pullan said a district court judge cannot constitutionally have his or her salary reduced. Judge Pullan wondered about the effect of that sanction. Judge Parkin asked if this section was necessary. Judge Boyden said in

the past commissioners were not at the same pay rate as district court judges or appellate court judges but they have always had a set pay. Judge Parkin said he believed salary could be set on a step program. Judge Boyden said she is also concerned about the terms, salary reduction or suspension. Judge Parkin asked if there are only full-time or if there are part-time commissioners as well. Ms. Sylvester said it is her belief that all commissioners are full-time. Judge Pullan wondered if a reduction in salary was similar to a suspension without pay. After further discussion, the committee agreed to change lines 134 and 135 regarding the reduction in salary to reduction in case assignments with corresponding salary reduction and add a suspension without pay.

Judge Boyden moved to change the section as discussed. Judge Parkin seconded the motion. The committee asked if they needed to approve each change or the rule in full. The committee decided to approve at the end.

Judge Parkin next discussed the two-thirds rule in section 7(B)(i)(c) regarding commissioner removals by the Council. He wanted to make sure this rule reflected the current rules in practice for how voting is done. Judge Parkin asked who sets the rule for the Council's processes. Does this committee have the authority to direct the Judicial Council to set a higher standard? Judge Pullan noted this committee submits the rule proposals and the Council acts on them. Mr. Lund said he was concerned that the Council would see this as a recommendation to set the standard higher. Ms. Sylvester noted she was concerned about saying "simple majority" instead of two-thirds because of the message this would send to current commissioners, and also noted that the two-thirds language is already in the existing rule. Judge Parkin said with the justice court judges, decisions are based on a majority. Mr. Lund said the rule would be sent to the Council and that body would decide if that was still acceptable. Judge Boyden said the practice of majority has been done in the district courts as well but also noted that the Council cannot remove a judge, only the Judicial Conduct Commission can.

Judge Mary Noonan said, in reference to section (7)(C) there are protections for judges, but are there protections for commissioners? Is there an appeal right? The committee agreed to amend section (C) to clarify how and to whom a commissioner can request a review. Judge Pullan recommended dividing this into two sections. Judge Pullan explained that an attempted removal would initially start with the presiding judges. But a removal could go directly to the Management Committee. Judge Pullan stated he believes it's important to preserve the idea that decisions are to be made at either the local level or Council level. Mr. Lund recommended that section (C) have a title as well. Keisa Williams asked if the committee would keep the section on the Management Committee making the decision. Judge Boyden said she could see there being an issue if a commissioner is really effective in their job in one district or court level but not in another. Judge Boyden does not want to see two-thirds move forward, she would

prefer majority instead. The committee discussed the Council's authority to remove or sanction a commissioner.

Judge Parkin requested that Ms. Sylvester organize the rule better, such as with more titles. He said the committee was also getting confused because of all of the formatting. Ms. Sylvester said she would be happy to clean up the rule.

Mr. Lund said he is concerned judges can vote to remove a commissioner and then the Management Committee can overturn that decision. The committee agreed this is a concern. Judge Parkin noted the Management Committee moves most issues to the Council. Judge Pullan said he is okay with the Management Committee taking on issues but he believes the Council should be the final decision-maker. The committee agreed to change line 148 to add that the Council will make the final decision.

Ms. Sylvester discussed line 160, paragraph 8, which discusses retention. Ms. Sylvester noted the practice has been the Council reviews a commissioner's declaration and the supporting materials (attorney surveys, etc.) and then votes on whether to certify that person for another term. The Council then sends the recommendation to the district courts for their approval. Judge Pullan said he would like the rule to be specific as to retention. Judge Noonan recommended putting "is eligible to be retained." Mr. Lund agreed. The committee agreed to change this section to say the decision sent from the Counsel is as to eligibility. Ms. Sylvester said the rule isn't on the Council's agenda for this month therefore the committee can make a final decision at the next meeting.

Ms. Sylvester next discussed rule 3-111. Ms. Sylvester noted the rule was sent to the Council in November 2016 on a different issue but she held it back from comment when she realized the issues overlapped with the ones raised here.

The committee discussed changes to section (1). Judge Noonan was concerned about some of the language, such as at lines 16 and 22. Line 22 talked about courtroom observation, which could be done by a review of recordings. Judge Noonan said in juvenile court the audio would not be helpful, specifically to evaluation of demeanor. The committee removed the option to review audio. Ms. Sylvester noted Mr. Johnson had put this proposal in rule 3-201 but she moved it to rule 3-111 since it seemed like a better fit there.

Judge Parkin asked if the language was underlined because it was new language or just moved from another rule. Ms. Sylvester said it's both. She explained which words were new and which were preexisting. Mr. Lund asked if the results from the commissioners' performance plans would be kept in the human resources personnel file. Ms. Sylvester noted this was new language recommended through a discussion she had with Judge Pullan, Mr. Johnson, and Keisa Williams. Ms. Sylvester stated that currently the performance plan is only for someone needing correction. Mr. Lund said

this should be an HR issue, he is not sure if this needs to be in a rule. Ms. Sylvester noted she currently manages the process and performance plans are ineffective. Ms. Sylvester noted the evaluations are done annually but the performance plans have not been done and they contain basically the same language as the evaluations. Judge Noonan said she would like to clarify performance plans in section 4(G). The committee agreed on line 155 to delete "new" performance plan and instead use just performance plans. Then that would allow for corrective action plans. Judge Parkin didn't agree with using corrective action plans because it had a negative connotation. Ms. Sylvester noted a situation that had recently happened with a commissioner who needed corrective action and the presiding judge prepared a performance plan for them. The committee briefly discussed how performance or corrective action plans apply to senior judges then decided to remove the section since senior judges are not employees.

Judge Parkin then went back to discussing section (1)(D). Judge Parkin asked if the justice courts policy is only for that section. Ms. Sylvester stated lines 11 through 13 say the rule applies to justice court judges. Judge Parkin said he specifically wanted to know if after line 35, sections (1)(E) and on apply to justice courts. Ms. Sylvester said they do. Mr. Lund recommended identifying that in the rule. Mr. Lund recommends having section (2) have a title to clarify it is where evaluations section begins.

No voting took place. The committee instructed Ms. Sylvester to make the changes as proposed and return with cleaner versions of the rules.

(3) Other Business.

The next meeting is scheduled for April 7 in the Judicial Council room at 12:00. The legislative update is the same day so Ms. Sylvester will see if they can get a meeting room onsite. Mr. Lund noted he will not be able to attend the April 7 meeting. There being no other business, the meeting adjourned at 11:44 am.

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~~ 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 as provided in paragraph (4) 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~~ the negative comments 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 ~~the each courts 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.

(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)(8)(B)~~ 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) **Court commissioner Pperformance evaluation and public comments.review.**

(A) **Performance evaluations and performance plans.** 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. A copy of the performance plan and any subsequent evaluation shall be maintained in the official 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) When the public comment period has closed, the comments shall go to the presiding judge in the district in which 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 given notice and an opportunity to respond to the comments.~~

(B) Public comment period results. When the public comment period for a commissioner provided in paragraph (4) closes, the comments shall be given to and reviewed by the presiding judge of each district or court level the commissioner serves. If any comments would negatively affect the presiding judge's decision of whether to sanction the commissioner or remove the commissioner from office in accordance with paragraph (7), 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.

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

(A) **Sanctions.**

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

(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.~~

(iii) Sanctions may include but are not limited to private or public censure, restrictions in case

assignments with corresponding reduction in salary, mandatory remedial education, and suspension
without pay for a period not to exceed 60 days. ~~suspension for a period not to exceed 60 days, and~~
~~reduction in salary~~

(B) Removal.

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

(a) as part of a reduction in force;

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

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

(ii) ~~or~~ Removal by District or Court Level.

(a) During a commissioner's term, 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) 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, with final determination by the Judicial Council.

(C) Review of District or Court Level Decisions. ~~If the commissioner disagrees with the a presiding~~
~~judge's district or court level's decision to sanction or remove,~~ the commissioner may request a review of
the decision by the Management Committee 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 is eligible to be
retained for another term in accordance with rule 3-111.

~~(CB) At the end of a commissioner's term, 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.~~

(9) Salaries and benefits.

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

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

180 | **(109) Support services.**

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

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

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 procedures 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 as provided in paragraph (4) 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 the negative comments 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 a majority of judges in each district is necessary for selection.

(K) The presiding judge 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) issue a press release and other public notices listing the names of the nominees or court commissioner with instructions on how to submit comments; 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.

(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 vote not to retain the commissioner in accordance with paragraph (8)(B) 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) Court commissioner performance review.

(A) Performance evaluations and performance plans. The presiding judge of 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. Court commissioners shall comply with the program for judicial performance evaluation, including expectations set forth in a performance plan.

(B) Public comment period results. When the public comment period for a commissioner provided in paragraph (4) closes, the comments shall be given to and reviewed by the presiding judge of each district or court level the commissioner serves. If any comments would negatively affect the presiding judge's decision of whether to sanction the commissioner or remove the commissioner from office in accordance with paragraph (7), 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.

(7) Sanctions or removal during a commissioner's term.

(A) Sanctions.

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

(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 in either district or court level the commissioner serves.

(iii) Sanctions may include but are not limited to private or public censure, restrictions in case assignments with corresponding reduction in salary, mandatory remedial education, and suspension without pay for a period not to exceed 60 days.

(B) Removal.

(i) Removal by Judicial Council. During a commissioner's term, the court commissioner may be removed by the Council:

(a) as part of a reduction in force;

(b) for failure to meet the evaluation requirements; or

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

(ii) Removal by District or Court Level.

(a) During a commissioner's term, 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.

(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, with final determination by the Judicial Council.

(C) **Review of District or Court Level Decisions.** If the commissioner disagrees with a district or court level's decision to sanction or remove, the commissioner may request a review of the decision by the Management Committee of the Council.

(8) Retention

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

(B) At the end of a commissioner's term, the judges of each district or court level the commissioner serves may vote not to retain the commissioner for another term of office. The decision not to retain is without cause and shall be by the concurrence of a majority of the judges in each district or court level the commissioner serves. A decision not to 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 60 days prior to the end of the commissioner's term .

(9) 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.

(10) 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

Rule 3-201.

Draft: 5/26/2017

171 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) Court commissioners.**

(1)(A)(i) On forms provided by the administrative office, the presiding judge of the a district or court level a court commissioner primarily serves shall complete an annual evaluation of the court commissioner's performance by January 31 of each year. If a commissioner serves multiple districts or court levels, the presiding judge of each district or court level shall complete an evaluation.

(1)(A)(ii) 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.

(1)(A)(iii) The presiding judge shall provide a copy of each commissioner evaluation to the Judicial Council. Copies of plans under paragraph (3)(G) 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)(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)(FE) **Senior judges and "Needs Improvement" ratings.** 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) **Evaluation and Certification Criteria.** 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; ~~and~~

~~(2)(Q)3 Senior judges shall also be evaluated on their ability and willingness to use the court's case management systems in all cases.~~

(34) Standards of performance.

(34)(A) Survey of attorneys.

(34)(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 (32)(A)(vi) of this rule.

(34)(A)(ii) **Survey scoring.** The survey shall be scored as follows.

(34)(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.

(34)(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.

(34)(A)(ii)(c) A court commissioner's performance is satisfactory if:

(34)(A)(ii)(c)(1) at least 75% of the questions have a satisfactory score; and

(34)(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.

(34)(A)(ii)(d) The Judicial Council shall determine whether the senior judge's survey scores are satisfactory.

(34)(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.

(34)(A)(iv) Exclusion from survey respondents.

(34)(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.

(34)(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.

(34)(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.

(34)(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.

(34)(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.

(34)(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.

(34)(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.

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

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

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

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

(34)(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

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

(34)(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.

(34)(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.

(34)(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.

(3)(G) Performance and corrective action plans for court commissioners.

(3)(G)(i) 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.

(3)(G)(ii) If a court commissioner receives an overall "Needs Improvement" rating on the court commissioner's annual performance evaluation, the presiding judge shall prepare a corrective action plan setting forth specific ways in which the court commissioner can improve in deficient areas.

(45) Judicial Council certification process

(A) **August Council meeting.** 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:

(45)(A)(i) survey scores;

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

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

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

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

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

(45)(B) **Records delivery.** 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.

(45)(C) **August Council meeting closed session.** 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.

(45)(D) **Certification presumptions.** 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.

(45)(E) **Overcoming presumptions.** 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:

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

(45)(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.

(45)(F) **September Council meeting.** 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

195 court commissioner is to deliver written materials. The Administrative Office of the Courts shall deliver
196 copies of all materials to the Council and to the senior judge or court commissioner prior to the
197 September meeting.

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

204 | ~~(45)~~(H) **Final certification decision.** At its September meeting in open session, the Council shall
205 approve its final findings and certification regarding all senior judges and court commissioners whose
206 terms of office expire that year.

207 | ~~(45)~~(I) **Communication of certification decision.** The Judicial Council shall communicate its
208 certification decision to the senior judge or court commissioner. The Judicial Council shall communicate
209 its certification decision for senior judges to the Supreme Court and for court commissioners to the
210 presiding judge of the district the commissioner serves.

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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) Court commissioners.**

(1)(A)(i) On forms provided by the administrative office, the presiding judge of a district or court level a court commissioner serves shall complete an evaluation of the court commissioner's performance by January 31 of each year. If a commissioner serves multiple districts or court levels, the presiding judge of each district or court level shall complete an evaluation.

(1)(A)(ii) 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.

(1)(A)(iii) The presiding judge shall provide a copy of each commissioner evaluation to the Judicial Council. Copies of plans under paragraph (3)(G) 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)(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) **Senior judges and "Needs Improvement" ratings.** 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) **Evaluation and Certification Criteria.** 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;

(2)(P) issuance of opinions and orders without unnecessary delay; and

(2)(Q) ability and willingness to use the court's case management systems in all cases.

(3) **Standards of performance.**

(3)(A) **Survey of attorneys.**

(3)(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 (3)(A)(vi) of this rule.

(3)(A)(ii) **Survey scoring.** The survey shall be scored as follows.

(3)(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.

(3)(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.

(3)(A)(ii)(c) A court commissioner's performance is satisfactory if:

(3)(A)(ii)(c)(1) at least 75% of the questions have a satisfactory score; and

(3)(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.

(3)(A)(ii)(d) The Judicial Council shall determine whether the senior judge's survey scores are satisfactory.

(3)(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.

(3)(A)(iv) **Exclusion from survey respondents.**

(3)(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.

(3)(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.

(3)(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.

(3)(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.

(3)(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.

(3)(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.

(3)(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.

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

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

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

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

(3)(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

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

(3)(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.

(3)(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.

(3)(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.

(3)(G) **Performance and corrective action plans for court commissioners.**

(3)(G)(i) 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.

(3)(G)(ii) If a court commissioner receives an overall "Needs Improvement" rating on the court commissioner's annual performance evaluation, the presiding judge shall prepare a corrective action plan setting forth specific ways in which the court commissioner can improve in deficient areas.

(4) **Judicial Council certification process**

(A) **August Council meeting.** 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:

(4)(A)(i) survey scores;

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

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

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

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

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

(4)(B) **Records delivery.** 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.

(4)(C) **August Council meeting closed session.** 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.

(4)(D) **Certification presumptions.** 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.

(4)(E) **Overcoming presumptions.** 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:

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

(4)(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.

(4)(F) **September Council meeting.** 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.

(4)(G) **September Council meeting closed session.** 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.

(4)(H) **Final certification decision.** 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.

(4)(I) **Communication of certification decision.** 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.