

## **Policy and Planning Committee**

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

September 11, 2017

### **Members Present**

Hon. Derek Pullan – Chair  
Hon. Ann Boyden  
Hon. Mary Noonan  
Hon. Reed S. Parkin  
Hon. Marvin D. Bagley  
Rob Rice

### **Members Excused**

### **Staff**

Keisa L. Williams  
Nancy J. Sylvester

### **Guests**

Nini Rich, Director, ADR/Mediation  
Shane Bahr  
Jim Peters

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

Judge Pullan welcomed the members to the meeting. Judge Pullan then addressed the August 4, 2017 minutes. There being no changes to the minutes, Mr. Rice moved to approve the minutes. Judge Noonan seconded the motion and it passed unanimously.

### **(2) CJA 4-501.03. Qualification of ADR Providers. (Amendment)**

Judge Pullan welcomed the Director of ADR Programs for the AOC, Nini Rich, to the meeting and thanked her for proposing some rule changes and using the new form to do it. Ms. Rich explained that a few years ago when the ADR Committee undertook the process of determining how to educate mediators on their ethical requirements and provide them more training, it was determined that a best practice guide should be created. The ADR Committee developed that guide and then started looking at the ethics exam with the desire of making it broader in scope. In order to be included on the Court's roster as a mediator, individuals must pass an ADR ethics exam. The previous exam covered only the Code of Ethics for ADR Providers found in the Utah Court-Annexed Dispute Resolution Rules (Rules 101-104). However, mediators are subject to compliance with not only those court rules, but also the Utah Alternative Dispute Resolution Act (Title 78B, Chapter 6), the Utah Uniform Mediation Act (Title 78B, Chapter 10), and Code of Judicial Administration Rule 4-510.05. The new ethics exam covers all of those standards and requirements.

Judge Parkin asked if the ADR Committee approved the language Ms. Rich is proposing. Ms. Rich said she did run it by the committee to see if it would be sufficient.

Mr. Rice asked what the other requirements were for the rule change. Ms. Rich stated that in addition to the rules and statutes (noted above), there is also case law that affects the ethical behavior of mediators, such as *Reese v. Tingey* and *Rawlings v. Rawlings*. The rule amendment doesn't change any of the requirements, it's just a better process to test as well as educate. The Committee has taken the best practice guide to the Utah State Bar, the Family Law Section and the Utah Council on Conflict Resolution and have received positive responses. This test was given out as a beta test to the current members, who stated that it was helpful to them.

Judge Parkin: Is your language sufficient or do we need to have Ms. Sylvester or Ms. Williams draft a proposed amendment?

Judge Pullan pointed to the proposed language from Ms. Rich on Line 36 that says "successfully pass an examination on the ethical requirements for mediators on the Utah Court Roster". The committee felt that the proposed change addressed the issues.

Judge Noonan made a motion approve the amendment as proposed for submission to the Judicial Council for public comment. Mr. Rice seconded the motion and it passed unanimously.

### **(3) CJA 3-201. Court Commissioners / CJA 3-111. Performance evaluations of senior judges and court commissioners (Back from Public Comment)**

Ms. Sylvester noted that these rules have come back from public comment and only one comment was received from Commissioner Thomas Morgan. The comment had to do with a legislative issue with respect to the retirement benefits for commissioners. Ms. Sylvester feels this comment should be passed along to somebody who could deal with this on a legislative level.

Ms. Sylvester: Line 111 of CJA 3-111 talks about surveys of presiding judges (PJs) and court staff. These rule amendments were raised in the Judicial Council meeting today. There was feedback from TCEs and PJs saying that the PJ surveys aren't being done and seem like a bureaucratic redundancy or maybe something that is meaningless. Ms. Sylvester sent out a survey to PJs and TCEs for those who had senior judges appear in their district and has not received any meaningful responses, which is problematic. Since Ray Wahl approves the senior judge requests for courts of record and allocates the funds, he said he could send an e-mail to the PJ in each district asking them to complete an evaluation. For senior judges, we do simultaneous attorney evaluations by the National Center for State Courts (NCSC). What we would be doing is duplicating that

process at the PJ and TCE level. It would be an immediate evaluation, as opposed to right before they are certified. Ms. Sylvester asked if they should look at the rule language and change something, or perhaps work this through the NCSC and have them do the same thing that they're doing with the attorneys.

Judge Boyden: A comment was made that senior judges don't appear often enough all over the state and PJs might not have a relationship with them. Clearly that's not the case. Judge Skanchy's concern is that since PJs' aren't in court, they wouldn't know about the senior judge's performance. It would be easiest to see if they have received any complaints. By definition, no PJ is in the courtroom when a senior judge is on the bench because the very reason we need a senior judge is that no one is available to cover that calendar. When we ask attorneys who appear in court before a senior judge for an evaluation, then the attorneys at least have a foundation for valuable feedback. We could also ask the clerks for input. The PJ, and no other judge by definition, is going to know how the senior judges are managing their court calendars. That is the crux of the PJs' complaint. Not that they're unwilling to fill out an evaluation, it's just that they don't have firsthand information.

Ms. Sylvester: Currently, the NCSC is conducting attorney surveys. Within a week or so after a senior judge takes over a calendar, the NCSC e-mails a survey to the attorneys that have appeared before the judge. They accumulate results until the senior judge is up for certification and Ms. Sylvester receives them back. The response rate for senior judge evaluations is pretty low. Commissioners are also evaluated by attorneys and have a much higher response rate.

Judge Parkin: We need effective evaluations. The whole purpose for this policy and the rule was to create a system that allows us to objectively assess senior judges who are appointed to the bench to do the people's work but really have no accountability to the public. The State legislature made it very clear that the courts need to include senior judges in the evaluations or they'll do it for us. We need some process that is effective. We empower PJs to know the business of their district. I understand that this hasn't been in practice, but we might need to train TCEs and PJs more thoroughly on their expanded role. I don't want to rely on an outside organization to be the only evaluators. It may be one component of the evaluation process, but it shouldn't be all that we do.

Ms. Sylvester: Senior judges are supposed to be evaluated every 18 months, but the Judicial Council only gets the evaluations if there is a "needs improvement" rating. That happens very rarely. We need to make sure PJs and TCEs have a list of who is appearing in the courts and find out how well the judge did substantively. We aren't delegating our responsibilities to the NCSC, we have a contract in place to conduct the surveys, so they could just duplicate that process for the PJs and TCEs.

Mr. Rice clarified that senior judges and court commissioners aren't covered under the JPEC process.

Shane Bahr: From a TCE perspective, it is difficult to complete evaluations because all I know when I report to the PJ is whether the senior judge showed up and whether there were any complaints from staff. On occasion I will hear good comments from staff saying they really liked a particular senior judge, but I don't know what that means in terms of their performance as a judge, only that they got along with staff and perhaps administratively managed their calendar well. What would be helpful is telling the TCEs and PJs what you really want to know. Perhaps creating a form that is filled out just after a senior judge's calendar that says, "here is how he/she performed in these particular areas." The form would then be submitted to the TCE after each appearance. The other issue is that some PJs rotate in and out, so they have to contact the TCEs to find out who was even in their district in the last year. There is some disconnect between what information we are really looking for and when we collect it. If we don't collect it immediately, it's gone.

Judge Pullan: The entire point of hiring a senior judge is to cover a calendar. As a PJ, if I have to sit in court and observe them, and they are only there for one day every 45 days, that would be very difficult to balance with other judicial responsibilities.

The committee discussed creating a simple form survey that court staff could fill out after an assignment is done, asking whether the senior judge appeared on time, etc. Substantive performance could be tracked in the attorney surveys. NCSC could send out a survey to the attorneys and, at the same time, send a survey to the court staff, PJ and TCE. Mechanically it might make sense to send out the surveys simultaneously, perhaps in an e-mail. All of the surveys could then be compiled in a repository for use when the time is up for certification/evaluation. That way, all of the surveys over the last few years would be available.

Shane Bahr: PJs sign the notice of assignment, which is then scanned into every case the senior judge is hearing that day. The clerk sitting next to the senior judge has that notice of assignment. If that notice also included a few questions asking how the judge did that day, it could be tied into the existing process.

The committee expressed concern that the attorney surveys are anonymous, but the clerks' evaluations may not be as anonymous if there are only one or two clerks working in the office.

Judge Noonan: What we are focusing on here in my estimation is procedure, and how we get the information. The substance of the rule seems to be appropriate. I am not persuaded based on the conversation today that the rule needs to be changed. I think we've identified some infirmities in the procedure, but I'm not in favor of holding these

rules for another month because we haven't really touched on anything substantive. If we have the ability to craft questions that will illicit meaningful information, then we can do that in the survey and we don't need to amend the rule. Judge Boyden agreed.

Ms. Sylvester expressed concern that if the processes or procedures are not captured in the rule itself, they won't be followed.

Judge Pullan pointed to the language in lines 111-118 of CJA 3-111, noting that it gives the committee the discretion to do just what Judge Noonan suggested. Ms. Sylvester noted that the problem is highlighted under lines 40-65, which outlines the criteria for evaluating senior judges. PJs can't speak to those specific criteria if they aren't in the courtroom. One of the questions on the survey should ask if the PJ has reviewed the information provided by the NCSC regarding the senior judge with a "yes" or "no" checkbox. That tells us if the judge has some foundation to render an opinion. However, several committee members expressed concern that a few simple questions for PJs in a survey wouldn't comply with the criteria listed in lines 40-65.

The committee discussed ways in which PJs could obtain firsthand information sufficient to evaluate a senior judge's substantive abilities. The presiding judge could pick five of the ten cases a senior judge handled and review them, but that may not save time. If a PJ knew that's what he/she had to do every time a senior judge was used, they would be inclined to just handle the calendar themselves. One way to give PJs meaningful information would be to require him/her to go back and listen to a random number of hearings the senior judge presided over. It would impose some meaningful duty on the PJ. Under CJA 3-111, lines 21-23, PJs are required to review at least five active cases presided over by a commissioner, including courtroom observation. This would be the same concept over senior judges. That would be a substantive change requiring a rule amendment.

Ms. Sylvester recommended that the committee hold rules 3-201 and 3-111 until the October meeting and she would speak to Ray Wahl about his recommendations. Judge Bagley made that motion. Mr. Rice seconded the motion and it passed unanimously.

#### **(4) CJA 9-109. Presiding Judges in Justice Court. (New)**

Ms. Sylvester: Last policy and planning meeting, the presiding judge rule came here. The justice courts are proposing this rule. This committee removed paragraph (g), but after conversations with the Supreme Court about URCP Rule 63 and URCrP Rule 29, there needs to be a mechanism for the assignment of substitute judges, causing amendments to Rules 63 and 29. During those discussions, the Supreme Court made a few more edits to paragraph (g) of CJA rule 9-109. Looking at URCrP Rule 29 (lines 39 and 47), the edits require that assignments of justice court cases be made in accordance with CJA 9-109, rather than the statute (78A-7-208). The problem with the statute is that

the local government can make a list of judges authorized to preside in their court, but there was no mechanism identifying who can make the actual assignment. Currently, the county makes the assignment, but the Supreme Court expressed some concerns that there may be a constitutional issue because court assignments are a judicial procedure. The Supreme Court asked for clarifying language in CJA 9-109. T

Judge Parkin: Most justice courts have a list of five judges that they take to the city council, and the city council approves the list, so it complies with the statute. If there is a conflict for a particular judge, justice courts want language authorizing them to assign a conflict judge from the pre-approved list. This language puts the assignment in the hands of the presiding judge.

Ms. Sylvester: URCrP 29 and URCP 69 refer back to CJA 9-109 for Justice Court assignments. These amendments remove the statutory citation because the Supreme Court is very uncomfortable with it. The proposal would be to send the three rules out together once the judicial council weighs in just to make it clear what we are doing.

Judge Pullan: If that's the distinction we're making then in lines 87 – 89, instead of using the word "appoint", we should probably use the word "assign." It should read, "In the event that a judge is disqualified from a case, the presiding judge shall assign any judge duly appointed pursuant to Section 78A-7-208."

A motion was made by Judge Parkin to adopt the proposed language in 3(G), with Judge Pullan's amendment, for submission to the Judicial Council for public comment. Mr. Rice seconded the motion and it was unanimously passed.

#### **(5) CJA 4-202.02. Records Classification. (Amendment)**

Keisa Williams discussed Brent Johnson's email proposing an amendment to CJA 4-202.02. Currently, a minor's full name is used in child protective orders, but only the minor's initials are used in all other protective orders. Law enforcement has said they can't enforce protective orders when only initials are used because the initials are not sufficient to identify the exact child requiring protection. Brent thinks this came up because of an FBI audit criticizing the courts for only using the initials due to enforcement problems. Brent is proposing that the word "child" be deleted in line 139, allowing a minor's full name to be listed in any type of protective order.

After discussion, Judge Bagley made a motion to approve the proposed amendment for submission to the Judicial Council for public comment. Mr. Rice seconded the motion and it passed unanimously.

#### **(6) Internal Operating Procedures**

At the last meeting, this committee asked Ms. Williams to add language to the internal operating guide requiring the committee's staff attorney to get back with people who have submitted rule amendment requests. Ms. Williams pointed to the language she added in paragraph 5.

Judge Noonan suggested adding a date on the bottom of the form indicating when the committee adopted and/or approved a request.

After discussion, the committee approved both the internal operating guide and the request form, with the proposed amendments. Ms. Williams will distribute these documents to staff, notifying them of the procedural change for getting rule drafts before this committee.

#### **(7) Other Business.**

The committee discussed the date/time for the next meeting. Currently, it is scheduled for October 3, 2017 from 4:00-6:00, just after the Judicial Council meeting because the Liaison Committee took the 10:00-12:00 spot. But, if the council meeting ends early, the Policy and Planning meeting may be able to start early. Judge Pullan asked Ms. Williams not to invite presenters if at all possible so that the start time of the meeting could remain flexible.

#### **(8) Adjourn**

There being no further issues, there was a motion for the meeting to be adjourned by Judge Noonan. The motion was seconded by Judge Bagley and it passed unanimously.