Policy and Planning Committee

Matheson Courthouse
Council Room
450 S. State St.
Salt Lake City, UT 84114

December 1, 2017
9:00 a.m. – 5:00 p.m.

Members Present	**Members Excused**
Hon. Derek Pullan - Chair	Hon. Kara Pettit
Hon. Augustus Chin	
Hon. John Walton	
Rob Rice	

Staff	**Guests**
Keisa Williams	Dawn Marie Rubio
Nancy Sylvester	Brent Johnson
	Rob Parkes
	Jaycee Skinner

(1) Welcome, Member Introductions, and Chair re-election.
Judge Pullan welcomed everyone and introduced the Committee's two newest members. Judge Augustus Chin is from the Holladay Justice Court and has been on the bench for six years. Judge John Walton is from the Fifth District Court and today marks his twelfth year on the bench. Judge Kara Pettit was unable to attend. Judge Pullan left the room. A motion was made by Judge Chin to reappoint Judge Pullen as Committee chair. Judge Walton seconded the motion and it passed unanimously.

(2) Approval of minutes.
Judge Pullan addressed the October 3, 2017 minutes. Judge Pullen stated that in paragraph four under "Records classification", he would like to add that the Committee discussed the significant public interest in knowing the grounds on which the Executive Branch exercises its arrest power, and for that reason, probable cause statements ought to remain public. There being no other amendments to the minutes, Rob Rice made a motion to approve the minutes as amended. Judge Walton seconded the motion and it passed unanimously.

(3) CJA 3-201. Court Commissioners.
CJA 3-111. Performance evaluations of senior judges and court commissioners.

CJA 3-201
Ms. Sylvester addressed CJA 3-201 and stated that the rule draft is essentially finished and just needs a motion to approve it. A motion was made by Judge Chin to approve the current version of rule CJA 3-201 which will become effective as of May 1, 2018. Rob Rice seconded the motion and it passed unanimously.

CJA 3-111
Ms. Sylvester provided an update on CJA 3-111. The Committee has approved most of the amendments, but the Council recently raised some issues when they were going through senior judges' certifications about getting meaningful feedback from presiding judges and trial court executives (TCEs). The rule has already been circulated for public comment, but it has been subject to enough changes that it will likely need to go back out for public comment before being approved.

Ms. Sylvester met with senior judges and Keisa Williams met with the presiding judges at the Annual Judicial Conference. The presiding judges' feedback was the same as the senior judges, in that there needs to be a better mechanism for gaining more significant feedback. JPEC was contacted and asked for suggestions on how to attain feedback for the part-time justice court judges since they are not getting as much response through the regular process for full-time judges. Ms. Sylvester spoke with Jennifer Yim who explained that an interviewer stands outside the courtroom after a hearing and as people leave, they are given a questionnaire to fill out.

Ms. Sylvester created four new questionnaires based upon what was drafted in paragraph 3(b), lines 111 – 135. The idea is that presiding judges and trial court executives will collect the questionnaires which will inform their creation of senior judges' performance evaluations. Even if presiding judges and TCEs don't have direct knowledge of a senior judge's performance, they can still gather information which can then be processed, distilled and sent to the Council.

Ms. Sylvester explained that the Court of Appeals survey is an entirely different process since there is no trial court executive. She suggested that it may be best to have a clerk of court (CoC) essentially become the TCE in 3(b)(2)(i). This way, the presiding judge and CoC would acquire information from the other members of the panel and law clerks. Central staff is assigned to senior judges in the appellate court. Since there is no way of concealing the identity of an individual answering the survey, Ms. Sylvester suggested that lines 122 and 133 (3)(b)(2)(i) be removed from the appellate surveys that states, "retype and edit as necessary." Judge Pullen expressed concerned that if there is no anonymity in the survey, law clerks and court staff may not feel comfortable being honest about a senior judge's evaluation.

The new language in Lines 115 – 117 are provisions that deal with the form that Ms. Sylvester has created where she draws a distinction between the questionnaire and the survey. The questionnaire is less formal and is what the public and court staff will be filling out. The survey is filled out by the presiding judge and TCE. Judge Pullen asked if the questionnaire will be anonymous. Ms. Sylvester stated that it may ultimately be a policy question. Rob Rice said that in order to get a candid response from court staff, the questionnaires should be done anonymously. There was discussion about whether the language in the questionnaire should reflect that it's an "anonymous questionnaire" and if the signature line should be removed.

Judge Chin pointed out that if the questionnaire is anonymous, it may be difficult to follow-up on performance issues or concerns. Senior judges will continually be evaluated by attorneys who have appeared before them. The presiding judge is usually unaware of evaluation results. Another concern is that if the questionnaire is anonymous and the signature line is taken out, presiding judges and TCEs may not be able to ask the individual for additional details about a specific situation that raises a flag or concern. The questionnaires are not subject to GRAMA requests because they deal with personnel so that is not a concern. Jurors may raise significant issues about the trial itself and the court would have an obligation to do something about it. Judge Pullen noted that in order for a questionnaire to be meaningful, it has to be candid. Ms. Sylvester suggested that it may be up to internal staff to determine whether questionnaires should be anonymous.

It was also noted that because there are no TCEs in justice courts, line 114 should be changed to include the justice court administrator. It was decided by the Committee that "anonymous questionnaire" would be added to line 115 (the same applies with the appellate court). Ms. Sylvester will take out "and jurors" in section 3(B)(i) because jurors only fill out the questionnaires.

Judge Pullen asked for clarification as to why survey questions only deal with the "non-legal ability of judges." Ms. Sylvester explained that attorneys are being surveyed on the legal abilities of the judge, where court staff may not be qualified to weigh in on a judge's legal ability.

Ms. Sylvester pointed out that sections 3(B)(i) and 3(B)(ii) deal with courts of record. Since justice courts don't have TCEs, it might be helpful to add the language, "or in the justice courts, the justice court administrator" on line 114.

Recently the Judicial Council brought up a concern about section 3(C), regarding the case under advisement standard because senior judges who are up for retention are self-certifying. The council suggested that something be put in the rule that says the

AOC will pull all of that information. The Committee decided to revisit this issue at a later date.

In section (4)(F) (lines 205-207), Judge Pullen suggested that the language be changed to read, "At the request of the Council the senior judge or court commissioner challenging a non-certification decision shall meet with the Council in August." The committee agreed to that change.

A motion was made by Judge Chin to recommend to the Judicial Council that rule CJA 3-111 be published for public comment. The motion was seconded by Rob Rice and it passed unanimously.

(4) CJA 3-101. Judicial Performance Standards.
This came up in the last Council meeting. The Council felt that the rule was too harsh and didn't allow room for discretion of the Council and their ability to consider special circumstances. Ms. Sylvester proposed changes to the Rule's intent at lines 3-4. The language clarifies that the rule establishes standards of performance upon which the Council certifies judges for retention to JPEC.

Ms. Sylvester added paragraph 5, a good cause standard, which states, "For good cause, including excusable neglect, the Council may elect to certify a judge who does not meet all performance standards." Mr. Rice questioned whether the good cause and excusable neglect language is articulated elsewhere in the rules or whether it's just a general definition. Judge Walton suggested that there is an advantage to using similar language to that outlined in the statute requiring JPEC to provide reasoning for any deviation to the certification standards. Mr. Rice felt that "good cause" is an appropriate standard rather than just a detailed explanation for the deviation. Judge Walton noted that the "good cause" standard might be too strict because there may circumstances in which a judge's issue doesn't rise to the level of good cause, but it was one minor issue over a short period of time that could be explained through the less strict JPEC deviation requirement.

Jaycee Skinner suggested a hybrid approach – where the court would keep the strict liability standard, either they met the criteria or they didn't, but make a finding of good cause to JPEC that overcomes the presumption. It would be helpful for JPEC to have the benefit of the court's reasoning. The court would be saying that the judge doesn't technically meet the certification requirements, but the court is, nonetheless, recommending that they be certified for the following reasons. JPEC makes the final decision about whether a judge has met the certification/performance standards, but it will now have the benefit of the Court's information. The committee expressed concern about whether the Council can certify a judge for retention who does not meet the minimum certification requirements. After a review of the statutory language and JPEC's administrative rules, the committee determined that the strict liability standard

for certification cannot be changed. The language was amended to state that the Council declines to certify the judge, but recommends retention.

The committee expressed potential timing concerns of publishing this rule for comment because it may cause confusion about the court's intent. A decision on this is time-sensitive because Chief Justice Durrant will be meeting with JPEC and it might be helpful for him to discuss the potential rule amendment. Ms. Skinner suggested that the timing is less a problem for the legislative session and is more of an issue if it's changed in the middle of a retention election.

Ms. Skinner suggested that Ms. Sylvester speak to JPEC and get their opinion before putting this out for public comment. It was decided that the committee would submit the rule draft for discussion by the Council and not recommend that it be sent out for public comment until the Council has had time to address it and Ms. Sylvester can get JPEC's feedback.

A motion was made by Judge Chin to send this to the Judicial Council for discussion. The motion was seconded by Rob Rice and it passed unanimously.

(5) CJA 7-303. Truancy Referrals.
Dawn Marie Rubio addressed a proposal to repeal rule CJA 7-303 of the Code of Judicial Administration. The rule outlines the court's process for truancy referrals made to the juvenile court. Last year during the legislative session, HB 239 eliminated the jurisdiction of the juvenile court over habitual truancy matters. As such, this rule is no longer needed and similar efforts are being made by the Rules of Juvenile Procedure Committee to repeal URJP Rule 31. The proposal to repeal CJA 7-303 has been supported and vetted through the Board of Juvenile Court Judges.

A motion was made by Rob Rice to repeal rule CJA 7-303 and recommend to the Judicial Council that this be published for public comment. Judge Chin seconded the motion and it passed unanimously.

(6) Policy on Naming Courthouses.
Ms. Sylvester reviewed the Judicial Council's discussion at its last meeting regarding a request to name the Provo Courthouse. There were no competing proposals and the Council was concerned about acting upon it and suggested that a policy regarding naming courthouses be created. Nancy drafted a proposed policy and Justice Lee provided feedback and edits. Justice Lee wanted to make it clear that we're creating this policy because of a recent request. The proposal creates a presumption that the Council won't name any of their new courthouses, except for those that are named geographically. The Council would consider requests to name newly constructed or significantly remodeled courthouses. In order to have a courthouse named after a person (living or dead), the person must have strong ties to the community and have

made significant contributions to the community where the courthouse is located. In order to be considered, the person must have contributed to the administration of justice, have a tie to the judiciary, have lived an exemplary life, and served as a role model in the community. The Committee may consider a request to name a courthouse, but ultimately it does not have the authority to name it. The authority resides with the Department of Administrative Services' Building Board, to which the Judicial Council may make recommendations. The Committee has the authority to name internal areas of a courthouse. Naming an internal area would require the same criteria. Judge Chin noted that in paragraph two, the phrase "will consider requests" should be changed to "may consider requests."

The Committee reviewed the Building Board's naming policy. The committee discussed the meaning of "ties to the community" and whether it has to mean ties to the local community or to the state of Utah. Ms. Sylvester recommended adding the desire of the individual's family as a requirement. The committee discussed whether there should be a policy at all. The policy could also be used if there were a legislative proposal to name a building. The Council may need to be equipped with a tool to respond to requests. The committee made amendments based on their discussion and agreed to recommend that a policy be in place.

A motion was made by Judge Chin to advance the proposed policy to the Judicial Council for discussion. Judge Walton seconded the motion and it passed unanimously.

(7) CJA 3-104. Presiding Judges.
Brent Johnson reviewed proposed rule changes to CJA 3-104. There was an omission in the packet. Brent handed out paragraph (3)(O) that should have been added at the end of the rule. The Rules of Criminal Procedure Committee is reorganizing URCrP Rule 7 and dividing it into several distinct rules, each addressing different subjects. One of the proposed changes to Rule 7 incorporated a requirement for the development of a rotation of magistrates. The Supreme Court suggested that the provision be moved out of Rule 7 and into the presiding judge rule because it involved internal operating procedures, not rules of criminal procedure. Developing the rotation isn't mandatory; this would just provide the ability for jurisdictions to do it if they wanted to.

The amendments in section (3)(L)(ii), at lines 163-166, refer to a different issue. This relates to judges reporting cases under advisement. Currently, the rule refers to a form that doesn't exist. The practice throughout the district is different, some only require reporting if judges have cases under advisement. Some require reporting every month. Mr. Johnson recommended that the rule be tabled pending further review and edits on his part so that he can explore whether the AOC can/should just internally run reports every month so that judges don't have to report anything at all. That data would just be tracked by the AOC. There is a concern about self-reporting in part because some judges have not reported when a case is under advisement, although it hasn't been a

significant issue. Judge Pullan stated that he liked the self-reporting requirement because it kept the issue fresh in his mind. He suggested that the AOC run automatic reports, but keep the self-reporting requirement. Judge Walton stated that requiring self-reporting also helps judges to discover problems with the data. For example, the docket says the case is under advisement, but the judge has resolved the issue with attorneys including a stipulation that the case not be decided at that time. In those instances, there should be a record made to that effect, but it might have been overlooked.

Mr. Johnson stated that it might be important to approve the portion of the amendment getting rid of a form that doesn't exist now and table the remaining amendments for a later time. Mr. Rice suggested that all of the amendments to (3)(L)(ii) be held until the entire section can be revisited.

A motion was made by Mr. Rice to recommend to the Council that the amendments under section (3)(O) – but not section (3)(L)(ii) - be published for public comment. The motion was seconded by Judge Walton and passed unanimously.

(8) CJA 6-601. Mental Health Commissioners.
Brent Johnson reviewed the proposed amendments to CJA 6-601. During the last legislative session, the legislature created a new cause of action to allow individuals to seek treatment for someone who is suffering from an opioid addiction. The new statute is under Title 62A, Chapter 15, Substance Abuse and Mental Health Act. Court commissioners are currently authorized to conduct proceedings under part 6, which includes the provisions on civil commitments of mentally ill individuals. Because court commissioners are already conducting those proceedings, the Second District Court is proposing that court commissioners also be allowed to preside over the essential treatment proceedings.

Judge Pullan stated that there is a policy question about whether commissioners should preside over those proceedings. Judge Pullan reviewed the statute and expressed a concern that commissioners do a lot of their work by taking proffers from attorneys. The statute makes several references to the fact that the parties may testify and be cross-examined and the court must make certain findings. The statute contemplates something more than what a commissioner can do and there are very few commissioners state-wide to address these cases.

Mr. Johnson stated that his concern is that the intent behind the statute is for these proceedings to happen as quickly as possible because there are people with opioid addictions who need treatment right away. Mr. Johnson is uncomfortable having commissioners handle these proceedings because it would be good to have a judge's eyes on it right away. In addition, Mr. Johnson expressed concerned that we are already stretching the authority of commissioners to do what they are doing now.

Adding this ability may be going too far. Judge Pullan stated that he thinks these time-sensitive cases should go directly to a district court judge. Judge Walton stated that because these are new, they could be high-profile and involve the media. Commissioners don't run for retention elections. For a variety of reasons, these should remain with district court judges. Judge Chin supported that position.

A motion was made by Judge Walton to decline to adopt the proposed rule amendments. The motion was seconded by Judge Chin and it passed unanimously.

(9) CJA 4-202.07. Appeals.
Brent Johnson reviewed the proposed amendments to CJA 4-202.07. There are 3 proposals:

1. Clarifies that a person may appeal a response stating that the court does not have the record. Rule 4-202.05 distinguishes between denials of requests and responses that the record does not exist, but the appeals rule does not. In theory, we could reject an appeal on a response that the record doesn't exist, although we have never done so.
2. Increases the time-frames for responses. Appeals on denials of records requests are fairly frequent. When an appeal is sent to the state court administrator, he refers those to the legal department for research and response. We have found that the response time of 5 days is sometimes too short because of the time necessary to prioritize the appeal, research the appeal, make efforts to resolve or negotiate a resolution of the appeal, and prepare a decision. Extending the response time to 10 days would be very helpful and would not have a significant impact on the person appealing the decision.
3. Extends the time for mailing a Management Committee decision. Additional time is sometimes necessary because the committee's decision must be reduced to writing and disseminated for approval before it is mailed.

The records requests are technically requests under the Court's rules, not GRAMA. We get these requests from prisoners, litigants, etc. District and Justice Courts get them all the time. The appeals from those come to the legal department. Judge Pullan asked how a 10 day response time compares to response times in the Executive Branch because we wouldn't want to be significantly slower than we should be. Mr. Johnson stated that the court would not be out of synch with the Executive Branch and 5 days has proven to be unworkable.

Judge Pullan stated that all the other response times in the rule should be changed to make them consistent with the dates in rules of procedure by removing the reference to "business" days, etc. The changes recommending 10 business days will be changed to 14 days. In line 14, 30 days was changed to 28 to align it with other rules. The reference to 15 days in line 23 will be changed to 21 days.

A motion was made by Mr. Rice to recommend to the Council that the amendments, with the proposed changes, be published for public comment. The motion was seconded by Judge Walton and it passed unanimously.

(10) HR Policy: Definitions and 220 – Employment Assessments.
Brent Johnson reviewed the proposed amendments to the Human Resources Policy and Procedure Manual. This proposal came from one TCE and was then approved for submission to this committee by all of the TCEs. The proposal is to require pre-employment drug tests for a certain category of employees – "highly sensitive positions." That special category is created by these amendments in the definition section. The TCEs are particularly concerned with deputy probation officers because they transport juveniles on a daily basis for work crews. The executive branch has a category of highly sensitive positions and they mostly include law enforcement and positions which frequently handle money. The proposal is to include probation officers, deputy probation officer, others who work with juveniles, such as volunteer coordinators and program managers, and the most controversial category, any other position that frequently requires operating a motor vehicle. The ADR director, Nini Rich, is concerned that the last category is unnecessary and may reduce the applicant pool for mediators.

Judge Pullan asked exactly what positions would be affected by the last category. Mr. Johnson stated that it would apply to mediators, TCEs, and Clerks of Court who travel between courts on a frequent basis and not those traveling to Salt Lake for a monthly meeting. In order to apply, the job description for the position must require frequent travel. Mr. Rice asked whether there was a specific incident that instigated this proposal. Mr. Johnson stated that there was no incident, there is just a general concern and a desire to be proactive and prevent an incident in the future. Judge Pullan noted that pre-employment testing is easily evaded because it is scheduled.

The HR Director, Rob Parkes, joined the meeting for this discussion. Mr. Johnson noted that a distinction could be made between those positions which involve driving juveniles, rather than just driving alone. The policy allows drug testing when there is reasonable suspicion of impairment. Randomized testing would be unconstitutional for most positions. Probation officers don't drive juveniles very often. Deputy probation officers drive juveniles daily. Judge Pullan noted that deputy probation officers do not rise to the level of law enforcement officers. Mr. Rice asked Mr. Parkes whether this would address a risk that is of great concern from a human resources perspective. Mr. Parkes stated that this is not something HR has had specific issues or concerns with, it would be strictly preventative. Mr. Rice stated that if the question is how to mitigate risk, it seems that the last category may be going too far. This seems like a safety issue, not a highly sensitive position issue. The village project coordinator deals primarily

with volunteers and is typically a deputy probation officer. Mr. Rice stated that we may be trying to fix a problem that doesn't exist.

Mr. Parkes stated that there are less than 50 deputy probation officers statewide. He didn't feel this would have an impact on recruiting. Judge Chin questioned whether creating a solution for a problem that doesn't exist is appropriate. Judge Walton noted that this would be exceeding the standards set by the state for driving state vehicles. Judge Pullan noted that the only real risk is that these probation officers are driving other people's kids around. Ultimately, the committee felt that having the ability to test based on reasonable suspicion is enough.

A motion was made by Rob Rice to decline to adopt the amendment. Judge Walton seconded and the motion passed unanimously.

(11) HR Policy: Code of Personal Conduct 500 – Court Security.
Brent Johnson reviewed the proposed amendment creating a new section addressing court security in the Human Resources Policy and Procedure Manual. This request comes from the TCEs and was promulgated based on an incident where a probation officer left a handgun in a state vehicle. Carrying a weapon in a state vehicle is a violation of state regulations, even if the person has a concealed weapon permit, however, it does not currently violate any court policy. The TCEs want to make it clear to employees when and where they can possess weapons. Employees are already prohibited from possessing weapons in courthouses. This proposal would extend that prohibition to state vehicles, probation officers that are not covered under court security plans, and any other offices where employees might work. The proposal would also prevent weapons at conferences, meetings, or other gatherings conducted off court premises.

Judge Pullan asked if the gatherings provision would apply to summer barbeques and other social gatherings of employees. Mr. Johnson stated that it would. Judge Chin asked if any employees are engaged in weapons training that might coincide with conferences or gatherings off-site. Mr. Johnson stated that probation officers are trained on safety and how to disarm an individual, but they are not trained on handguns, however, they do have OC spray. Judge Chin asked whether any court employees are required to carry weapons within the scope of their employment. Mr. Johnson and Mr. Parkes confirmed that there are no positions requiring the possession of weapons.

Mr. Rice asked whether the off-site provision would violate statutory provisions and whether Mr. Johnson had reviewed the statute. Mr. Johnson stated that he did review the statute and the court has the ability to regulate weapons for its court employees. It is important to note that employees may possess weapons in their vehicles in parking lots. Judge Pullan questioned what security interest the Court has in restricting weapons at outside events. Ms. Sylvester expressed concerned about employees having

weapons around judges. Judge Pullan expressed concern that the "gatherings" provision might violate the 2nd amendment.

The committee decided to remove the provision restricting weapons at "other work-related gatherings." Section 16.4 will continue to apply to court functions off-premises, such as conferences and meetings.

A motion was made by Mr. Rice to recommend to the Council that the amendments, with the proposed changes, be approved. The motion was seconded by Judge Chin and it passed unanimously.

(12) CJA 4-202.02. Records Classification.
Brent Johnson reviewed the proposed amendments to CJA 4-202.02 pertaining to vital records (line 119) and affidavits of indigency (lines 120). Ms. Williams reviewed the proposed amendments to probable cause statements (line 72).

Vital Records
Mr. Johnson stated that this proposal relates to petitions and orders to amend a Utah vital record. The Office of Vital Records will typically allow an individual to seek an amendment to a vital record simply by providing an affidavit and support for the requested amendment. However, there are also many circumstances in which the office will deny a request and tell a litigant that they must first obtain a court order. There is very little statutory support for referring them to the court, but these are occurring regularly and judges are reviewing them and issuing orders.

The old forms committee considered creating specific forms for these petitions because the self-help center receives these requests on a weekly basis. The question arose whether these should be public or private records. The committee felt that they should be classified as private because they deal with the same types of information that have been deemed private in other case types, such as adoptions, divorces, paternity actions, etc.

Judge Pullan noted that the statute does not require a court order. This is ultimately the responsibility of the Office of Vital Records. Judge Pullan is concerned that by creating a form, we are creating a cause of action. Mr. Johnson doesn't think this would create or legitimize the creation of a cause of action. Judge Pullan questioned why the Office of Vital Records is punting this responsibility to the courts. Mr. Johnson stated that he thinks they are just seeking the protection afforded by a court order. Judge Pullan asked if these were the gender change requests. Mr. Johnson said no, these aren't the gender change requests, but they could potentially cover those. Mostly, these are for clerical errors.

Mr. Johnson noted that the forms have been tabled until the statute has been amended creating a cause of action for the court. Mr. Rice asked whether, even though we aren't creating a form, this amendment would imply that there is a legitimate cause of action. Judge Pullan feels that it would and expressed a strong opposition to creating a cause of action. Judge Chin and Mr. Rice agreed. Judge Pullan noted that this would encourage the Office of Vital Records to continue to not do its job. The committee discussed what information is included in the petition that would support making the document private, including dates of birth and social security numbers. Mr. Johnson noted that there is a provision in the rules currently whereby a party can petition the court to classify a record as private.

A motion was made by Judge Chin to decline to adopt the amendment. Mr. Rice seconded and the motion passed unanimously.

Affidavit of Indigency

Mr. Johnson stated that this proposal makes affidavits of indigency private records. The rule classifies affidavits of impecuniosity in civil cases as private records but it does not address affidavits of indigency in the criminal context. If a person's financial information is private in civil cases, it should also be private in criminal cases. One argument might be that a defendant in a criminal case has a lesser expectation of privacy than a litigant in a civil case, however, that diminished expectation wouldn't extend to financial information that has nothing to do with the crime itself. Judge Chin agreed.

Judge Pullan noted that there could be a public interest in knowing how frequently public defenders are appointed and on what grounds because it involves the expenditure of state funds. Judge Walton asked how parties would challenge those appointments. Ms. Williams noted that parties to a case and attorneys of record can access private records. Judge Pullan was more concerned with the general public's interest, including the media, not individual parties. Judge Chin noted that the public is not without remedy in obtaining those records. Mr. Johnson agreed, stating that our rules allow the court to release private records for research purposes.

Mr. Rice asked what the federal court does with affidavits of indigency. He noted that there was a recent article in the news where the federal court was questioned about how public defenders are appointed. Judge Chin stated that his recollection of the procedure in federal courts is to appoint almost automatically under most circumstances. There were rarely affidavits of indigency submitted. It was based on limited testimony stating simply that the person was indigent and was requesting an attorney.

The forms addressing affidavits of indigency are very different across jurisdictions. Some include sensitive income information, social security numbers, tax returns, pay

stubs, and spousal income details. Ms. Williams stated that because there is a mechanism for obtaining the information, the public interest concern would be covered.

A motion was made by Judge Chin to recommend to the Council that the amendments be published for public comment. The motion was seconded by Judge Walton. Judge Pullen voted against the motion. The motion passed.

Probable Cause Statements

Ms. Williams reviewed the proposed amendment to CJA 4-202.02 regarding probable cause (PC) statements. Ms. Williams has been travelling around the state conducting presentations on the new automated probable cause system. A concern arose regarding the potential for private information to be accidentally included in an officer's statement (i.e., victim names and addresses, SSN, names of confidential informants, etc.). BCI, sheriffs, and county attorneys all stated that they are training officers consistently that these documents are public and not to include such information. However, sheriffs and county attorneys noted that it still happens and they don't want anyone to get hurt if these are made public.

Pursuant to URCrP Rule 40, search warrants are sealed for 20 days before they become public. This is also reflected in section (2)(FF) of this rule. If a prosecutor or law enforcement officer wishes to keep the warrants sealed, they must file a motion with the court. The records can then be sealed in part or in their entirety upon certain findings by the court.

The probable cause working group does not feel that the warrant process is appropriate given the public nature of PC statements. The group considered several options and is proposing that PC statements be treated as public, unless a judge sees private information in the affidavit at the time of the PC review. The judge could then approve the PC statement (if PC existed), but flag the document as sealed. The document would remain sealed for 72 hours. It would not be made public in Xchange, nor would it attach to a case filed by the prosecutor. Prosecutors and law enforcement could motion the court to redact the document before it is made public. This would require a court order. The new PC system is in place currently in several jurisdictions so there is some urgency in addressing this issue.

Mr. Johnson stated that PC statements are public documents and the court has always treated them accordingly. The difference now is that they are more easily accessible in electronic form immediately upon a judge's PC decision. Before, the public would have to make a records request and law enforcement agencies had the opportunity to redact any sensitive information. Mr. Johnson does not support this change to the court's policy. Our rules put the onus on parties to redact, or not include, private information in a public document. This is ultimately the responsibility of the officers. Ms. Williams noted that PC statements in the new system go from the officers to the jail before it gets

to the court. Jails are being trained to look for sensitive information and reject it. That would require correction by the officers and resubmission to the jail for another review.

Judge Chin expressed concern that in domestic violence cases, the release of the names of minor children, victims, and addresses would be very dangerous. Judge Pullan noted that judges should not be responsible for catching officers' mistakes. The judiciary should not be the back-stop for law enforcements' training failures. Judge Walton stated that if the court starts solving the problem for them, they will not self-regulate. Judge Pullan agrees. Mr. Johnson noted that our rules still allow prosecutors and law enforcement to make a motion to seal a document. However, if a party wanted to make a motion to seal the record, there is no case opened to file it in and the document would likely have already been publicly available in Xchange for some period of time. Judge Pullan questioned whether there are any circumstances under which a judge might want to classify a PC statement as sealed. He described a homicide case where there were multiple defendants and one indicated the involvement of another. Judge Pullan noted, however, that there is a way for officers to exclude such information and still meet the PC requirements.

A motion was made by Mr. Rice to decline to adopt the amendment. Judge Walton seconded and the motion passed unanimously.

(13) Reorganization of CJA 4-202.02. Records Classification.
Ms. Williams presented a working document requested by the committee to reorganize CJA Rule 4-202.02 in a more user-friendly way. The proposal creates a table that would be included as a link in the rule. The rule itself would not be altered.

Judge Pullan asked that the first word in the right-hand column be capitalized. The committee discussed the various aspects of the table, including the addition of section references. Ms. Sylvester suggested that Ms. Williams have another person review the table for accuracy. Ms. Sylvester will conduct the review. Because this table would be demonstrative and would not change the language in the rule, it does not need to go out for public comment.

A motion was made by Judge Walton to advance the proposed policy to the Judicial Council for discussion and approval. Mr. Rice seconded the motion and it passed unanimously.

The next meeting is scheduled for January 5, 2018 in the council room at 12:00. There being no other business the meeting was adjourned at 1:53 p.m.