UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING AGENDA

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
June 7, 2019 – 12:00 p.m. to 2:00 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Walton
12:05	CJA revision to permit JPEC Basic Evaluation Pilot Program		Tab 2	Michael Drechsel Jennifer Yim
12:30	CJA 4-103 – Civil calendar management - *Review proposed revisions in light of Holmes v. Cannon, 2016 UT 42.*		Tab 3	Judge Walton Michael Drechsel
12:50	Update on CJA 4-601 – Selection of indigent aggravated murder defense fund counsel		Tab 4	Michael Drechsel
2:00	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/policyplan/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Friday of each month from 12:00 noon to 2:00 p.m. (unless otherwise specifically noted):

August 2, 2019
September 6, 2019
October 4, 2019
November 1, 2019 – **9:00 a.m. to 5:00 p.m.**
December 6, 2019

TAB 1

Minutes – May 03, 2019 Meeting

NOTES:

UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
May 3, 2019 – 9:00 a.m. to 2:00 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge Derek Pullan, *Chair*	•	
Judge Augustus Chin	•	
Judge Ryan Evershed	•	
Judge John Walton	•	
Mr. Rob Rice	•	

GUESTS:

Judge Mary Noonan
Dr. Jennifer Yim
Commissioner Russell Minas
Jim Peters
Judge Rueben Renstrom
Judge Laura Scott
Allison Barger
Nancy Sylvester
Neira Siaperas
Wendall Roberts
Kim Free

STAFF:

Michael Drechsel
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES: - RECORDING STARTED AT 8:59 AM

Judge Pullan welcomed the committee to the meeting. The committee considered the minutes from the March 1, 2019 meeting. With no changes, Judge Chin moved to approve the draft minutes. Judge Walton seconded the motion. The committee voted and the motion was unanimously passed.

(2) JPEC BASIC EVALUATION:

The Board of Justice Court judges and JPEC have been in discussion surrounding a pilot project for basic evaluations of justice court judges. Many judges welcome the idea of receiving feedback in an effort to improve the job performance. Dr. Jennifer Yim discussed that this project does come with several obstacles (i.e. costs, technology resources, FTE time) and asked for this committee's assistance in determining if those costs are worth proceeding forward with the project. CJA rule 4-401.02 prohibits the use of video recording in judicial hearings. If the project were approved to more forward, the rule would require changes OR JPEC would need to be temporarily exempt from the requirements of the rule. The primary function of the project is to be able to view those judges who, based upon the small size of their court, sit infrequently on the bench, making a more routine evaluation extremely difficult. Currently, justice court hearings are audio recorded, but the lack of video limits the ability to see how a judge behaves in the courtroom. As a means to provide useful and meaningful feedback, the video recording would allow reviewers to see the judge's facial expression and body language, in addition to hearing what is being said.

Since the idea was last presented to the Judicial Council, Dr. Yim has had multiple conversations with Brent Johnson and general counsel for JPEC in determining who would take ownership and responsibility of video recording. The court currently maintains ownership of courtroom proceeding audio recording. Would the court also maintain ownership of video recordings, or would responsibility be given to JPEC due to the purpose and nature of the recording? Dr. Yim asks if the Policy and Planning committee has any fundamental objection to making a rule change to allow the project to move forward. Dr. Yim reiterated that the justice court judges are on board with the idea, and though they are aware they will be recorded, justice courts are not court of record and would not fall under the rules of dual recordings.

Judge Chin noted that he has no level of discomfort in allowing for video recording in the courtroom so long as notification is given to all parties involved in the hearing, and there are no objections to the recording. The committee discussed concerns regarding protected record designation.

Following further discussion, the committee agreed to recommend the pilot project to the Judicial Council. The project still needs to be better defined and received approval from the Judicial Council. Dr. Yim noted that if the project could be approved by Judicial Council by July, JPEC will have until September to get the project up and running. The project will take anywhere from 6 months to one year to complete the testing phase, and then approximately another year to complete evaluations. This means an exemption from the requirements may need to last for approximately two years.

With those provisions in mind, Judge Chin moved to support JPEC's request to begin the pilot project of recording judges in the courtroom for performance improvement. Judge Evershed seconded the motion. The committee voted and the motion was unanimously approved.

The committee discussed whether Mr. Drechsel should prepare a draft proposal to present to the Judicial Council that will include a time frame for the project and an exemption to the recording rule in rule 4-401.02.

(3) CJA 6-305 – CONSOLIDATION OF PROBATION UPDATE:

Mr. Drechsel noted that this committee discussed CJA 6-305 during the October 2018 meeting. [That rule number was assigned as a placeholder for the draft rule and is not actually a numbered rule at this point in time.] Since this committee last reviewed the matter, the legislative change had been made to Utah Code § 77-18-1(12)(b)(i) removing the "that authorized probation" from the statute. Removal of this language makes it possible to proceed with further consideration of the consolidation of probation rule. In the last month, the issue was raised about where this rule should most appropriately be housed. Initially, this was drafted to be included in the Code of Judicial Administration. More recently, other individuals have expressed an opinion that the rule would belong in the Rules of Criminal Procedure, rather than under the Code of Judicial Administration. After further discussion, the Board of District Court Judges, General Counsel for the Courts, and the initial author of the draft rule (Judge Taylor) were all of the opinion that the rule should be moved to the Advisory Committee on the Rule of Criminal Procedure for further action. After discussion, Policy & Planning also agreed that that was the proper course of action.

With no further discussion, Mr. Rice moved to approve rule 6-305 be removed from the Code of Judicial Administration and placed under Rules of Criminal Procedure. Judge Evershed seconded the motion. The committee voted and the motion passed unanimously.

Mr. Drechsel will coordinate with Mr. Johnson on transfer of this project.

(4) CJA 4-903 – UNIFORM CUSTODY EVALUATIONS:

Commissioner Minas joined the meeting. He chairs the Committee on Children and Family Law. The committee has been working on a relatively modest, but involved, amendment to CJA 4-903 which would add Licensed Clinical

Mental Health Counselors (LCMHC) as those professionals who are qualified to conduct custody evaluations. Commissioner Minas noted that a judge on the committee stated that clinical providers would allow for greater expansion of all who may provide the evaluations, leading to lower costs savings to rural defendants. Commissioner Minas stated that there is no law that prohibits the inclusion of LCMHC to the list, and they are required to maintain the same amount of education and clinical hours as that of marriage and family counselors. Judge Chin noted that the Department of Occupational and Professional License does not have standard of care as to how mental health providers are regulated so long as they have the necessary hours needed. Commissioner Minas described to the committee the amount of time and effort involved in this project prior to bring the matter to Policy & Planning, including seeking input from other professionals who currently conduct such evaluations. There is a difference of opinion about whether adding this new category of professionals is the correct thing to do.

As part of the discussion, Judge Pullan stated that HB0035 was passed this year regarding custody and parent-time revisions. Judge Pullan noted that the legislature has invested a great deal of energy defining what factors a judge should consider when making custody decisions. In light of that, Judge Pullan wondered whether Rule 4-903(4) should be amended to remove all of the evaluation factors from the rule, and instead simply require evaluations to address all statutory factors.

The committee discussed both proposals. Judge Evershed moved to approve that LCMHC be included as a new group of authorized professionals to conduct custody evaluations in rule 4-903 and the rule go out for public comment. Mr. Rice seconded the motion. The committee voted and the motion was unanimously approved.

Following additional discussion, Judge Evershed moved to delete paragraphs (4)(A) – (4)(H) and simply have the rule require a custody evaluator to address all factors required in statute. Judge Walton seconded the motion. The motion was unanimously approved. The matter will be recommended to the Judicial Council for public comment.

(5) BALANCE CJA 1-204(3) AND CJA 3-402(5)(A)&(C):

Judge Mary Noonan joined the meeting. She provided the committee with an update regarding the Courts' human resources (HR) policies and procedures, and the efforts being made to review those as directed by the Judicial Council. There are two rules that need attention. Rule 1-204 outlines Policy and Planning's responsibilities which includes making recommendations to the Judicial Council regarding the HR manual. There is a second rule in the Code of Judicial Administration that refers to the "Human Resources Policy and Procedure Review Committee" (CJA 3-402). The two rules, when read together, create confusion as to the appropriate chain of action to propose HR policy changes to the Judicial Council.

The committee discussed the matter and agreed that Policy & Planning should be involved in HR policy review. The committee also agreed that the HR review committee should refer its work to Policy & Planning for review prior to Policy & Planning submitting recommended changes to the Judicial Council. In that way, the HR Review Committee would serve as a working group or subcommittee of Policy & Planning as both groups work together to attend to the assignment from the Judicial Council.

In order to tie the two rules (CJA 1-204 and CJA 3-402) together, it was recommended that CJA 1-204(3) have a reference to CJA 3-402 added. In addition, Judge Noonan reported that a group had met in April to review the membership of the HR Review Committee. As a result of that meeting, that group proposes that Rule 3-402(5)(A) include a trial court executive, three clerks of court, a probation supervisor, and a case manager. As part of the review committee of the HR policies, these additions would allow for a more board representation of all level of court employees. The appointment of these representatives would be accomplished through elections from within their respective groups, and not by selection of the state court administrator.

The committee reviewed CJA 3-402(5)(C). The committee determined that the Policy and Planning committee would continue to review all amendments to the HR policy for approval prior to submission for review by the Judicial Council.

Judge Noonan asked if the duration of a term to serve on the committee should be included in CJA 3-402. Mr. Drechsel pointed out that term limits are already addressed in Rule 1-205. The committee also recommended including language in the rule to denote that non-voting members of the review committee might be assigned by the Policy and Planning Committee, and that the chair of the committee will be appointed by the court administrator. Judge Noonan requests that Mr. Rice serve as a consultant to the committee, which is something he has offered to do.

With no further discussion, Mr. Rice moved to recommend those agreed upon changes for further consideration by the Judicial Council. Judge Chin seconded the motion. The motion was unanimously approved.

Mr. Drechsel will draft a memorandum to the Judicial Council, along with redline versions of the two rules for approval of the rules for public comment.

As a final note on this agenda item, Judge Noonan noted the Chief Justice requested a review of the harassment policy in February. Mr. Johnson is currently gathering harassment policies from other state courts for review and comparison to Utah's current policy. Mr. Johnson and Mr. Rice will review these policies and, when ready, will advance their findings to this committee for review at a future meeting.

(6) CJA APPENDIX B – JUSTICE COURT STANDARDS FOR RECERTIFICATION:

Jim Peters and Judge Rueben Renstrom presented amendments for standards of certification and recertification of justice courts. There used to be a committee that reviewed these standards, however the committee has been disbanded. The Board of Justice Court Judges is now reviewing these standards. The certification and recertification is required every two years. The Board may look to recodify the standards to Rule 9-108 at some point, but due to time constraints it is recommended that they standards remain in Appendix B for the time being. The Board is requesting for the rule to advance in time for the fall recertifications.

Judge Pullan recommends that the statutory requirements be removed from the rule and replaced with language that states that justice courts will adhere to all statutory requirements. Judge Pullan noted that legislative changes occur frequently in regards to requirement changes, which would then require that the CJA rule also be changed. Mr. Peters pointed out that having all of the factors in a single place has been helpful for judges and those entities running justice courts. Mr. Peters suggested that he will prepare a reference sheet, external to the Code of Judicial Administration to assist entities and justice court judges to identify all of the requirements

With no further discussion, Judge Chin moved to approve changes to CJA Appendix B as recommended by the committee. Judge Walton seconded the motion. The committee unanimously voted to approve the rule as amended.

Mr. Drechsel will work with Mr. Peters to remove the statutory factors and to prepare the rule for submission to the Judicial Council for approval for public comment.

(7) NEW PROBATE RULES:

Judge Laura Scott and Allison Barger, with Nancy Sylvester also in attendance, joined the meeting. They described the work of the Probate Subcommittee to address probate issues within the Rules of Civil Procedure. Judge Laura Scott, through her work as a probate rotation judge, was left with some concerns regarding how the probate issues were being address. Allison Barger, a probate practitioner, expressed concerns about how the probate rules were being addressed. Attorneys and parties are not sure of the requirements in probate court, and which rules apply to mediation process.

Judge Scott stated that the committee looked at areas where parties in probate court could be better served. The committee recognized a "silver tsunami" of guardianship, conservatorship and probate matters that is inevitably

going to be coming to the courts. The committee looked at parties who struggled to get to court on time, mainly the elderly and those who had a disability, as well as parties on the autism spectrum who may struggle with the hustles and bustles of a chaotic courtroom, and those just unfamiliar with the courtroom in general. The committee looked at concerns expressed by practitioners who say they could not have meaningful mediations due a lack of understanding or confusion of statutory requirements. The committee is contemplating having a separate set of Rules of Probate Procedure as a means to make the process better for parties and practitioners.

The group discussed two draft rule recommended by the subcommittee. The first is a new rule that would be numbered 4-1001. It describes informal probate trials. After discussion, Judge Pullan recommends that the rule be considered for inclusion in the Rules of Civil Procedure, rather than in the Code of Judicial Administration. Everyone agreed that would be the correct course of action. With no further discussions, Mr. Rice moved to refer the rule for review by the Rules of Civil Procedure Advisory Committee for creation of one rule and recommendations made by this committee. Judge Chin seconded the motion. The committee unanimously approved the motion.

The committee also reviewed a new proposed rule that is numbered 6-506 regarding procedures for contested probate matters. It includes a mandatory mediation process. The committee discussed rule 6-506. With no further discussions, Mr. Rice moved to recommend proposed Rule 6-506 to the Judicial Council for public comment. Judge Walton seconded the motion. The motion was unanimously approved.

Mr. Drechsel will submit a memorandum to the Judicial Council for public comment.

(8) CJA 4-206(4) - EXHIBITS:

The Supreme Court recently issued an opinion on the Sandoval v. State matter. In that case, the defendant argued that his rights to due process under Utah's constitution were violated when the evidence presented during the trial was destroyed by the Courts' under CJA 4-206(4). Due to this, he was unable to seek a post-conviction DNA testing. CJA 4-206(4)(B) allows for courts to dispose of exhibits three months after final disposition. The courts did not destroy the exhibits in this matter until approximately two years after the appeals court upheld the trial court's decision. The Supreme Court noted in the ruling that CJA 4-206 may create a potential due process challenge in a future case and suggested that the Judicial Council explore whether the three-month time limit imposed by the rule so limits the rights granted by the PCRA as to implicate due process concerns. In light of the Supreme Court's recommendation, Mr. Drechsel asked to this committee to determine if changes to rule 4-206(4) should be taken.

The committee discussed the reasoning behind the Supreme Court's opinion. The committee reviewed Utah Code § 78B-9-107 regarding post-conviction relief statute of limitations. Judge Walton recommended that the committee review how other jurisdictions have addressed disposals of evidence and rulings in post-conviction cases. Judge Evershed would recommended that the rule contains direction for attorneys to be notified when exhibits are being destroyed. Judge Pullan asked Mr. Drechsel to research other jurisdictions' approaches to this type of situation and to provide an update to this committee at another meeting. Judge Pullan noted that the Board of District Court Judges may want to weigh in on this subject.

No motion was made at this time. This rule will be reviewed again at a future meeting.

(9) CJA 7-302 – COURT REPORTS PREPARED FOR DELINQUENCY CASES:

Rule 7-302 of the Code of Judicial Administration came back from public comment on March 15, 2019. There were no comments received for this rule. It is recommended that the rule be sent to Judicial Council for adoption.

With no further discussion, Judge Evershed moved to accept CJA 7-302 as written and send to Judicial Council for adoption. Mr. Rice seconded the motion. The committee voted and the motion passed unanimously.

(10) CJA 3-201.02 – COURT COMMISSIONER CONDUCT COMMITTEE / CJA 3-201 – COURT COMMISSIONERS:

The committee had previously reviewed CJA 3-201.02 at the March 1 meeting. At that time, the committee had discussed concerns surrounding a subsection of the rule that described who would be allowed access to records and hearings. Mr. Drechsel noted that the language of subsection (2)(C) is not necessary in the rule. Court Commissioner Conduct Committee records are already considered protected under CJA 4-202.02(5)(J). Mr. Drechsel proposes that the language in CJA 3-202.02(C) removed from the rule.

In addition, the Mr. Drechsel informed the committee that the proposed changes to Rule 3-201.02 recommended by the committee also require the committee to consider changes to 3-201(7) regarding sanctions and removal of a commissioner. Rule 3-201 refers to "formal complaints" and unsatisfactory performance. The distinction between formal and informal complaints has been removed from CJA 3-201.02. The committee discussed whether sanctions for all types of complaint could be addressed by both the Judicial Council and the presiding judge (depending on need and circumstances). The committee discussed the issue in greater detail.

With no further discussions, the committee instructed Mr. Drechsel to prepare a draft of CJA 3-201 in light of the committee's discussion. Mr. Drechsel will redraft the rule and the matter will be reviewed again at the next meeting.

(11) HR 480 – EMPLOYEE EXERCISE POLICY:

Niera Siaperas, Wendell Roberts, and Judge Noonan joined the meeting. The committee had previously discussed HR 480 (employee exercise policy) during several previous meetings, including most recently the March 1, 2019 meeting. The policy has been reviewed with the interim HR director and the TCE's to address concerns identified by the committee.

Niera Siaperas thanked the committee for their input and attention to this policy as it is something the TCE feels is strongly beneficial to court employees. The TCEs have made several changes to the policy. The proposed policy is now more reflective of the views of all TCE members and is more comprehensive of the needs of all court employees.

The committee did not express any additional concerns for the policy and thanked the TCEs for their time and effort in revising the policy. The committee suggested that a few additional minor changes be made to the rule.

With no further discussion, Judge Chin moved to adopt HR 480 as amended and proposed by the Trial Court Executives. Judge Evershed seconded the motion. The committee unanimously moved to recommend the policy to the Judicial Council.

Mr. Drechsel will draft a memorandum to the Judicial Council for approval.

(12) CJA 4-401.01 – ELECTRONIC MEDIA COVERAGE OF COURT PROCEEDINGS:

As part of the annual review required by CJA 2-207, CJA 4-401.01 was reviewed by Judge Chin. Judge Chin noted that section (3)(A)states that media outlets must request permission for media coverage at least "one business day." Judge Chin asked the committee if this is practical. Would 48 or 72 hours be more sufficient? The committee discussed that the time frame given is sufficient for media coverage requests. This only becomes an issue when requests are made at the last minute or before a hearing is to begin. The committee members agreed that the one day business will remain as is written.

Judge Chin recommended removing "except as permitted by the judge" from section (4)(G)(viii) as interviews should not be permitted in the courtroom during a proceeding. The committee discussed that judges like having

the discretion to allow interviews to occur in the courtroom on as needed basis. The committee agreed that the statement should remain as written.

No motion was made for this rule.

(13) CJA 4-401.02 – POSSESSION AND USE OF PORTABLE ELECTRONIC DEVICES:

As part of the annual review required by CJA 2-207, Judge Chin asked the committee to review section (3)(b)(iii) and determine if the court should use the word "further" to discourage judges from imposing additional restrictions. The committee determined that having "further" in the rule would not change the outcome of the order. Judge Chin had no oppositions to leaving the rule as written.

No motion was made for this rule.

(14) CJA 4-103(3) – CIVIL CALENDAR MANAGEMENT:

As part of the annual review required by CJA 2-207, Judge Evershed reviewed CJA 4-103(3) and noted that in citing to URCP 41, CJA 4-103 misstated the Rule 41. Judge Pullan noted that section (3) and (4) are not necessary to include in the rule. Judge Pullan recommended removal of sections (3) and (4) from the rule.

With no further discussion, Judge Chin moved to strike sections (3) and (4) from CJA 4-103. Judge Walton seconded the motion. The committee voted and the motion was unanimously approved.

(15) CJA 4-110 – TRANSFER OF JUVENILE CASES FROM DISTRICT AND JUSTICE COURTS TO THE JUVENILE COURT:

As part of the annual review required by CJA 2-207, Judge Evershed stated that he was interested in how CJA 4-110 is currently written, and asked if the rule should be reviewed by the Juvenile Court Board for any additional recommendations. Judge Evershed noted that there may be issues in juvenile cases from district and justice courts that are not normally reviewed by the juvenile court. The board may want to weigh in on the transfer rule and make their recommendations to this committee for review.

With no further discussions, Judge Evershed moved to have the Juvenile Court Board review CJA 4-110 for additional input. Judge Chin seconded the motion. The motion was unanimously approved by the committee.

(16) CJA 4-202.03(6) – RECORDS ACCESS:

As part of the annual review required by CJA 2-207, Judge Evershed discussed recommended changes to CJA 4-202.03(6). Judge Evershed proposes the addition of allowing a parent or guardian of a victim of a delinquent act to access that the victim's disposition order if the victim is unemancipated or incapacitated. The committee discussed Judge Evershed's recommendation and did not have any concerns or objections to the recommendations.

With no further discussion, Judge Chin moved to accept the recommendations as proposed by Judge Evershed. Mr. Rice seconded the motion. The motion was unanimously approved.

(17) CJA 4-202.09(3) - MISCELLANEOUS:

As part of the annual review required by CJA 2-207, Judge Evershed proposed that scanning of records be included in rule 4-202.09. Judge Evershed stated that in this day and age, many people are making photo copies of their records on their phones, rather than actually printing out the documents. The committee discussed the matter and determined that the rule should not be amended at this time.

No motion or action was taken for this rule.

(18) CJA 4-501 – EXPEDITED JURY TRIAL:

As part of the annual review required by CJA 2-207, Mr. Drechsel provided the committee with a history of CJA 4-501. The Legislature passed HB 349 in 2011 that in turn created Utah Code § 78B-3-901. The Judicial Council was directed to create a rule to implement HB 349. The law contained a repeal date of January 1, 2017, within the code. The statute has been repealed, but CJA 4-501 remains as one of the Courts' rules. It is no longer necessary to have CJA 4-501. Mr. Drechsel proposed that the rule be recommended to the Judicial Council for repeal. There also need to be some updates to the Courts' website.

With no further discussion, Mr. Rice moved that CJA 4-501 be submitted to the Judicial Council for repeal. Judge Evershed seconded the motion. The motion was unanimously approved.

(19) CJA 4-902 – LIMITED SCOPE INVESTIGATION OF DOMESTIC ISSUES:

As part of the annual review required by CJA 2-207, Judge Evershed asked the committee for their input on section (1) of CJA 4-902. Judge Evershed does not recall a judge having the need to for "minimum qualifications required for a custody evaluation under Rule 4-903". None of the committee members have had any experience with this rule in practice. The ocmmitte wondered whether the rule is useful or necessary. Judge Walton proposed a language change to remove "the minimum qualifications required for a custody evaluation under Rule 4-903" with "… agree to by the parties or otherwise designated by the court." Mr. Drechsel suggested that he speak with the commissioners to see if they see the rule being used, and then report back to the committee. The committee approved Mr. Drechsel's recommendation.

No motion was taken for this rule. Mr. Drechsel will provide updated information once he has spoken with court commissioners.

(20) CJA 4-905 – RESTRAINT OF MINORS IN JUVENILE COURT:

As part of the annual review required by CJA 2-207, Judge Evershed discussed CJA 4-905. Judge Evershed recommended removal of the specific citation to a particular subsection in Utah Code § 78A-6-105. The citation will quickly be out of date whenever the Legislature amends Utah Code § 78A-6-105 (which happens nearly every session).

With no further discussions, Judge Evershed moved to remove the pinpoint citation and leave the citation generally to Utah Code § 78A-6-105 in the rule. Judge Chin seconded the motion. The motion was unanimously approved by the committee.

The rule should not need to go out for additional comment as there has not been a substantive change to any part of the rule.

(21) CJA 4-601 – SELECTION OF INDIGENT AGGRAVATED MURDER DEFENSE FUND COUNSEL:

As part of the annual review required by CJA 2-207, Judge Walton discussed that section (2) allows for a board member to identify a public defender to represent an indigent defendant. Judge Walton noted that application of this rule has resulted in none of the local qualified attorneys being considered for appointment. Judge Walton wondered if there should be a geographical component to the rule where the local qualified attorneys are added to the random selection process, with any additional attorneys selected from the rest of the state at random to get to five possible attorneys to choose from.

The committee instructed Mr. Drechsel to contact the fund board to discuss any concerns with adding a regional component to the rule. Mr. Drechsel should also draft a new version of the rule with a geographical component to the random selection process, based on the discussion and direction from the committee. Mr. Drechsel will bring this matter back to Policy and Planning at the next meeting.

(22) CJA 4-609 – PROCEDURE FOR OBTAINING FINGERPRINTS AND OFFENSE TRACKING NUMBERS ON DEFENDANTS WHO HAVE NOT BEEN BOOKED IN JAIL:

As part of the annual review required by CJA 2-207, Judge Walton asked the committee for input to determine if the courts around the state are acting in compliance with CJA 4-609. Mr. Drechsel reported that while there is room for some improvement in certain parts of the state, that most of the state is largely compliant with the rule. Several locations around the state are using LiveScan machines to conduct fingerprinting at the courthouse. Mr. Drechsel reported that one of the legislative study items for this interim is criminal records accuracy, which may require additional fingerprint collection at courthouse to ensure the person arrested is the person charged is the person convicted, is the person incarcerated is the person on probation / parole, etc. After that discussion, the committee did not have any concerns or recommendations for this rule. The committee determined that it would be best to leave the rule as it is currently written and bring it back at another date for further discussion once the Legislatures decide on any changes to the law.

(23) CJA 4-610 – APPOINTMENT OF JUSTICE COURT JUDGES TO PRESIDE AT FIRST APPEARANCE, PRELIMINARY HEARINGS AND ARRAIGNMENTS:

As part of the annual review required by CJA 2-207, Judge Walton asked the committee if the AOC provides a course or training for appointments of justice court judges in appearances at first appearance hearings. Judge Chin stated that Judge Fuchs does a training with each new justice court judge appointed to the position. Mr. Drechsel stated that the AOC does pay for the judges to be trained. Judge Walton had no additional comments or concerns.

With no further discussion, Judge Evershed moved to make no changes to the rule as currently written. Judge Chin seconded the motion. The motion passed unanimously; no changes will be made to this rule at this time.

(7) ADJOURN

With no further items for discussion the meeting adjourned at 2:00 p.m. The next meeting will be held on June 7, 2019 at 12:00 pm (noon).

TAB 2

JPEC Basic Evaluation Pilot Program Rule

NOTES: At its May 20, 2019 meeting, members of the Judicial Council provided some input to Policy & Planning on how to proceed with JPEC's proposed Basic Evaluation Pilot Program. Policy & Planning should review the following proposed rule changes with an eye toward implementing a rule change that will permit JPEC to effectively conduct its pilot program.

Rule 4-401.02. Possession and use of portable electronic devices.

Intent:

To permit the use of portable electronic devices in courthouses and courtrooms, subject to local restrictions.

Applicability:

This rule applies to the courts of record and not of record.

Statement of the Rule:

(1) Definitions.

(1)(A) "Judge" as used in this rule means the judge, justice, or court commissioner who is presiding over the proceeding.

(1)(B) "Portable electronic device" as used in this rule means any device that can record or transmit data, images or sounds, or access the internet, including a pager, laptop/notebook/personal computer, handheld PC, PDA, audio or video recorder, wireless device, cellular telephone, or electronic calendar.

(2) Possession and use of portable electronic devices in a courthouse.

(2)(A) A person may possess and use a portable electronic device anywhere in a courthouse, except as limited by this rule or directive of the judge.

(2)(B) All portable electronic devices are subject to screening or inspection at the time of entry to the courthouse and at any time within the courthouse in accordance with Rule 3-414.

(2)(C) All portable electronic devices are subject to confiscation if there is reason to believe that a device is or will be used in violation of this rule. Violation of this rule or directive of the judge may be treated as contempt of court.

(2)(D) For the limited purpose of conducting a pilot project to evaluate the performance of justice court judges using courtroom observation, the Judicial Performance Evaluation Commission may record and/or transmit video and sound of court proceedings. These recordings and/or transmissions are protected records and must be subject to a retention schedule that results in the records being destroyed immediately following the completion of the observation.

(3) Restrictions.

(3)(A) Use of portable electronic devices in common areas. The presiding judges may restrict the time, place, and manner of using a portable electronic device to maintain safety, decorum, and order of common areas of the courthouse, such as lobbies and corridors.

(3)(B) Use of portable electronic devices in courtrooms.

(3)(B)(i) A person may silently use a portable electronic device inside a courtroom.

(3)(B)(ii) A person may not use a portable electronic device to record or transmit images or sound of court proceedings, except in accordance with Rule 4-401.01 or subsection (2)(D) above.

(3)(B)(iii) A judge may further restrict use of portable electronic devices in his or her courtroom. Judges are encouraged not to impose further restrictions unless use of a portable electronic device might interfere with the administration of justice, disrupt the proceedings, pose any threat to safety or security, compromise the integrity of the proceedings, or threaten the interests of a minor.

(3)(B)(iv) During trial and juror selection, prospective, seated, and alternate jurors are prohibited from researching and discussing the case they are or will be trying. Once selected, jurors shall not use a portable electronic device while in the courtroom and shall not possess an electronic device while deliberating.

(4) Use of portable electronic devices in court chambers. A person may not use a portable electronic device in chambers without prior approval from the judge.

(5) Instruction to witnesses. It should be anticipated that observers in the courtroom will use portable electronic devices to transmit news accounts and commentary during the proceedings. Judges should instruct counsel to instruct witnesses who have been excluded from the courtroom not to view accounts of other witnesses' testimony before giving their own testimony.

Effective May/November 1, 20___

TAB 3

CJA 4-103 – Civil calendar management

NOTES: At the committee's May 3, 2019 meeting, this rule was identified as potentially needing some amendment. The committee subsequently received additional information about the genesis of the language that the committee was proposing to remove from the rule. In particular, 4-103(3) was added to the rule in November 2017 as a result of Holmes v. Cannon, 2016 UT 42 (attached). In that case, the Utah Supreme Court identified that CJA 4-103 and URCP 41(b) both permit a court to dismiss an action. URCP 41(b) notes that a dismissal under URCP 41(b) "operates as an adjudication on the merits" (meaning with prejudice) "unless the dismissal order otherwise states." Prior to 2017, CJA 4-103 didn't require that dismissals under CJA 4-103 "otherwise state" (to use the parlance of URCP 41(b)). To bring clarity to the confusion that arose in Holmes v. Cannon, the Judicial Council enacted CJA 4-103(3) requiring a court to include "without prejudice" language any time a case is dismissed under that rule.

That said, the language used in CJA 4-103(3) might still need to be amended to clarify the intention behind the language. The current use of "Pursuant to Rule 41 of the Utah Rules of Civil Procedure" language is what has caused confusions, as Rule 41 doesn't actually require "without prejudice" language. Staff has made an effort to revise the language in CJA 4-103(3) so that it does not continue to perpetuate the confusion that caught Policy & Planning's attention.

In addition to the change to CJA 4-103(3), the committee also marked CJA 4-103(4) for deletion, viewing the provision as superfluous. After further research, it appears that language is included in the rule to incorporate the relief available under URCP 60 into this rule. In other words, if a matter is dismissed without prejudice under CJA 4-103, one might conclude that the only avenue for moving forward is to file a new action. 4-103(4) clarifies that a party may seek to have the dismissal order set aside and continue litigating the existing action, instead of filing a new action.

Rule 4-103. Civil calendar management.

Intent:

To establish a procedure that allows the trial courts to manage civil case processing.

To reduce the time between case filing and disposition.

Applicability:

This rule shall apply to the District Court.

Statement of the Rule:

(1) If a default judgment has not been entered by the plaintiff within 60 days of the availability of default, the clerk will mail written notification to the plaintiff stating that absent a showing of good cause by a date specified in the notification, the court will dismiss the case without prejudice for lack of prosecution.

(2) If a certificate of readiness for trial has not been served and filed within 330 days of the first answer, the clerk will mail written notification to the parties stating that absent a showing of good cause by a date specified in the notification, the court will dismiss the case without prejudice for lack of prosecution.

(3) ~~Pursuant to Rule 41 of the Utah Rules of Civil Procedure, all~~Any order~~s~~ of dismissal entered under this rule must contain the language "without prejudice."

(4) Any party may, pursuant to the Utah Rules of Civil Procedure, move to vacate a dismissal entered under this rule.

Effective November 1, 2017

Commented [MCD1]: This language was added to Rule 4-103 in 2017 as a result of Holmes v. Cannon, 2016 UT 42.

Commented [MCD2]: Incorporates the relief available under URCP 60 into this rule. In other words, if a matter is dismissed without prejudice under CJA 4-103, one might conclude that the only avenue for moving forward is to file a new action. 4-103(4) clarifies that a party may seek to have the dismissal order set aside and continue litigating the existing action, instead of filing a new action.

This opinion is subject to revision before final publication in the Pacific Reporter

2016 UT 42

IN THE

SUPREME COURT OF THE STATE OF UTAH

TERRY HOLMES,
Appellant,

v.

CHRIS CANNON,
Appellee.

No. 20150238
Filed September 8, 2016

On Appeal of Interlocutory Order

Third District, Salt Lake Dep't
The Honorable Laura Scott
No. 140905719

Attorneys:

Victor A. Sipos, Salt Lake City, for appellant

Phillip E. Lowry, Bryson R. Brown, Salt Lake City, for appellee

JUSTICE DURHAM authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PEARCE joined.

JUSTICE DURHAM, opinion of the Court:

INTRODUCTION

¶1 In *Panos v. Smith's Food & Drug Centers, Inc.*, 913 P.2d 363 (Utah Ct. App. 1996), the court of appeals held that when a judge issues an order dismissing a case for failure to prosecute, but fails to explicitly provide that the case is dismissed with prejudice or pursuant to Utah Rule of Civil Procedure 41(b), the presumption is that the case is dismissed without prejudice.

¶2 Today we overrule *Panos*, concluding it was incorrectly decided. The plain language of rule 41(b) is clear that the presumption of prejudice applies broadly in most cases, including not only to cases where the judge specifies reliance on rule 41(b), but

also to "any dismissal[s] not provided for in this rule." There are limited exceptions to the rule's presumption, including when a judge "otherwise specifies" that the case is not dismissed with prejudice.

¶3 Because we determine that the appellee in this matter is unable to establish reliance on the *Panos* decision for purposes of prospective application of our holding, we decline to afford it.

BACKGROUND

¶4 This litigation initially began twelve years ago, when Chris Cannon filed a lawsuit against the defendant individuals and companies he alleges are responsible for several tort and contract violations associated with an investment gone wrong. *See Ted Knodel v. Terry Holmes*, Civ. No. 040918738 (Utah 3rd D. Ct. August 22, 2013). After the case languished for several years, the district court issued an order requiring "the parties to appear . . . and show cause why this case should not be dismissed for failure to prosecute. By failing to appear, the Court will enter an order of dismissal without further notice." Neither side's counsel appeared at the hearing, and the district court dismissed the case: "No parties present. The Court orders this case be dismissed." The judge did not indicate under which rule the case was to be dismissed.

¶5 Mr. Cannon did not attempt to set aside the dismissal, but rather filed a new action in the district court, asserting the same claims against the same defendants. Defendants filed a 12(b)(6) motion to dismiss, arguing that the dismissal operated as a dismissal with prejudice under rule 41(b). Mr. Cannon opposed the motion, arguing that rule 4-103(2) of the Utah Code of Judicial Administration presumes that failure-to-prosecute dismissals are dismissed without prejudice and citing the court of appeals' decision in *Panos v. Smith's Food & Drug Centers, Inc.*, 913 P.2d 363 (Utah Ct. App. 1996).

¶6 The district court judge held a hearing on the defendants' 12(b)(6) motion to dismiss and then denied the motion, finding the *Panos* decision controlling. We granted defendants' petition for an interlocutory appeal pursuant to Utah Code section 78A-3-102(3)(j), and the district court stayed the action pending the outcome of this appeal. We review the district court's interpretation of our rules of procedure for correctness. *Simler v. Chilel*, 2016 UT 23, ¶ 9, -- P.3d –- ("[T]he district court's interpretations of . . . rules of procedure are questions of law reviewed for correctness." (second alteration in original) (citation omitted)).

ANALYSIS

I. *PANOS* INCORRECTLY RELIED ON RULE 4-103(2) OF THE UTAH CODE OF JUDICIAL ADMINISTRATION RATHER THAN RELYING ON UTAH RULE OF CIVIL PROCEDURE 41(B)

¶7 Utah Rule of Civil Procedure 41(b) is our rule on the effect of involuntary dismissals and provides in part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant[1] may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

¶8 We have interpreted "adjudication on the merits" to mean that the case is dismissed with prejudice—i.e., the plaintiff is barred from re-filing the same claim in the same court. *See Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, ¶¶ 22-23, 289 P.3d 502. Therefore, a case is presumptively dismissed with prejudice unless it falls under an exception. *See Alvarez v. Galetka*, 933 P.2d 987, 990 (Utah 1997) ("[I]t is a general rule that if a court grants an involuntary dismissal and does not specify whether it is with or without prejudice, it is assumed that the dismissal is with prejudice.").

¶9 The rule enumerates three express exceptions: lack of jurisdiction, improper venue, and lack of an indispensable party. *Horne*, 2012 UT 66, ¶ 23. "[T]he exceptions enumerated in rule 41 are

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[1] Although the rule provides that "a defendant" may move for dismissal, courts have the inherent power to dismiss cases *sua sponte*. *See Wilson v. Lambert*, 613 P.2d 765, 768 (Utah 1980) ("[T]he court retains inherent power to dismiss an action [under rule 41(b)] for failure to prosecute pursuant to its own motion."); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629, 630-631 (1962) ("The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. . . . The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

[not] exhaustive. . . . The rule's list of non-preclusive dismissals . . . simply illustrates the types of dismissals that do not preclude further litigation." *Id.* The dismissals mentioned are illustrative of non-preclusive dismissals as they all "result[] from an 'initial bar' to the court's adjudication of the parties' claims and defenses." *Id.* ¶ 24 (citation omitted); *cf. Alvarez*, 933 P.2d at 991 (describing the general rule that dismissals under rule 12(b)(6) are not preclusive and "the court normally will give plaintiff leave to file an amended complaint" (citation omitted)).

¶10 Additionally, district court judges maintain discretion to dismiss without prejudice when they choose to "otherwise specif[y]" that result. *See Donahue v. Smith,* 2001 UT 46, ¶ 8 n.3, 27 P.3d 552 ("[U]nder rule 41(b) the district court was not required to dismiss plaintiff's complaint with prejudice. Rule 41(b) provides that, 'Unless the court in its order for dismissal provides otherwise, a dismissal under this subdivision . . . operates as an adjudication upon the merits.' Under the rule, it would not have been error for the district court to provide in its order that plaintiff's complaint be dismissed without prejudice." (second alteration in original)).

¶11 As in this case, *Panos v. Smith's Food & Drug Centers, Inc.*, 913 P.2d 363 (Utah Ct. App. 1996), involved a dismissal for failure to prosecute. The judge's order for dismissal "did not indicate whether the dismissal was with or without prejudice, or pursuant to Rule 41(b) of the Utah Rules of Civil Procedure or Rule 4-103 of the Utah Code of Judicial Administration."[2] *Id.* at 364. After dismissal, the plaintiff filed a new complaint against the defendant. The defendant filed a motion to dismiss, arguing that under rule 41(b), the case was dismissed with prejudice. *Id.*

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[2] The *Panos* opinion recites that the original notice to appear in that case was "pursuant to Rule 4-103," but references a later order as follows: "After presumably finding good cause not to dismiss the case [on the first order]," the court ordered "counsel to settle [the] case or file a Certificate of Readiness for Trial." 913 P.2d at 364. "If neither are done, the case will be dismissed without further notice. . . ." *Id*. Thus, it is arguable, although not clear, that the ultimate dismissal in *Panos* was in a rule 4-103 proceeding and entitled to be treated as without prejudice. Notwithstanding that argument, the language of *Panos* does not reference it when it concludes, "If a trial court wishes to dismiss a case for failure to prosecute, the trial court must expressly indicate that dismissal is with prejudice or pursuant to Rule 41(b). Otherwise, we assume the dismissal was without prejudice under Rule 4-103(2) of the Utah Code of Judicial Administration." *Id.* at 365 (footnote omitted).

¶12 The court of appeals "refuse[d] to apply the Rule 41(b) presumption in favor of dismissal with prejudice when the trial court has failed to explicitly identify that it is dismissing the case pursuant to Rule 41(b), or at least indicate that it is dismissing the case with prejudice." *Id.* at 364–65. The court determined that in this situation, "we assume the dismissal was without prejudice under Rule 4-103(2) of the Utah Code of Judicial Administration." *Id.* at 365.

¶13 Rule 4-103(2) provides that

> [i]f a certificate of readiness for trial has not been served and filed within 330 days of the first answer, the clerk shall mail written notification to the parties stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution.

Because rule 4-103(2) provides that the case is dismissed without prejudice, the court of appeals resolved the apparent conflict between rules 41(b) and 4-103(2) by determining that rule 4-103(2) is the default rule and that "[i]f a trial court wishes to dismiss a case with prejudice for failure to prosecute, the trial court must expressly indicate that dismissal is with prejudice or pursuant to Rule 41(b)." *Panos*, 913 P.2d at 365.

¶14 The problem is that the *Panos* interpretation of rule 41(b) and rule 4-103 reverses the presumption contained in the plain language of rule 41(b). Rule 41(b) presumes that all involuntary dismissals—whether falling under rule 41(b) or *any other rule*—are dismissed with prejudice, unless the dismissal falls under one of the "initial bar" exceptions or the judge "otherwise specifies." In *Panos*, as in this case, the judge did not "otherwise specify" that the case was to be dismissed without prejudice, nor did the case fall under one of the exceptions. Therefore, we overrule *Panos* and hold that involuntary dismissals are presumptively dismissed with prejudice unless the judge otherwise specifies or the case falls under an exception.[3]

[3] Article VIII, section 4 of the Utah Constitution gives the Utah Supreme Court the power to "adopt rules of procedure and evidence to be used in the courts of the state." In Article VIII, section 12 the Judicial Council is empowered to adopt rules for the "administration of the courts of the state." The Code of Judicial Administration, in which rule 4-103(2) appears, has been promulgated in accordance with that authority. Rule 4-103 is contained in "Article I. Calendar Management" of the rules, and is titled "Civil Calendar

II. WE DECLINE TO APPLY OUR DECISION ONLY PROSPECTIVELY

¶15 The general rule of retroactivity in a civil case is that "the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively." *Monarrez v. Utah Dep't of Transp.*, 2016 UT 10, ¶ 28, 368 P.3d 846 (citation omitted).[4] However, we will deviate from the default rule of retroactivity and apply our decision prospectively only when two requirements are met. First, the ruling must "result [from] a change in the law" that "significantly alter[s] the legal landscape by ending or overruling a relied-upon practice." *Id.* But it is not enough to make a "bare assertion . . . that our decision overrules prior cases," *id*. (alteration in original) (citation omitted), because the party seeking prospective application of the ruling must also show either "justifiable reliance on the prior state of the law," or that retroactive application would create an undue burden. *Id.* (citation omitted). We conclude that the second requirement is not met in this case.

¶16 As to the first requirement that the ruling "significantly alter[s] the legal landscape by ending or overruling a relied-upon

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Management." Its intent is "to establish a procedure which allows the trial courts to manage civil case processing," and, according to the court of appeals in *Meadow Fresh Farms, Inc. v. Utah State Univ. Dep't of Agric. & Applied Sci.*, "merely codifies . . . an inherent power of the trial court to dismiss a case sua sponte for lack of prosecution under Rule 41(b)." 813 P.2d 1216, 1218 n.3 (Utah Ct. App. 1991).

The difficulty, unrecognized by the court of appeals in *Panos*, is that the portion of rule 403(2) providing that "the court shall dismiss the case without prejudice" cannot alter the requirement in rule 41(b) that the order of dismissal must specify on its face that it is without prejudice to avoid the presumption that the dismissal is on the merits. The Judicial Council has no authority to override a rule of civil procedure. Thus, even though rule 403(2) on its face purports to give trial judges the power to dismiss for lack of prosecution *only without prejudice*, trial judges cannot properly exercise that power without complying with rule 41(b)'s "otherwise specifies" language.

The difficulty in the future can be easily resolved by amending rule 4-103 to require that all dismissals entered pursuant to the rule must contain the language "without prejudice," and by developing forms consistent with that requirement.

[4] The presumption is reversed for statutes, where the general rule is that "[a] provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive." UTAH CODE § 68-3-3.

practice," our decision today overrules the court of appeals' decision in *Panos v. Smith's Food & Drug Centers, Inc.*, 913 P.2d 363 (Utah Ct. App. 1996). As discussed in Part I *supra*, *Panos* held that unless the trial court explicitly says the dismissal is with prejudice or pursuant to rule 41(b), it is dismissed without prejudice. Today we "significantly alter the legal landscape" by reversing what was a clear interpretation of a rule of civil procedure—made by an appellate court—and determine that if an order of dismissal is silent, it is dismissed with prejudice as required by rule 41(b).

¶17 As to the second requirement, the party requesting prospective application must show either "'justifiable reliance on the prior state of the law' or that 'the retroactive operation of the new law may otherwise create an undue burden.'" *Monarrez*, 2016 UT 10, ¶ 28. Mr. Cannon does not argue that overruling *Panos* will create an undue burden; therefore, we focus exclusively on whether he justifiably relied on *Panos*'s clear interpretation of Utah Rule of Civil Procedure 41(b) and Utah Rule of Judicial Administration 4-103.

¶18 We have held that "[l]itigants ought to be able to rely on our constructions of our rules and statutes. . . ." *Carter v. Lehi City*, 2012 UT 2, ¶ 15, 269 P.3d 141. In *Carter*, a group of voters wanted to amend city ordinances through the initiative process. After the city council declined to include the initiatives on the ballot, the group filed a petition for an extraordinary writ. The relevant statute required the group to file its petition "'within 10 days after the refusal' of the initiative by the 'local clerk.'" *Id.* ¶ 11. The group filed its petition on the eleventh day. However, we had earlier held, in *Low v. City of Monticello*, 2002 UT 90, 54 P.3d 1153, that Utah Rule of Civil Procedure 6(e) extended the ten-day period by an additional three days to account for mail service, which would have made the group's petition timely, a ruling on which petitioners specifically relied in calculating their time. Oral Argument at 1:44 – 4:04, Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (No. 20110482), https://www.utcourts.gov/opinions/streams/sup/.

¶19 We overruled *Low* to the extent that it "adopted a construction of rule 6(e) that is contrary to its text. Rule 6(e) has no application to the ten-day filing requirement for extraordinary writs . . . as the statutory period is triggered by *refusal* of an initiative and not its *service* to a party." *Carter*, 2012 UT 2, ¶ 15. However, if we had followed the general rule in *Carter* and applied this ruling retroactively, it would have "result[ed] in dismissal of the petition as untimely." *Id.* ¶ 14. We therefore did not extend this holding retroactively with respect to the group of voters in *Carter* because we determined that "[l]itigants ought to be able to rely on our

constructions of our rules and statutes. . . ." *Id.* ¶ 15. And where we had previously clearly interpreted one of our rules to apply in this specific situation and the petitioner had actually relied on that interpretation, we held that the group was "entitled to rely on our opinion in *Low* and should not be punished for accepting it as controlling so long as it stood unreversed." *Id.*

¶20 Unlike the petitioners in *Carter*, Mr. Cannon has not asserted on appeal nor demonstrated in the record any decision or act undertaken or not pursued in reliance on *Panos*. He has not even asserted that he was aware of the *Panos* decision until the motion to dismiss was filed in this case. Absent such a demonstration of justified reliance, his argument for prospective-only application of our decision must fail.

CONCLUSION

¶21 Today we overrule *Panos v. Smith's Food & Drug Centers, Inc.*, 913 P.2d 363 (Utah Ct. App. 1996), and hold that the plain text of Utah Rule of Civil Procedure 41(b) controls whether a case is dismissed with or without prejudice. Because the district court judge in this case did not specify that the case was to be dismissed without prejudice, and this case does not fall within an exception to rule 41(b), the case should have been dismissed with prejudice. Further, we hold that in the absence of a showing of reliance on the court of appeals earlier opinion in *Panos*, Mr. Cannon is not entitled to a prospective-only application of our ruling.

TAB 4

Update on CJA 4-601 – Selection of indigent aggravated murder defense fund counsel

NOTES: At the May 3, 2019 meeting, the committee discussed CJA 4-601 and agreed that an effort should be made to incorporate a geographical component to the selection process. On that same date, the Courts were contacted by a member of the Inidigent Defense Funds Board regarding this same rule, advocating that changes be made to the selection process outlined in the rule, including removing court involvement in the selection process. Several days after that, staff learned that CCJJ is also considering legislative revisions the underlying processes this coming session. As a result, the committee may wish to revisit the decision to take action on this rule at this time.