UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
October 4, 2019 – 12:00 p.m. to 2:00 p.m.

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

GUESTS:

Judge Mary Noonan
Brent Johnson
Nini Rich
Bart Olsen
Nancy Sylvester

STAFF:

Keisa Williams
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Pullan welcomed members to the meeting. The committee considered the minutes from the September 6, 2019 meeting. With no additional changes, Judge Walton moved to approve the draft minutes. Rob Rice seconded the motion. The committee voted and the motion was unanimously passed.

(2) RULES BACK FROM PUBLIC COMMENT:

CJA 6-506:
Code of Judicial Administration rule 6-506 came back from public comment on August 8, 2019, having received three comments. Ms. Sylvester reviewed the public comments and her recommended changes based on those comments. The Rules of Civil Procedure Committee addressed the comments related to URCP 26.4. One comment suggested changing 6-506 to allow private mediators to mediate contested probate disputes, or allow the ADR program to contract with private mediators. Ms. Sylvester recommended no change because the court has an interest in using mediators vetted through the ADR program, and after talking to Ms. Rich; rule 4-510.05 permits the use of private mediators. Nini Rich, AOC ADR Director, reported that rule 4-510.05 does not prohibit private providers. The rule allows parties to select their own mediator and states that parties may choose from the court roster or a mediator pro tem with specialized skills. The court roster is provided as a resource, and is made up entirely of private providers vetted to ensure they possess the requisite skills, training, and experience. There are no district court staff mediators. Allowing use of a mediator pro tem opens it up even further.

Another commenter stated that estate litigation frequently involves complicated issues that cannot be easily addressed by mediation, so the mandatory nature of 6-506 is an obstacle to much-needed flexibility on the part of the court, and the time frames for response are much too short. Ms. Sylvester stated that the rule already does most of what the commenter asked for because the court can waive mediation, however, subsection (1)(C) could be bolstered by adding a requirement that, as a part of the pre-mediation conference, judges must make a determination about whether the case contains complicated

issues of fact and law better resolved in the ordinary course of litigation. Judge Pullan agreed that the more hands-on involvement of a judge early in the case, the more likely it will be resolved efficiently.

The ADR Committee proposed adding a provision in subsection (1)(C). During the pre-mediation conference, the new provision would require judges to select the mediator or determine the process and time frame for selecting the mediator, in accordance with Rule 4-510.05. The Committee agreed with that amendment. The Disability Law Center's first comment suggested adding language to URCP 26.4 clarifying that a court should offer assistance to a respondent filing an objection using his/her preferred method or means of communication. Judge Pullan expressed concern about any amendment that requires the court to offer assistance to one side of the litigation. In addition, he noted that the language allowing an individual to use their preferred method or means of communication to file an objection is unclear, and depending on the meaning, it may not be practical. Ms. Sylvester stated that the Rules of Civil Procedure Committee addressed the second issue in 26.4(c)(2) by removing the requirement that objections be made or reduced to writing. The Civil Procedure Committee's amendment allows the court, for good cause, to accept an objection using the person's preferred means of communication and requires documentation of the objection in the court record. Judge Pullan stated that as long as the objection is documented in a way that it could be docketed, his concern would be addressed.

The Disability Law Center also recommended that Rule 6-506 be amended to include the requirement of counsel found in 75-5-303(2)(b), and follow the process in 75-5-303(5)(d) if a respondent is not represented by counsel. The Center also commented that the requirement for parties to share mediation costs could be problematic or prohibitive for disabled individuals with very limited income. Ms. Sylvester suggested adding the provision of counsel as another factor for consideration at the pre-mediation conference. She noted that the rule already allows parties to request, and the court to grant, a waiver of mediation fees. The committee agreed with the change regarding provision of counsel.

After discussion, Mr. Rice moved to approve all redlined changes as discussed, and to recommend to the Judicial Council that the proposed amendments be approved as final. Judge Evershed seconded the motion. The motion was unanimously approved.

(3) (NEW) CJA 4-411. COURTHOUSE ATTIRE:

The Self-represented Parties Committee is proposing new rule 4-411 for consideration and adoption. The rule addresses appropriate courthouse attire for all parties conducting business at the courthouse and within a courtroom. The intent of the rule is to prevent court patrons from being turned away from the courthouse or a courtroom by court staff or bailiffs unless they fall within a few narrow exceptions.

Judge Noonan asked whether the term "judicial officer," defined as including both judges and commissioners, is consistent with other rules. Ms. Sylvester stated that she believes it is consistent. Judge Noonan recommended adding "consultation" to the role of bailiffs, court security, or court staff. As a practical matter, judges may need to consult with bailiffs and staff when making these types of decisions. Judge Noonan stated that the provision listing specific articles of clothing in subsection (2)(b) appears to target clothing traditionally worn by women and is unnecessary because the issue is addressed more broadly in subsection (2)(a). After discussion, the committee agreed with both of Judge Noonan's suggestions.

The committee removed "shirt, pants, and shoes or equivalent attire" from (2)(a). As long as the individual is wearing attire covering the body parts listed, it is sufficient. Use of the word "may" ensures judges still retain some discretion. Mr. Rice expressed concern with the language "special consideration" in reference to breastfeeding mothers. He recommended amending (2)(c) to permit breastfeeding pursuant to Utah Code 13-7a-101.

Judge Noonan expressed concern about the health and safety provision. "Communicable disease" is a term of art. It is probably outside nearly everyone at the court's expertise to correctly identify a communicable disease. It seems that what the rule is trying to accomplish is to provide the discretion to deny access when there is a reasonable appearance of a health concern. It is problematic to use a term of art; the language should be stated more broadly. Rob Rice asked for an example of the need for this provision. A committee member described an incident involving a defendant who appeared in court coughing terribly who told the court he had Mersa. Another individual entered the law library with an open, seeping wound. Other examples included lice and scabies. Mr. Rice asked whether there was another rule addressing health and safety, or another rule in which addressing health and safety would be more appropriate. Mr. Rice expressed concern that a rule discussing the "appearance" of a health issue could lead to disability discrimination. Judge Evershed referred to the Utah Communicable Disease Control Act which defines communicable disease. After discussion, the committee determined that the health and safety provision doesn't belong in a rule addressing courtroom attire, but could be addressed in a courtroom security rule. Mr. Rice suggested that the provision might be a better fit in a rule describing accommodations for disabilities. Judge Pullan noted that if the committee were to take up the health and safety issue in another rule, it should review policies in other states.

The committee discussed the difference between the terms "court," "courthouse," and "courtroom." Judge Pullan asked whether the terms were meant to be defined differently. He expressed a concern about judges getting involved in access to the "courthouse," which appears to be entrance to the building itself, an issue he felt was better suited to security personnel. Ms. Sylvester stated that one of the main problems the Self-Represented Parties Committee is trying to avoid is court security at the door denying entrance to the building, and by extension the courtroom, without judicial input. The Self-Rep Committee feels that judges should be involved in access decisions to avoid violations of the open courts rule. Individuals might miss their court appearance and if it's a criminal case, a warrant could be issued. Judge Evershed stated that criminal cases are different. In those instances, judges should be involved. Judge Cannell stated that the 1st District court staff and security personnel know what the courtroom attire rules are, but those decisions aren't left up to them. If court staff are concerned, they notify the judge's bailiff and the judge brings the person in and address it in the courtroom. Judges shouldn't abdicate their role in making decisions as to what will be allowed in their courtroom, but many patrons visit the courthouse to pay a fine or file a case without ever entering a courtroom.

Judge Pullan provided the following example: A man in his twenties comes into the courthouse wearing a backpack and a t-shirt that says, "It's a good day to die." The court needs to empower security personnel to exercise some discretion when they have legitimate safety concerns. Security officers are trained to identify threats. They are much better suited than judges to make those kinds of determinations. Judge Pullan stated that when it comes to attire, subsection (2)(a) establishes the judicial standard for "courtrooms." He does not feel that judges should be involved in making all "courthouse" decisions. Mr. Rice stated that he doesn't believe Rule 4-411 prohibits security personnel from preventing access when there are legitimate security threats. In Judge Pullan's example, security personnel wouldn't be denying access on the basis of the t-shirt itself, but based on other factors indicating the man poses a threat. Ms. Sylvester stated that the intent is not to prevent security personnel from denying access on the basis of legitimate threats, but rather preventing them from making subjective decisions about the appropriateness of an individual's attire. Another example: A large group of individuals wearing gang colors are attempting to enter a courthouse with an ongoing criminal trial involving a rival gang shooting in which threats to witnesses have been made.

The committee amended (1)(b) to clarify that "courtroom" access decisions regarding attire will be made by a judicial officer, and added a provision clarifying court security personnel's authority to deny access to a "courthouse" if a person's attire raises a security concern. The Committee asked Ms. Sylvester to run the rule past Chris Palmer to ensure it does not conflict with court security rules or local court security plans.

The Committee determined that the rule, as revised, should be reviewed again by the Board of District Court judges, Board of Juvenile Court Judges, Board of Justice Court Judges, Board of Appellate Court Judges, and the Self-represented Parties Committee before being presented to the Council. The committee determined that it would be beneficial for a member of Policy & Planning to attend board meetings when this rule is discussed. Ms. Williams will email dates of the next board meetings to committee members to determine which members are available to attend. Ms. Sylvester will send the revised version of Rule 4-411 to the Self-represented Parties Committee for review and comment.

(4) CJA 1-205. STANDING AND AD HOC COMMITTEE:

The Online Court Assistance Committee (OCAP) has been dissolved. The Committee on Court Forms requested that the OCAP member be removed from their committee membership list. Ms. Sylvester stated that the Self-Represented Parties Committee's concerns would be addressed by retaining the OCAP member under advisory or emeritus status so she had no objections to the proposed amendment.

With no further discussion, Mr. Rice moved to adopt and accept the changes as proposed. Judge Chin seconded the motion. The committee unanimously voted to approve the motion. The rule will be presented to the Judicial Council for approval for public comment.

5) CASELAW RE: ABILITY TO PAY ANALYSIS AND PROCEDURAL DUE PROCESS IN THE PRETRIAL CONTEXT:

Ms. Williams briefly reviewed the memo included in the packet. No action on the part of Policy and Planning is requested at this time. The purpose of the discussion is to notify the committee of emerging caselaw and the potential for precedent in the near future. Over the last several years, in both state and federal cases across the country, courts are consistently holding that it is an unconstitutional deprivation of due process and equal protection rights under the 14th Amendment to set monetary conditions of pretrial release without first considering an arrestee's ability to pay. The majority of cases are requiring courts to hold a hearing with full due process protections within 24-48 hours of arrest. Utah does not currently have the funding or infrastructure in place to implement those changes.

None of the caselaw is precedential at this time, but Ms. Williams believes many cases are persuasive and precedent is imminent. Utah criminal defense attorneys have already begun making these arguments in court and Ms. Williams has been notified that some may be actively looking for a case to appeal. Implementing these changes would require a large statewide reform effort with an impact on all criminal justice stakeholders, including the court, legislature, counties, law enforcement, prosecutors, and public defenders. Such reforms would significantly impact court policies, procedures, staffing, and resources.

The Standing Committee on Pretrial Release and Supervision has identified this issue as critical and is working to develop a reform proposal for the Council including both short and long-term efforts. The committee hopes to have a proposal for review by early 2020. The committee is also working with the Rules of Criminal Procedure Committee on related amendments to Rules 9 and 9A. The Criminal Procedure Committee created a URCrP 9 and 9A subcommittee. Judge Pullan is a member. The first subcommittee meeting is October 30, 2019.

The Pretrial Committee has asked Ms. Williams to meet with all stakeholders to educate them about the caselaw, notify them of the Pretrial Committee's work, and invite feedback and participation. Ms. Williams has already met with Board of District Court Judges, and is scheduled to meet with TCEs, CoCs, Board of Justice Court Judges, any juvenile judges assuming district court duties in criminal cases, and bench meetings for both district and justice court judges.
Judge Noonan noted that the cases referenced in the memo are appellate court decisions in other states. Utah has a choice to either be proactive and deliberate, or to wait for a state or federal appellate decision. There is energy in Utah right now to make some of these reforms and it would benefit the court to take

advantage of it. Ms. Williams stated that Representative Hutchings is a member of the Pretrial Committee. At the last meeting, Rep. Hutchings indicated that he has discussed the issue with other legislators and there is an appetite to make changes. He recommended that the court not wait to pursue reforms, and has asked that we provide draft legislation, identify funding sources, and provide cost estimates, etc.

Judge Noonan stated that reforms would permeate every aspect of the criminal justice system. An example of a few areas of the court which would be significantly impacted include: workloads, judges' time, judicial assistance, use of buildings, security, and technology. Judge Noonan asked for guidance and recommendations about which committee should advance this conversation to the Council in a deliberate, heads-up sort of way. The Council should understand the enormity of the issue and the fast-moving pace with which we may be hit if we don't get out ahead. Judge Pullan requested that Ms. Williams report to the Council at its next meeting and let the Council decide whether the Pretrial Committee is the best vehicle. He stated that attempting to pass legislation this year is unrealistic and ill-advised. Judge Noonan suggested that Judge Pullan alert the Council during his P&P report at the October 28th meeting, and then she would include it on the November Council agenda for a more comprehensive discussion. Judge Pullan and the committee agreed. Ms. Williams will present to the Judicial Council at its November meeting for guidance and feedback.

6) EVIDENCE AUDIT STATUE REPORT (CJA 4-206):

Judge Noonan provided an update on the AOC's action plan in response to the August 2019 evidence audit. Judge Noonan and Mr. Palmer have worked with the Clerks of Court and Trial Court Executives to take immediate steps to secure their evidence holding areas as recommended by the audit.

After reviewing rules and policies from the federal system and other states, Brent Johnson recommended that Utah adopt the federal model and never take custody of large or sensitive exhibits. Mr. Johnson reviewed CJA 4-206 and Federal Rule of Civil Procedure 83-5, Custody and Disposition of Trial Exhibits. One of the main issues identified in the audit involved the court's failure to keep custody of tracking records. The revised rule should include a directive to maintain a good tracking system.

Individual parties introducing bulky or sensitive physical exhibits or evidence (controlled substances, firearms, jewelry, etc.) would be solely responsible for custody, transportation, chain of evidence protocols, storage, and preservation for future appeals. Utah could make this a hard and fast rule or allow some judicial discretion. The court could keep a photo of the physical item in the record once it has been introduced. Mr. Rice stated that this may be a good opportunity for the court to reach out to practitioners to assess their understanding of the rule and obtain feedback about what impact any proposed changes may have. Mr. Johnson pointed to proposed language requiring parties to retain exhibits which may be needed for any post-conviction relief. Law enforcement agencies are required to follow federal chain of custody standards making them better suited to retain certain exhibits.

Judge Pullan stated that if parties are going to retain custody, there should be some clear statutory duty to preserve exhibits. Once the executive branch obtains a conviction, the strongest incentive for preservation disappears. Imposing some statutory duty seems to make a lot of sense. In addition, the court should meet with law enforcement to identify the types of evidence that should be preserved for long periods of time. Judge Cannell stated that the statutory duty should be accompanied by an order making failure to comply contemptable to create an incentive to follow the law.

Mr. Johnson noted that the purpose of today's discussion is not to approve the rule, but to get approval from P&P on the direction that the court, in most instances, would not be the repository of physical evidence. The AOC will then begin working on draft language, and will obtain feedback from clerks, practitioners, judges, law enforcement, and others who will be impacted by any changes. That process will take time. But there is a need right now to provide directives to judges about what to do between

now and the time a new rule is in place. Mr. Johnson proposed advising judges to issue an administrative order, for example, that fills in the gaps in 4-206. The Committee agreed with the direction proposed by Mr. Johnson.

7) HR 440 – EDUCATION ASSISTANCE:

Mr. Johnson reviewed proposed amendments to HR 440. The Human Resources Department and Deputy State Court Administrator are requesting that the Deputy State Court Administrator's ability to approve education assistance requests over the capped maximum be revoked because overage requests reduce the amount of money available for all employees.

With no changes, Judge Cannell moved to approve the amendments as proposed. Judge Evershed seconded the motion. The motion was unanimously approved by the committee. HR 440 will proceed to the Judicial Council for further review and approval.

8) HR 550 – HARASSMENT POLICY:

Mr. Rice reviewed the Human Resource Review Committee's latest draft of HR 550. The Council asked the Review Committee to pay particular attention to the creation of a mechanism whereby employees would clearly understand to whom and how they are permitted to report allegations about judges, justices, and high-level directors or administrators. The language in subsection (1) definitively states that the policy applies to everyone, including judges, justices, and high-level administrators, with no exceptions, and subsection (5) provides very clear and detailed reporting procedures.

The Review Committee spent a lot of time on the reporting procedures section. It outlines to whom and how employees may report allegations. Employees may contact any supervisor or member of management with whom they feel comfortable reporting. They may also contact the HR director, AOC management, court-level administrator, state court administrator, deputy state court administrator, assistant state court administrator, a judge, justice, or commissioner.

Mr. Johnson identified three companion rules that he believes should be amended once HR 550 is approved. If approved, HR 550 would be the only policy in the Personnel Policy and Procedures Manual applicable to judges. To ensure judges are aware of their responsibilities, Mr. Johnson recommends incorporating a reference to HR 550, or language outlining specific duties, in the following rules:

- CJA 3-103. Administrative Role of Judges
- CJA 3-104. Presiding Judges
- Code of Judicial Conduct. Canon 2.3. Bias, Prejudice, and Harassment (amend protected categories to make it consistent with HR 550)

Once the Judicial Council approves HR 550, Policy and Planning will consider amendments to CJA 3-103 and CJA 3-104. Mr. Johnson will propose amendments to CJC Canon 2.3 to the Supreme Court for approval.

The Committee discussed the proposed amendments and made minor language changes. The committee recommended that the rule be forwarded to the Judicial Council for review, and circulated to the TCE's as an FYI. Ms. Williams will send the proposed version of HR 550 to the TCEs notifying them when it will be on the Council's agenda.

With no further changes, Judge Chin moved to adopt the rule as amended. Mr. Rice seconded the motion. The committee unanimously voted to adopt the rule as amended and to recommend to the Council that it be reviewed and approved as final.

9) ADJOURN

With no further items for discussion the meeting was adjourned at 2:05 p.m. without a motion. The next meeting will be held on November 1, 2019 at 9:00 a.m. This will be the bi-annual full day meeting.