

**UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES**

Judicial Council Room (N31), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
February 7, 2020 - 10 a.m. – 12 p.m.

MEMBERS:

PRESENT

EXCUSED

Judge Derek Pullan, <i>Chair</i>	•	
Judge Brian Cannell – by phone	•	
Judge Augustus Chin – by phone	•	
Judge Ryan Evershed – by phone	•	
Judge John Walton – by phone	•	
Mr. Rob Rice	•	

GUESTS:

Michael Drechsel
Tom Langhorne
Judge Barry Lawrence
Nancy Sylvester
Brent Johnson
Paul Barron
Judge Kate Appleby
Judge Mary Noonan
Dr. Kim Free
Chris Palmer

STAFF:

Keisa Williams
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Pullan welcomed the committee to the meeting. The committee considered the minutes from the December 2, 2019 meeting. With no additional changes, Judge Chin moved to approve the draft minutes. Rob Rice seconded the motion. The motion passed unanimously.

(2) JUNE RETREAT RULES:

Judge Pullan discussed two proposed rule drafts assigned to Policy and Planning by the Judicial Council at its June 2019 retreat. Between Policy and Planning's December 2019 meeting and today, the rules have undergone several revisions. Judge Pullan worked closely with the Court, the Management Committee, and Judge Noonan to reach consensus on revisions to the rules.

Management Performance Review Committee:

Judge Pullan: The State Court Administrator (SCA) serves at the pleasure of both the Supreme Court and the Judicial Council. The intent of the rule is to establish a process for reviewing the performance of the State Court Administrator, judicial officers, and court employees, and creating an avenue by which complaints may be received, reviewed, and investigated. Initial discussions involved leaving that responsibility to the Management Committee, but creating a process providing equal representation of the Court and the Council became problematic. The Performance Review Committee (PRC) will consist of a member of the Management Committee who is not a member of the Supreme Court, and that representative is appointed by a majority vote of the Management Committee. The Supreme Court would designate a member, making it a two-person committee. Both the Supreme Court and Management Committee may receive complaints regarding the performance of the SCA. Each body would disclose the complaint to each other, and then pass that information along to the PRC. The PRC is ultimately responsible for two things. First they must review the complaint, determine what investigation is

appropriate, and make recommendations to the Council and Court as to whether the SCA should be exonerated, subjected to a performance or corrective action plan, be disciplined, or be terminated. The recommendation is not binding.

The second responsibility of the PRC is to conduct an annual performance review of the SCA in accordance with the Human Resources Manual. The Human Resources Review Committee will be proposing a draft of the Human Resources Manual, which will outline details regarding performance reviews for the SCA and high level managers. The SCA will be responsible for assessing the performance of high level managers. High level managers should only have one boss. If a high-level manager is not performing well, the SCA is responsible for addressing those concerns. If a recommendation is made to discipline or terminate the SCA, both the Court and Council will meet in a joint executive session. Additional investigation may be requested.

Subsection (3) addresses complaints regarding judges and state court employees and how those complaints are reviewed and investigated. In subsection (4) the Management Committee is authorized to receive complaints from, and consult with, presiding judges and the SCA on personnel and related matters. This creates a level of transparency and openness. The Council can refer complaints to the Judicial Conduct Commission. Subsection (5) addresses confidentiality.

Mr. Rice: Where will the rule reside in relation to the Human Resources Policies and Procedures Manual? How will this rule operate in relation to, or separate from, the complaint procedures that the HR committee and the Judicial Council recently adopted? Brent Johnson: I brought some rules to P&P as a preliminary discussion some months ago about including cross references in the Code of Judicial Administration and the Human Resources Policies Manual. For example, there is a presiding judge rule that will need to reference a portion of the HR Manual because the HR Manual was typically only applicable to court employees. My suggestion is to make direct references in this rule and the other two presiding judge rules stating that judges must abide by particular provisions in the HR manual. The presiding judge rules will be brought back to P&P for discussion at a future meeting.

At the suggestion of Brent Johnson, the Committee struck 'review and investigate' from subsection (3)(b). Also under subsection (3)(b), the Committee added language regarding complaints about the Human Resource Director. Those complaints should go to the SCA. The Management Committee may receive complaints regarding the HR Director under (3)(b), which will ensure they have notice about potential issues that may need to be addressed with the SCA.

At the suggestion of Mr. Rice, the Committee amended (2)(a)(ii) and (2)(b)(i) to expand the options regarding recommendations. Recommendations may include: no further action, performance or corrective action, discipline as a condition of continued employment, or termination.

Mr. Rice moved to approve the rule on the condition that Mr. Johnson will make any necessary references to the HR Manual. Judge Walton seconded the motion and it carried unanimously. Ms. Williams will number the rule and include it on the Judicial Council's February agenda.

Administration of the Judiciary:

Judge Pullan: This rule has been applied in practice even though it has not yet taken effect. Questions arose surrounding the justice court reform task force. The Supreme Court has the authority to manage the appellate process, but the Judicial Council has exclusive authority over the administration of the judiciary. Supreme Court and Management Committee representatives met and determined that authority over the justice court reform task force lies solely with the Judicial Council. A Judicial Council task force was formed, with a Supreme Court representative to address questions related to the appellate court.

Mr. Johnson recommended amending subsection (1)(b) to make it clear that judges must comply with the Human Resources Policy and Procedure Manual. The Judicial Council promulgates HR rules, but the HR Manual is not a rule. After discussion, that change was made.

Mr. Rice moved to approve the rule as amended. Judge Chin seconded the motion and it carried unanimously. Ms. Williams will number the rule and include in on the Judicial Council agenda.

(3) AUTOMATIC EXPUNGEMENTS (4-208):

Michael Drechsel reported on the progress of CJA 4-208. A rule draft is forthcoming. Mr. Drechsel apologized to IT for the delay. The rule needs to accomplish a few things: 1) provide a mechanism for standing orders to issue which allow an automated process for issuing expungement orders when eligibility criteria have been met, 2) give direction to prosecutors about providing a single email address per prosecuting entity, 3) provide a mechanism for prosecutors to object through the e-filing system on a specific document type, and 4) provide notification once the court has taken action on an automatic expungement.

In July of 2019, Mr. Drechsel and Heidi Anderson received approval from the Judicial Council to pursue the standing order model. It just needs to be effectuated. Mr. Drechsel will meet with Mr. Johnson to talk about how to structure the legal component of the standing orders, whether it's by presiding judges of the eight districts, or whether it's by presiding judges of the district and justice courts. Mr. Drechsel will have a draft rule for review by Policy and Planning at the March 6th meeting.

Judge Pullan expressed discomfort with a process that automatically affixes a judge's signature without judicial review. Mr. Drechsel: There may be some comfort in the fact that over many years and in a significant number of cases statewide, expungements have been granted in the high-90s percentage-wise without any opposition. The small subset of cases with opposition that weren't granted are not the types of cases that qualify for automatic expungement under the statute. Those are excluded from this process automatically, for example, convictions for DV, assault, violent behaviors, and higher level offenses like felonies. All Class A misdemeanors are also excluded, except for simple possession and even then there is a 7-year waiting period before they become eligible. The expungement process would be unmanageable if a manual review process was required. There are tens of thousands of qualifying cases each year. The development process has been very careful and thorough. The system will not be developed in a way that would ever identify a case that should not be expunged. It will err on the side of no expungement if there is any question about whether eligibility criteria have been met. Hopefully that will give the judiciary confidence in the process. The first part of the development process is focused on those cases that have been dismissed with prejudice in its entirety, and those cases that resulted in an acquittal.

Judge Pullan: Prior to this, parties would file a petition for expungement and a judge would determine whether or not they met the criteria. The driving force now behind affixing automatic signatures is the sheer volume of cases. That is the practical effect of the overcriminalization of conduct in our society. Rather than address that problem, we are going to let a machine make judicial decisions. I am extremely uncomfortable with that.

Mr. Drechsel noted that the implementation date is May 1st. Ms. Williams suggested asking that the Council adopt the rule on an expedited basis so as to give IT time to finalize the programming and process.

(4) RULE 4-410. COURTHOUSE CLOSURE

Draft template order:

Ms. Williams: Rule 4-410 was approved by the Council on an expedited basis and is out for public comment. The TCEs asked for a sample order and a checklist to assist judges in complying with the rule

when making closure decisions. In October, the Policy and Planning asked if IT could send an electronic notice of closures through the e-filing system. Ms. Williams spoke with Heidi Anderson. Ms. Anderson did not recommend using the e-filing system as it would require programming, and a person would need to be logged into their account to see the notice. Ms. Anderson recommends that notice be posted in a prominent place on the court's website. Ms. Williams spoke with Clayson Quigley who agreed to post notice on the website. Mr. Fattah is required under the rule to send notice to both the media and the public. Judge Pullan suggested having Mr. Fattah send notice to the bar as well.

Ms. Williams reviewed the sample courthouse closure order. After discussion, the committee made minor language changes to the order. Judge Walton suggested an amendment to Rule 4-410 by removing "not safe" in the first sentence of subsection (2). It could be amended to say that a courthouse may not be safely operated or staffed due to the weather. When the rule comes back to the Committee after public comment, Judge Walton's proposed amendment will be considered.

After discussion, the Committee added "Paper filing may be filed at [name of location][address]" to the order.

Draft checklist:

Ms. Williams reviewed the checklist. Ms. Williams received feedback from the TCEs on both the checklist and the draft order. The TCEs prefer that the checklist be in Google Forms because each court entry will be captured.

The Committee approved the checklist and sample order. No motions were necessary because both are procedural.

(5) JUDICIAL BRANCH EDUCATION:

Education Director, Tom Langhorne reviewed the rationale and background behind the proposed amendments to CJA 3-403. The Board of District Court Judges is very supportive of the proposed language and with Mr. Langhorne being more proactive in monitoring the assignment and quality of mentoring relationships. The Board of Juvenile Court Judges' top priority for this year is to enhance mentoring for new juvenile court judges. The Board Chair and Juvenile Judges Planning Committee devoted a day to determining how to be better mentors. Mr. Langhorne will be developing a half day of interactive exercises and will review the best practice guidelines adopted by the Council in 2016. Mr. Langhorne has consulted with many states to help develop and enhance their mentoring programs. The proposed language in 3-403 is very similar to language adopted by Ohio. In his experience, if expectations aren't clearly defined and there are no teeth to the rule, mentoring programs will die on the vine. These amendments do not apply to the appellate bench. The appellate bench has its own guidelines and rules.

Judge Pullan suggested removing the language tying timing to termination of prior employment. The language in (8)(A) and (B) was amended to read:

8(A): "Within seven business days after a new district or juvenile judge has been sworn in, the Presiding Judge shall appoint a mentor to the new judge."

8(B): "Within fourteen business days after a new district or juvenile judge has been sworn in, the mentor and the new judge shall meet ..."

Mr. Rice moved to approve the rule as amended for recommendation to the Council for public comment. Judge Chin seconded the motion and it carried unanimously.

6) 4-411. COURTHOUSE ATTIRE:

Judge Pullan welcomed Judge Lawrence and Judge Appleby to the meeting.

Judge Cannell provided an overview of his research into other states. Judge Cannell: Most of the language included in other states' rules seems bias-driven. The language proposed in subsection (2)(a) was pulled from the court's website. I didn't include a laundry list of do's and don'ts in an effort to avoid penalizing patrons for minor violations. Clerks in the 1st district get calls regularly from patrons asking what they should wear to court. The clerks use the language directly from the website. The language added to (4)(b) is meant to discourage judicial officers from making decisions to exclude patrons unjustly. Requiring findings on the record would promote careful thought and consideration and deter bad actors.

Mr. Rice: I view the enumerated list in the committee's last draft to be a very important mechanism for setting the floor. I am sensitive to judges' need to maintain control over the courtroom, but setting a standard grounded in statutory principle is an effective way to meet that intent. Judge Pullan expressed concern that a draft including the enumerated list would not be adopted by the Council. Many of the trial court judges feel that the enumerated list would invite patrons to use the low bar as a means to protest or disrupt the proceedings.

Judge Cannell suggested providing judicial training to address bad actors, and expressed concern with requiring clerks to respond to calls with the list of body parts. Mr. Rice: There is a separation between what the rule says and what patrons are being told over the phone. They are related but separate. Training for clerks in responding to those calls may be beneficial. When meeting with the Supreme Court, they had no criticism of the enumerated list in the rule. It may be wise to be clearer in the intent section about what we're trying to accomplish. Making the standard something you would wear to a job interview may be too high.

Judge Lawrence: The Self-Represented Parties Committee presented the rule to the Judicial Council because some of the behaviors throughout the state were outrageous. The constitutional right to public access and an open court outweighs concerns about potential violations of the standard. Tying the standard to judicial discretion about what an individual judge feels detracts or disrupts the proceedings would allow the same bad conduct to continue.

Judge Pullan: If a woman comes in wearing a giant green foam cowboy hat that is knocking everyone around, the cowboy hat has to go. It is not prejudicing anyone. It is removing a distraction from the courtroom. She is disrupting the proceedings. Judge Lawrence: If she doesn't take the hat off, she is violating an order and is in contempt. That isn't a problem. Judge Cannell's language in (2)(a) is an aspirational standard. It's okay to say 'this is how you should dress if you can,' as long as they aren't excluded or removed from court for not meeting that subjective standard.

Judge Pullan recommended deleting subsection (2) in its entirety. Subsection (1)(a) would cover the prohibition against excluding patrons based solely on attire. Judge Lawrence: The Self-Represented Parties Committee's concern is that patrons were not allowed into the building based on attire, and were not even making it into the courtroom where a judge could make a decision. They should be allowed in the courtroom where judges can then make the call about continuing with the case if they are behaving badly.

Judge Pullan: If bailiffs do not have some discretion in excluding individuals from the building we may be inviting a safety issue, for example, gang colors. Chris Palmer: In talking to the bailiffs, oftentimes they are relying on signs on the courtroom door, and in talking to judges they are often unaware that bailiffs have removed someone from the building or denied them access.

No motion was made. Rule 4-411 will be included on the next agenda.

7) OLD BUSINESS/NEW BUSINESS:

No other business was discussed

8) ADJOURN:

With no further items for discussion, the meeting was adjourned without a motion. The meeting adjourned at 2 pm. The next meeting will be held March 6, 2020 at noon in Conference Room B & C.