UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

Board Room (N21), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
March 6, 2020 - 10 a.m. – 12 p.m.

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

GUESTS:

Chris Palmer
Bart Olsen
Brent Johnson
Heidi Anderson
Paul Barron

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 February 9, 2019 meeting. On the bottom of page 2 under "Administration of the Judiciary," the second sentence was amended to read, "The Supreme Court has the authority to manage the *appellate* process…." With no additional changes, Judge Chin moved to approve the draft minutes. Rob Rice seconded the motion. The motion passed unanimously.

(2) 4-411. COURTHOUSE ATTIRE

The meeting packet includes four different versions of CJA 4-411. Judge Pullan: About a year ago, Policy and Planning undertook an effort to try and define what court employees could and could not wear to work, and in doing so, ended up with a 75-page policy manual with countless pictures and descriptions of clothing. The original version of 4-411 attempted to do that again by defining what court patrons can and cannot wear to court. We have less control over court patrons than we do court employees. In an effort to be concise, we ended up with a near nakedness standard in 4-411 that has been very controversial with trial court judges.

Judge Pullan: I am proposing a version that eliminates the minimum standard in subsection (2) of the original draft. The word "solely" in subsection (1)(a) sets the standard with clear, limited exceptions for security threats and courtroom integrity. It also distinguishes between courthouse and courtroom as suggested by Judge Lawrence. This version requires that all *courtroom* access decisions be made by a judicial officer on a cases-by-case basis, removing bailiff discretion. Bailiffs' authority extends to the security of the *courthouse*. Subsection (3) requires judicial officers to make specific findings on the record if they deny access to a courtroom due to disruption, prejudice, or safety. That should discourage bad behavior. Subsection (4) makes it clear that any existing orders regarding courthouse attire that are contrary to this rule are rescinded.

In discussing the Sixth Amendment, the Harvard Law Review article states, "This Part does not undertake to spell out what clothing can and cannot be banned in any particular context. Indeed it is the core claim of this Note that this decision must necessarily be made in the courtroom, by the judge who knows or has the opportunity to learn

all the relevant facts (such as the subject matter of the case, the presence or absence of a jury, or any disruption that results) and not by an outside party who doesn't." If the Committee thinks a minimum standard is necessary, I like the article's note: "States of dress (or, more to the point, undress) that are not legal on the streets outside the courthouse need not be permitted inside it ." That might be a better way to talk about it. States of undress that are not permitted by Utah law are not permitted in the courthouse.

Judge Chin: I agree that attempting to police specific attire is not wise and the minimum standard language should be deleted, leaving the decision clearly within the discretion of the judicial officer. I appreciate the fact that it provides a means by which the judicial officer can then explain, on the record, their rationale behind the specific order. Judge Pullan: I am on my 17th year on the bench and in all that time I don't think I've ever asked someone to leave the courtroom based on what they were wearing. I'm just happy that they showed up and I don't think I'm alone in that.

Judge Walton: I like allowing for judicial discretion with a ruling on the record, requiring them to make a finding that something is disruptive. In (1)(b), I recommend changing "judicial officer includes", to "judicial officer is defined as..," making it clear that judicial officers are the only people authorized to make those decisions.

Judge Cannell: I am supportive of the rule. My concern has to do with what instructions we are giving patrons regarding attire. For example, the Judicial Assistants (JAs) in our court are getting calls daily from unrepresented individuals who don't know what to wear to court. When we take down signs at the courthouse and strike all contrary language from the website, what do our JAs say that is consistent with the rule and that can be helpful to individuals making those calls? I recommend replacing the language on the court's website with something consistent with the rule. The JAs could refer to that language when answering questions. I can address that at the Judicial Council meeting.

Judge Evershed: I like this more simplified version. It provides clear instructions about what is and is not allowed and requires judges to own their decisions. Mr. Rice: I think it strikes the right balance. I am okay with eliminating the minimum standard language. A previous draft referenced breastfeeding which is already addressed in statute so there is law on that point. It only needs to be mentioned if it is an issue on the ground. After further discussion, the Committee determined that a statement regarding breastfeeding isn't necessary.

Mr. Rice moved to approve the draft of CJA 4-411 as amended, and to recommend that the Judicial Council send it out for public comment. Judge Cannell seconded the motion. The motion passed unanimously.

(3) RULES BACK FROM PUBLIC COMMENT

- 1-204. Executive Committees
- 1-205. Standing And Ad Hoc Committees
- 3-111. Performance Evaluation Of Active Senior Judges And Court Commissioners
- 3-406. Budget And Fiscal Management Committee
- 4-403. Electronic Signature And Signature Stamp Use
- 4-503. Mandatory Electronic Filing
- 4-905. Restraint of Minors in Juvenile Court
- 10-1-102. Verifying Use of Jury
- App. F. Records Retention Schedule

Ms. Williams: After a 45-day comment period, we received only one comment. It was a question about removing the OCAP member from two committees in CJA 1-205. The question was about why the OCAP Committee was abolished and whether the OCAP interviews and forms would still be available. The OCAP Committee was a statutory creation and the legislature eliminated it. There is still an OCAP working group. They meet regularly to discuss the OCAP system and interview forms. The Self-represented Parties Committee was okay with removing the

OCAP member from the rule because one of their other members is on the OCAP working group. Judge Pullan asked Ms. Williams to reach out to the individual who left the public comment to explain.

Ms. Williams: There is a last minute change to CJA 1-205. The Uniform Fine and Bail Schedule Committee asked that the juvenile court judge be removed, and another justice court judge added so that district and justice court judges would be equally represented. I forgot to add it when the rules went out for comment. The Committee determined that the amendment to the membership of the Uniform Fine and Bail Schedule Committee did not need to go back out for public comment.

Judge Chin moved to recommend that the Judicial Council approve all of the rules as final. Judge Evershed seconded the motion. The motion passed unanimously.

(4) 4-208. AUTOMATIC EXPUNGEMENTS

Ms. Williams distributed a draft expungement rule, CJA 4-208, and a draft standing order. Draft expungement orders were included in the packet. The orders would be generated by the system with judges' signatures automatically affixed and sent to BCI, prosecutors, and others automatically without review.

Mr. Johnson: This is happening quickly because deadlines are approaching. The background is that the bill was enacted last year. At the time, we expressed concerns about it because of its automatic nature and judicial involvement. But BCI said that in order to expunge records for federal purposes, they must have an order signed by a judge. I do not like the idea of automatically affixing judicial signatures to orders, but we seem to have reached that point. If we're going to do it, we need a process in place that provides presiding judges with a certain level of confidence that the right records will be expunged at the correct time.

In the automated expungement orders, judges would be making findings without ever reviewing the order. That's problematic. The Presiding Officer of the Judicial Council (Chief Justice), pursuant to statute, has the authority to assign judges in courts of records to courts in another jurisdiction. The rule would need to start with the Chief authorizing presiding judges (PJs) to hear these cases for both district and justice courts. One of the issues is that the statute requires that those orders include finite durations, so the Chief Justice would be required to conduct regular reviews. Presiding judges would appoint district court judges to order expungements. Presiding judges would authorize the AOC to develop a program (master model) where fact finding is given to someone else - a program that identifies cases meeting the factual criteria. The program would have to be approved by the Judicial Council in order to create a comfort level for judges that what is being kicked out of the system is factually reliable. Once it gets to that point, PJs can then authorize the AOC to automatically affix their signatures to the expungement orders. That is the closest process we could identify that would provide some trust in what is ultimately kicked out in the end.

Judge Pullan: The camel's nose in this tent was Rule 109. Now the camel's head is in the tent. One assurance we talked about is that these authorizations would be in a rule of procedure rather than an administrative rule. That is the direction we took with Rule 109. Mr. Johnson: Everything I described will be reflected in a rule of procedure. The only thing that won't be in the rules of procedure are the orders themselves. The criteria for those orders and the entire process leading up to those orders would be in the rule. The rule will reflect the substance of what is happening. Judge Pullan: Constitutionally, the Court has the authority to govern the practice of law and rules of procedure. If the Chief and the Court decide to approve this process then I have more comfort with it.

Mr. Johnson: One of the good things about Rule 109 is that the form itself was approved by the Council and everybody knows what that form looks like. I think it would be helpful to bring the Council into this process to approve the programming and what is kicked out. Judge Pullan: The expungement orders need to reflect what is actually happening, rather than state that the court is making findings.

Mr. Johnson: The rule and the orders need more work and should probably be discussed at your next meeting. We will miss the deadline, but that work has to happen. Ms. Anderson: If we need more time, we need to go back to

the sponsor of the legislation, explain the challenges, and set that expectation. And that conversation needs to happen soon.

Judge Pullan: Is there a way to monitor the programming for any kind of error rate? Ms. Anderson: Right now we are testing acquittals and dismissals with prejudice. We built business logic and are sending those files to BCI for a more thorough vetting process. BCI is going through the files and ensuring there is nothing in the file that shouldn't be there. They will let us know whether our programming meets their standards. Prior to go-live, we have discussed also programming a process wherein the court can take a second look, and not just rely on BCI's review. We would create a second file and ask judges or the Council to conduct an audit. I would welcome anyone testing and validation of our system to ensure what we pull is accurate. Our system is set up to err on the side of caution. If we can't explicitly identify a person and a case it gets kicked out. We anticipate that clean slate expungements will be more difficult and many of those cases will be kicked out of the process. The records kicked out of the system would not be automatically expunged and would require a manual review. Defendants in that group can be told to go to BCI to have their records expunged. It is not ideal but it's better to err on the side of caution. The original legislation required the court to notify individuals who were expungement eligible but we don't have a way to make that determination. Prosecutors and BCI would need to make that determination.

Judge Pullan: This is a result of the over-criminalization of conduct in our society. We have created the expungement process to eliminate criminal convictions to say that we didn't mean it in the first place and now because of high volumes we are eliminating the need for judicial eyes on every one of those cases. That is backward.

Ms. Anderson: We are happy to produce any information about the tech we are building. Judge Pullan: We need to monitor error rates to achieve a high degree of confidence. The quality of BCI data may be a weakness. Ms. Anderson: BCI was provided enough funding from the legislature to cover the expenses associated with conducting reviews. The court was not.

Judge Pullan: This is a policy decision that the Council needs to weigh in on. I will report to the Council at the March meeting.

(5) 4-206. EXHIBITS

Mr. Palmer: I am leading efforts to alter how we hold onto and dispose of items of physical evidence versus exhibits. We had three meetings with the clerks of court, TCE's and others who use this rule on a regular basis. This is a first draft for your review. We recently had questions regarding IT-type issues. The planning committee intended to draft these procedures in a way that didn't require changes to CORIS or CARE, but we anticipate changes in the future.

The group really focused on substantive portions of the rule regarding how we handle issues like marking and storage. We excluded sensitive law enforcement items requiring chain of custody which made it a little easier because there is no need to address storing those the items under lock and key or using sign in/sign out sheets. This is just for exhibits and the exhibit book - things that will be accepted into the record. The discussions also focused on implementation across all districts. The intent is that this will be a unifying rule.

Judge Pullan: My initial concern is that (1)(B) is essentially a rule of civil procedure. When we place obligations on a party and then bury it in an administrative rule no one ever complies with the rule because no one knows about it. I am also concerned that (1)(B) conflicts with final pretrial disclosures under Rule 26, where parties are already obligated within 28 days of trial to share all exhibits they intend to offer at trial. In practice that has always been included in the exhibit list. I'm not saying this is a bad idea but if we are going to do it then it ought to be in the rules of civil procedure. I recommend striking (1)(B).

(2)(B) talks about exhibits other than those described in (2)(A) which will be retained by counsel, and that are bulky or sensitive in some way. Why is digital storage media included in that group? In a case with close to 400 exhibits, we should be able to hang on to a thumb drive for example. Mr. Palmer: We were thinking about hard drives, laptops, or other bulky items entered as physical evidence. That subsection wasn't meant to prevent the retention of evidence on a disk or thumb drive. Judge Pullan: That ought to be clarified in the rule and should be in (2)(A). Judge Walton: But that's not an exhibit, it would be the judge's courtesy copy of an exhibit. Mr. Palmer: We can re-write this to better delineate between copies of evidence on digital media storage versus originals, and make it clear that (2)(B) is intended to apply to bulky items. We won't take originals, we will take copies.

Judge Pullan: At the end of a day in trial, the clerk will say 'I'm taking these exhibits," and will then log them into evidence and put them in storage. The next day, the clerk will pull them out of storage and log that into a minute entry. We need a way to do this in CORIS. Mr. Palmer: Correct. We will be looking into fixing that in the future.

Judge Pullan: In (3)(A), the rule says that anytime I want look at a trial exhibit I need to go get it out of evidence. I can't keep it in my office overnight. I have to turn it back in every night. The practical effect of this is to say every party in every case has to provide courtesy copies to the court. Otherwise this will be burdensome. Mr. Palmer: Before the audit, the court held on to physical evidence like guns, cocaine, a door with bullet holes in it, etc. The clerks on the planning committee described some of the processes in place prior to the audit. For example, a judge would say, "I'm taking the case under advisement," and would then take all of the exhibits from the exhibit manager and keep them in their office. Clerks would consider an email from the judge to that effect to be an order of the court and they would just make a minute entry. Because we're not taking law enforcement items that require chain of custody, we can include language in the rule that says the court could retain certain items in other areas of the courthouse like the judge's chambers. The portion of the rule discussing secured storage allows some discretion like putting certain exhibits in a locked office or desk drawer.

Judge Pullan: How closely do we want our processes to look like an exhibit room? If that's case, the judge's order should be in the docket. Mr. Palmer: Clerks said they would capture the email in the file but an entry should be in the minutes or in the docket. Judges across the state are doing things differently. We tried to draft the rule in a way that would work across the board. Ultimately, we just need to know where this stuff is. Judge Chin: The minute entry acknowledges the order, even if there's no email in the record. Mr. Palmer: Once the audit process is complete, we will be auditing ourselves to ensure we are in compliance with the rule. Judge Pullan: I recommend that an order be created and captured in the docket. Example: I hear a trial in 3 hours, I have a bunch of original exhibits and no one's made any copies for me, I take the case under advisement and go back to my office with the original exhibits, I look at them for 45 minutes and then come out and make my ruling. Am I in violation of the rule? Judge Chin: You aren't retaining them over an extended period of time. It's temporary to facilitate your review and ruling. The rule seems to contemplate a more extended period.

Judge Pullan: Another issue is that many times I'm reviewing a case at 10:00 pm and my clerk has left for the day. I have the original exhibits in my office and I'm going to issue a ruling in the morning via telephone conference. Mr. Palmer: Once the item is in your possession, it is in your possession until you give it back. However you choose to store it is up to you as long as it meets the secure storage requirements. Judge Pullan: Temporary storage has to include a locked chamber door. Judge Chin: What happens when a cleaning crew needs to unlock a judge's chambers to clean? Offices aren't necessarily secure.

Mr. Palmer: 2(C) allows for storage in a temporary location for less than 72 hours as long as the location is sufficient to prevent access by unauthorized persons and secured via a key lock. Judge Chin: That would require that the judge have a separate file drawer with a key, with the judge being the only person with access for the temporary duration. (2)(E) was deleted for some reason and needs to be put back in the rule. Judge Pullan: The feedback for the planning committee is to think about what this means for a judge who has to decide cases every day. Can we draft this in a way that makes sense from a practical standpoint? Judge Chin: You should consider situations in which the only secure storage location is a judge's chambers, and whether and how you can prohibit entry into the chambers for a certain period of time. Judge Pullan: It won't look the same for all locations. Provo

is very secure but it may not be the same in Monticello. We are headed in the right direction, we just need clearer directions.

Judge Pullan: Under (3)(C), on the last line it says the parties are "responsible for retaining exhibits that may be needed for any post-conviction proceedings." I would remove "that may be needed for." I don't want any discretion built into the rule. You just have a duty to maintain them. In (3)(F), we need to build post-conviction into the rule. I believe most post-conviction relief could be appealed within a year, but there are some provisions that allow newly discovered evidence to go longer than that. That needs to be researched. In (3)(F)(ii), who determines the value of the property to be destroyed? Is it monetary value or evidentiary value? Mr. Palmer: It is monetary value. The intent is that the court won't take the actual item, but rather a picture of the item that would have a zero dollar value. Ms. Williams: "Monetary value" should be added to (3)(F)(ii) and (2)(B).

Mr. Palmer: I will take your feedback to the planning committee and present another draft to Policy and Planning at a later date.

(6) 3-402. HUMAN RESOURCES ADMINISTRATION:

Ms. Williams: Bart Olsen is proposing amendments to rule 3-402 at the request of the Council. The amendments include clarifying language, provide consistency with relevant state statutes and current practices, and align with the Judicial Council's direction.

Mr. Rice moved to recommend that the Judicial Council approve the amendments for public comment. Judge Chin seconded the motion. The motion passed unanimously.

(7) 4-202.08. FEES FOR RECORDS, INFORMATION, AND SERVICES

Ms. Williams: This rule amendment was born out of a request from the clerks of court and Heidi's office. When the court receives a request for documents or recordings they are provided on CDs or disks, but disks aren't really used anymore. Now the court purchases thumb drives, downloads the recordings/information onto those, and gives the thumb drive to the patron to keep. The first amendment reflects that advancement in technology. The second amendment increases the cost of CDs, digital storage media, and audio recordings for one half day of testimony to $15.00 (up from $10.00).

Heidi Anderson: If the cost isn't increased, the court would incur a loss of $2.80 per thumb drive. CDs cost $0.20, thumb drives cost $3.00. The options are either to raise the price or accept the loss, which would come out to roughly $30,000 per year. Right now clerks are burning records and recordings onto a CD. Patrons want thumb drives and it's a lot easier for the clerks. Most laptops and devices don't have a way to read CDs anymore. Thumb drives are purchased by the court. We don't allow patrons to bring their own because of security issues. We buy thumb drives in bulk which is why the difference in cost is only $2.80. I don't think the increase will be an issue for patrons because most of them are paying more for a thumb drive now.

Judge Pullan: Will the cost increase at some point? Heidi: It might, but probably not significantly. Judge Chin: That seems like a reasonable increase given all the factors. Mr. Rice: I think this passes the rational basis test. The only concern I have is how consumers will react. Lawyers will pay it, but will the public question the $15 charge? Ms. Williams: There is a fee waiver provision in subsection (8).

After further discussion, Judge Chin moved to recommend that the Judicial Council approve the amendments for public comment. Mr. Rice seconded the motion. The motion passed unanimously.

(8) OLD BUSINESS/NEW BUSINESS:

- JULY MEETING DATE CHANGE: The committee's July meeting is scheduled for Friday, July 3. The court will be closed that day. The committee voted to cancel the July meeting.

(9) ADJOURN:

With no further items for discussion, the meeting was adjourned without a motion. The meeting adjourned at 2:00 pm. The April meeting has been canceled. The next meeting will be on May 1, 2020 in the Judicial Council Room.