UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING AGENDA
Boardroom (N21), Call/text Keisa to get in: 385-227-1426
450 South State Street, Salt Lake City, Utah 84114
March 6, 2020 – 12:00 p.m. to 2:00 p.m.
Conference Line: 877-820-7831, Code: 897882#

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Pullan
12:05	4-411. Courthouse Attire	Action	Tab 2	Judge Pullan
12:25	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 • 10-1-202. Verifying Use of Jury • App. F. Records Retention Schedule	Action	Tab 3	Keisa Williams
12:35	4-208. Automatic Expungements	Action	Tab 4	Keisa Williams
12:55	4-206. Exhibits	Action	Tab 5	Chris Palmer
1:15	3-402. Human Resources Administration	Action	Tab 6	Bart Olsen
1:30	4-202.08. Fees for records, information, and services	Action	Tab 7	Brent Johnson
1:50	Old Business / New Business • *July Meeting Date Change*	Action		Judge Pullan
2:00	Adjourn			

2020 Meetings:

May 1, 2020 (**9:00 a.m. to 5:00 p.m.**)
June 5, 2020
July 3, 2020
August 7, 2020
September 4, 2020
October 2, 2020
November 6, 2020 (**9:00 a.m. to 5:00 p.m.**)
December 4, 2020

TAB 1

Minutes - February 2, 2020

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.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge Derek Pullan, *Chair*	•	
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 judicial 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.

TAB 2

CJA 4-411 (NEW) Courthouse Attire.

NOTES: Members of Policy and Planning presented Rule 4-411 to each of the Boards of Judges for feedback. The committee considered that feedback at its December 2, 2019 and February 2, 2020 meetings.

Three drafts are included:

1. Committee draft from 12/2/19
2. Judge Cannell's proposed draft w/ Judge Pullan's edits
3. Judge Lawrence's draft based on Keisa's understanding of his feedback and discussion

Rule 4-411. Courthouse attire.

Intent:

To ensure that Utah's courts are open in accordance with Article 1, Section 11 of the Utah Constitution while balancing the need for decorum in court proceedings and safety of all persons having business in Utah's courthouses.

Applicability:

This rule applies to all Utah justice courts, district courts, juvenile courts, and appellate courts.

Statement of the Rule:

(1) **Open courts, personal attire, and judicial officer decision-making.**

(1)(a) Except as provided in paragraphs ~~-~~(3) and (4), no person ~~having business in any court~~ shall be denied access to a courtroom or courthouse based solely on the person's attire.

(1)(b) All courtroom access decisions regarding attire made in accordance with this rule shall be determined by a judicial officer on a case-by-case basis. "Judicial officer" includes a judge or court commissioner.

(1)(c) Except as provided in paragraph (3), ~~T~~the role of a court bailiff, court security, or court staff in decisions made under this rule is limited to consultation and enforcement.

(2) **Personal attire standards.**

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(2)(a)A person attending court proceedings should dress in a manner that does not interfere with or degrade the dignity of the proceedings. If possible, a person attending court should dress in clothing he or she would wear for an important occasion, like a job interview.~~that one would wear for an important occasion such as a job interview. When attending a court proceeding a person should dress appropriately in clothes that one would wear for an important occasion, such as a job interview.~~

~~(2)(b) Breastfeeding is permitted.~~

(3) **Courthouse security.**

(3)(a) Court security personnel may deny access to a courthouse~~,~~ if a person's attire raises a security concern or to enforce a judicial order.

(4) **Removal from court proceedings.**

(4)(a) A person may be denied access to a courthouse or courtroom if, in the opinion of a judicial officer, the person's attire would:

(4)(a)(i) disrupt the proceedings;

(4)(a)(ii) prejudice any victim or party to the proceedings; or

(4)(a)(iii) introduce safety concerns generally.

(4)(b) Prior to a person being denied access to a courtroom, a judicial officer must first make findings on the record under (4)(a) above justifying removal.

(5) **Contrary statements.**

(5)(a) All statements contrary to this policy are hereby rescinded, including those expressed in any courthouse, courtroom, website, or policy manual, and shall be removed.

Rule 4-411. Courthouse attire.

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(1)(b) All courtroom access decisions regarding attire made in accordance with this rule shall be determined by a judicial officer on a case-by-case basis. "Judicial officer" includes a judge or court commissioner.

(1)(c) The role of a court bailiff, court security, or court staff in decisions made under this rule is limited to consultation and enforcement.

(2) **Minimum personal attire standards.**

(2)(a) A person may not be denied access to a courthouse ~~if~~ unless the person ~~is not adequately~~'s attire~~d~~ does not~~to~~ cover their genitalia, buttocks, or~~and~~ breasts at or below the top of the areola.

(2)(b) Breastfeeding is permitted ~~pursuant to Utah Code section 13-7a-101~~.

(3) **Courthouse security.**

(3)(a) Court security personnel may deny access to a courthouse, if a person's attire raises a security concern or to enforce a judicial order.

(4) **Integrity of court proceedings ~~and decorum~~.**

(4)(a) A person may be denied access to a courthouse or courtroom if, in the opinion of a judicial officer, the person's attire would ~~jeopardize the integrity of court proceedings by~~:

(4)(a)(i) ~~detracting from or~~ disrupt~~ing~~ the proceedings;

(4)(a)(ii) ~~introducing~~ prejudice ~~to~~ any victim or party to the proceedings; or

(4)(a)(iii) ~~introducing~~ introduce safety concerns generally.

~~(4)(b) The judicial officer may enter a decorum order when the judicial officer is concerned that the integrity of the court proceedings may be jeopardized due to the above, or similar, circumstances.~~

(5) **Contrary statements.**

(5)(a) All statements contrary to this policy are hereby rescinded, including those expressed in any courthouse, courtroom, website, or policy manual, and shall be removed.

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This rule applies to all Utah justice courts, district courts, juvenile courts, and appellate courts.

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(1) **Open courts, personal attire, and judicial officer decision-making.**

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(2)(b) Breastfeeding is permitted ~~pursuant to Utah Code section 13-7a-101~~.

(3) **Courthouse security.**

(3)(a) Court security personnel may not deny access to ~~a courthouse, if a person's attire raises a security concern or to enforce a judicial order~~any person entering a courthouse based solely on their appearance or attire. Court security personnel may always deny access to persons who present a legitimate safety or security threat.

(4) **Integrity of court proceedings ~~and decorum~~.**

(4)(a) A person may be denied access to a ~~courthouse or~~ courtroom if, in the opinion of a judicial officer, the person's attire would ~~jeopardize the integrity of court proceedings by~~:

~~(4)(a)(i) detracting from or disrupting the proceedings;~~

(4)(a)(i~~i~~) ~~introducing~~ prejudice ~~to~~ any victim or party to the proceedings; or

(4)(a)(iii~~i~~) ~~introducing~~ introduce safety concerns generally.

~~(4)(b) The judicial officer may enter a decorum order when the judicial officer is concerned that the integrity of the court proceedings may be jeopardized due to the above, or similar, circumstances.~~

(5) **Contrary statements.**

(5)(a) All statements contrary to this policy are hereby rescinded, including those expressed in any courthouse, courtroom, website, or policy manual, and shall be removed.

SIXTH AMENDMENT CHALLENGE TO COURTHOUSE DRESS CODES

Courthouses with dress codes require the public to conform to particular standards of attire in order to enter. They may be specific — for example, refusing entry to people wearing shorts, tank tops, hats, or clothing with writing or logos — or general — requiring that all clothing meet a standard like "appropriate"[1] or not "dirty, slovenly, bizarre, revealing, or immodest."[2] Where, as in the vast majority of courthouses,[3] the public must pass through a security checkpoint, the dress code is enforced by security officers at the point of entry.[4] Dress codes therefore delegate to security officers the authority to decide who may enter to observe court proceedings, based on their own determinations of who is dressed "appropriately" and who is not.

Largely unconstrained discretion to exclude members of the public from courthouses, and from criminal proceedings in particular, threatens three distinct harms. First, it weakens the key constitutional principle of popular access to, and control over, the courts. Public access to the courts is protected by the First Amendment, Sixth Amendment, Due Process Clauses, and Privileges and Immunities Clause.[5] These guarantees recognize the importance of public access as both a safeguard of individual liberty and an assertion of popular sovereignty: as the Supreme Court said in *In re Oliver*,[6] "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[7] But if members of the public can be arbitrarily excluded by the government they are supposed to check, such "contemporaneous review" promises little bite. While there is no data on the number of people excluded from courts for their manner of dress (and it is likely highly variable by space and time), reporting across the country suggests that it is not at all uncommon.[8]

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[1] *See* Jona Goldschmidt, "*Order in the Court!": Constitutional Issues in the Law of Courtroom Decorum*, 31 HAMLINE L. REV. 1, 55 (2008).

[2] *Id.* at 57 (quoting SISKIYOU COUNTY, CAL. SUPER. CT., LOCAL RULES app. 1 § 4(c)).

[3] As of 2013, seventy-four percent of state courthouses had security screening at the point of entry. TIMOTHY F. FAUTSKO ET AL., NAT'L CTR. FOR STATE COURTS, STATUS OF COURT SECURITY IN STATE COURTS, at iv (2013), https://cdm16501.contentdm.oclc.org/digital/collection/facilities/id/184 [https://perma.cc/4CN8-TNWG].

[4] For example, the author witnessed security at the District of Columbia's H. Carl Moultrie Courthouse deny entry to a man wearing a tank top.

[5] *See* Goldschmidt, *supra* note 1, at 14–15.

[6] 333 U.S. 257 (1948).

[7] *Id.* at 270.

[8] *See, e.g.*, Tom Jones, *Court Dress Code Sparks Outrage*, WSB-TV ATLANTA (July 3, 2012, 5:34 PM), http://www.wsbtv.com/news/local/court-dress-code-sparks-outrage_npmg6/242105894

Second, dress code exclusions pose even greater risks in practice. The standards that security officers are likely to apply in determining who is dressed "appropriately" and what clothing is "disruptive" or "threatening" are likely to be entangled with culture, race, gender, and class.[9] In the first place, people without much money may be simply unable to afford clothes that satisfy certain standards of formality.[10] Equally important, some notions of what clothes are "professional" have discriminated against people of color.[11] Trials that have struggled with perceptions of racial bias, from Nelson Mandela's to Assata Shakur's, have involved racist conceptions of what clothing is appropriate for court.[12] It is exceedingly unlikely that the people kept out of courthouses because of what they wear are a random cross section of the community — the impact is likely to fall almost entirely on the poor, minorities, and anyone who rouses the ire of courthouse security.

For a "criminal justice system"[13] already deeply vulnerable to critiques of race and class bias,[14] the risk that security officers will

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[https://perma.cc/DW22-649K]; Matt Kaminer, *Courtroom Dress Code Met with Mixed Reactions*, ROCKBRIDGE REP. (Nov. 17, 2016), http://rockbridgereport.academic.wlu.edu/2016/11/17/courthouse-dress-code-met-mixed-reactions [https://perma.cc/8VZ3-SSUR]; Valerie Rowell, *Courtroom Attire Important to Judges*, COLUMBIA COUNTY NEWS-TIMES (Oct. 24, 2004), http://newstimes.augusta.com/stories/2004/10/24/new_2350788.shtml [https://perma.cc/V9HG-UGEZ].

[9] *Cf.* SISKIYOU COUNTY, CAL. SUPER. CT., LOCAL RULES app. 1 § 4(c) ("[T]he court[] belong[s] to the people[;] judges cannot impose personal preference as to attire of participants in court proceedings and must be mindful and tolerant of changing fashions and reasonable individual idiosyncrasies.").

[10] *See, e.g.*, Rowell, *supra* note 8 ("'We do [turn people away] all the time, especially [i]n criminal court,' [chief bailiff Sergeant Leon] Powell said. 'They will come in shorts. We'll tell them what [proper] attire is. If they are close to their house, to go get proper attire or go to Wal-Mart and get them a pair of slacks.'" (first and fourth alterations in original)).

[11] *See, e.g.*, Carmen Rios, *You Call It Professionalism; I Call It Oppression in a Three-Piece Suit*, EVERYDAY FEMINISM (Feb. 15, 2015), http://everydayfeminism.com/2015/02/professionalism-and-oppression [https://perma.cc/8YRC-SG4A]; *see also* Jackson Connor, *Remembering the NBA's Implicitly Racist Dress Code, and the Players Who Were Most Affected*, COMPLEX (Apr. 30, 2014), http://www.complex.com/style/2014/04/stylish-nba-players-who-were-affected-by-leagues-dress-code [https://perma.cc/BL8Y-QD6R].

[12] *See* WINNIE MANDELA, PART OF MY SOUL WENT WITH HIM 87 (Anne Benjamin ed., 1984) ("I was banned from wearing my traditional dress [during Nelson Mandela's Rivonia trial] . . . it inspired people, it evoked militancy — but . . . [i]f I wanted to attend the trial, I had to conform."); Cheryl Clarke, *Assata Shakur's Trial*, OFF OUR BACKS, Apr. 1977, at 2, 2 ("[Judge] Appleby told Assata not to wear her African dress in the courtroom because he considered it 'inappropriate and disrespectful.'").

[13] This term, which refers to the complex of federal, state, and local institutions that enforce criminal laws, is meant to suggest neither that these encompass one "system," *see* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 13 (2017), nor that any has yet achieved the goal of dispensing "justice," *see* Michael Zuckerman, *Criminal Injustice*, HARV. MAG., Sept.–Oct. 2017, http://harvardmagazine.com/2017/09/karakatsanis-criminal-justice-reform [https://perma.cc/5URR-FXHB] ("[I]f you say things like 'the criminal justice system,' people might get the sense that you're talking about a system that does justice." (quoting Alec Karakatsanis)).

[14] *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 44–

disproportionately view black, brown, and poor citizens as inappropriately dressed for court is profound. And the harm is magnified by the fact that these communities already comprise a disproportionate number of the individuals charged with crimes.[15] If public access is supposed to hold the government accountable for the way it prosecutes its citizens, then the presence of racial minorities and the poor in criminal court audiences is vital as a check on the overincarceration of their own communities. Excluding the populations most directly impacted by criminal prosecutions would render the public's information incomplete, feedback unrepresentative, and oversight ineffective.[16] Courtroom audiences that are too wealthy and too white will be less likely to object to (and even to perceive) the biases that plague criminal prosecutions.

Third, the current system marginalizes judicial oversight. The decision of whom to exclude from courthouses is better located with judges in courtrooms, not security officers outside. This is not to suggest that security officers are bad people.[17] Rather, as discussed in Parts II and III, all of the information necessary to determine whether someone can be constitutionally excluded is readily apparent to judges, but structurally unavailable to security officers. Security officers do not know the particulars of the case, the role of the person in question, or the relevant legal precedent. Placing the decision with judges is therefore desirable pragmatically, since they alone are equipped to make it.

Requiring judges to make decisions about the operation of the courts should be an important reminder of their role in the criminal justice system. By entrusting values of constitutional dimension to courthouse security officers, dress codes are consistent with a larger trend away from judicial control of criminal procedure. Scholars have noted the movement away from searching inquiry into the conduct of law enforcement and security personnel, with courts preferring instead to defer to the "expert" judgment of those "on the ground."[18] Whatever the merits

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59 (2011).

15 *See* PFAFF, *supra* note 13, at 45–46. The victims of crime and their families, to whom courts must also be accountable, are also disproportionately from poor and minority communities. *See* MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, BROOKINGS INST., TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 5 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/v8_THP_10CrimeFacts.pdf [https://perma.cc/9699-BMRR].

16 *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008) ("Decisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones. Those sad propositions explain much of the inequality in American criminal justice.").

17 *Cf.* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 n.16 (1993) ("I am not suggesting that police officers are inherently untrustworthy or bad people. Instead, my point concerns who controls police power. . . . Society . . . should wean itself off the notion that the police do not need to be regulated by citizens or judges.").

18 *See, e.g.*, Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV.

of this trend as it applies to corrections facilities and public streets, from which judges are necessarily removed, it presents distinct harms (and can claim fewer justifications) when it advances into courthouses. Yet many judges have delegated to security personnel the judgment of what physical restraints defendants may be required to wear in court, despite the risk of infringing liberty without due process.[19] Others have allowed procedures like immigration detainers to continue the detention of individuals that the court has ordered released, even without probable cause.[20] The enforcement of dress codes at the courthouse doors cedes further control of the "palaces of justice"[21] to security and law enforcement, rather than judges sworn to uphold the Constitution. What's more, it does so in a way that is highly visible, impossible for anyone who enters a courthouse to miss. It therefore threatens not only underlying constitutional rights to public access, but also the notions of democratic legitimacy with which they are closely associated.[22] As the Ninth Circuit has stated, "[w]e must make every reasonable effort to avoid the appearance that courts are merely the frontispiece of prisons."[23]

But for courts or other parties concerned with the risks posed by dress code enforcement at the courthouse steps, constitutional doctrine already offers a viable remedy. This Note argues that the Sixth Amendment right to public trials offers a powerful tool to significantly curtail exclusions based on attire and to relocate that decision with judges and constitutional law. Part I outlines possible avenues for challenging courthouse dress codes and explains the advantages of a Sixth Amendment claim over First Amendment challenges. Part II surveys lower court doctrine, considering the obstacles that courts might raise to such a challenge and offering a roadmap for defendants in avoiding them. Part III offers preliminary observations on the likely outcomes of

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1995, 1998–99 (2017); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 308 (2016) (criticizing vague conditions of probation for providing too much power and discretion to probation officers); *see also* Terry v. Ohio, 392 U.S. 1, 22–23 (1968).

19 *See, e.g.*, United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997) ("[N]ot surprisingly, in most . . . cases, a district judge will defer to the professional judgment of the Marshals Service regarding the precautions that seem appropriate or necessary in the circumstances."). *But see* United States v. Sanchez-Gomez, 859 F.3d 649, 653, 666 (9th Cir. 2017) (en banc) ("Courts must decide whether the stated need for security outweighs the infringement on a defendant's right. This decision cannot be deferred to security providers or presumptively answered by routine policies." *Id.* at 666.).

20 *See, e.g.*, Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 685 (2013).

21 *Sanchez-Gomez*, 859 F.3d at 662.

22 *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2182 (2014) ("The [courtroom] audience's power . . . is bolstered by its ability to act based on what it hears: not only through voting . . . but also by contributing to public discourse . . . .").

23 *Sanchez-Gomez*, 859 F.3d at 665.

the Sixth Amendment claim and the changes it should bring to the practice of courthouses across the country.

I. THE ADVANTAGES OF THE SIXTH AMENDMENT CLAIM

A. Sixth Amendment Public Trial

The Sixth Amendment guarantees defendants a "speedy and public trial."[24] But the Supreme Court has rejected the idea that the right is limited by its text to "trials," extending it to apply also to voir dire[25] and suppression hearings.[26] In giving content to the public trial right, the Supreme Court has applied a stringent test any time a courtroom "closure" occurs. In *Waller v. Georgia*,[27] the Court held that:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.[28]

Where these four prongs are not satisfied, the Sixth Amendment right is violated.

While Part II addresses objections to the claim that dress code exclusions are closures for the purposes of the Sixth Amendment, it is sufficient here to note that a courtroom "closure" never requires a chain on the courthouse door. While the Supreme Court has not provided an exact definition of the term, it is clear that measures that prevent only some people, or even only one person, from attending criminal proceedings may nonetheless be considered "closures."[29]

The greatest strength of the Sixth Amendment right, however, is the remedy for its violation. The right belongs to the defendant, and only the defendant can assert it.[30] Most importantly, it is one of the few rights that remains a "structural error."[31] When it is violated at trial or voir dire, prejudice need not be shown, and reversal of a conviction is the required remedy.[32] As the Court said in *Waller*, "[w]hile the benefits of

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[24] U.S. CONST. amend. VI.

[25] Presley v. Georgia, 558 U.S. 209, 213 (2010) (per curiam).

[26] Waller v. Georgia, 467 U.S. 39, 47 (1984).

[27] 467 U.S. 39.

[28] *Id.* at 48.

[29] *See infra* Part II, pp. 858–67.

[30] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 379–80 (1979) ("The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused." (citation omitted)).

[31] *See* Kristin Saetveit, Note, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 STAN. L. REV. 897, 906 (2016).

[32] *See Waller*, 467 U.S. at 49 n.9 ("[T]he settled rule of the federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings." (quoting Levine v. United States, 362 U.S. 610, 627 n.* (1960) (Brennan, J., dissenting) (alterations in original))).

a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real."[33]

In *Presley v. Georgia*,[34] the Supreme Court decided its first public trial case in twenty-four years. In a per curiam decision, the Court held that the defendant's right was violated and reversal was required when the trial court excluded the courtroom's lone spectator during voir dire without making the findings required by *Waller*.[35] But *Presley* was not simply a straightforward application of *Waller*: rather, the Court adopted a powerful formulation of the public trial right and placed new, affirmative duties on trial courts. Thus, "trial courts are required to consider alternatives to closure even when they are not offered by the parties"[36] — "[t]he public has a right to be present whether or not any party has asserted the right."[37]

Even more significantly, the Court said that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."[38] This powerful obligation, framed in sweeping terms, recognizes the affirmative duty of judges to make sure members of the public are not unnecessarily excluded from courtrooms. Decisions about exclusion are therefore properly, and indeed necessarily, placed with judges. As Professor Jocelyn Simonson has argued, the per curiam decision "reinvigorated the relevance of the Sixth Amendment's right to a public trial. . . . Lower courts have taken these cues from *Presley*, and a renewed expansion of the Sixth Amendment right has begun."[39]

B. First Amendment Public Access

Another potential avenue to challenge courthouse dress codes is the First Amendment right of public access to criminal trials. The Supreme Court has held that the public has a right of access to criminal trials and standing to challenge its exclusion under the First Amendment's protection of "freedom to listen."[40] The First Amendment doctrine is in some respects identical to that under the Sixth Amendment: the four-part *Waller* test was actually wholly transplanted from the First Amendment context, where it was first articulated in *Press-Enterprise Co. v. Superior*

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[33] *Id.*

[34] 558 U.S. 209 (2010) (per curiam).

[35] *Id.* at 213.

[36] *Id.* at 214. And, to the extent that the "party seeking to close" the hearing must be the one to provide adequate justification, *id.* (quoting *Waller*, 467 U.S. at 48), courthouse dress codes are proposed and enforced by the government, the same party bringing the prosecution.

[37] *Id.*

[38] *Id.* at 215.

[39] Simonson, *supra* note 22, at 2212–13.

[40] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion) ("Free speech carries with it some freedom to listen."); *see also id.* at 583 (Stevens, J., concurring).

Court.[41] Sixth Amendment doctrine has followed First Amendment doctrine in other ways, too — *Presley*, for example, relied on First Amendment precedent to extend the Sixth Amendment right to voir dire.[42]

But the differences between the Sixth Amendment and First Amendment rights are not merely formal. The First Amendment right belongs to, and must be asserted by, the public — not the defendant.[43] And its violation is not a "structural error" requiring reversal when infringed.[44]

C. First Amendment Free Speech

Courthouse dress codes might also be attacked for violating the free speech rights of members of the public.[45] In the analogous circumstance of schools, dress codes sometimes infringe free speech rights, at least where the banned clothing is nondisruptive and "akin to pure speech."[46] Judges analyzing a free speech challenge to dress code standards would first have to determine whether the affected clothing constituted "expressive conduct" within the meaning of the First Amendment.[47] Even if it did, so long as interests like preserving courtroom decorum were deemed unrelated to suppressing free expression, the relatively relaxed standard of *United States v. O'Brien*[48] would apply. And even if the dress code failed this undemanding test, it could nonetheless be defended as an allowable restriction of speech on government property. Under this analysis, a courthouse is a nonpublic forum,[49] and the restrictions

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[41] 464 U.S. 501, 510–11 (1984).

[42] *See Presley*, 558 U.S. at 213 ("The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other. Still, there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has.").

[43] Simonson, *supra* note 22, at 2196.

[44] *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 562 (plurality opinion); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 601 (1982).

[45] *See* U.S. CONST. amend. I; *see also* Goldschmidt, *supra* note 1, at 63–78.

[46] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (internal quotation marks omitted).

[47] Judges would ask whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." Texas v. Johnson, 491 U.S. 397, 404 (1989) (alterations in original) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam)).

[48] 391 U.S. 367 (1968). The dress code would be allowable if it were "within the constitutional power of the Government," "further[ed] an important or substantial governmental interest," and if the restriction were "no greater than is essential to the furtherance of that interest." *Id.* at 377.

[49] *See, e.g.*, Mezibov v. Allen, 411 F.3d 712, 718 (6th Cir. 2005) ("The courtroom is a nonpublic forum, where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir." (citation omitted)).

are constitutional so long as they are viewpoint-neutral and reasonable in light of the court's intended purpose.[50]

D. Advantages of the Sixth Amendment Claim

Among these three potential options, opponents of courthouse dress codes would do best to pursue the Sixth Amendment claim. The previous sections explored some of the doctrinal obstacles to the free speech challenge. But for both potential First Amendment claims, whether public access or free speech, the greatest shortcomings, and therefore the greatest advantages of the Sixth Amendment claim, are practical ones.

Start with the free speech challenge. Even if a person excluded from the courthouse (perhaps for wearing a tank top) could raise a viable free speech claim, he would have little opportunity or incentive to do so. Because the decision to exclude is made by a security guard, there is no judgment, no reason-giving, and no chance to appeal.[51] Even when exclusions abridge First Amendment rights, those who are excluded likely lack the time, money, and interest to sue security officers for the violation under § 1983[52] or *Bivens*.[53] And even if they did, qualified immunity (and the recent evisceration of the *Bivens* remedy[54]) would raise a significant, perhaps insurmountable, obstacle to recovery.

The First Amendment public access claim is similarly unlikely to generate much litigation. While it is doctrinally more attractive to people who are excluded, they have little incentive to litigate the claim at all. One need not read past the captions of the Supreme Court's cases on the subject to see the narrow subset of cases in which the claim is actually litigated — Press-Enterprise Co., Richmond Newspapers, and Globe Newspaper Co. pursued their claims to access because well-resourced media companies wanted to be able to cover trials of significant public interest. But for the vast majority of cases, in the vast majority of courtrooms, there will be no press interest at all, let alone motivation to litigate a courtroom closure. And journalists, while not known for being well dressed, are unlikely to be among those deemed

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[50] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992).

[51] The most famous courthouse dress code case demonstrates this shortcoming by virtue of the fact that it is not a courthouse dress code case at all. In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court vindicated the defendant's First Amendment right to wear his "Fuck the Draft" jacket in the courthouse. *See id.* at 26. But he was not *excluded* from the courthouse. *Id.* at 16. Although the arrest took place in a courthouse corridor, Cohen was charged with violating a statute that criminalized offensive conduct in a variety of public places. *Id.* at 16 n.1, 19. In fact, while Cohen was in the courtroom, a police officer sent a note to the judge suggesting that Cohen be held in contempt — the judge, however, declined to delegate his authority to courthouse security. *Id.* at 19 & n.3. The free speech issue was therefore litigated only because it resulted in criminal charges.

[52] 42 U.S.C. § 1983 (2012).

[53] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[54] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–63 (2017) (barring new *Bivens* claims that differ in any "meaningful" way from ones previously decided).

"inappropriate" for court by security officers. The claim is therefore unlikely to be raised often enough to pose a serious challenge to courthouse dress codes.

The Sixth Amendment claim, in contrast, has its incentive built in. While putative audience members could not raise it on their own behalves, defendants have every reason to — a violation of the public trial right is structural error that will result in automatic reversal in the event of a conviction. This promise is therefore even more enticing than damages, and it could (and should) be raised as a matter of course by defense lawyers.[55] And if lawyers fail to raise it, judges should consider it themselves. As *Presley* made clear, "courts are obligated to take every reasonable measure to accommodate public attendance."[56] This obligation should include examining the rules that govern the courts judges administer to ensure that they do not exclude more people than the Constitution allows.

While Part III will consider in greater depth the likely outcomes of successful claims, it should take only one or two successes (or even the threat of a future success) in any given jurisdiction to bring down unconstitutional dress codes. Rather than risk reversal of resource-intensive convictions, courts are likely to change their rules preemptively. These changes would result in benefits to the public, who will be more free to observe the workings of criminal courts; defendants, who will see a more representative criminal court audience; and the criminal justice system as a whole, which will be reminded of the duty of judges to ensure compliance with the Constitution.

II. MAKING THE SIXTH AMENDMENT CLAIM

A Sixth Amendment attack on courthouse dress codes is not just theoretically powerful — it is also viable under current doctrine. This Part argues that the four-part *Waller* inquiry (requiring an overriding interest, narrow tailoring, consideration of alternatives, and on-the-record findings) should apply to dress code exclusions and identifies the major objections to this claim. It concludes that in nearly all jurisdictions, such a claim is viable. In jurisdictions where doctrinal obstacles prove insurmountable, those doctrines are unjustified in light of Supreme Court precedent.

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[55] It may be objected that, in some cases, the disadvantages of raising the claim will outweigh the potential benefits. Where, for instance, potentially excluded members of the audience are family or friends of the defendant, he or she might fear "transferred stigma" when the judge is required to make *Waller* findings regarding the person. But many defendants likely want their family and friends present. This is exactly the sort of decision that defense attorneys should empower their clients to make.

[56] Presley v. Georgia, 558 U.S. 209, 215 (2010) (per curiam).

With only occasional guidance from the Supreme Court,[57] lower courts have had difficulty defining when the *Waller* test applies.[58] Given that failing to make a required *Waller* finding is structural error requiring mandatory reversal, "[l]ower courts faced with less serious infringements of the public trial right . . . have struggled to reconcile the Court's precedent with the practical reality of . . . seemingly de minimis violations."[59] In response, they have erected a maze of obstacles, not always consistently defined across or even within jurisdictions, to limit the "closures" that require a *Waller* inquiry in the first place.[60]

This Part does not undertake an actual *Waller* inquiry into any specific dress code exclusion — a limited foray into that analysis is presented in Part III. Rather, it argues that the *Waller* inquiry is well suited to dress code exclusions, as a matter of both first principles and lower-court doctrine. As Professor Stephen E. Smith argues in another context,[61] the *Waller* test is a flexible inquiry that need not be feared: rather, courts would benefit from its unflinching application. This is particularly true for dress code violations, where the alternative is unguided and unreviewable decisions by courthouse security, sheltered from constitutional scrutiny.[62]

This Part considers in turn the intent or affirmative act requirement, triviality doctrine, partial closures, and the requirement of evidence of actual exclusion. It then considers specific arguments that might be raised against the novel dress code claim and outlines the basic strategy that defense attorneys should follow in pursuing the claim.[63]

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[57] *See* Saetveit, *supra* note 31, at 900 n.7. Two pieces of student writing have undertaken excellent surveys of lower-court doctrine. Daniel Levitas and Kristin Saetveit have both cataloged the ways in which courts have narrowed or undermined the application of *Waller* and argued that these "innovations" are unjustified. *See* Daniel Levitas, Comment, *Scaling* Waller*: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493 (2009). This Note, greatly indebted to their careful research, extends it to a context that neither considers — exclusions of the public based on manner of dress.

[58] Saetveit, *supra* note 31, at 901.

[59] *Id.*

[60] *See id.*; *see also* Levitas, *supra* note 57, at 499.

[61] *See* Stephen E. Smith, Commentary, *The Right to a Public Trial and Closing the Courtroom to Disruptive Spectators*, 93 WASH. U. L. REV. 235 (2015). Smith's article argues that *Waller* should apply to exclusions based on in-court disruptions. *Id.* at 242–46. While he does not consider dress code exclusions, the arguments in this context are at least as strong.

[62] This Part considers trial, voir dire, and suppression hearings — the contexts to which the "public trial" right has already been applied by the Supreme Court. While Professor Jocelyn Simonson argues persuasively that the right should apply to almost all courtroom proceedings, *see* Simonson, *supra* note 22, at 2205–19, that argument is outside the scope of this Note.

[63] This Part is not an in-depth survey of the law in every state and circuit; rather, it flags the major obstacles that attorneys should look out for in raising jurisdiction-specific claims.

A. Intent or Affirmative Acts

In some jurisdictions, *Waller* is not implicated unless the trial court intentionally closes the courtroom or takes an "affirmative act" to do so. In the Tenth Circuit, for example, "[t]he denial of a defendant's . . . right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom."[64] Without an affirmative act, no "closure" occurs.[65] The majority of courts, however, have rejected this position. The Seventh Circuit has held that "[w]hether the closure was intentional or inadvertent is constitutionally irrelevant."[66]

Notably, the intent or affirmative act doctrine has been developed largely in circumstances involving the overlapping authority of judges and courtroom security.[67] In *United States v. DeLuca*,[68] for example, the U.S. Marshal initiated a screening procedure without direction from the trial court, requiring that all would-be spectators present written identification for inspection and review.[69] These cases reflect a sentiment that it is unfair to hold a trial court responsible, by finding structural error, for a procedure it neither initiates nor knows about.[70] Courthouse dress codes, however, are not such a procedure. While they implicate the same overlap of authority between judges and security, they are highly formalized, usually published or posted, and may even be promulgated by judges in their administrative authority.[71] Appellate courts should therefore be hesitant to find that they are "inadvertent" or not an "affirmative act."

The Third Circuit, for example, considers whether the trial court "ratifies" the actions of courtroom security.[72] Whether or not a court announces a dress code from the bench, judges who go to work every day in a building where the public is excluded based on manner of dress

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64 United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994) (citations omitted).

65 *See, e.g.*, Bunn v. Lopez, No. 2:11-cv-1373, 2016 WL 4010038, at *8 (E.D. Cal. July 26, 2016), *appeal filed*, No. 17-6232 (9th Cir. June 14, 2017).

66 Walton v. Briley, 361 F.3d 431, 433 (7th Cir. 2004).

67 *See, e.g.*, *Walton*, 361 F.3d at 432 (trial held late in the evening when courthouse doors were locked); *Al-Smadi*, 15 F.3d at 153–54 (courthouse doors closed by security at 4:30 PM pursuant to normal practice, even though trial was taking place); United States v. Keaveny, No. 98-1605, 1999 WL 525954, at *1 (1st Cir. Mar. 4, 1999) ("[C]onstitutional concerns may be raised even by a court officer's unauthorized partial exclusion of the public.").

68 137 F.3d 24 (1st Cir. 1998).

69 *Id.* at 32.

70 *See, e.g.*, Martineau v. Perrin, 601 F.2d 1196, 1197 (1st Cir. 1979) ("The court at no time directed the courtroom doors to be locked . . . . It is not possible to determine from behind the bench whether the doors to the courtroom are locked or unlocked.").

71 *See* Goldschmidt, *supra* note 1, at 101 ("One of the methods that courts use . . . is promulgating rules of courtroom decorum.").

72 *See, e.g.*, United States v. Greene, 431 F. App'x 191, 196 (3d Cir. 2011) ("Nonetheless, courts of appeals have unfailingly examined whether the trial judge either initiated or ratified the closure . . . .").

certainly know about and ratify the courtroom closure. This is particularly true in light of the Supreme Court's admonition in *Presley* that judges must do everything they reasonably can to accommodate public attendance,[73] which calls into question whether the intent or affirmative act requirement can *ever* be sustained.[74]

B. Triviality

The "triviality" doctrine also reflects the concern that not every exclusion should merit the strong medicine that structural error requires.[75] Although there is a circuit split over whether the Sixth Amendment is subject to such "de minimis" review,[76] relevant factors (beyond inadvertence) typically include how long the courtroom was closed and whether any of the defendant's family or friends were excluded.[77] Even courts that accept triviality, however, emphasize its "narrow application."[78]

Triviality analysis is not "harmless error" review.[79] Rather, the majority of the circuits "consider whether the closure implicates the values served by the Sixth Amendment as set forth by the Supreme Court in *Waller*."[80] These are four: "1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury."[81]

Dress code exclusions clearly implicate these values. They undermine the fairness of the trial and the need to remind the prosecutor and judge of their responsibilities to the accused. As Simonson points out, the makeup of the criminal courtroom is a powerful accountability mechanism.[82] A criminal court system with diminished democratic input from the relevant community falls into exactly the trap the Sixth

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[73] Presley v. Georgia, 558 U.S. 209, 215 (2010) (per curiam).

[74] *See* Simonson, *supra* note 22, at 2220.

[75] Some courts consider intent or affirmative acts in their triviality analysis. *See, e.g.*, Commonwealth v. Cohen, 921 N.E.2d 906, 919 (Mass. 2010).

[76] *See* Simonson, *supra* note 22, at 2222.

[77] *See, e.g.*, State v. Taylor, 869 N.W.2d 1, 11 (Minn. 2015); People v. Woodward, 841 P.2d 954, 958 (Cal. 1992).

[78] United States v. Gupta, 699 F.3d 682, 688 (2d Cir. 2012).

[79] *See, e.g.*, *id.* ("[The triviality standard] is . . . very different from a harmless error inquiry." (quoting Peterson v. Williams, 85 F.3d 39, 42 (2d Cir. 1996))).

[80] United States v. Aguiar, 82 F. Supp. 3d 70, 84 (D.D.C. 2015).

[81] *Peterson*, 85 F.3d at 43 (citing Waller v. Georgia, 467 U.S. 39, 46–47 (1984)).

[82] Simonson, *supra* note 22, at 2194 ("When audiences are excluded, both defendants and the local community lose out on an opportunity to promote fairness and accountability."); *id.* at 2231 ("Indeed, local movements for social change by low-income populations in urban areas can and do involve courtroom observation . . . . [B]oth the defendants and their supporters are explicitly exercising their rights and responsibility to 'remind[] the participants . . . that the consequences of their actions extend to the broader community.'" (quoting United States v. Rivera, 682 F.3d 1223, 1230 (9th Cir. 2012) (alteration in original))).

Amendment seeks to avoid. Excluding members of the community, especially those who are black, brown, and poor, makes it easier for prosecutors and judges to forget the groups who feel the impact of their decisions. And *any exclusion* may impact the ability of witnesses to come forward or make perjury less daunting.[83] The risk is particularly great where, as here, exclusions will disproportionately impact communities most likely to have knowledge relevant to the events of the trial or of the honesty of testifying witnesses.[84]

C. Partial Closure

Some courts, while acknowledging that the Sixth Amendment may be violated even if the entire public is not excluded, apply a less stringent version of the *Waller* test to exclusions that affect some, but not all, of the public.[85] The *Waller* inquiry remains exactly the same, except that the requirement of an "overriding interest" is replaced with some lesser formulation, such as a "substantial reason."[86]

The partial closure doctrine is the subject of a circuit split and disagreement among state courts.[87] Some courts have taken the view that the Supreme Court implicitly rejected this doctrine in *Presley*, by applying the full-strength *Waller* test to an exclusion of only one person during jury voir dire.[88] But this view of the Court's holding is hard to sustain, since the one person excluded was the only member of the audience, making the case at once an exclusion of one person and a "total closure" of the courtroom.[89]

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[83] Levitas, *supra* note 57, at 531 ("[I]t is impossible to know how the exclusion of unknown persons may have impacted the proceeding.").

[84] *See supra* note 15; *cf.* FED. R. EVID. 608(a) ("A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness . . . .").

[85] *See, e.g.*, Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992); United States v. Sherlock, 962 F.2d 1349, 1356–57 (9th Cir. 1992); Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989); Douglas v. Wainwright, 739 F.2d 531, 533 (11th Cir. 1984) (per curiam).

[86] *E.g.*, *Rivera*, 682 F.3d at 1236 (quoting *Sherlock*, 962 F.2d at 1357).

[87] *See* Angiano v. Scribner, 366 F. App'x 726, 727 (9th Cir. 2010) ("The Circuits are split as to the applicability of the four-part test in *Waller* to 'partial closures,' where only one person is excluded from a trial."); Saetveit, *supra* note 31, at 917–19 (reviewing the positions taken by state courts).

[88] *See, e.g.*, Drummond v. Houk, 728 F.3d 520, 527 (6th Cir. 2013) ("*Presley v. Georgia* . . . held that *Waller* applies equally to full and partial courtroom closures . . . ."), *vacated on other grounds sub nom.* Robinson v. Drummond, 134 S. Ct. 1934 (2014) (mem.); *see also* Simonson, *supra* note 22, at 2213 ("[T]he Court in *Presley* ordered a new trial based on the exclusion of one lone spectator . . . . This . . . contradicted the approach of some circuit courts, which had found that when a small number of people are excluded . . . that exclusion requires a lower level of scrutiny.").

[89] Presley v. Georgia, 558 U.S. 209, 210 (2010) (per curiam). In *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), the Supreme Court noted the state court's finding of a full rather than "partial" closure and explained the distinction, but gave no hint it had foreclosed such analysis. *Id.* at 1906.

The partial closure doctrine likely makes a formal distinction without much practical difference,[90] particularly for the purposes of a challenge to courthouse dress codes. Even if trial courts analyze courthouse dress codes as partial closures, the judge, not security at the front steps, will be making the decision. This alone accomplishes the goal of bringing the operation of the courthouse back within constitutional scrutiny. As for the goal of excluding fewer people from court proceedings, there is little reason to think that analyzing dress code exclusions for whether they are based on a "substantial reason" rather than an "overriding interest" will make much difference.

D. Actual Exclusion Evidence

A small minority of courts has required evidence that at least one person was actually excluded by a courtroom closure.[91] Other courts, including the Second and Third Circuits, have squarely rejected this view, holding that the Sixth Amendment does not require producing an actual person who was excluded.[92]

As Saetveit notes, the requirement of exclusion evidence is hard to square with precedent. The Supreme Court in *Waller* ignored the question of whether anyone had actually been excluded.[93] Requiring evidence of exclusion seems inconsistent with the structural error doctrine, which insists that it is impossible to tell whether prejudice has resulted from a courtroom closure.[94] And *Waller* teaches that whenever a court excludes the public from a proceeding, it is required not just to have a good reason but also to actually make findings.[95]

So long as the doctrine persists, however, lawyers in a handful of jurisdictions will have to deal with it. Here, it helps that the Sixth Amendment claim is in some sense orchestrated — the public trial right is used as a vehicle to restrict courthouse dress codes. Defense attorneys, therefore, may well enlist a member of the public as an "inappropriately dressed" test case to be excluded from the courthouse.

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[90] *See, e.g.*, Ayala v. Speckard, 131 F.3d 62, 70 (2d Cir. 1997) ("It may be doubted whether trial judges can make meaningful distinctions between 'compelling' and 'overriding' interests or can distinguish between whether such interests are 'likely to be prejudiced' or whether there is a 'substantial probability of' prejudice.").

[91] *E.g.*, State v. Salazar, 414 S.W.3d 606, 616 (Mo. Ct. App. 2013). "Massachusetts, Minnesota, New Jersey, and Rhode Island have also held that a defendant has no viable public trial claim without evidence of a particular individual denied entry." Saetveit, *supra* note 31, at 910; *see also id.* at 910 n.80 (citing cases).

[92] *See, e.g.*, Peterson v. Williams, 85 F.3d 39, 44 & n.7 (2d Cir. 1996); United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969) (en banc); Lilly v. State, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012); *see also* Saetveit, *supra* note 31, at 910–11, 911 n.81.

[93] Saetveit, *supra* note 31, at 923 (citing Waller v. Georgia, 467 U.S. 39, 48 (1984)).

[94] *Id.* at 923–24.

[95] *See* United States v. Gupta, 699 F.3d 682, 687 (2d Cir. 2012) ("In other words, if a court intends to exclude the public from a criminal proceeding, it *must* first analyze the *Waller* factors and make specific findings with regard to those factors.").

E. Case-Specific Objections

Each of the strands identified above can be understood as an attempt to determine which exclusions or barriers to entry count as "closures," and therefore implicate *Waller*, and which don't. Along these lines, several arguments might be raised against recognizing dress code exclusions in particular as courtroom closures. If the heartland closure case is a chain across the door of the courtroom, with no spectators allowed inside, the implementation of a dress code is different in several respects. First, the ban on entry is individualized to particular people. Second, it is based on an action by the excluded person, which the person has an opportunity to avoid.

1. Individualization. — The fact that dress code exclusions apply to particular people, rather than as a blanket ban, does not distinguish them from other cases that are already analyzed as courtroom closures. Several courts have considered security procedures implemented for the protection of witnesses and jurors, typically involving identification requirements or background checks for spectators.[96] Most courts have analyzed such "screening devices" as closures subject to Sixth Amendment scrutiny.[97] A recent New York case, accordingly, noted that "[w]hatever we call it, the device implemented here raises the same secrecy and fairness concerns that a total closure does. The defendant's Sixth Amendment right to a public trial is still implicated."[98]

Indeed, individualized exclusions are at least as problematic for Sixth Amendment purposes, if not more so. Recalling the purposes of the public trial right, it is hard to see why prosecutors and judges will be better reminded of their responsibilities to the community, perjury will be better deterred, or witnesses will be better encouraged to come forward because officers of the state, at their sole discretion, were able to pick and choose who would be allowed to witness the trial. The Michigan Supreme Court recognized the danger of accepting this argument over a century ago, holding that the state's constitutional guarantee of a public trial was violated when a security officer excluded citizens at the door pursuant to a judge's order that only "respectable" citizens were to be admitted.[99] The court asked:

> Is respectability of the citizen who desires to witness a trial to be made a test of the right of access to a public trial, and is that test to be left to the knowledge or discretion of a police officer? Must a citizen who wishes to witness a trial of a person accused, whether he be a friend, an acquaintance,

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[96] *See, e.g.*, United States v. Shryock, 342 F.3d 948 (9th Cir. 2003); United States v. DeLuca, 137 F.3d 24 (1st Cir. 1998).

[97] *See, e.g.*, *DeLuca*, 137 F.3d at 33–34; United States v. Brazel, 102 F.3d 1120, 1155–56 (11th Cir. 1997).

[98] People v. Jones, 750 N.E.2d 524, 529 (N.Y. 2001) (citations omitted).

[99] People v. Murray, 50 N.W. 995, 1000 (Mich. 1891).

> or a stranger to the accused, present to the police officer stationed at the door of the Temple of Justice a certificate of his respectability? If so, by whom shall it be certified? By the mayor, the chief of police, or police commissioners, or by his pastor or clergyman?[100]

These questions have found no easy answers in the intervening years. It is no better today to leave public access to a security officer's determination of what is "respectable" or "appropriate."

2. Opportunity to comply. — In the first place, the claim that people excluded for violating a dress code are different from those excluded by a paradigm "closure" because they have an opportunity to conform to its requirements is not always true. There are certainly people who don't own and can't afford the kind of clothes that a security officer might require. Even if most — or even a vast majority — do, it would be foolish for the state to act as if there are no exceptions. Unless security officers are to hold something like a *Bearden*[101] hearing on the courthouse steps, the time will inevitably come when an excluded person actually *was* unable to afford suitable clothing. If ability to conform really makes a constitutional difference, the claim in this hypothetical case should succeed, and any guilty verdict should be reversed. Given the tremendous risk of such an outcome, even the relatively remote possibility it would occur in any given case should have a significant impact on state practice.

Furthermore, dress code exclusions are not unique for conditioning entry on what a person does or doesn't do. The screening procedure cases, for instance, analyze as courtroom closures requirements that aspiring spectators present photo identification. The argument takes the same form: because you did not come to court, *either* in particular clothing *or* with a particular item, you cannot enter.

Finally, by focusing on what the *spectators* could have done, this argument forgets the mandate of *Presley* to ask what the court can do to ensure maximum public access. A case decided by the Texas Court of Criminal Appeals, *Lilly v. State*,[102] presents a good example. There, the court found that a proceeding held in a prison violated the public trial right.[103] While the public was not forbidden, "highly restrictive" admission policies allowed visitors to be denied access at the guard's discretion if, for example, "they wore offensive clothing or sought admittance for an 'improper purpose.'"[104] While "many of the individual admittance policies in this case would not, standing alone, necessarily

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[100] *Id.* at 998.

[101] Bearden v. Georgia, 461 U.S. 660, 661–62 (1983) (forbidding incarceration for nonpayment of fines without a determination that the person had the ability to pay).

[102] 365 S.W.3d 321 (Tex. Crim. App. 2012).

[103] *Id.* at 324.

[104] *Id.* at 331.

amount to a per se closure, the cumulative effect of the Unit's policies undermine[d the court's] confidence that *every reasonable measure was taken to accommodate public attendance* at Appellant's trial."[105] The trial court had therefore failed to live up to its obligation under *Presley*.[106] Proper attention to the command of *Presley* forbids courts from asking what the spectators could have done to gain entry. Instead, judges must take the spectators as they are and ask what they themselves can do to ensure that spectators are not unnecessarily excluded.

Courtroom closures by any name implicate the right of the defendant to a public trial. Thus, Smith has argued persuasively that the *Waller* test should apply even to exclusions of disruptive persons already in the courtroom,[107] and Simonson has argued for an expansive definition of a "closure" that would include procedures that prevent the public from understanding what they observe in court, even as they are actually allowed in.[108] The argument advanced here is much closer to the heartland closure case, since it takes place outside the courtroom and occurs before any actual disruption.

F. Making the Sixth Amendment Claim

Before any proceeding to which the public trial right extends, including suppression hearings, voir dire, and trial, defense attorneys should raise the claim that operating the courthouse with an overly restrictive or vague dress code violates the defendant's right to a public trial. Judges need not fear that dress code claims will become a trap for the unwary jurist — the Supreme Court has suggested, and the majority of state and federal courts have held, that failure to make a contemporaneous objection waives the claim.[109] A sample pleading is provided in Appendix A.[110]

In raising this claim in the dress code context, attorneys and judges are confronted with a practical obstacle: it may not be clear what even the most sympathetic judge can do at the time the claim is raised. The proceeding is, after all, about to begin — anyone who was excluded at the courthouse steps presumably has already been turned away. Even if a judge were to immediately order the dress code retracted and courthouse security to stand down, most of the harm would have been done.

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105 *Id.* (emphasis added).

106 *Id.* at 332.

107 Smith, *supra* note 61, at 242–46.

108 Simonson, *supra* note 22, at 2226–28.

109 *See* Levine v. United States, 362 U.S. 610, 619 (1960) ("The continuing exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom . . . thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it."); Robinson v. State, 976 A.2d 1072, 1082–83 (Md. 2009) (collecting cases).

110 *See infra* p. 871. Where evidence of actual exclusion is required, the pleading will have to be modified.

And it would be difficult to raise the claim in advance, when it would necessarily be speculative.

In the first place, it bears noting that this problem isn't unique to the dress code context. Same-day remedies may be impossible any time that members of the public are excluded without the knowledge of the judge, and even when the judge herself orders a courtroom closed (since many of those excluded may have already left). Yet trial judges and appellate courts still find the public trial right violated, even when the problem could not have been fixed with a simple order at the time of the proceeding.[111] This is consistent with the rule of *Presley* that it is the obligation of trial courts to "take every reasonable measure to accommodate public attendance at criminal trials."[112] Defense attorneys should therefore make a record of the Sixth Amendment violation and their objection. Even if the trial court judge rejects the claim in their case, choosing to take her chances on appeal if necessary, she may well choose to avoid seeing the issue presented again in the future (indeed, possibly in every case) by preemptively removing or revising the courthouse dress code.[113]

Second, a quirk of Supreme Court doctrine affords judges a de facto opportunity to consider the claim in advance. If a defense attorney raises the claim at a pretrial suppression hearing, a judge might reject it. For a judge who structures her decisions to maximize efficiency while minimizing the risk of reversal, this is a relatively low-risk proposition: the Supreme Court has held that, when the public trial right is violated only at a suppression hearing, the proper remedy is not to reverse the conviction but only to repeat the hearing.[114] The judge may therefore reject the argument and proceed with the hearing. As voir dire and trial approach, however, the risk attending infringement of the Sixth Amendment right increases exponentially, since reversal of any conviction becomes required.[115] The court may therefore rationally take the same steps outlined above to prevent a violation of the right at trial, even having refused to find that it was violated during the suppression hearing.

III. RESPONSE TO THE SIXTH AMENDMENT CLAIM

Having argued that the requirements of *Waller* apply to dress code exclusions, this Part turns to the *Waller* hearings themselves. It suggests

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111 *See, e.g.*, *Lilly*, 365 S.W.3d at 331.

112 Presley v. Georgia, 558 U.S. 209, 215 (2010) (per curiam).

113 In many jurisdictions, judges promulgate these rules under their administrative authority. *See* Goldschmidt, *supra* note 1, at 101.

114 *See* Waller v. Georgia, 467 U.S. 39, 50 (1984). If the result of the hearing is the same, no new trial is needed. *Id.*

115 *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 149 (2006).

that some dress requirements may still be implemented at the courthouse steps, though they will likely be much narrower in scope than current practice. And even if some or even many of the people excluded by courthouse security at the front steps can be constitutionally excluded by the trial court at the courtroom door (an empirical question on which this Note takes no position), doing so via the process prescribed by the Sixth Amendment will offer the benefits of cabining discretion, developing a body of law on the subject, and reasserting the primacy of the Constitution in the administration of criminal courts.

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. In this respect, the author is in no better position than a courthouse security officer. Some preliminary observations, however, are possible.

First, it is not a courtroom closure within the meaning of the Sixth Amendment to exclude someone based on a law of general application. 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.[116]

Second, the Sixth Amendment public trial right cannot require what the Sixth Amendment fair trial right forbids. Lower courts have reached different outcomes on when spectators' courtroom attire violates the defendant's fair trial right.[117] In *Carey v. Musladin*,[118] the Supreme Court stated that its precedents do not clearly answer the question.[119] Concurring in the judgment, Justice Kennedy noted that the case "present[ed] the issue whether as a preventative measure, or as a general rule to preserve the calm and dignity of a court, buttons proclaiming a message relevant to the case ought to be prohibited as a matter of course."[120] He further reasoned that trial courts may "as a general practice already take careful measures to preserve the decorum of courtrooms, thereby accounting for the lack of guiding precedents on this subject."[121]

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116 *E.g.*, IND. CODE § 35-45-4-1.5(b) (2017) (outlawing public nudity).

117 *Compare* Norris v. Risley, 918 F.2d 828, 830–31 (9th Cir. 1990) (spectators with "Women Against Rape" buttons at sexual assault trial deprived defendant of fair trial), *with* Davis v. State, 223 S.W.3d 466, 475 (Tex. App. 2006) (spectators wearing medallions with murder victim's picture did not deprive defendant of fair trial).

118 549 U.S. 70 (2006).

119 *Id.* at 76.

120 *Id.* at 81 (Kennedy, J., concurring in the judgment).

121 *Id.*

It is possible to imagine some "general rules" that might be appropriately administered outside the courtroom. To take an example familiar from restaurant windows, "no shirt, no service" would be unobjectionable, since it is reasonable to think that shirtless spectators would per se interfere with criminal proceedings.[122] Other rules, however, call for the sort of unguided judgments that courthouse security simply cannot make. The same button or T-shirt might or might not be a ground for exclusion, depending on whether it was relevant to the subject matter of the trial, which courthouse security could almost never know. Consider, for example, the "Kourts Kops Krooks" T-shirt worn by an audience member in *In re Contempt of Dudzinski*.[123] While in an ordinary trial it might be an acceptable (or even constitutionally protected) display of criticism of the criminal justice system, in another (such as the trial of a police officer) it may well violate the *defendant*'s rights.

Similar problems apply to other justifications adequate for exclusion. For example, spectators may be excluded when their conduct is threatening to witnesses.[124] While clothing threatening in some circumstances might be entirely innocuous in others (such as clothing with colors that are associated with gangs), it is possible that some per se rules could be crafted and appropriately administered at the courthouse door. At least one court, for example, has categorically banned "Stop Snitching" T-shirts.[125] Equally threatening (though not yet the subject of a judge's ban) are the T-shirts recently worn by police officers in D.C. Superior Court, featuring a white supremacist symbol and the image of the Grim Reaper.[126]

Judges should remember, however, that *Waller* is not a monster under the bed. In almost all cases, exclusions based on manner of dress will be exceedingly quick and painless. The required finding of an overriding interest may be made swiftly, and can be based on the judge's own observations.[127] Consideration of alternatives may include asking the person to cover unacceptable clothing or remove an objectionable pin. No formal hearing or written order is required — the court may

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[122] One exception would be the rare case when the person can't afford a shirt. Since a lack of shoes may not even be noticed in a courtroom, "no shirt, no *shoes*, no service" is not as clear a case.

[123] 667 N.W.2d 68, 70 (Mich. Ct. App. 2003).

[124] *See, e.g.*, United States *ex rel.* Orlando v. Fay, 350 F.2d 967, 971 (2d Cir. 1965).

[125] Suzanne Smalley, *Judge Bans Cellphones in Dorchester Courthouse*, BOS. GLOBE (Mar. 13, 2007), http://archive.boston.com/news/local/articles/2007/03/13/judge_bans_cellphones_in_dorchester_courthouse/ [http://perma.cc/GFD6-W6VD].

[126] *See* Keith L. Alexander & Peter Hermann, *Controversial Police T-Shirt Leads to Dismissal in D.C. Gun Case*, WASH. POST (Aug. 5, 2017), http://wapo.st/2fiAszw [http://perma.cc/3SYX-DWWT]. The fact that the anti-snitch shirt has been banned and the police T-shirt has not supports this Note's hypothesis about the impact of discretionary exclusions on communities of color. The fact that this bias will affect judges as well as security officers simply highlights the importance of requiring reason-giving, a record, and an opportunity for appeal.

[127] Smith, *supra* note 61, at 245.

make its findings orally from the bench.[128] Nor must findings be individualized — a closure can apply to exclude multiple people in a courtroom at once. As Smith has argued, *Waller* is not a hammer, but a scalpel.[129]

But just because *Waller* will not burden trial courts by requiring an inordinate amount of their limited time does not mean it lacks the ability to effect significant change in the practice of criminal courts. If defense attorneys attack courthouse dress codes on Sixth Amendment grounds, the incentives for trial courts to sharply limit or eliminate them entirely will be significant — if an appellate court were to accept the claim for a voir dire or trial, automatic reversal would be required. In light of this risk and their obligations under *Presley*, trial courts can and should limit or end the use of dress codes in their courthouses.

No matter how many fewer exclusions result from following the requirements of *Waller*, the most important results are likely to be procedural. Relocating the decision to exclude from security personnel to the trial court will limit arbitrariness, allow precedent to develop on dress codes, and reduce the chilling effect on members of the public who must present themselves to unaccountable security officers for inspection. Putting this decision in the hands of courts will make it more constrained, since it will spur the growth of binding precedent, and more accountable, since appeal will be possible.

What's more, the reminder that some determinations are uniquely within the competence of the courts may be valuable. While deferring to law enforcement and security personnel in the field may be desirable, courts in some contexts possess *more* information and competence. Dress codes may well be only a starting point: once the security checkpoint is pierced, the requirements of the Constitution could be reasserted throughout the courthouse.

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[128] *Id.*

[129] *Id.* at 242.

APPENDIX A — SAMPLE MOTION

1. During the previous [preliminary hearing/voir dire/trial] proceedings of [client] in [matter], [courthouse] was closed to all members of the public whose dress did not satisfy the following standard: [insert dress code standard employed in the courthouse].

2. By excluding these members of the public, and deterring others from even attempting to enter, [courthouse] effects a closure without making the findings required by *Waller v. Georgia*, 467 U.S. 39 (1984), before excluding the public from a court proceeding.

3. This Court has an independent obligation "to take every reasonable measure to accommodate public attendance at criminal trials." *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam).

4. Before anyone is excluded from [defendant's next proceeding] based on their manner of dress, four conditions must be satisfied: "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48.

5. When a court fails to make the findings required by *Waller*, the right to a public trial is denied and structural error results. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006). Were the trial to result in conviction, reversal would be required.

6. [Defendant] therefore requests that, before conducting [next proceeding] with the courthouse dress code in place, this honorable Court fulfill its duty to "take every reasonable measure to accommodate public attendance." *Presley*, 558 U.S. at 215.

7. In particular, [defendant] requests that every person seeking entry be allowed into the courtroom, and that the Court make *Waller* findings before anyone is excluded from the courthouse for their manner of dress.

TAB 3

Rules back from public comment

NOTES: The following rules are back from public comment. Only one comment was received (noted below). It wasn't substantive.

- 1-204. Executive Committees
- 1-205. Standing and Ad Hoc Committees
    - Earl D Tanner Jr, January 21, 2020 at 12:46 pm
    - As recently as last November, there was a meeting of the OCAP committee. Was there a public announcement of its demise? I found nothing on a Google search. Is this part of the court's efforts to broaden non-lawyer participation in providing legal services? What will become of existing OCAP interviews and forms?
- 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
- 10-1-202. Verifying Use of Jury
- App. F. Records Retention Schedule

Rule 1-204. Executive committees.

Intent:

To establish executive committees of the Council.

To identify the responsibility and authority of the executive committees.

To identify the membership and composition of the executive committees.

To establish procedures for executive committee meetings.

Applicability:

This rule shall apply to the judiciary.

Statement of the Rule:

(1) The following executive committees of the Council are hereby established: (a) the Management Committee; (b) the Policy and Planning Committee; ~~and~~ (c) the Liaison Committee; and (d) the Budget and Fiscal Management Committee.

(2) The Management Committee shall be comprised of at least four Council members, one of whom shall be the Presiding Officer of the Council. Three Committee members constitute a quorum. The Presiding Officer of the Council or Presiding Officer's designee shall serve as the Chair. When at least three members concur, the Management Committee is authorized to act on behalf of the entire Council when the Council is not in session and to act on any matter specifically delegated to the Management Committee by the Council. The Management Committee is responsible for managing the agenda of the Council consistently with Rule 2-102 of this Code. The Management Committee is responsible for deciding procurement protest appeals.

(3) The Policy and Planning Committee shall recommend to the Council new and amended rules for the Code of Judicial Administration. The committee shall recommend to the Council new and amended policies, or repeals, for the Human Resource Policies and Procedures Manual, pursuant to Rule 3-402. The committee shall recommend to the Council periodic and long term planning efforts as necessary for the efficient administration of justice. The committee shall research and make recommendations regarding any matter referred by the Council.

(4) The Liaison Committee shall recommend to the Council legislation to be sponsored by the Council. The committee shall review legislation affecting the authority, jurisdiction, organization or administration of the judiciary. When the exigencies of the legislative

process preclude full discussion of the issues by the Council, the Committee may endorse or oppose the legislation, take no position or offer amendments on behalf of the Council.

(5) The Budget and Fiscal Management Committee shall review court budget proposals, recommend fiscal priorities and the allocation of funds, and make recommendations to the Council regarding budget management and budget development in accordance with Rule 3-406.

~~(5)~~(6) Members of the executive committees must be members of the Council. Each executive committee shall consist of at least three members appointed by the Council to serve at its pleasure. The members of the Policy and Planning Committee and the Liaison Committee shall elect their respective chairs annually and select a new chair at least once every two years.

~~(6)~~(7) Each committee shall meet as often as necessary to perform its responsibilities, but a minimum of four times per year. Each committee shall report to the Council as necessary.

~~(7)~~(8) The Administrative Office shall serve as the secretariat to the executive committees.

Effective May/November 1, 20___

Rule 1-205. Standing and Ad Hoc Committees.

Intent:

To establish standing and ad hoc committees to assist the Council and provide recommendations on topical issues.

To establish uniform terms and a uniform method for appointing committee members.

To provide for a periodic review of existing committees to assure that their activities are appropriately related to the administration of the judiciary.

Applicability:

This rule shall apply to the internal operation of the Council.

Statement of the Rule:

(1) **Standing Committees.**

(1)(A) **Establishment.** The following standing committees of the Council are hereby established:

(1)(A)(i) Technology Committee;

(1)(A)(ii) Uniform Fine Schedule Committee;

(1)(A)(iii) Ethics Advisory Committee;

(1)(A)(iv) Judicial Branch Education Committee;

(1)(A)(v) Court Facility Planning Committee;

(1)(A)(vi) Committee on Children and Family Law;

(1)(A)(vii) Committee on Judicial Outreach;

(1)(A)(viii) Committee on Resources for Self-represented Parties;

(1)(A)(ix) Language Access Committee;

(1)(A)(x) Guardian ad Litem Oversight Committee;

(1)(A)(xi) Committee on Model Utah Civil Jury Instructions;

(1)(A)(xii) Committee on Model Utah Criminal Jury Instructions;

(1)(A)(xiii) Committee on Pretrial Release and Supervision; and

(1)(A)(xiv) Committee on Court Forms.

(1)(B) **Composition.**

(1)(B)(i) The Technology Committee shall consist of:

(1)(B)(i)(a) one judge from each court of record;

(1)(B)(i)(b) one justice court judge;

(1)(B)(i)(c) one lawyer recommended by the Board of Bar Commissioners;

(1)(B)(i)(d) two court executives;

(1)(B)(i)(e) two court clerks; and

(1)(B)(i)(f) two staff members from the Administrative Office.

(1)(B)(ii) The Uniform Fine/Bail Schedule Committee shall consist of:

(1)(B)(ii)(a) one district court judge who has experience with a felony docket;

(1)(B)(ii)(b) three district court judges who have experience with a misdemeanor docket;

(1)(B)(ii)(c) one juvenile court judge; and

(1)(B)(ii)(d) three justice court judges.

(1)(B)(iii) The Ethics Advisory Committee shall consist of:

(1)(B)(iii)(a) one judge from the Court of Appeals;

(1)(B)(iii)(b) one district court judge from Judicial Districts 2, 3, or 4;

(1)(B)(iii)(c) one district court judge from Judicial Districts 1, 5, 6, 7, or 8;

(1)(B)(iii)(d) one juvenile court judge;

(1)(B)(iii)(e) one justice court judge; and

(1)(B)(iii)(f) an attorney from either the Bar or a college of law.

(1)(B)(iv) The Judicial Branch Education Committee shall consist of:

(1)(B)(iv)(a) one judge from an appellate court;

(1)(B)(iv)(b) one district court judge from Judicial Districts 2, 3, or 4;

(1)(B)(iv)(c) one district court judge from Judicial Districts 1, 5, 6, 7, or 8;

(1)(B)(iv)(d) one juvenile court judge;

(1)(B)(iv)(e) the education liaison of the Board of Justice Court Judges;

(1)(B)(iv)(f) one state level administrator;

(1)(B)(iv)(g) the Human Resource Management Director;

(1)(B)(iv)(h) one court executive;

(1)(B)(iv)(i) one juvenile court probation representative;

(1)(B)(iv)(j) two court clerks from different levels of court and different judicial districts;

(1)(B)(iv)(k) one data processing manager; and

(1)(B)(iv)(l) one adult educator from higher education.

(1)(B)(iv)(m) The Human Resource Management Director and the adult educator shall serve as non-voting members. The state level

administrator and the Human Resource Management Director shall serve as permanent Committee members.

(1)(B)(v) The Court Facility Planning Committee shall consist of:

(1)(B)(v)(a) one judge from each level of trial court;

(1)(B)(v)(b) one appellate court judge;

(1)(B)(v)(c) the state court administrator;

(1)(B)(v)(d) a trial court executive;

(1)(B)(v)(e) two business people with experience in the construction or financing of facilities; and

(1)(B)(v)(f) the court security director.

(1)(B)(vi) The Committee on Children and Family Law shall consist of:

(1)(B)(vi)(a) one Senator appointed by the President of the Senate;

(1)(B)(vi)(b) one Representative appointed by the Speaker of the House;

(1)(B)(vi)(c) the Director of the Department of Human Services or designee;

(1)(B)(vi)(d) one attorney of the Executive Committee of the Family Law Section of the Utah State Bar;

(1)(B)(vi)(e) one attorney with experience in abuse, neglect and dependency cases;

(1)(B)(vi)(f) one attorney with experience representing parents in abuse, neglect and dependency cases;

(1)(B)(vi)(g) one representative of a child advocacy organization;

(1)(B)(vi)(h) one mediator;

(1)(B)(vi)(i) one professional in the area of child development;

(1)(B)(vi)(j) one representative of the community;

(1)(B)(vi)(k) the Director of the Office of Guardian ad Litem or designee;

(1)(B)(vi)(l) one court commissioner;

(1)(B)(vi)(m) two district court judges; and

(1)(B)(vi)(n) two juvenile court judges.

(1)(B)(vi)(o) One of the district court judges and one of the juvenile court judges shall serve as co-chairs to the committee. In its discretion the committee may appoint non-members to serve on its subcommittees.

(1)(B)(vii) The Committee on Judicial Outreach shall consist of:

(1)(B)(vii)(a) one appellate court judge;

(1)(B)(vii)(b) one district court judge;

(1)(B)(vii)(c) one juvenile court judge;

(1)(B)(vii)(d) one justice court judge; one state level administrator;

(1)(B)(vii)(e) a state level judicial education representative;

(1)(B)(vii)(f) one court executive;

(1)(B)(vii)(g) one Utah State Bar representative;

(1)(B)(vii)(h) one communication representative;

(1)(B)(vii)(i) one law library representative;

(1)(B)(vii)(j) one civic community representative; and

(1)(B)(vii)(k) one state education representative.

(1)(B)(vii)(l) Chairs of the Judicial Outreach Committee's subcommittees shall also serve as members of the committee.

(1)(B)(viii) The Committee on Resources for Self-represented Parties shall consist of:

(1)(B)(viii)(a) two district court judges;

(1)(B)(viii)(b) one juvenile court judge;

(1)(B)(viii)(c) two justice court judges;

(1)(B)(viii)(d) three clerks of court – one from an appellate court, one from an urban district and one from a rural district;

(1)(B)(viii)(e) ~~one member of the Online Court Assistance Committee;~~

~~(1)(B)(viii)(e)~~(1)(B)(viii)(f) one representative from the Self-Help Center;

~~(1)(B)(viii)(f)~~(1)(B)(viii)(g) one representative from the Utah State Bar;

~~(1)(B)(viii)(g)~~(1)(B)(viii)(h) two representatives from legal service organizations that serve low-income clients;

~~(1)(B)(viii)(h)~~(1)(B)(viii)(i) one private attorney experienced in providing services to self-represented parties;

~~(1)(B)(viii)(i)~~(1)(B)(viii)(j) two law school representatives;

~~(1)(B)(viii)(j)~~(1)(B)(viii)(k) the state law librarian; and

~~(1)(B)(viii)(k)~~(1)(B)(viii)(l) two community representatives.

(1)(B)(ix) The Language Access Committee shall consist of:

(1)(B)(ix)(a) one district court judge;

(1)(B)(ix)(b) one juvenile court judge;

(1)(B)(ix)(c) one justice court judge;

(1)(B)(ix)(d) one trial court executive;

(1)(B)(ix)(e) one court clerk;

(1)(B)(ix)(f) one interpreter coordinator;

(1)(B)(ix)(g) one probation officer;

(1)(B)(ix)(h) one prosecuting attorney;

(1)(B)(ix)(i) one defense attorney;

(1)(B)(ix)(j) two certified interpreters;

(1)(B)(ix)(k) one approved interpreter;

(1)(B)(ix)(l) one expert in the field of linguistics; and

(1)(B)(ix)(m) one American Sign Language representative.

(1)(B)(x) The Guardian ad Litem Oversight Committee shall consist of:

(1)(B)(x)(a) seven members with experience in the administration of law and public services selected from public, private and non-profit organizations.

(1)(B)(xi) The Committee on Model Utah Civil Jury Instructions shall consist of:

(1)(B)(xi)(a) two district court judges;

(1)(B)(xi)(b) four lawyers who primarily represent plaintiffs;

(1)(B)(xi)(c) four lawyers who primarily represent defendants; and

(1)(B)(xi)(d) one person skilled in linguistics or communication.

(1)(B)(xii) The Committee on Model Utah Criminal Jury Instructions shall consist of:

(1)(B)(xii)(a) two district court judges;

(1)(B)(xii)(b) one justice court judge;

(1)(B)(xii)(c) four prosecutors;

(1)(B)(xii)(d) four defense counsel;

(1)(B)(xii)(e) one professor of criminal law; and

(1)(B)(xii)(f) one person skilled in linguistics or communication.

(1)(B)(xiii) The Committee on Pretrial Release and Supervision shall consist of:

(1)(B)(xiii)(a) two district court judges;

(1)(B)(xiii)(b) one juvenile court judge;

(1)(B)(xiii)(c) two justice court judges;

(1)(B)(xiii)(d) one prosecutor;

(1)(B)(xiii)(e) one defense attorney;

(1)(B)(xiii)(f) one county sheriff;

(1)(B)(xiii)(g) one representative of counties;

(1)(B)(xiii)(h) one representative of a county pretrial services agency;

(1)(B)(xiii)(i) one representative of the Utah Insurance Department;

(1)(B)(xiii)(j) one representative of the Utah Commission on Criminal and Juvenile Justice;

(1)(B)(xiii)(k) one commercial surety agent;

(1)(B)(xiii)(l) one state senator;

(1)(B)(xiii)(m) one state representative;

(1)(B)(xiii)(n) the Director of the Indigent Defense Commission or designee; and

(1)(B)(xiii)(o) the court's general counsel or designee.

(1)(B)(xiv) The Committee on Court Forms shall consist of:

(1)(B)(xiv)(a) one district court judge;

(1)(B)(xiv)(b) one court commissioner;

(1)(B)(xiv)(c) one juvenile court judge;

(1)(B)(xiv)(d) one justice court judge;

(1)(B)(xiv)(e) one court clerk;

(1)(B)(xiv)(f) one appellate court staff attorney;

(1)(B)(xiv)(g) one representative from the Self-Help Center;

(1)(B)(xiv)(h) the State Law Librarian;

(1)(B)(xiv)(i) the Court Services Director;

~~(1)(B)(xiv)(j) one member selected by the Online Court Assistance Committee;~~

~~(1)(B)(xiv)(k)~~(1)(B)(xiv)(j) one representative from a legal service organization that serves low-income clients;

~~(1)(B)(xiv)(l)~~(1)(B)(xiv)(k) one paralegal;

~~(1)(B)(xiv)(m)~~(1)(B)(xiv)(l) one educator from a paralegal program or law school;

~~(1)(B)(xiv)(n)~~(1)(B)(xiv)(m) one person skilled in linguistics or communication; and

~~(1)(B)(xiv)(o)~~(1)(B)(xiv)(n) one representative from the Utah State Bar.

(1)(C) **Standing committee chairs.** The Judicial Council shall designate the chair of each standing committee. Standing committees shall meet as necessary to accomplish their work. Standing committees shall report to the Council as necessary but a minimum of once every year. Council members may not serve, participate or vote on standing committees. Standing committees may invite participation by others as

they deem advisable, but only members designated by this rule may make motions and vote. All members designated by this rule may make motions and vote unless otherwise specified. Standing committees may form subcommittees as they deem advisable.

(1)(D) **Committee performance review.** At least once every six years, the Management Committee shall review the performance of each committee. If the Management Committee determines that committee continues to serve its purpose, the Management Committee shall recommend to the Judicial Council that the committee continue. If the Management Committee determines that modification of a committee is warranted, it may so recommend to the Judicial Council.

(1)(D)(i) Notwithstanding subsection (1)(D), the Guardian ad Litem Oversight Committee, recognized by Section 78A-6-901, shall not terminate.

(2) **Ad hoc committees.** The Council may form ad hoc committees or task forces to consider topical issues outside the scope of the standing committees and to recommend rules or resolutions concerning such issues. The Council may set and extend a date for the termination of any ad hoc committee. The Council may invite non-Council members to participate and vote on ad hoc committees. Ad hoc committees shall keep the Council informed of their activities. Ad hoc committees may form sub-committees as they deem advisable. Ad hoc committees shall disband upon issuing a final report or recommendations to the Council, upon expiration of the time set for termination, or upon the order of the Council.

(3) **General provisions.**

(3)(A) **Appointment process.**

(3)(A)(i) **Administrator's responsibilities.** The state court administrator shall select a member of the administrative staff to serve as the administrator for committee appointments. Except as otherwise provided in this rule, the administrator shall:

(3)(A)(i)(a) announce expected vacancies on standing committees two months in advance and announce vacancies on ad hoc committees in a timely manner;

(3)(A)(i)(b) for new appointments, obtain an indication of willingness to serve from each prospective appointee and information regarding the prospective appointee's present and past committee service;

(3)(A)(i)(c) for reappointments, obtain an indication of willingness to serve from the prospective reappointee, the length of the prospective reappointee's service on the committee, the attendance record of the prospective reappointee, the prospective reappointee's contributions to the committee, and the prospective reappointee's other present and past committee assignments; and

(3)(A)(i)(d) present a list of prospective appointees and reappointees to the Council and report on recommendations received regarding the appointment of members and chairs.

(3)(A)(ii) **Council's responsibilities.** The Council shall appoint the chair of each committee. Whenever practical, appointments shall reflect geographical, gender, cultural and ethnic diversity.

(3)(B) **Terms.** Except as otherwise provided in this rule, standing committee members shall serve staggered three year terms. Standing committee members shall not serve more than two consecutive terms on a committee unless the Council determines that exceptional circumstances exist which justify service of more than two consecutive terms.

(3)(C) **Expenses.** Members of standing and ad hoc committees may receive reimbursement for actual and necessary expenses incurred in the execution of their duties as committee members.

(3)(D) **Secretariat.** The Administrative Office shall serve as secretariat to the Council's committees.

Effective _____, 2020

Rule 3-111. Performance Evaluation of Active Senior Judges and Court Commissioners.

Intent:

To establish a performance evaluation, including the criteria upon which active senior judges and court commissioners will be evaluated, the standards against which performance will be measured and the methods for fairly, accurately and reliably measuring performance.

To generate and to provide to active senior judges and court commissioners information about their performance.

To establish the procedures by which the Judicial Council will evaluate and certify senior judges and court commissioners for reappointment.

Applicability:

This rule shall apply to presiding judges, the Board of Justice Court Judges, and the Judicial Council, and to the active senior judges and court commissioners of the Court of Appeals, courts of record, and courts not of record.

Statement of the Rule:

(1) **Performance evaluations.**

(1)(A) **Court commissioners.**

(1)(A)(i) On forms provided by the administrative office, the presiding judge of a district or court level a court commissioner serves shall complete an evaluation of the court commissioner's performance by June 1 of each year. If a commissioner serves multiple districts or court levels, the presiding judge of each district or court level shall complete an evaluation.

(1)(A)(ii) The presiding judge shall survey judges and court personnel seeking feedback for the evaluation. During the evaluation period, the presiding judge shall review at least five of the commissioner's active cases. The review shall include courtroom observation.

(1)(A)(iii) The presiding judge shall provide a copy of each commissioner evaluation to the Judicial Council. Copies of plans under paragraph (3)(G) and all evaluations shall also be maintained in the commissioner's personnel file in the administrative office.

(1)(B) **Active senior judges.** An active senior judge's performance shall be evaluated by attorneys as provided in paragraph (3)(A) and by presiding judges and court staff as provided in paragraph (3)(B).

(2) **Evaluation and certification criteria.** Active senior judges and court commissioners shall be evaluated and certified upon the following criteria:

(2)(A) demonstration of understanding of the substantive law and any relevant rules of procedure and evidence;

(2)(B) attentiveness to factual and legal issues before the court;

(2)(C) adherence to precedent and ability to clearly explain departures from precedent;

(2)(D) grasp of the practical impact on the parties of the commissioner's or senior judge's rulings, including the effect of delay and increased litigation expense;

(2)(E) ability to write clear judicial opinions;

(2)(F) ability to clearly explain the legal basis for judicial opinions;

(2)(G) demonstration of courtesy toward attorneys, court staff, and others in the commissioner's or senior judge's court;

(2)(H) maintenance of decorum in the courtroom;

(2)(I) demonstration of judicial demeanor and personal attributes that promote public trust and confidence in the judicial system;

(2)(J) preparation for hearings or oral argument;

(2)(K) avoidance of impropriety or the appearance of impropriety;

(2)(L) display of fairness and impartiality toward all parties;

(2)(M) ability to clearly communicate, including the ability to explain the basis for written rulings, court procedures, and decisions;

(2)(N) management of workload;

(2)(O) willingness to share proportionally the workload within the court or district, or regularly accepting assignments;

(2)(P) issuance of opinions and orders without unnecessary delay; and

(2)(Q) ability and willingness to use the court's case management systems in all cases.

(3) **Standards of performance.**

(3)(A) **Survey of attorneys.**

(3)(A)(i) The Council shall measure satisfactory performance by a sample survey of the attorneys appearing before the active senior judge or court commissioner during the period for which the active senior judge or court commissioner is being evaluated. The Council shall measure

satisfactory performance based on the results of the final survey conducted during a court commissioner's term of office, subject to the discretion of a court commissioner serving an abbreviated initial term not to participate in a second survey under Section (3)(A)(vi) of this rule.

(3)(A)(ii) **Survey scoring.** The survey shall be scored as follows.

(3)(A)(ii)(a) Each question of the attorney survey will have six possible responses: Excellent, More Than Adequate, Adequate, Less Than Adequate, Inadequate, or No Personal Knowledge. A favorable response is Excellent, More Than Adequate, or Adequate.

(3)(A)(ii)(b) Each question shall be scored by dividing the total number of favorable responses by the total number of all responses, excluding the "No Personal Knowledge" responses. A satisfactory score for a question is achieved when the ratio of favorable responses is 70% or greater.

(3)(A)(ii)(c) A court commissioner's performance is satisfactory if: at least 75% of the questions have a satisfactory score; and the favorable responses when divided by the total number of all responses, excluding "No Personal Knowledge" responses, is 70% or greater.

(3)(A)(ii)(d) The Judicial Council shall determine whether the senior judge's survey scores are satisfactory.

(3)(A)(iii) **Survey respondents.** The Administrative Office of the Courts shall identify as potential respondents all lawyers who have appeared before the court commissioner during the period for which the commissioner is being evaluated.

(3)(A)(iv) **Exclusion from survey respondents.**

(3)(A)(iv)(a) A lawyer who has been appointed as a judge or court commissioner shall not be a respondent in the survey. A lawyer who is suspended or disbarred or who has resigned under discipline shall not be a respondent in the survey.

(3)(A)(iv)(b) With the approval of the Management Committee, a court commissioner may exclude an attorney from the list of respondents if the court commissioner believes the attorney will not respond objectively to the survey.

(3)(A)(v) **Number of survey respondents.** The Surveyor shall identify 180 respondents or all attorneys appearing before the court commissioner, whichever is less. All attorneys who have appeared before the active senior judge shall be sent a survey questionnaire as soon as possible after the hearing.

(3)(A)(vi) **Administration of the survey.** Court commissioners shall be the subject of a survey approximately six months prior to the expiration of their term of office. Court commissioners shall be the subject of a survey during the second year of each term of office. Newly appointed court commissioners shall be the subject of a survey during the second year of their term of office and, at their option, approximately six months prior to the expiration of their term of office.

(3)(A)(vii) **Survey report.** The Surveyor shall provide to the subject of the survey, the subject's presiding judge, and the Judicial Council the number and percentage of respondents for each of the possible responses on each survey question and all comments, retyped and edited as necessary to redact the respondent's identity.

(3)(B) **Non-attorney surveys.**

(3)(B)(i) **Surveys of presiding judges and court staff regarding non-appellate senior judges.** The Council shall measure performance of active senior judges by a survey of all presiding judges and trial court executives, or in the justice courts, all presiding justice court judges and the justice court administrator, of districts in which the senior judge has been assigned. The presiding judge and trial court executive will gather information for the survey from anonymous questionnaires completed by court staff on the calendars to which the senior judge is assigned and by jurors on jury trials to which the senior judge is assigned. The Administrative Office of the Courts shall distribute survey forms with instructions to return completed surveys to the Surveyor. The survey questions will be based on the non-legal

ability evaluation criteria in paragraph (2).The Surveyor shall provide to the subject of the survey, the subject's presiding judge, and the Judicial Council the responses on each survey question. The Judicial Council shall determine whether the qualitative assessment of the senior judge indicates satisfactory performance.

(3)(B)(ii) **Surveys of Court of Appeals presiding judge and clerk of court.** The Council shall measure performance of active appellate senior judges by a survey of the presiding judge and clerk of court of the Court of Appeals. The presiding judge and clerk of court will gather information for the survey from anonymous questionnaires completed by the other judges on each panel to which the appellate senior judge is assigned and by the appellate law clerks with whom the appellate senior judge works. The Administrative Office of the Courts shall distribute the survey forms with instructions to return completed surveys to the Surveyor. The survey questions will be based on the non-legal ability evaluation criteria in paragraph (2). The Surveyor shall provide to the subject of the survey, the subject's presiding judge, and the Judicial Council the responses on each survey question. The Judicial Council shall determine whether the qualitative assessment of the senior judge indicates satisfactory performance.

(3)(C) **Case under advisement standard.** A case is considered to be under advisement when the entire case or any issue in the case has been submitted to the senior judge or court commissioner for final determination. The Council shall measure satisfactory performance by the self-declaration of the senior judge or court commissioner or by reviewing the records of the court.

(3)(C)(i) A senior judge or court commissioner in a trial court demonstrates satisfactory performance by holding:

(3)(C)(i)(a) no more than three cases per calendar year under advisement more than ~~60 days~~two months after submission; and

(3)(C)(i)(b) no case under advisement more than 180 days after submission.

(3)(C)(ii) A senior judge in the court of appeals demonstrates satisfactory performance by:

(3)(C)(ii)(a) circulating no more than an average of three principal opinions per calendar year more than six months after submission with no more than half of the maximum exceptional cases in any one calendar year; and

(3)(C)(ii)(b) achieving a final average time to circulation of a principal opinion of no more than 120 days after submission.

(3)(D) **Compliance with education standards.** Satisfactory performance is established if the senior judge or court commissioner annually complies with the judicial education standards of this Code, subject to the availability of in-state education programs. The Council shall measure satisfactory performance by the self-declaration of the senior judge or court commissioner or by reviewing the records of the state court administrator.

(3)(E) **Substantial compliance with Code of Judicial Conduct.** Satisfactory performance is established if the senior judge or court commissioner demonstrates substantial compliance with the Code of Judicial Conduct, if the Council finds the responsive information to be complete and correct and if the Council's review of formal and informal sanctions lead the Council to conclude the court commissioner is in substantial compliance with the Code of Judicial Conduct. Under Rule 11-201 and Rule 11-203, any sanction of a senior judge disqualifies the senior judge from reappointment.

(3)(F) **Physical and mental competence.** Satisfactory performance is established if the senior judge or court commissioner demonstrates physical and mental competence to serve in office and if the Council finds the responsive information to be complete and correct. The Council may request a statement by an examining physician.

(3)(G) **Performance and corrective action plans for court commissioners.**

(3)(G)(i) The presiding judge of the district a court commissioner serves shall prepare a performance plan for a new court commissioner within 30 days of the court commissioner's appointment. If a court commissioner serves multiple districts or court levels, the presiding judge of each district and court level shall prepare a performance plan. The performance plan shall communicate the expectations set forth in paragraph (2) of this rule.

(3)(G)(ii) If a presiding judge issues an overall "Needs Improvement" rating on a court commissioner's annual performance evaluation as provided in paragraph (1), that presiding judge shall prepare a corrective action plan setting forth specific ways in which the court commissioner can improve in deficient areas.

(4) **Judicial Council certification process.**

(4)(A) **July Council meeting.** At its meeting in July, the Council shall begin the process of determining whether the senior judges and court commissioners whose terms of office expire that year meet the standards of performance provided for in this rule. The Administrative Office of the Courts shall assemble all evaluation information, including:

(4)(A)(i) survey scores;

(4)(A)(ii) judicial education records;

(4)(A)(iii) self-declaration forms;

(4)(A)(iv) records of formal and informal sanctions;

(4)(A)(v) performance evaluations, if the commissioner or senior judge received an overall rating of Needs Improvement; and

(4)(A)(vi) any information requested by the Council.

(4)(B) **Records delivery.** Prior to the meeting the Administrative Office of the Courts shall deliver the records to the Council and to the senior judges and court commissioners being evaluated.

(4)(C) **July Council meeting closed session.** In a session closed in compliance with Rule 2-103, the Council shall consider the evaluation information and make a preliminary finding of whether a senior judge or court commissioner has met the performance standards.

(4)(D) **Certification presumptions.** If the Council finds the senior judge or court commissioner has met the performance standards, it is presumed the Council will certify the senior judge or court commissioner for reappointment. If the Council finds the senior judge or court commissioner did not meet the performance standards, it is presumed the Council will not certify the senior judge or court commissioner for reappointment. The Council may certify the senior judge or court commissioner or withhold decision until after meeting with the senior judge or court commissioner.

(4)(E) **Overcoming presumptions.** A presumption against certification may be overcome by a showing of good cause to the contrary. A presumption in favor of certification may be overcome by:

(4)(E)(i) reliable information showing non-compliance with a performance standard; or

(4)(E)(ii) formal or informal sanctions of sufficient gravity or number or both to demonstrate lack of substantial compliance with the Code of Judicial Conduct.

(4)(F) **August Council meeting.** At the request of the Council the senior judge or court commissioner challenging a non-certification decision shall meet with the Council in August. At the request of the Council the presiding judge shall report to the Council any meetings held with the senior judge or court commissioner, the steps toward self-improvement identified as a result of those meetings, and the efforts to complete those steps. Not later than 5 days after the July meeting, the Administrative Office of the Courts shall deliver to the senior judge or court commissioner being evaluated notice of the Council's action and any records not already delivered to the senior judge or court commissioner. The notice shall contain an adequate description of the reasons the Council has withheld its decision and the date by which the senior judge or court commissioner is to deliver written materials. The Administrative Office of the Courts shall deliver copies of all materials to the Council and to the senior judge or court commissioner prior to the August meeting.

(4)(G) **August Council meeting closed session.** At its August meeting in a session closed in accordance with Rule 2-103, the Council shall provide to the senior judge or court commissioner adequate time to present evidence and arguments in favor of certification. Any member of the Council may present evidence and arguments of which the senior judge or court commissioner has had notice opposed to certification. The burden is on the person arguing against the presumed certification. The Council may determine the order of presentation.

(4)(H) **Final certification decision.** At its August meeting in open session, the Council shall approve its final findings and certification regarding all senior judges and court commissioners whose terms of office expire that year.

(4)(I) **Communication of certification decision.** The Judicial Council shall communicate its certification decision to the senior judge or court commissioner.

The Judicial Council shall communicate its certification decision for senior judges to the Supreme Court and for court commissioners to the presiding judge of the district the commissioner serves.

Effective May/November 1, 20___

Rule 3-406. Budget and fiscal management.

Intent:

To develop and maintain the policies and programs of the judiciary through sound fiscal management.

To provide for sound fiscal management through the coordinated and cooperative effort of central and local authorities within the judiciary.

To maintain accountability for appropriated funds, and to maintain a balanced budget.

To cooperate with the Governor and the Legislature in managing the fiscal resources of the state.

Applicability:

This rule shall apply to the management of all funds appropriated by the state to the judiciary.

Statement of the Rule:

(1) **Fiscal programs and program directors established.** For purposes of fiscal management, the judiciary is divided into programs. Each program budget is managed by a program director designated by the state court administrator and approved by the Management Committee.

The budget of a geographic division shall be managed by the court executive subject to the general supervision of the program director.

(2) **Budget management.**

(A) **Responsibility of the council.** The responsibility of the Council is to:

(i) cooperate with the Governor and the Legislature in managing the fiscal resources of the state;

(ii) assure that the budget of the judiciary remains within the limits of the appropriation set by the Legislature; and

(iii) allocate funds as required to maintain approved programs and to assure a balanced judicial budget.

(B) **Responsibility of the state court administrator.** It is the responsibility of the state court administrator to:

(i) implement the directives of the Council;

(ii) direct the management of the judiciary's budget, including ~~orders~~ recommendations to reduce or redirect allocations ~~upon notice to the Council~~; and

(iii) negotiate on behalf of the Council the position of the judiciary with the executive and legislative branches.

(C) **Responsibility of the administrative office.** It is the responsibility of the administrative office to:

(i) clear all warrants and other authorizations for the payment of accounts payable for the availability of funds;

(ii) monitor all expenditures;

(iii) provide monthly expenditure reports by court to court executives, program directors, the state court administrator, Boards of Judges and the Council; and

(iv) develop a manual of procedures to govern the payment of accounts payable and the audit thereof. The procedures shall be in conformity with generally accepted principles of accounting and budget management.

(D) **Responsibility of the program directors.** Within their respective programs, it is the responsibility of the program directors to:

(i) comply with the directives of the Council and the state court administrator;

(ii) administer the reduction or redirection of allocations;

(iii) monitor all expenditures;

(iv) supervise and manage court budgets in accordance with the manual of procedures; and

(v) develop recommendations for fiscal priorities, the allocation of funds, and the reduction or redirection of allocations.

(E) **Responsibility of court executives.** Within their respective courts, it is the responsibility of court executives to:

(i) comply with the directives of the Council, the state court administrator, and the program director, and to consult with the presiding judge and the individual judges of that jurisdiction concerning budget management;

(ii) develop work programs that encumber no more funds than may be allocated, including any reduction in allocation;

(iii) amend work programs as necessary to reflect changes in priorities, spending patterns, or allocation;

(iv) credit and debit accounts that most accurately reflect the nature of the planned expenditure;

(v) authorize expenditures;

(vi) prepare warrants and other authorizations for payment of accounts payable for submission to the Administrative Office;

(vii) monitor all expenditures; and

(viii) develop recommendations for fiscal priorities, the allocation of funds, and the reduction or redirection of allocations.

(F) **Process.** After the legislative general session the state court administrator shall consider all sources of funds and all obligated funds and develop a recommended spending plan that most closely achieves the priorities established by the Council at the prior annual planning meeting. The state court administrator shall review the recommended spending plan with the Management Committee and present it to the Judicial Council for approval.

(3) **Budget development.**

(A) **Responsibility of the council.** It is the responsibility of the Council to:

(i) establish responsible fiscal priorities that best enable the judiciary to achieve the goals of its policies;

(ii) develop the budget of the judiciary based upon the needs of organizations and the priorities established by the Council;

(iii) communicate the budget of the judiciary to the executive and legislative branches; and

(iv) allocate funds to the geographic divisions of courts in accordance with priorities established by the Council.

(B) **Responsibility of the boards.** It is the responsibility of the Boards to:

(i) develop recommendations for funding priorities; and

(ii) review, modify, and approve program budgets for submission to the Council.

(C) **Responsibility of the state court administrator.** It is the responsibility of the state court administrator to:

(i) negotiate on behalf of the Council the position of the judiciary with the executive and legislative branches; and

(ii) ~~develop recommendations to~~ implement the Council's ~~for~~ fiscal priorities and ~~the~~ allocation of funds.

(D) **Responsibility of the administrative office.** It is the responsibility of the Administrative Office to:

(i) develop a schedule for the timely completion of the budget process, including the completion of all intermediate tasks;

(ii) assist program directors and court executives in the preparation of budget requests; and

(iii) compile the budget of the judiciary.

(E) **Responsibility of the program directors.** Within their respective programs, it is the responsibility of program directors to review, modify, and approve budget requests.

(F) **Responsibility of court executives.** Within their respective courts, it is the responsibility of court executives to:

(i) work closely with presiding judges, judges, and staff to determine the needs of the organization; and

(ii) develop a budget request that adequately and appropriately meets those needs.

(G) **Process.**

(i) Each Board of Judges, each court and committee and each department of the administrative office of the courts may develop, prioritize and justify a budget request. The courts shall submit their requests to the appropriate Board of Judges. The committees and the departments of the AOC shall submit their requests to the state court administrator.

(ii) The Boards shall consolidate and prioritize the requests from the courts and the requests originated by the Board. The state court administrator shall consolidate and prioritize the requests from the committees and departments.

(iii) The state court administrator shall review and analyze all prioritized budget requests and develop a recommended budget request and funding plan. The state court administrator shall review the analysis and the recommended budget request and funding plan with the Council.

(iv) At its annual planning meeting the Council shall consider all prioritized requests and the analysis and recommendations of the state court administrator and approve a prioritized budget request and funding plan for submission to the governor and the legislature.

(4) **General provisions.**

(A) Appropriations dedicated by the Legislature or allocations dedicated by the Council shall be expended in accordance with the stated intent.

(B) All courts and the Administrative Office shall comply with the provisions of state law and the manual of procedures.

(C) Reductions in allocations, reductions in force, and furloughs may be ordered by the state court administrator with notice to the Council. In amending the work program to reflect a budget cut, reductions in force and furloughs shall be used only when

absolutely necessary to maintain a balanced budget. If reductions in force are necessary, they shall be made in accordance with approved personnel procedures. If furloughs are necessary, they should occur for no more than two days per pay period.

Rule 4-403. Electronic signature and signature stamp use.

Intent:

To establish a uniform procedure for the use of judges' and commissioners' electronic signatures and signature stamps.

Applicability:

This rule shall apply to all trial courts of record and not of record.

Statement of the Rule:

(1) A clerk may, with the prior approval of the judge or commissioner, use an electronic signature or signature stamp in lieu of obtaining the judge's or commissioner's signature on the following:

(1)(A) bail bonds from approved bondsmen;

(1)(B) bench warrants;

(1)(C) civil orders for dismissal when submitted by the plaintiff in uncontested cases or when stipulated by both parties in contested cases;

(1)(D) civil orders for dismissal pursuant to Rule 4-103, URCP 3 and URCP 4(b);

(1)(E) orders to show cause;

(1)(F) orders to take into custody;

(1)(G) summons;

(1)(H) supplemental procedure orders;

(1)(I) orders setting dates for hearing and for notice;

(1)(J) orders on motions requesting the Department of Workforce Services (DWS) to release information concerning a debtor, where neither DWS nor the debtor opposes the motion;

(1)(K) orders for transportation of a person in custody to a court hearing, including writs of habeas corpus ad prosequendum and testificandum; and

(1)(L) orders appointing a court visitor; ~~and~~

~~(1)(M) domestic relations injunctions under URCP 109.~~

(2) When a clerk is authorized to use a judge's or commissioner's electronic signature or signature stamp as provided in paragraph (1), the clerk shall sign his or her name on the document directly beneath the electronic signature or stamped imprint of the judge's or commissioner's signature.

(3) In a case where a domestic relations injunction must be issued under URCP 109, the electronic signature of the judge assigned to the case may be automatically attached to the domestic relations injunction form approved by the Judicial Council, without the need for specific direction from the assigned judge and without the need for a clerk's signature accompanying the judge's signature.

(~~3~~ 4) All other documents requiring the judge's or commissioner's signature shall be personally signed by the judge or commissioner, unless the judge or commissioner, on a document by document basis, authorizes the clerk to use the judge's or commissioner's electronic signature or signature stamp in lieu of the judge's or commissioner's signature. On such documents, the clerk shall indicate in writing that the electronic signature or signature stamp was used at the direction of the judge or commissioner and shall sign his or her name directly beneath the electronic signature or stamped imprint of the judge's or commissioner's signature.

Effective January 1, 2020

Rule 4-503. Mandatory electronic filing.

Intent:

To require that documents in district court civil cases be filed electronically.

To provide for exceptions.

Applicability:

This rule applies in the district court.

Statement of the Rule:

(1) Except as provided in Paragraph (2), pleadings and other papers filed in civil cases in the district court on or after April 1, 2013 ~~shall~~ must be electronically filed using the electronic filer's interface.

(2)(A) A self-represented party who is not a lawyer or licensed paralegal practitioner may file pleadings and other papers using any means of delivery permitted by the court.

(2)(B) A lawyer or licensed paralegal practitioner whose request for a hardship exemption from this rule has been approved by the Judicial Council may file pleadings and other papers using any means of delivery permitted by the court. To request an exemption, the lawyer or licensed paralegal practitioner ~~shall~~ must submit a written request to the District Court Administrator outlining why the exemption is necessary ~~to the District Court Administrator~~.

(2)(C) Pleadings and other papers in probate cases may be filed using any means of delivery permitted by the court until July 1, 2013, at which time they ~~shall~~ must be electronically filed using the electronic filer's interface.

(3) The electronic filer ~~shall~~ must be an attorney or licensed paralegal practitioner of record and ~~shall~~ must use a unique and personal identifier that is provided by the filer's service provider.

Effective date: January 1, 2020

Rule 4-905. Restraint of minors in juvenile court.

Intent:

To provide for proper restraint of minors in juvenile court proceedings.

Applicability:

This rule applies to the juvenile court.

Statement of the Rule:

(1) Absent exigent circumstances, a minor, while present in a juvenile courtroom, shall not be restrained unless the court finds by a preponderance of the evidence that:

(1)(A) restraints are necessary to prevent physical harm to the minor or a third party present in the courtroom;

(1)(B) the minor is a flight risk;

(1)(C) the minor is currently in jail, prison or a secure facility as defined by Utah Code section 78A-6-105~~(36)~~;

(1)(D) the seriousness of the charged offense warrants restraints; or

(1)(E) other good cause exists for the minor to be restrained.

(2) Any person with an interest in the case may move the court to restrain a minor during court proceedings. The court shall permit all persons with a direct interest in the case the right to be heard on the issue of whether to restrain the minor.

(3) If the court orders that a minor should be restrained, the court shall reconsider that order at each future hearing regarding the minor.

(4) Ex parte communications that provide information on the criteria listed in paragraph (a) are not prohibited. However, the judge or commissioner shall notify all other parties of the communication as soon as possible and shall give them an opportunity to respond.

Effective May/November 1, 20___

~~**Rule 10-1-202. Verifying use of jury.**~~

~~**Intent:**~~

~~To establish a procedure allowing attorneys to enter an appearance or request a trial setting by telephone.~~

~~To establish a procedure allowing attorneys to verify with the clerk's office, by telephone, the need for a jury in criminal cases.~~

~~**Applicability:**~~

~~This rule shall apply to the Second District Court in Class B and C misdemeanors and infractions.~~

~~**Statement of the Rule:**~~

~~(1) Defendants and/or their attorneys, who enter an appearance in a criminal case or request a trial setting by telephone, shall be deemed by the Court as having waived the filing of a formal Information and having agreed to proceed on the citation, unless the filing of an Information is specifically requested in writing.~~

~~(2) Defendants and/or their attorneys who demand a jury trial in a criminal case may file a written demand in accordance with the Rules of Criminal Procedure or, in the alternative, may request a jury trial and move the Court to waive the filing of the written demand upon assuming responsibility for verifying the need for a jury with the Clerk of the Court on the business day before commencement of the trial and stipulating that a failure to do so shall be construed by the Court as a waiver of a jury trial.~~

~~*Effective May/November 1, 20___*~~

Appendix F. Utah State Court Records Retention Schedule

(A) Definitions.

(A)(1) **Appellate proceedings.** As applicable to the particular case:

(A)(1)(a) expiration of the time in which to file an appeal;

(A)(1)(b) completion of the initial appeal of right;

(A)(1)(c) completion of discretionary appeals; or

(A)(1)(d) completion of trial court proceedings after remittitur.

Appellate proceedings do not include collateral review, such as a petition for post conviction relief or a petition for writ of habeas corpus, although these petitions may themselves be the subject of appellate proceedings.

(A)(2) **Case file.** The compilation of documents pertaining to a case in the district court and justice court. The compilation of documents pertaining to an individual under the jurisdiction of the juvenile court.

(A)(3) **Case history.** Includes the docket, judgment docket, registry of judgments, register of actions and other terms used to refer to a summary of the parties and events of a case.

(A)(4) **Clerk of the court.** Includes all deputy clerks.

(A)(5) **Confidential records.** Records classified in accordance with the Title 63G, Chapter 2, Government Records Access and Management Act and Rule 4-202 et seq. of the Judicial Council as private, protected, juvenile, or sealed.

(A)(6) **Critical documents.** As applicable to the particular case:

(A)(6)(a) **Civil.** Final amended complaint or petition; final amended answer or response; final amended counterclaims, cross claims, and third party claims and defenses; home study or custody evaluation; jury verdict; final written opinion of the court, including any findings of fact and conclusions of law; final trial court order, judgment or decree; interlocutory order only if reviewed by an appellate

court; orders supplemental to the judgment and writs that have not expired; notice of appeal; transcripts; appellate briefs; final order, judgment or decree or any appellate court; case history.

(A)(6)(b) **Child abuse, neglect or dependency.** In addition to that which is required of civil cases, shelter hearing order; adjudication orders; disposition orders; reports of the Division of Child and Family Services; psychological evaluations; reports from treatment providers; motion for permanency hearing; response to motion for permanency hearing; petition for termination of parental rights; and response to petition for termination of parental rights.

(A)(6)(c) **Divorce and domestic relations.** In addition to that which is required of civil cases, petitions to modify or enforce a final order, judgment or decree and the final order entered as a result of that petition.

(A)(6)(d) **Felonies, including offenses by a minor in juvenile court.** All documents other than duplicates, subpoenas, warrants, orders to show cause, presentence investigation reports and notices of hearings.

(A)(6)(e) **Misdemeanors and infractions, including offenses by a minor in juvenile court.** Final amended citation or information; jury verdict; final written opinion of the court, including any findings of fact and conclusions of law; final trial court order, judgment or decree; notice of appeal; appellate briefs; final order, judgment or decree or any appellate court; case history.

(A)(6)(f) **Probate.** In addition to that which is required of civil cases, will admitted to probate; trust instrument; final accounting; reports, findings and orders regarding the mental competence of a person.

(A)(7) **Document.** Any pleading or other paper filed with or created by the court for a particular case, regardless of medium.

(A)(8) **Off-site storage.** Storage at the State Records Center under the control of the Division of State Archives.

(A)(9) **On-site storage.** Storage at the courthouse or any secure storage facility under the control of the court.

(A)(10) **Retention period.** The time that a record must be kept. The retention period is either permanent or for a designated term of months or years.

(B) Case Records.

(B)(1) **Objectives.** The objective of the records retention schedule is to maintain convenient access to the documents of the case and to the case history as necessary to the activity in the case. Even in a case in which judgment has been entered there may be substantial activity. In criminal cases, the court can expect affidavits alleging violations of probation and petitions for post conviction relief. In civil cases, the court can expect to issue writs, orders supplemental to the judgment and to conduct other proceedings to collect the judgment. In divorce cases, the court can expect petitions to modify the decree or to enforce visitation and support. This may mean more immediate access in particular cases. The objective of the records retention schedule is to guide the transfer of permanent records to off-site storage and the destruction on non-permanent records.

(B)(2) **Storage medium.** The decisions of what storage medium to use and when to use it are left to local discretion, needs and resources of the clerk of the court.

With proper training or by the Division of State Archives the clerk of the court may microfilm records. Given the sensitive nature of identifying information contained in court records, such as name, address, telephone number, and social security number of parties, witnesses and jurors, microfilming of court records by Utah Correctional Industries is prohibited. All microfilming shall be in accordance with the standards adopted by the Division. All microfilm developing and quality assurance checks shall be done by the Division. The Division of State Archives shall keep the original film and return a copy to the court.

The clerk of the court may scan documents to a digital image based on local needs and resources. Once scanned to a digital image, the document may be destroyed. Electronic documents may be printed and maintained in the case file.

(B)(3) **Storage location.** The Administrative Office of the Courts shall maintain all computer records. The clerk of the court shall store on site pending cases, closed cases

with significant post judgment activity, and cases with a retention period of less than permanent.

The clerk of the court shall not store case files with significant activity off-site. Records in which there is an order of alimony or child support, visitation or custody shall not be stored off-site until at least three years has expired from the date of the last activity in the case. Within these parameters, the decision to store permanent records on-site or off-site is left to local discretion, needs and resources. The state court records officer and the Division of State Archives may evaluate exceptions for courthouses with critically short storage problems. Records stored off-site shall be prepared in accordance with standards and instructions of the Division of State Archives. If a record stored off-site is needed at the courthouse, the record will be returned to the court for the duration of the need. The clerk of the court shall not return a record in which there is an order of alimony or child support, visitation or custody to off-site storage until at least three years after the last activity in the case.

(B)(4) **Critical documents.** At any time after the completion of appellate proceedings, the clerk of the court may remove from the case file and destroy all documents other than critical documents.

(B)(5) **The retention period in a criminal case begins as of the completion of the sentence.** The level of offense is determined by the offense of which the defendant is convicted or to which the offense is reduced under Utah Code Section 76-3-402. The retention period in a civil or small claims case begins as of the expiration or satisfaction of the judgment. The retention periods are for the following terms.

(B)(5)(a) **Permanent.** All case types not governed by a more specific designation; ~~the record of arraignment and conviction required by Rule 9-301;~~ prosecution as a serious youth offender.

(B)(5)(b) **10 years.** Third degree felonies; violations of Utah Code Section 41-6a-502 or Section 41-6a-503, or of Section 41-6a-512 if the conviction is to a reduced charge as provided in that section; hospital liens~~.~~; domestic violence misdemeanors within the scope of Utah Code Section 77-36-1.

(B)(5)(c) **5 years.** Administrative agency review; civil and small claims cases dismissed with prejudice; forcible entry and detainer; investigative subpoenas; ~~domestic violence misdemeanor within the scope of Utah Code Section 77-36-1;~~ post conviction relief or habeas corpus other than capital offenses and life without parole; tax liens; temporary separation; worker's compensation; probable cause statements and search and arrest warrants not associated with a case.

(B)(5)(d) **3 years.** Violations of Utah Code Section 53-3-231; violations of Utah Code Section 76-5-303.

(B)(5)(e) **1 year.** Civil cases with a judgment of money only; extraditions; misdemeanors and infractions classified as "mandatory appearance" by the Uniform Fine and Bail Schedule; petitions to expunge an arrest record in which no charges have been filed.

(B)(5)(f) **6 months.** Civil and small claims cases dismissed without prejudice; misdemeanors and infractions classified as "non-mandatory appearance" by the Uniform Fine and Bail Schedule; small claims cases with a judgment of money only.

(B)(6) **Retention period in Juvenile Court.** The retention period in a delinquency petition or referral begins as of the completion of the sentence. The retention period in other cases begins as of the expiration of the judgment. The retention periods are for the following terms.

(B)(6)(a) **Permanent.** Adoptions; civil cohabitant abuse; orders terminating parental rights; prosecution as serious youth offender; substantiation.

(B)(6)(b) **Until the youngest subject of the petition reaches age 28.** Abuse, neglect and dependency; felonies.

(B)(6)(c) **Until the subject of the petition reaches age 18 and jurisdiction of the court is terminated.** Misdemeanors and infractions other than non-judicial adjustments; interstate compact.

(B)(6)(d) **10 years.** Violations of Utah Code Section 41-6a-502 or Section 41-6a-503, or of Section 41-6a-512 if the conviction is to a reduced charge as provided in that section.

(B)(6)(e) **3 years.** Violations of Utah Code Section 53-3-231.

(B)(6)(f) **1 year.** Petitions to expunge an arrest record in which no charges have been filed.

(B)(6)(g) **6 months.** Non-judicial adjustment of referrals; misdemeanors and infractions classified as "non-mandatory appearance" by the Uniform Fine and Bail Schedule, such as fish and game violations; cases dismissed without prejudice.

(B)(7) **Retention period in Supreme Court and Court of Appeals.** The retention period for records in the Supreme Court and Court of Appeals is permanent.

(B)(8) **Special cases.**

(B)(8)(a) The retention period for foreign judgments, abstracts of judgment and transcripts of judgment is the same as for a case of the same type filed originally in Utah.

(B)(8)(b) The retention period for contempt of court is the same as for the underlying case in which the contempt occurred.

(B)(8)(c) The retention period in the juvenile court for records of the prosecution of adults is the same as for the corresponding offense in district or justice court.

(B)(9) **Case related records.** If the record is filed with the case file, it is treated as a non-critical document unless it is specifically included within the definition of a critical document. If the record is not filed with the case file then its retention period is determined in accordance with the following schedule:

(B)(9)(a) **Audio and video tapes and tape logs; court reporter notes.** For misdemeanors, infractions and small claims, 3 years from the date the record is created. Otherwise, 9 years from the date the record is created. Tapes shall not be reused.

(B)(9)(b) **Court calendars.** As determined by the clerk of the court based on local needs.

(B)(9)(c) **Confidential records.** Confidential records are retained for the same period as the case to which they apply, but they are filed and stored in such a manner as to protect their confidentiality.

(B)(9)(d) **Depositions.** 6 months after the close of appellate proceedings.

(B)(9)(e) **Exhibits.** Three months after disposition of the exhibit in accordance with Code of Judicial Administration 4-206.

(B)(9)(f) **Expunged records.** For the same time as though the record had not been expunged.

(B)(9)(g) **Indexes.** Permanent.

(B)(9)(h) **Jury lists and juror qualification questionnaires.** 4 years from completion of term of availability.

(B)(9)(i) **Case history.** Permanent.

(B)(10) **Record destruction.** Court records 50 years of age or older shall be reviewed for historical significance by the Division of State Archives prior to destruction. If a record is of historical significance, the Division will take possession. If a record is not of historical significance, the court shall manage the record in accordance with this schedule.

Paper documents shall be destroyed after expiration of the retention period or after copying the document to microfilm, digital image, or electronic medium. If documents are copied to microfilm, digital image, or electronic medium, the court may maintain the paper documents until such later time that convenient access to the case file can be achieved by means of microfilm or digital image. Each court is responsible for destroying records or making arrangements for destroying records. The court must comply with all laws applicable to the method of destruction. Confidential records must be shredded prior to destruction. Recycling is the preferred method of destruction. In addition, the court may destroy records by incineration or deposit in a landfill. If the court is unable to destroy records by these means, the court may arrange through the state court records officer to have records destroyed by the State Records Center, which may charge a fee.

(C) Administrative Records.

(C)(1) **Record storage, microfilming, imaging and destruction.** Administrative records shall be stored on-site. Administrative records may be microfilmed or scanned to a digital image based on local needs and resources.

(C)(2) **Retention period.** The retention period for administrative records is in accordance with the following schedule.

(C)(2)(a) **Accounting, audit, budget, and finance records.** 4 years from the date the record is created.

(C)(2)(b) **Final reports approved by the Judicial Council.** Permanent.

(C)(2)(c) **General counsel legal files.** 10 years from date the record is created.

(C)(2)(d) **Juror fee and witness fee payment records.** 4 years from date of payment.

(C)(2)(e) **Meeting minutes.** Permanent.

(C)(3) **Other Record Retention.** All administrative records not specifically listed in this record retention schedule will be retained, transferred or destroyed according to the appropriate court policy and procedure manual or the "Utah State Agency General Retention Schedule."

(D) Email retention.

(D)(1) **Incidental Personal Correspondence.** Correspondence that does not relate to the business of the courts. The sender and recipient should delete the email as soon as s/he has no more need for it.

(D)(2) **Transitory Correspondence.** Court-related correspondence that is transitory in nature and does not offer unique information about court functions or programs. These records include acknowledgment files and most day-to-day office and housekeeping correspondence. The sender and recipient should delete the email as soon as s/he has no more need for it.

(D)(3) **Policy and Program Correspondence.** Court-related correspondence that provides unique information about court functions, policies, procedures, or programs. These records document material discussions and decisions made regarding all court interests. The recipient should delete the email as soon as s/he has no more need for it. The sender must retain policy and program email for the same duration as the Utah State Archives Record Retention Schedule for a record of that type.

(D)(4) **The sender must retain policy and program correspondence in a reproducible medium separate from transitory messages.** The sender can do this by moving the email message to an electronic folder in the email system with an appropriate retention period or by copying the correspondence to another medium for retention, such as a web page, a saved file, or a printed document. If the sender copies the email to another medium for retention, s/he should delete the email.

(D)(5) **Email records of a terminated or transferred employee.**

(D)(5)(a) **Supervisor's or designee's responsibility.** If an employee is scheduled for termination or transfer, the employee's supervisor or designee will notify the Help Desk of the IT Division using the form provided by the Division. Upon termination or transfer, the supervisor or designee will review the employee's email. The supervisor or designee will retain policy and program correspondence of which the employee was the sender in accordance with paragraph (D)(3).

(D)(5)(b) **IT Division's responsibility.** If the employee is transferred, the IT Division will maintain the employee's email account at the new location. If the employee is terminated, the IT Division will:

~~1)~~(D)(5)(b)(i) De-provision the user id and email account of the employee;

~~2)~~(D)(5)(b)(ii) Remove authority to sign on to the court's computing network;

~~3)~~(D)(5)(b)(iii) Remove authority to access the court's email account;

~~4)~~(D)(5)(b)(iv) Remove the employee from group email lists; and

~~5)~~(D)(5)(b)(v) Remove authority to access personal and network drives.

Upon receipt of notice of termination or transfer, the IT Division will retain the employee's email in its original form for 180 days from the date of termination or transfer. After 180 days, the IT Division may back up the employee's email, delete the email account and recover and reuse the disk space. The IT Division will retain the back-up off site for one year from the date of deletion. If a terminated or transferred employee returns within 180 days after the date of termination, the IT Division will reactivate the employee's email account.

(D)(6) **Litigation.** Upon notice of pending or potential litigation, the IT Division will retain the employee's email in the current format until notice that the litigation is complete or is no longer contemplated. At such time, the employee's email will be subject to this section (D).

Effective: May/November 1, 20__

TAB 4

CJA 4-208 (NEW) Automatic Expungements

NOTES:

Draft orders are attached for review.

- Order on Automatic Expungement of Acquittal / Dismissal with Prejudice
- Order on Automatic Expungement of Conviction

The expungement rule will be distributed prior to, or at, the meeting. Apologies. The session continues to delay this one.

In the District / Justice Court of Utah
[district_number] Judicial District, [county_name] County / [city_name] City

[prosecuting_entity – usually "State of Utah"], Plaintiff, vs. [defendant_name] [defendant_dob] Defendant.	**Order on Automatic Expungement of Acquittal / Dismissal with Prejudice** Case Number: [case_number]

The matter before the court is the automatic expungement of the case pursuant to Utah Code § 77-40-114.

The Court Finds:

1. The requirements for automatic expungement have been met;
2. Expunging the records associated with case number [case_number] is statutorily mandated.
3. Issuance of this order is authorized by standing order and R. Jud. Admin. _____.

The Court Concludes:

4. The records of defendant's arrest, investigation, detention, and prosecution relating to court case number [case_number] should be expunged.

The Court Orders:

5. The records of defendant's arrest, investigation, detention, and prosecution related to court case number [case_number] are expunged.

Judge's signature will appear at the top of the first page of this document.

In the District / Justice Court of Utah
[district_number] Judicial District, [county_name] County / [city_name] City

[prosecuting_entity – usually "State of Utah"], Plaintiff, vs. [defendant_name] [defendant_dob] Defendant.	**Order on Automatic Expungement of Conviction** Case Number: [case_number]

The matter before the court is the automatic expungement of the case pursuant to Utah Code § 77-40-114.

The Court Finds:

1. Notice was sent to the prosecuting agency as provided by law;
2. No objection was received within the time allowed by law;
3. The requirements for automatic expungement have been met;
4. Expunging the records associated with case number [case_number] is statutorily mandated.
5. Issuance of this order is authorized by standing order and R. Jud. Admin. _____.

The Court Concludes:

6. The records of defendant's arrest, investigation, detention, prosecution, and conviction relating to court case number [case_number] should be expunged.

The Court Orders:

7. The records of defendant's arrest, investigation, detention, prosecution, and conviction related to court case number [case_number] are expunged.

Judge's signature will appear at the top of the first page of this document.

TAB 5

CJA 4-206 (Amend) Exhibits

NOTES:

Rule draft precipitated by the State Audit and *Sandoval v. State*

Rule 4-206. Exhibits.

(1~~a~~) Prior to Trial.

(1~~1~~)(A) **Marking Exhibits.** ~~Prior to trial, e~~Each party must mark all the exhibits it intends to introduce during trial by utilizing exhibit labels in the format prescribed by the clerk of court~~.~~ ~~Electronic labels are allowed. Plaintiffs.~~ Each party must use a label or tag which shall contain, at a minimum, ~~of~~ a case number and~~,~~ exhibit number or ~~/~~letter. Parties may use electronic labels that conform to the minimum standards of case number and exhibit number or ~~/~~letter. ~~must use consecutive numbers defendants must use consecutive letters.~~ Each party must designate the source of the exhibit ~~by the~~with an appropriate party designation. ~~such as: pPis,s letter "P" if it is received from plaintiff and "D" if it is received from defendant. In cases with multiple parties, the label must further identify the parties, e.g. 1st D is the first named defendant in the pleadings, 3rd D is the third party defendant. If the number or nature of the exhibits makes standard marking impracticable, t~~The court may prescribe an alternate marking system ~~and include instructions in the pretrial order~~.

(1~~2~~)(B) **Preparation for Trial.** After completion of discovery and prior to ~~the final pretrial conference~~trial, ~~counsel for~~ each party ~~must~~ shall (i) prepare and serve on opposing ~~counsel~~ party a list that identifies and briefly describes all marked exhibits the party will offer ~~to be offered~~ at trial; and (ii) afford opposing ~~counsel~~ party an opportunity to examine the listed exhibits. ~~Those exhibits also must be listed in the final pretrial order.~~ Exhibits are part of the public record and personal information ~~should~~ shall be redacted in accordance with~~pursuant~~ ~~FRCiv P 5.2 and DUCiv R 5.2-1 to r~~Rule 4-202.09(10).

Comment [JCP1]: Discussion centered on if this should be a "shall"

(2~~b~~) During Trial.

~~(2b) During Trial.~~

(2)(A) Custody of the Court. Exhibits that are received into evidence during trial and that are suitable for filing and transmission to the appellate courts, as a part of the record on appeal, must be placed in the custody of the clerk of court or designee. The clerk of court or designee must list exhibits in the exhibit list. The exhibit list means either the court's designated case management system or a form approved by the Judicial Council. The exhibit list shall be made part of the case record.

(2)(B) Custody of the Parties. Exhibits other than those described in paragraph (2)(A), that are received into evidence during trial, will be retained in the custody of the party offering the exhibit. Such exhibits will include, but not be limited to, items requiring law enforcement chain of custody, the following types of bulky or sensitive exhibits or evidence: biohazard, controlled substances, firearms, ammunition, explosive devices, pornographic materials, jewelry, poisonous or dangerous chemicals, intoxicating liquors, money or articles of high monetary

value, counterfeit money, digital storage media and documents or physical exhibits of unusual bulk or weight. With approval of the court, a printed photograph may be offered by the submitting party as a representation of the original exhibit. The clerk of court or designee must list these exhibits in the exhibit list and note that the original exhibit is in the custody of the party.(21)(A) **Custody of the Clerk.** Unless the court orders otherwise, all exhibits that are admitted into evidence during trial and that are suitable for filing and transmission to the appellate courts of appeals as a part of the record on appeal, must be placed in the custody of the clerk of court,the '. The clerk must list the exhibit in the custody tracking record and note that the exhibit has been filed as part of the record. Each person with custody of an exhibit must identify herself or himself in the exhibit custody tracking record, and record document changes in the status of the exhibit contemporaneous with the event. The exhibit custody tracking record means the CORIS computer 'system or a form approved by the Administrative Office of the Courts. If an approved form is used as the exhibit custody tracking record, it shall be placed in the case file.

(2)(B) **Custody of the Parties.** Unless the court otherwise orders, exhibits admitted into evidence during trial will be retained in the custody of the party offering . Such exhibits will include, but not be limited to, the following types of bulky or sensitive exhibits or evidence: controlled substances, firearms, ammunition, explosive devices, pornographic materials, jewelry, poisonous or dangerous chemicals, intoxicating liquors, money or articles of high monetary value, counterfeit money, and documents or physical exhibits of unusual bulk or weight. With approval of the trial court, a photograph may be substituted for an exhibit once it has been introduced into evidence. The photograph will become part of the court record. The clerk must list these exhibits in the custody tracking record and note that the exhibit is in the custody of the party.

(23)(C) **Custody Tracking RecordExhibit Custody.** Prior Upon to daily adjournment, the clerk of court or designee , under the direction of the court, must compare the exhibit custody tracking recordlist with the exhibits received that day. The clerk must keep Tthe exhibits received, under subsection (2b)(2A1) must be storedin a in an envelope or container, marked with the case number, a,nd placed themsinto a secured storage location sufficient locked facilityto prevent access by unauthorized perssonsthat meets the requirements outlined in subsection (2)(E). The clerk of court or designee may store exhibits in a temporary secured location for recesses lasting less than 72 hours. The temporary location must be sufficient to prevent access by ut unauthorized persons and secured via key lock, with the clerk of court or designee maintaining sole access. .The clerk must note in the exhibit custody tracking record, the date and time the exhibit was transferred to the or from a temporary location or secured storage facility. When an exhibit is removed from the facility, the custody tracking record shall include information aboutdocument the date and time the exhibit was removed and the person who removed the exhibit.

The exhibit custody tracking record must include information about all movements of an exhibit including date, time, place, and persons involved.

Comment [JCP2]: Discussion was had on inserting a provision for temporary storage of exhibits during brakes, such as locking the exhibits into a drawer or cabnet.

~~2(D)**Exhibit Manager.** ,primary of court (2)(E) **Secured Storage Location.** Each court location must provide a locked facility for storing exhibits retained by the court under subsection (2b)(A)(2). protect exhibitsrosecured storage written requestingsecured storage locationedures,the location, access procedures, or security controlsThe clerk of the court shall appoint an exhibit manager with responsibility for the security, maintenance and disposition of exhibits. The clerk may also appoint a person to act as exhibit manager during periods when the exhibit manager is absent. Access to the exhibit storage area by anyone other than the exhibit manager, acting exhibit manager, and the clerk is prohibited without a court order.~~

Comment [KW3]:

Comment [KW4]:

(3~~c~~) After Trial.

(3~~1~~)(A) **Exhibits in the Custody of the ~~ClerkTrial~~ Court.** When the ~~clerk of~~ court takes custody of exhibits under subsection (2~~b~~)(A~~1~~) of this rule, those exhibits may not be taken from the custody of the clerk of court or designee until final disposition of the matter, except upon order of the court and execution of a receipt that identifies the material taken, which receipt will be filed in the case.

(3)(A)(i) **Exhibit Manager.** The clerk of court shall appoint an exhibit manager with responsibility for the security, maintenance, documentation of chain of custody, and disposition of exhibits. The clerk of court may also appoint a person to act as exhibit manager during periods when the primary exhibit manager is absent. Unaccompanied access to the exhibit storage area by anyone other than the exhibit manager, acting exhibit manager, or the clerk of court is prohibited without a court order.

(3)(A)(ii) **Secured Storage Location.** Each court must provide a secured location within their facility for storing exhibits retained by the court under subsection (2)(A). The secured location must be sufficient to prevent access from unauthorized persons through key, combination lock, or electronic access. The facility must also protect exhibits from theft or damage. The secured storage location shall be certified by the Court Security Director through a written request fully describing the secured storage location, local access procedures, and security controls. Any changes to the location, access procedures, or security controls will require recertification by the Court Security Director.

(3~~2~~)(B) **Removal of ~~from Evidence~~Exhibits.** Parties ~~are to~~shall remove all exhibits in the custody of the ~~clerk of~~ court after the time for appeal has expired or after all appeals are resolved~~within fourteen (14)~~ thirty ~~days after the mandate of the final reviewing court is filed or, if no appeal is filed, upon the expiration of the time for appeal. Parties failing to comply with this rule will be notified by the clerk to remove their exhibits and sign a receipt for them. Upon their~~

~~failure to do so within fourteen (14)~~ thirty ~~days of notification by the clerk, the clerk may destroy or otherwise dispose of the exhibits as the court deems appropriate.~~

(3)(C) **Exhibits in the Custody of the Parties.** Unless the court orders otherwise, the party offering exhibits of the kind described in subsection (2~~b~~)(B~~2~~) of this rule will retain custody of ~~them~~ the exhibits and be responsible to the court for preserving them in the~~ir~~ same condition ~~as of~~as the time of admission~~admitted~~, until the time for appeal has expired or after all appeals are resolved~~any appeal is resolved or the time for appeal has expired~~. The party is also responsible for retaining exhibits that may be needed for any post-conviction proceedings.

(3~~4~~)(D) **Access to Exhibits by Parties.** In case of an appeal, the appellate court or any party, ~~upon~~ may file a written request for access to an exhibit admitted in the trial court. The ~~of any other~~ party ~~or by order of~~with custody of the exhibits ~~the court~~, will promptly make available any or all original exhibits in its possession, or ~~true~~ true copies of the exhibit.~~thereof, to enable such other party to prepare the record on appeal.~~

(3~~5~~)(E) **Exhibits in Appeals.** ~~When a notice of appeal is filed~~Upon request of the appellate court, each party will prepare and submit to the clerk of the appropriate appellate ~~court~~ court a list that designates which exhibits are necessary for the determination of the appeal and in whose custody they remain. Parties who have custody of exhibits ~~so listed~~ are charged with the responsibility for their safekeeping and transportation, if required, to the appellate courts ~~of appeals~~. All other exhibits that are not necessary for the determination of the appeal, and ~~that~~ are not in the custody of the clerk of the appellate ~~is court~~court, ~~court,~~ will remain in the custody of the respective party. ~~S, such party will be responsible for forwarding the same to the clerk of the court of appeals on request.~~

(3~~6~~)(F) **Disposal of exhibits.** After ~~three months~~sixty days have expired from final disposition, the time for appeal has expired or after all appeals are resolved ~~of the case, if and no appeals have been filed or requests for new trials or rehearing have been made~~, the exhibit manager~~clerk~~ ~~must~~ shall dispose of any exhibits in the court's possession as follows:

> ~~(3)(F)(i) Property having value must be returned to its owner or, if unclaimed, must be given to the sheriff of the county or other law enforcement agency to be sold in accordance with Utah Code Section 24-3-103. The agency receiving the property must furnish the court with a receipt to be maintained with the exhibit custody tracking record.~~
>
> (3)(F)(~~i~~i) Property having no value ~~must~~ shall be destroyed by the ~~clerk~~ exhibit manager.~~of the court.~~ The ~~clerk~~ exhibit manager shall~~must~~ create a certificate of destruction which includes a description, case number, and exhibit number. The certificate of destruction is to be maintained in~~with~~ the ~~exhibit custody tracking record or noted in~~in the ~~computer record~~record.~~.~~
>
> (3)(F)(ii) Property having value shall be returned to its owner or, if unclaimed, shall be given to the sheriff of the county or other law enforcement agency to be sold in accordance with Utah Code Section 24-3-103. The agency receiving the property shall furnish the court with a receipt to be maintained in the record.~~(3)(F)(iii) The exhibit manager must record disposition of exhibits.~~

TAB 6

CJA 3-402 (Amend) Human Resources Administration

NOTES:

Update to provide consistency, clarification, alignment with other relevant state statutes and current practices, and alignment with current direction and requests of the Judicial Council.

Policy and Planning - Rule Amendment Request Form

The respondent's email address (**barto@utcourts.gov**) was recorded on submission of this form.

Instructions

Unless the proposal is coming directly from the Utah Supreme Court, Judicial Council, or Management Committee, this Request Form must be submitted along with a draft of the proposed rule amendment before it will be considered by the Policy and Planning Committee.

To be considered, you must e-mail your proposed rule draft to Keisa Williams at keisaw@utcourts.gov.

Date of Request *

MM DD YYYY

02 / 12 / 2020

Name of Requester *

Bart Olsen

Requester Phone Number *

801-578-3802

Name of Requester's Supervisor *

Cathy Dupont

Location of the Rule *

Code of Judicial Administration

CJA Rule Number or HR/Accounting Section Name *

3-402

Brief Description of Rule Proposal *

Language updates throughout Rule 3-402 to align with and propel the overall mission of the judiciary.

Reason Amendment is Needed *

Update to rule governing human resource administration to provide consistency, clarification, alignment with other relevant state statutes and current practices, and alignment with current direction and requests of Judicial Council.

Is the proposed amendment urgent? *

- [ ] Yes
- [x] No

If urgent, please provide an estimated deadline date and explain why it is urgent.

Select each entity that has approved this proposal. *

- [ ] Accounting Manual Committee
- [ ] ADR Committee
- [ ] Board of Appellate Court Judges
- [ ] Board of District Court Judges
- [ ] Board of Justice Court Judges
- [ ] Board of Juvenile Court Judges
- [ ] Board of Senior Judges
- [ ] Children and Family Law Committee
- [ ] Court Commissioner Conduct Committee
- [ ] Court Facility Planning Committee
- [ ] Court Forms Committee
- [ ] Ethics Advisory Committee
- [ ] Ethics and Discipline Committee of the Utah Supreme Court
- [x] General Counsel
- [ ] Guardian Ad Litem Oversight Committee
- [ ] Judicial Branch Education Committee
- [ ] Judicial Outreach Committee
- [ ] Language Access Committee
- [ ] Law Library Oversight Committee
- [ ] Legislative Liaison Committee
- [ ] Licensed Paralegal Practitioner Committee
- [ ] Model Utah Civil Jury Instructions Committee
- [ ] Model Utah Criminal Jury Instructions Committee
- [x] Policy and Planning member
- [ ] Pretrial Release and Supervision Committee
- [ ] Resources for Self-Represented Parties Committee

- [ ] Rules of Appellate Procedure Advisory Committee
- [ ] Rules of Civil Procedure Advisory Committee
- [ ] Rules of Criminal Procedure Advisory Committee
- [ ] Rules of Evidence Advisory Committee
- [ ] Rules of Juvenile Procedure Advisory Committee
- [ ] Rules of Professional Conduct Advisory Committee
- [ ] State Court Administrator
- [x] TCE's
- [ ] Technology Committee
- [ ] Uniform Fine and Bail Committee
- [ ] WINGS Committee
- [ ] None of the Above

If the approving entity (or individual) is not listed above, please list it (them) here.

HR Policy & Planning Review Committee

List all stakeholders who would be affected by this proposed amendment. *

Judicial Council and all non-judicial officer state employees.

Rule 3-402. Human resources administration.

Intent:

To establish guidelines for the administration of a human resources system for the judiciary.

Applicability:

This rule shall apply to all non-judicial officer ~~state~~ employees in the judicial branch.

Statement of the Rule:

(1) A department of human resources is established within the Administrative Office to guide~~direct and coordinate~~ the human resources activities of the judiciary.

(2) The department of human resources shall provide the necessary human resources services to the judiciary in compliance with the state constitution, state statute, and this Code. The department of human resources shall provide ~~keep~~ all state employees in the judicial branch information regarding~~informed of~~ benefits, compensation, retirement, and other human resources related matters.

(3) The human resources policies ~~and procedures~~ for non-judicial officer employees:

(3)(A) shall include classification of career service exempt (at-will) and non-exempt jobs, designation of FLSA exempt and non-exempt jobs~~positions~~, guidelines governing recruitment, selection, classification, compensation, working conditions, grievances and other areas deemed necessary; and

(3)(B) shall be based upon the following merit principles:

(3)(B)(i) the recruitment, selection and promotion of employees based upon relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment;

(3)(B)(ii) a salary schedule which provides for equitable and adequate compensation based upon current job market data gathered at least ~~studies conducted~~ every three years including~~of the~~ salary levels of comparable positions in both the public and private sector, local labor market information and trends, other relevant data, and available funds;

(3)(B)(iii) employee retention on the basis of ~~adequate~~ performance that enhances and/or advances the mission of the judiciary—where appropriate, provision will be made for correcting ~~inadequate~~ performance and separating employees whose performance or

misconduct interferes with or fails to advance the mission of the judiciary~~inadequate performance cannot be corrected~~;

(3)(B)(iv) fair treatment in all aspects of human resources administration without regard to sex, gender, age, ancestry, national origin, race, color, religious creed, mental or physical disability or medical condition, sexual orientation, gender identity or expression, marital status, military or veteran status, genetic information, or any other category protected by federal, state or applicable local law~~to race, color, religion, sex, national origin, age, creed, disability, political affiliation, sexual orientation, gender identity, or other non-merit factors and proper regard for employees' constitutional and statutory rights as citizens~~; and

(3)(B)(v) notification to employees and an explanation of their political rights and prohibited employment practices.

(4) The state court level administrator shall be responsible for the day-to-day administration of the human resources system within that court level. A director of human resources, appointed by the State Court Administrator, shall be responsible for effective governance~~directing and coordinating the human resources activities~~ of the human resources department ~~system~~ and will assist the state level administrators, ~~and~~ court executives and other managers with human resources related matters.

(5) Human resources policies ~~and procedures~~, including ~~and~~ a Code of Ethics for non-judicial officer employees, shall be adopted by the Council in accordance with the rulemaking provisions of this Code ~~and shall be reviewed every three years~~.

(5)(A) There is established a H~~h~~uman R~~r~~esources P~~p~~olicy ~~and procedure~~ R~~r~~eview ~~c~~Committee responsible for making and reviewing proposals for ~~repealing~~ human resources policy amendments~~policies and procedures and promulgating new and amended human resources policies and procedures~~. The committee shall review human resource policies at least every three years. The committee shall consist of the following voting members, which, where indicated, must be selected by majority vote of the entire body of the specified group:

(5)(A)(i) the director of human resources;

(5)(A)(ii) two trial court executives, selected by the trial court executives;

(5)(A)(iii) three clerks of court (one juvenile, one district, and one appellate), selected by the clerks of court;

(5)(A)(iv) a chief probation officer from the juvenile court, selected by the chief probation officers; and

(5)(A)(v) a case manager, selected by the clerks of court.

(5)(B) The chair of the committee shall be designated by the state court administrator. Other members of the committee shall be appointed in a manner consistent with Rule 1-205. The department of human resources shall provide necessary support to the committee. Other non-voting members may be assigned by the Policy and Planning Committee, as necessary to assist the committee.

(5)(C) Pursuant to Rule 1-204, new and amended policies ~~and procedures~~, or repeals, recommended by the committee shall be reviewed by the Policy and Planning Committee prior to being submitted by the Policy and Planning Committee to the Judicial Council.

(6) A grievance review panel is established within the grievance process to sit as a quasi-judicial body and review any action taken under the authority of the judiciary's human resources policies~~procedures~~ and which pertains to decisions regarding ~~employee promotions,~~ dismissals, demotions, suspensions, reductions in force, wages/salary if an employee is not placed within the salary range of the employee's current position~~, salary~~, violations of human resources policies~~rules~~, and the equitable administration of insurance, retirement, or leave benefits~~, reductions in force and disciplinary actions~~.

(7) An official human resources file for each employee shall be maintained in the Administrative Office and shall include the following records: ~~leave records, education records~~, biographical information, ~~performance plans and appraisals~~, records of official human resources action, standards of performance expectations, corrective actions, records of official disciplinary action and supporting documentation, ~~letters of commendation,~~ job applications, and payroll and benefits information.

Comment [1]: assumption: Finance and Education records suffice ...?

Comment [2]: Training records have been kept locally for years. Leave records are maintained by finance/payroll.

TAB 7

CJA 4-202.08 (Amend) Fees for records, information, and services

NOTES:

At a recent clerks of court meeting the clerks discussed the fact that this rule has not been updated for a long time. In particular, it is mired in the technology of the 1990s. Clerks are frequently receiving requests for information to be put on a thumb drive. The courts are purchasing the thumb drives to ensure their integrity and therefore there should be a charge. The clerks would like to charge the same as they have been charging for compact discs, regardless of the number of records on the drive.

Policy and Planning - Rule Amendment Request Form

The respondent's email address (**keisaw@utcourts.gov**) was recorded on submission of this form.

Instructions

Unless the proposal is coming directly from the Utah Supreme Court, Judicial Council, or Management Committee, this Request Form must be submitted along with a draft of the proposed rule amendment before it will be considered by the Policy and Planning Committee.

To be considered, you must e-mail your proposed rule draft to Keisa Williams at keisaw@utcourts.gov.

Date of Request *

MM DD YYYY

12 / 06 / 2019

Name of Requester *

Brent Johnson

Requester Phone Number *

801-578-3856

Name of Requester's Supervisor *

Judge Noonan

Location of the Rule *

Code of Judicial Administration

CJA Rule Number or HR/Accounting Section Name *

4-202.08

Brief Description of Rule Proposal *

Accounts for outdated technology.

Reason Amendment is Needed *

At the recent clerks of court meeting the clerks discussed the fact that this rule has not been updated for a long time. In particular it is mired in the technology of the 1990s. Clerks are frequently receiving requests for information to be put on a thumb drive. The courts are purchasing the thumb drives to ensure their integrity and therefore there should be a charge. The clerks would like to charge the same as they have been charging for compact discs, regardless of the number of records on the drive.

Is the proposed amendment urgent? *

- [ ] Yes
- [x] No

If urgent, please provide an estimated deadline date and explain why it is urgent.

Select each entity that has approved this proposal. *

- [ ] Accounting Manual Committee
- [ ] ADR Committee
- [ ] Board of Appellate Court Judges
- [ ] Board of District Court Judges
- [ ] Board of Justice Court Judges
- [ ] Board of Juvenile Court Judges
- [ ] Board of Senior Judges
- [ ] Children and Family Law Committee
- [ ] Court Commissioner Conduct Committee
- [ ] Court Facility Planning Committee
- [ ] Court Forms Committee
- [ ] Ethics Advisory Committee
- [ ] Ethics and Discipline Committee of the Utah Supreme Court
- [x] General Counsel
- [ ] Guardian Ad Litem Oversight Committee
- [ ] Judicial Branch Education Committee
- [ ] Judicial Outreach Committee
- [ ] Language Access Committee
- [ ] Law Library Oversight Committee
- [ ] Legislative Liaison Committee
- [ ] Licensed Paralegal Practitioner Committee
- [ ] Model Utah Civil Jury Instructions Committee
- [ ] Model Utah Criminal Jury Instructions Committee
- [ ] Policy and Planning member
- [ ] Pretrial Release and Supervision Committee
- [ ] Resources for Self-Represented Parties Committee

- [ ] Rules of Appellate Procedure Advisory Committee
- [ ] Rules of Civil Procedure Advisory Committee
- [ ] Rules of Criminal Procedure Advisory Committee
- [ ] Rules of Evidence Advisory Committee
- [ ] Rules of Juvenile Procedure Advisory Committee
- [ ] Rules of Professional Conduct Advisory Committee
- [ ] State Court Administrator
- [ ] TCE's
- [ ] Technology Committee
- [ ] Uniform Fine and Bail Committee
- [ ] WINGS Committee
- [ ] None of the Above

If the approving entity (or individual) is not listed above, please list it (them) here.

Clerks of Court

List all stakeholders who would be affected by this proposed amendment. *

Clerks of Court, AOC

Rule 4-202.08. Fees for records, information, and services.

Intent:

To establish uniform fees for requests for records, information, and services.

Applicability:

This rule applies to all courts of record and not of record and to the Administrative Office of the Courts. This rule does not apply to the Self Help Center.

Statement of the Rule:

(1) Fees payable. Fees are payable to the court or office that provides the record, information, or service at the time the record, information, or service is provided. The initial and monthly subscription fee for public online services is due in advance. The connect-time fee is due upon receipt of an invoice. If a public online services account is more than 60 days overdue, the subscription may be terminated. If a subscription is terminated for nonpayment, the subscription will be reinstated only upon payment of past due amounts and a reconnect fee equal to the subscription fee.

(2) Use of fees. Fees received are credited to the court or office providing the record, information, or service in the account from which expenditures were made. Fees for public online services are credited to the Administrative Office of the Courts to improve data quality control, information services, and information technology.

(3) Copies. Copies are made of court records only. The term "copies" includes the original production. Fees for copies are based on the number of record sources to be copied or the means by which copies are delivered and are as follows:

(3)(A) paper except as provided in (H): $.25 per sheet;

(3)(B) microfiche: $1.00 per card;

(3)(C) audio tape: $10.00 per tape;

(3)(D) video tape: $15.00 per tape;

(3)(E) ~~floppy disk or compact disk~~ electronic storage medium other than of court hearings: $10.00 per ~~disk~~ unit;

(3)(F) electronic copy of court reporter stenographic text: $25.00 for each one-half day of testimony or part thereof;

(3)(G) electronic copy of audio record or video record of court proceeding: $10.00 for each one-half day of testimony or part thereof; and

(3)(H) pre-printed forms and associated information: an amount for each packet established by the state court administrator.

(4)(A) Mailing. The fee for mailing is the actual cost. The fee for mailing shall include necessary transmittal between courts or offices for which a public or private carrier is used.

(4)(B) Fax or e-mail. The fee to fax or e-mail a document is $5.00 for 10 pages or less. The fee for additional pages is $.50 per page. Records available on Xchange will not be faxed or e-mailed.

(5) Personnel time. Personnel time to copy the record of a court proceeding is included in the copy fee. For other matters, there is no fee for the first 15 minutes of personnel time. The fee for time beyond the first 15 minutes is charged in 15 minute increments for any part thereof. The fee for personnel time is charged at the following rates for the least expensive group capable of providing the record, information, or service:

(5)(A) clerical assistant: $15.00 per hour;
(5)(B) technician: $22.00 per hour;
(5)(C) senior clerical: $21.00 per hour
(5)(D) programmer/analyst: $32.00 per hour;
(5)(E) manager: $37.00 per hour; and
(5)(F) consultant: actual cost as billed by the consultant.

(6) Public online services.

(6)(A) The fee to subscribe to public online services shall be as follows:
(6)(A)(i) a set-up fee of $25.00;
(6)(A)(ii) a subscription fee of $30.00 per month for any portion of a calendar month; and
(6)(A)(iii) $.10 for each search over 200 during a billing cycle. A search is counted each time the search button is clicked.

(6)(B) When non-subscription access becomes available, the fee to access public online services without subscribing shall be a transaction fee of $5.00, which will allow up to 10 searches during a session.

(6)(C) The fee to access a document shall be $.50 per document.

(7) No interference. Records, information, and services shall be provided at a time and in a manner that does not interfere with the regular business of the courts. The Administrative Office of the Courts may disconnect a user of public online services whose use interferes with computer performance or access by other users.

(8) Waiver of fees.

(8)(A) Fees established by this rule other than fees for public online services shall be waived for:
(8)(A)(i) any government entity of Utah or its political subdivisions if the fee is minimal;
(8)(A)(ii) any person who is the subject of the record and who is impecunious; and
(8)(A)(iii) a student engaged in research for an academic purpose.

(8)(B) Fees for public online services shall be waived for:
(8)(B)(i) up to 10,000 searches per year for a news organization that gathers information for the primary purpose of disseminating news to the public and that requests a record to obtain information for a story or report for publication or broadcast to the general public;
(8)(B)(ii) any government entity of Utah or its political subdivisions;

(8)(B)(iii) the Utah State Bar;

(8)(B)(iv) public defenders for searches performed in connection with their duties as public defenders; and

(8)(B)(v) any person or organization who the XChange administrator determines offers significant legal services to a substantial portion of the public at no charge.