UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

WebEx Video Conferencing
May 1, 2020 - 9 a.m. – 2 p.m.

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

GUESTS:

Marty Blaustein
Brent Johnson
Michael Drechsel
Nancy Sylvester
Jim Peters
Paul Barron

STAFF:

Keisa Williams
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Pullan welcomed the committee to the meeting. The committee considered the minutes from the March 3, 2019 meeting. With no changes, Judge Chin moved to approve the draft minutes. Rob Rice seconded the motion. The motion passed unanimously.

(2) 4-202.02. RECORDS CLASSIFICATION:

Ms. Sylvester provided an overview. The proposed amendments to 4-202.02 would seal unlawful detainer actions in certain circumstances. When researching unlawful detainer actions, Utah Legal Services discovered several issues. Many cases are never prosecuted. Some cases were initiated in one district and then the same action was initiated in another district so it appeared the tenant had been evicted twice. Tenants should not have a searchable eviction action show up when they have not actually been evicted. This is causing the unlawful denial of housing to vulnerable populations.

Marty Blaustein: The idea behind this records classification amendment started around 3 years ago with tenants saying that they can't get into another unit or another apartment because of a bad credit history. In some cases we couldn't do much for them because the justification for the eviction was lawful. However, in other cases the tenant did what they were asked and still had an eviction show up on their credit report. Credit report data comes from the courts via public records, but that data is often missing critical information such as the disposition of the case. The tenant could have prevailed. We are seeing more and more cases where tenants' eviction records are showing up on their credit reports, and tenants have been black balled for hiring an attorney to address the issue. The Utah Legal Services Housing Task Force sent a letter to the Chief Justice on October 3, 2019 outlining our concerns. We researched cases going back to 2018 and found that 25% of cases in a one-month period seemed to be cases where the landlord did not proceed and there was no order for restitution, but the eviction sat on the record. When we did a background check, the records would show up on the report. We are proposing that eviction case be sealed when: 1) the plaintiff failed to serve the defendant within 120 days of filing, 2) the plaintiff failed to prosecute the action, 3) the plaintiff failed to seek a default judgment within 60 days after such a judgment could have been entered, and 4) the plaintiff requested dismissal, whether or not any judgment or order was entered.

Mr. Rice: I am sensitive to this issue. Does the language sealing the records for the numerated reasons need to be restricted? Why not seal the records for substantive reasons as opposed to things in the nature of possible failures to prosecute? Mr. Blaustein: Our goal is to stay within the four corners of what we are proposing. I would suspect that we would still file motions to classify records as sealed outside of those four scenarios in a particular circumstance, but they wouldn't be sealed as a matter of course.

Ms. Sylvester: There is a concern regarding workload. After speaking to IT, sealing the records will have to be a manual process by the clerks. The IT department can generate monthly reports identifying cases that meet the requisite criteria. There may be some hesitancy in allowing a clerk to make decisions about whether or not to seal a record so that may require more thought. I suspect we would get pushback from legislators who are landlords asking why all of the records were sealed. That's another reason why we wouldn't want to seal more records than necessary.

Judge Pullan: In terms of political pushback, we would get less on cases that were dismissed on the merits. I think it would be a mistake to assume that the plaintiff's failure to prosecute was without merit. The landlord may have filed the lawsuit and shortly after the tenant conceded that he couldn't pay the rent and left. That is the outcome the landlord wanted so the case sits without further action. Sealing that record creates the false impression that the tenant was compliant with the lease. I too am sensitive to the issue and I agree that we are going to see a political response if these changes are made. This type of initiative is what drove the expungement statute. People were being unfairly hampered with an arrest on their record.

Judge Walton: I don't have a problem with the idea, but I think there are practical issues. Even if the record is sealed, can't you still see that a case was filed and the nature of the case? Ms. Sylvester: Once a case file is sealed you can't see it and it isn't searchable. It would be as if the case never existed. Mr. Rice: When a case has been sealed, would the tenants show up if a landlord is doing an Xchange search? Paul Barron: In CORIS, you can see that a case exists but you can't access it or look it up by name. It's the same in Xchange. The person's name would never show.

Judge Walton: I don't share the concern regarding making assumptions that the plaintiff filed without merit. If a file is sealed there shouldn't be an assumption one way or the other. I think it would be inappropriate to draw a conclusion unless the court wanted to do so.

Judge Cannell: If a case is dismissed for one reason or another, why wouldn't it be automatically sealed? I echo Mr. Rice. If a case was dismissed for any reason, then sealing it wouldn't matter much.

Mr. Rice: How widespread of a problem is this? Would we ever be asked to quantify it? Mr. Blaustein: In 2018, in one month, 25% of cases were eligible to be sealed based on the definitions in the proposed amendment.

Judge Pullan: One unintended consequence of this decision would be that landlords who otherwise would have been willing to let the case sit without action when a tenant agrees to move out, will now be incentivized to move the case to judgment. Judge Walton: I agree. That is not uncommon at all. I am surprised by how many times there is no further action in a case once the restitution judgment is entered. There is no request for judgment and the case ends up getting dismissed.

Mr. Blaustein: In this proposal, if an order of restitution has been issued the case would not be sealed because the order is in effect.

Judge Pullan: Under (3)(A)(v)(2) and (3), cases with a restitution order (without a request for judgement) would be sealed because they would be dismissed for failure to prosecute. The rule as it is drafted would seal them. We are creating an incentive for landlords to go in and get a judgment to create an accurate record. The tenant who walked away because they couldn't pay the rent, who already has economic instability, is now shouldered with a judgment of unpaid rent, treble damages, and all that comes with it.

Ms. Sylvester: The purpose behind this is not failure to prosecute the action but failure to get a restitution order. If there is no restitution order it should be sealed. We could change the language to more clearly reflect that intent. Mr. Blaustein: Looking at it from the standpoint of representing a tenant, I see the case as being prosecuted if an order of restitution judgment has been entered. I think the definition of prosecution is open to debate.

Judge Pullan: I think that "failure to prosecute" is a term of art within the court. An order of restitution is only a partial judgment. Judge Walton: We could add language to line 102 saying, "the plaintiff failed to prosecute the action and no order of restitution has been entered or issued."
Mr. Rice: What is the open records analysis on this? What is the constitutional question to be answered? Do we have a rational basis for this? Ms. Sylvester: The court is empowered under GRAMA to create its own access rules so I don't think this would run afoul of that.

Judge Pullan: Another area where we determine that records aren't being used for a legitimate purpose is expungements. When a person has an arrest on their record that never resulted in prosecution, it should be automatically expunged (line 107 – expunged records are sealed). However, that was a legislative policy. If we make the proposed amendments to this rule, I can see the legislature saying we are creating policy.

Judge Evershed: Is this something we can approach the legislature about? They reach out to us when they are proposing changes to the statute. This might be an opportunity for us to reach out to them. Ms. Sylvester: There is some merit to that. Typically when we have those discussions with the legislature, both sides are represented. Marty represents the tenant but we don't have the landlord's perspective. This could go to the Council for discussion with a request that the Chief reach out to legislative leadership to start a conversation. Judge Chin: I would suggest asking members of the legislative liaison committee to weigh in. They may have an idea about how the legislature might react.

Judge Pullan: We need to have a policy discussion with the Judicial Council before moving forward. I believe a legislative response is inevitable. We may be well served by bringing them to the table early on to have a discussion. I would like more direction from the Judicial Council. Judge Walton: I recommend taking the rule draft (with the change to line 102) to the Council for a discussion about how we move forward. At what point do we send it out for public comment?

Ms. Williams: I can ask that this issue be added to the Judicial Council's agenda as a separate item for discussion. Depending on the outcome of that discussion, we can send it out for public comment afterward.

Judge Cannell: There should be a mechanism in the rule allowing a tenant to expunge a file that affects their record.

Judge Walton moved to take the rule, with the edits to line 102, to the Judicial Council for discussion. Judge Evershed seconded the motion. The motion passed.

(3) Rules 3-101, 3-104, 3-111:

- 3-101. Judicial Performance Standards – definition issue
- 3-104. Presiding Judges
- 3-111. Performance Evaluations of Senior Judges and Court Commissioners

Ms. Sylvester: These rule amendments have been circulating for a couple of years. The proposals originated from the Board of District Court Judges. The updates to Rule 3-101 establish a definition for "submitted" for purposes of the case under advisement performance standard. The updates also provide discretion to the Council to excuse full compliance with the performance standards regarding cases under advisement and education hours for circumstances beyond the judge's control.

Judge Pullan: These amendments have been vetted by the boards of every level of the court. What drove this is the concern that a Notice to Submit can be filed and, solely due to clerical error, never be submitted to a judge. Back in September, two very similar motions were pending in my court. We received two Notices to Submit for signature (one for each motion) on the same day. My clerk assumed that both Notices were related to the same motion. I signed an order on one and she didn't catch that the second issue was still pending. It sat for six months and was never brought to my attention. Because Notices to Submit require human review they are subject to human error as well. Before this rule, the Judicial Council had no discretion. If you missed something, after 60 days it had to be reported to the Council. The Council was required to not recommend you for retention regardless of whether the issue had anything to do with the judge. The proposed rule amendment also clarifies what it means for something to be submitted for a decision. My view is to move these rule proposals forward in their current form. I think in general it is a good policy for us.

Judge Evershed moved to approve the proposed rule amendments to be sent to the Judicial Council with a recommendation that they be published for comment. Mr. Rice seconded and the motion carried unanimously.

(4) 6-506. PROCEDURE FOR CONTESTED MATTERS FILED IN THE PROBATE COURT:

Judge Pullan: This amendment changes one word, "may" to "will" in regard to scheduling pre-mediation conferences in probate cases. The fact that the rule said "will" is forcing all probate cases into pre-mediation conferences when that isn't necessary.

Judge Walton moved to approve the amendment to be sent to the Judicial Council with a recommendation that it be published for comment. Judge Cannell seconded and the motion carried unanimously.

(5) 6-507. COURT VISITORS (NEW):

Ms. Sylvester: This proposal originated with the probate subcommittee. It was meant to be part of a set of probate rules of procedure accompanied by legislation, but the bill didn't pass. The amendment sets forth the appointment and role of court visitors and establishes a process for reviewing court visitor reports. The court visitor program hasn't been codified yet and it doesn't have a mechanism for ensuring that judges see the visitors' reports and act on them where appropriate. This rule seeks to resolve those issues (see, e.g. paragraph (6)(b)).

The probate committee proposes adding this rule to the Code of Judicial Administration pending the creation of a probate rule. The committee doesn't want to wait for a probate rule because it isn't clear when that will happen and the court visitor program needs a way to ensure reports are making their way to judges. There have been instances when action was needed but the reports never made it to a judge. A Request to Submit is required, but court visitors are not parties to the case. They are an extension of the court. This rule would create a mechanism to get reports before judges. The Notice of Filing would trigger the clerk to send the report to the judge for review. (lines 49-51).

Judge Pullan: Is there a reason we can't call this a Request to Submit, rather than a Notice of Filing? My concern is that a Notice of Filing could just sit in the file unless clerks are adequately trained to treat it as a Request to Submit. If we are treating it like a Request to Submit, why not just call it that? If you call it a Notice of Filing, judges would need judicial training about how to treat the reports, which is another argument for calling them a Request to Submit.

Mr. Barron: It depends on the document type. If we call it a Request to Submit and it is submitted to the clerk for manual filing, a tracking record would be automatically created. If we call it something else, we would have to program the system to do the same thing. We could create a mechanism allowing court visitors to use the e-filing system, but right now they can scan the report and send it directly to the court.

Judge Pullan: The challenge is that not every report will be submitted to the judge for review. The filing of the court visitor report is not a paper asking the court to do anything. If there is a dispute about whether a protected person is being treated fairly or being taken advantage of, why wouldn't we leave this to the party to make a motion to do something? Ms. Sylvester: These cases are unique. The court has asked the court visitor to conduct an investigation. The court is proactively saying please go look into this. Many times the party is incapacitated and doesn't have a representative. If the report is negative about a proposed guardian, the guardian doesn't have an incentive to do anything. The court visitor program is a necessary protection mechanism, similar to juvenile cases. Many times court visitors submit detailed, multi-page reports and get concerned when a judge never sees it. When that happens, court visitors feel like the court doesn't value their work and they no longer want to participate in the program.

Judge Cannell: When I have a problem case and I request a court visitor report, I know that I am waiting for that report to determine whether I want a follow-up or hold a hearing. It doesn't matter to me if you call it a Notice of Filing or a Request to Submit. Judge Walton agreed. Judge Pullan: In the fourth district, our probate calendar is assigned to one judge to deal with undisputed matters. My fear is that one judge who is handling the probate calendar orders a court visitor to do something , the case is then disputed for other reasons and assigned to me. I would never know that the court visitor has been appointed. If the only thing in the docket is a Notice of Filing, it's just going to sit there.

The Committee changed the title of (6)(b) to "Notice to Submit for Decision," along with lines 50 and 57.

Mr. Rice: I suggest changing line 58 to say "and respond to the report" instead of issuing an order because someone could argue that the findings have to closely follow the report and the court can pick and choose items from the report. Judge Cannell: Normally I won't make any findings until I get to the hearing. Judge Walton: I don't know that we want to go down this road. Why don't we say the Notice to Submit brings it to the court's attention in any decision the court is considering? I'm not sure it requires any language that foresees some other action. It would be like any other Notice to Submit. Once a judge becomes aware that a Notice to Submit is filed, he becomes aware that a decision needs to be made. When a court visitor has filed a report with a Notice to Submit for Decision, the court will review and entertain the recommendations prior to making further decisions on the matter.

Judge Pullan: If we call it a Notice to Submit and the judge reviews it and thinks it looks fine, when does tracking end? Does the court need to submit an order that it has been reviewed and no further action is necessary to take it off tracking? Ms. Sylvester: That's what we were contemplating. The court visitor program was only going to file if it needs some kind of court response. Judge Pullan: Does the court visitor submit a proposed order, similar to the requirement in lines 52-53 involving motions to Excuse the respondent from the hearing? Ms. Sylvester: Yes, that has been part of the discussion. In cases where we are not excusing the respondent, the court visitor role is to observe and report. It would be up to the judge to call a hearing for all parties to respond. Judge Walton: Asking a non-lawyer to submit an order seems like a bad idea. Judge Pullan agreed. Judge Pullan: Whether we call this a Notice to Submit or a Notice to File, my 60 days starts running. What stops that? There needs to be an order to stop it, even an order that says I've reviewed this and no further action is needed. That may just be a training issue for the judge. Ms. Sylvester: It could be as simple as minute entry.

Judge Cannell: If all I need is basic information from the report, calling it a Request to Submit creates additional, unnecessary work because then I need to create an order. Ms. Sylvester: Under (6)(b), the Notice to Submit is only filed if the court needs to take some action. Judge Cannell: I will know when I have requested a report. The issue is after the fact and after the appointment of the guardian when a party objects to the motion or the order. If there is no pending motion, it doesn't fit the rule if I need to take an action within 60 days. Judge Walton: The more I think about it the more I agree with Judge Cannell. Calling it a notice to submit is going to cause problems and make it more work.

Judge Pullan: My sense is that we send this back to the Probate subcommittee for further consideration. We may need a different treatment than when we are excusing a respondent from a hearing.

The Committee asked Ms. Sylvester to take the rule back to the Probate subcommittee for further consideration and bring it back to Policy and Planning in June.

(6) Rules 1-201, 3-403, 9-101, 9-109:

Jim Peters: Proposed changes to 1-201, 9-101 and 9-109 provide an alternative to conducting elections for leadership positions in the justice courts when the justice court conference is canceled. The proposed change to 3-403 authorizes the Board of Justice Court Judges to excuse judges from that conference (instead of the Management Committee). The Management Committee reviewed the proposals and recommended that the amendments be considered by Policy and Planning.

Judge Chin motioned to approve 3-403 as amended to send to the Council for approval for public comment. Judge Walton seconded and it passed unanimously.

Mr. Peters: The justice court Council member position is especially odd. The Board of Justice Court Judges elects that position at its spring conference, but the person doesn't take their seat until the annual conference in the Fall. There is a six-month lag until someone takes the position. Because the annual conference was canceled this year, we thought it might be a good time to align justice court elections with all of the others.

Judge Chin moved to approve rules 1-201, 9-101, and 9-109 as amended to send to the Council for approval for public comment. Mr. Rice seconded and the motion passed unanimously.

(7) 4-106. ELECTRONIC CONFERENCING (REPEAL):

Judge Pullan: The feeling of the Supreme Court is that this is a procedural matter and it should not be in the administrative code. The Rules of Civil Procedure Committee generally agrees given the degree that we are engaging in these kinds of conferencing efforts. Repealing this rule makes it solely a procedural question. The Rules of Civil Procedure Committee is aware that rule 4-106 will likely be repealed.

Mr. Rice moved to recommend to the Council that rule 4-106 be repealed. Judge Evershed seconded and the motion carried unanimously.

(8) SUBPOENA FORMS (POLICY QUESTION):

Judge Pullan: This issue has been bounced around amongst various parts of the judiciary and is now before us for a policy recommendation. When a subpoena goes out, the CJA requires that three forms be served along with the subpoena. A legislator approached court personnel asking why we are requiring that all of the paperwork be attached to the subpoena. According to the legislator, the county sheriffs have a hard time managing it and it makes more sense to just include hyperlinks to the three documents in the subpoena itself. The objection is that not everyone has access to a computer.

Mr. Rice: I issue a lot of subpoenas. It is not uncommon for me to get a call from people asking what they are supposed to do with them. I appreciate the cost issue and the need to tilt towards the paperless world, but I think the accompanying documents are really important pieces of information for someone not well versed in this area.

Judge Pullan: Would there be value in saying the forms don't have to be attached if the subpoena is going to a corporation, but they do if the subpoena is going to an individual? Mr. Rice: Anecdotally, these are probably routine documents for banks and schools but might not be for small businesses.

Judge Walton: I can see both sides of it. In 99% of the cases it would be sufficient to have a link in the subpoena directing people where to find more information, but I don't know that we're there yet. Judge Evershed: Even with internet access, training on how to use technology is an issue. I've had a lot of trouble with WebEx hearings. I

can't explain to someone using an iPhone how to download WebEx to their phone. Some people don't even know how to access the internet.

Brent Johnson: The Forms Committee was unanimous that it was better customer service to provide all documents in paper form, at least for now. In moving to WebEx, we were surprised by the number of employees who don't have adequate access to or know how to access the internet. I would recommend not changing anything yet, keeping the status quo, and requiring that all papers be served. There isn't a huge outcry for change.

The Committee agreed and took no action.

(9) 4-208. AUTOMATIC EXPUNGEMENT OF CASES (NEW):

Judge Pullan: In March, we talked about moving forward with the easier group of automatic expungements (acquittals and dismissals with prejudice) in order to be timely in our response to legislation. The more difficult process is identifying clean slate eligible cases. Our biggest concern with all three expungement types is the accuracy of the system and whether we can measure the error rate. IT has assured us that they can conduct robust testing and they expressed a high degree of confidence in their ability to accurately identify acquittals and dismissals with prejudice. Mr. Johnson has indicated that we should adopt a rule of procedure as well. CJA rule 4-208 would cover the process by which the automated program is created and approved.

Mr. Johnson: There was some discussion at the last meeting about amending the language of the automated orders to ensure everyone was comfortable with the "findings." Judge Pullan: In the orders, the "finding" is that the requirements for automatic expungement have been met and expungement of the record is statutorily mandated. Ultimately, issuance of the auto-expungement order is authorized by the presiding judge in each district. We should set forth in the order how those findings were made and acknowledge that this is an automated process without judicial review. The Rules of Civil Procedure would be helpful in that regard. If the Supreme Court decides (like it did in rule 109) that this is the way we are going to do business, then this is how we will operate. In my opinion, this type of electronic review will always have to be supported by a rule of procedure.

Mr. Johnson: I don't know whether the Rules of Civil Procedure Committee is working on an auto-expungement rule. This might be a rule of criminal procedure. The standard could be considered civil. The rest of the Rules of Civil Procedure really don't apply. It would have to be narrowly focused. It might be better overall in the Rules of Criminal Procedure. We probably need a general expungement rule in the Rules of Criminal Procedure. Even in non-automated cases. Judge Pullan: Does rule 4-208 need to be adopted in order to comply with the statute or can we recommend that there be a Rule of Criminal Procedure instead and wait to review the forms? Mr. Johnson: In theory, you can have presiding judges start the process with standing orders until a rule is adopted. When we were addressing rule 109, one of my concerns was that the use of standing orders may conflict with the signature stamp rule. That may be an issue here as well. The Criminal Procedure Committee meets in two weeks.

Judge Pullan: I recommend that Mr. Johnson take this issue to the Rules of Criminal Procedure Committee with the understanding that Policy and Planning views this as procedure and it needs to be supported by rule. The issue can be re-addressed at the next meeting.

The Committee agreed and took no action on the rule.

(10)- Rules 1-201, 6-102, 7-101:

- 1-201. Rules for the Conduct of Council Meetings
- 6-102. Election of District Court Judges to the Judicial Council
- 7-101. Juvenile Court Board, Executive Committee and Council Representatives

During the legislative session, SB 167 passed (effective date = May 12, 2020). The bill expands the membership of the Judicial Council, adding a new district court judge member (for a total of six district court judges) and a new juvenile court judge member (for a total of three juvenile court judges). The proposed amendment to rule 1-201 would allow the seats to be filled prior to September 2020. Currently the rule reads that new members are elected if an existing member is "unable to complete a term," which doesn't contemplate a new seat to fill. Changing the language to "vacancy" allows for immediately filling the newly created seat via the Board's process. In rules 6-102 and 7-101, the district and juvenile boards have identified how their seats would be allocated.

Judge Cannell: Rule 1-201 allows members to be selected prior to September when a vacancy exists. 6-102 says there will be only one representative from either 1st or 5th district. That creates a problem with the overlap between Judge Walton and me in First and Fifth districts. And there is some question about whether or not "vacancy" in the rule means a vacancy for a newly appointed seat, or a vacancy that exists for any other reason during a judge's term.

Judge Walton's term expires in September. I am fulfilling what's left of Judge Allan's term. In September I will be the continuing representative from First and Fifth, so that still works. The issue is in defining a "newly appointed member" or a "newly created" seat. If we fix that, it's resolved in the short term but I don't know how it will work as we make changes in the future. Mr. Rice: Including language that addresses a one-time issue is better than a constitutional challenge to a rule we make five years from now. Judge Pullan agreed stating that newly created seats are rare.

Judge Cannell: I think the change should be captured in a separate paragraph because it doesn't fit the language proposed in (3)(A). It's not a vacancy; it's just a newly appointed seat. The first sentence in line 20, section (3)(A), should be changed to, "Election of Council members, to include newly appointed seats, shall take place at the Annual Judicial Conference."

Judge Evershed: Are we anticipating that new members won't join until September? If we are changing the rule to say that the election will be held at the annual meeting, then appointments won't happen until the Fall. If we are changing the rule to say that we are adding new seats on the Judicial Council then I say we do it as soon as possible after the legislative session ends. Judge Cannell: The problem is that John and I are serving simultaneously in the First and Fifth District from now until September. It's unclear whether the Council anticipated having new folks join at its May meeting or at the annual conference. My sense is that new members' terms would start at the annual meeting. We need to try to be consistent with the old rule. As far as the new designations in 6-102, my expectation is that I will fulfill the original three-year term left over from Judge Allan and the fifth district representative would join when my term is finished. We can alternate from there. When there are multi-district seats, it can be resolved at the district level. My term ends in September 2021.

After discussion, the Committee decided to hold off on moving forward with Jim Peters' proposals to 1-201 (lines 16-18 and 23-24) and Mike Drechsel's proposal (lines 21-22) until all amendments are ready. Ms. Williams will let Mike Drechsel know about the committee's concerns and ask that they be addressed in a new revised draft. All three rules will be back on the June agenda.

(11) OLD BUSINESS/NEW BUSINESS:

None

(12) ADJOURN:

With no further items for discussion, the meeting was adjourned without a motion. The meeting adjourned at 11:11 am. The next meeting will be on June 5, 2020 at 12 (noon) via WebEx Video Conferencing.