

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

WebEx video conferencing  
October 2, 2020: 12 pm to 2 pm

<b>MEMBERS:</b>	<b>PRESENT</b>	<b>EXCUSED</b>	<b>GUESTS:</b>
Judge Derek Pullan, <i>Chair</i>	•		Paul Barron
Judge Brian Cannell	•		Shane Bahr
Judge Augustus Chin		•	Justice Christine Durham
Judge David Connors	•		Bridget Romano
Judge Michelle Heward	•		Nancy Sylvester
Mr. Rob Rice	•		Dr. Jennifer Yim
			<b>STAFF:</b>
			Keisa Williams
			Minhvan Brimhall (recording secretary)

**(1) WELCOME AND APPROVAL OF MINUTES:**

Judge Pullan welcomed members and guests to the meeting. The committee considered the minutes from the September 4, 2020 meeting. With no changes, Judge Heward moved to approve the minutes as drafted. Mr. Rice seconded the motion. Judge Connors abstained. The motion passed with a majority vote.

**(2) 3-101. Judicial Performance Standards:**

Judge Pullan provided an overview of the issue. Judge Johnson was unable to join the meeting due to an evidentiary hearing.

Ms. Romano: This is an important issue both to the Board of District Court Judges (BDCJ) and to JPEC. There have been concerns in the past that a judge may, unfairly, be found not to meet a performance measure based solely on the case under advisement standard for a situation outside of the judge's control. Until recently, JPEC believed that issue had been addressed by the AOC's implementation of a tracking system notifying judges of cases under advisement timelines. Initially, JPEC was concerned with amendments to both paragraphs (2) and (6), but after meeting with the BDCJ and learning how the tracking system works, JPEC understands that paragraph (2) more clearly defines when the clock starts ticking, which is perfectly appropriate

JPEC still has concerns with paragraph (6). JPEC has a statutory responsibility to the public to objectively evaluate judicial performance and provide recommendations with respect to retention. Paragraph (6) clearly intrudes upon and supplants what would otherwise be a JPEC function. During the meeting with the BDCJ, JPEC proposed alternatives (included in the meeting materials). We recommended eliminating the "good cause" language because it is terribly subjective and difficult to apply. Judge Stone suggested that was an artifact from an early draft. JPEC also suggested that if paragraph (6) were retained, it should include specific circumstances that would qualify as reasons outside a judge's personal control. Ms. Sylvester's alternative draft reflects a couple of them, such as temporary disability or system failure. That paragraph should also include language delineating the circumstances in which the Judicial Council would exercise its discretion to report to JPEC that a judge met an objective standard that he or she otherwise did not. Another suggestion was the possibility of reciprocity, for example, if a judge self-declared that he or she met objective criteria, but the Judicial Council was made aware of information

independently that the person in fact did not meet the criteria, the Judicial Council would be able to report that information to JPEC.

Those alternatives would help, but they do not eliminate JPEC's concerns, as reflected in the letter Dr. Yim sent in late August after the BDCJ meeting. The commission feels strongly that paragraph (6) supplants JPEC's function. Judges can provide an explanation to JPEC directly regarding why they should not be held responsible for a standard that they did not objectively meet, and JPEC can exercise its function to determine whether that judge or justice should ultimately be held accountable. One idea is to amend the self-declaration form to allow a judge to articulate reasons outside of his or her control. Before JPEC fails a judge on a performance standard, or if JPEC plans to recommend that the judge not be retained, we make sure that the judge has an opportunity to meet with and provide information to JPEC sufficient to allow us to make a fair and considered determination.

Justice Durham: I think it is accurate to say that from JPEC's perspective, the Judicial Council's function is to set the standards and JPEC's function (statutorily), is to evaluate compliance based on objective data. If the Judicial Council wants to include exceptions and mitigation into the rule, then I don't think JPEC would be as concerned, but as it is, the language in the rule leaves all of the discretion to the Council and does not allow JPEC to perform its function based on objective data. In my communication with Dr. Yim, it is my understanding that this has not been an issue for judges in terms of their recommendations for retention.

Judge Pullan: I'm troubled with the idea that the Judicial Council is in some way supplanting JPEC's role, because as Justice Durham mentioned, the Judicial Council does have a role here (independent of JPEC), which is to certify whether a judge has or has not met certain standards. As I understand it, nothing requires JPEC to accept the Judicial Council's findings. Under current paragraph (6), the Council would have to make findings that JPEC would be free to accept or reject. It's strange to me that JPEC is resistant to paragraph (6), because it is actually giving JPEC more information about the certification than they would have otherwise had.

In section 78A-2-223, a trial court judge shall decide all matters submitted for final determination within two months, unless circumstances causing the delay are beyond the judge's control. The legislature recognizes this exception, but nothing in our current rule incorporates that statutory standard. I don't view incorporating a statutory standard in the rule as supplanting JPEC's responsibility because nothing related to certification is binding on JPEC. JPEC can ultimately reach a different conclusion.

Justice Durham: It's not a question of whether the Judicial Council is supplanting JPEC. It's a question of whether the Judicial Council is performing its obligations with respect to setting the standards. Part of the problem is that the language of the rule does not fully define the standard. I think 78A-2-223 is unconstitutional. The legislature doesn't have the power to tell the judiciary what reasonable time standards are. That constitutional authority belongs with the Judicial Council. JPEC isn't worried about losing power as much as we are worried about ensuring the Council's role is clear, and that role is to set standards. With respect to the statute, the Judicial Council could incorporate the same statutory considerations into the rule, detail them, and ensure JPEC and judges know exactly what the criteria are for compliance with time standards.

Dr. Yim: I would encourage you to think for a moment as a member of the public, as someone who goes to JPEC's website and reads about judges who serve their community. I believe there is real value in having objective standards. Providing the Judicial Council with the discretion to overrule the self-declaration of a judge makes it appear that this process is something less than objective. I would encourage the Council to articulate the exceptions in the rule, so judges and the public know exactly what those standards are in advance. Those are better optics than allowing the Judicial Council to overrule and pass a judge who has failed the objective standards.

Judge Heward: Do judges make the determination themselves about when they self-disclose a situation beyond their control?

Ms. Romano: That was my suggestion with respect to potentially amending the self-declaration form, adding a section to provide objective information about a circumstance a judge feels was outside of his or her control, such

as a temporary disability, pandemic, hurricane, earthquake, etc. The judge would be accurately reporting that he or she did not meet the definition of the standard, but with an explanation as to why they should not be held accountable. That would allow JPEC to overcome the presumption. The Judicial Council should set the standard, but the Council should not also be applying the standard and telling JPEC whether the standard has been met.

Judge Heward: If paragraph (6) were adopted, JPEC would be getting more information than they were before and nothing prevents JPEC from making its own determination. I don't think that infringes on JPEC's responsibility.

Justice Durham: You're right that JPEC would get more information under the alternative proposal, but think about the optics. For example, the Judicial Council reviews and publishes its findings with respect to a particular judge, saying 'no this judge didn't meet the standards but we're going to excuse it and deem him or her in compliance because of the following factors,' and then JPEC disagrees, saying 'we don't think those factors arise to a sufficient level to deem this judge in compliance.' As Jennifer points out, what does the public make of that? The legislature didn't want judges judging the performance of other judges, which is why they split the functions, with the Council setting standards and JPEC enforcing those standards, or at least deeming compliance with the standards. I agree that JPEC would be getting more information and that's a factor we should keep in the mix. The more information the better and JPEC wants it, but I don't think you really want to set things up in such a way that the Council could potentially be in conflict with JPEC on evaluations.

Ms. Sylvester: This highlights the balance of power between the executive and judicial branches. I see the optics from a positive angle. If the Council thinks a judge should be certified but JPEC disagrees, that would underscore how important JPEC really is.

Dr. Yim: From a historical perspective, when a judge fails the minimum standards of performance, JPEC has always received from the judiciary the same amount of information suggested here. The commission invites and/or meets with the judge and the AOC provides written documentation. It would be great if that requirement were written into the rule, but in my view this is not an increase in information.

Judge Connors: When each judge signs his or her own self-declaration, copies are sent to the presiding judge. What am I supposed to do with them? Am I supposed to decide if what the judge wrote is truly a violation? Am I supposed to make some comment to the Judicial Council as I pass them along, or am I simply supposed to sign them with a note saying I reviewed them and send them on? Example: a brand new judge self-declared that he was non-compliant when, in fact, he was in compliance and had just made a mistake. He checked the wrong box. He had inherited something from a prior judge and hadn't had 10 minutes to think about the matter, let alone 60 days, and yet he declared himself non-compliant. And what about 50/50 compliance situations (i.e., rule suspensions due to the pandemic)? I don't see anything in the rule addressing those sorts of situations.

Justice Durham: If it's a clerical error, take the form back to the judge, explain the process, and give him a new form to fill out. I was thinking of other rules, like the education rule, that are based on clear objectives. Did you show up? Did you get enough credit hours?

Judge Pullan: The purpose of Policy and Planning is to serve as a lightning rod to identify the policy interests of stakeholders and ultimately make a recommendation to the Council. The discussion today has been fruitful and helped us better understand JPEC's concerns. Laws can be developed in two ways, by rule or case-by-case over time. If we were to try to list all of the circumstances outside a judge's control, it would be a very long list. My question is do we try to come up with a list, or do we let the standards develop case-by-case over time?

Justice Durham: Establishing a more robust definition of compliance and exceptions would help, but there are two issues. First, who should have discretion, the Council or JPEC? Second, related to the exercise of discretion is the scope of the discretion. Under the current rule, that scope is very broad. This discussion is about how to narrow the scope and make the standards more robust. If some of the discretion belongs with the Council, what is the scope of that discretion?

Judge Pullan: I don't like the good cause language. It isn't found in the statute and I think it should be eliminated. That is a narrowing of discretion.

Mr. Bahr: If the Council determines that a judge is non-compliant, is that information published by JPEC?

Dr. Yim: JPEC is statutorily required to invite a judge to appear if the judge fails a minimum standard. The judge can decline to appear, but it is not discretionary on JPEC's part. The commission will write a narrative giving the reasons for the failure and how the judge overcame that failure. If a judge chooses not to run for retention, certain parts of the report from the Council would be redacted as that information is protected.

Mr. Bahr: One of the BDCJ's concerns was what information would be made public.

Justice Durham: I recommend that we start focusing more on the creation of a rebuttable presumption, and maybe incorporate that language somewhere in the rule.

Judge Pullan: In terms of the legitimacy of our institutions, the Judicial Council has no interest in certifying bad judges and JPEC has no interest in decertifying good judges. If JPEC starts to decertify judges for things beyond their control, JPEC's legitimacy in the eyes of the public would be diminished. The same for the Council. Judge Pullan invited Dr. Yim, Justice Durham, and Ms. Romano to Policy and Planning's November meeting to continue this discussion and work on a rule draft. Judge Johnson and Judge Lawrence from the BDCJ will also be invited.

Ms. Williams will send Judge Heward, Judge Lawrence, and Judge Cannell a copy of the WebEx recording of today's meeting. Judge Heward will discuss this issue with the Board of Juvenile Court Judges. Judge Cannell will report to the BDCJ on October 16<sup>th</sup>.

**(3) Rules back from public comment:**

- 3-104. Presiding judges
- 3-111. Performance evaluation of senior judges and court commissioners
- 4-202.02. Records classification
- 6-507. Court visitor
- 3-407. Accounting
- 4-609. Procedure for obtaining fingerprints and OTNs on defendants not booked in jail
- 10-1-404. Attendance and assistance of prosecutors in criminal proceedings
- 4-401.01. Electronic media coverage of court proceedings
- 4-401.02. Possession and use of portable electronic devices

Ms. Williams reviewed rules back from public comment. Two comments were received on rule 6-507, and one comment was received on 4-401.02. No comments were received on the other seven rules.

Rule 6-507

Ms. Sylvester reviewed the public comments on Rule 6-507. A statutory reference in paragraph (2)(C) was corrected. In regard to the requirements under (3)(B), most of the rule simply codifies what court visitors are already doing, so I don't think this creates any additional burdens. In regard to interviewing physicians, I haven't heard of any significant challenges. From what I understand, court visitors just keep trying until they get in touch.

Judge Pullan: If a physician has conducted an assessment and provided information relevant to the physical or mental condition of the defendant, that's a pretty important person that I'd like to talk to.

Judge Connors: Most of the letters from physicians are incredibly general, and some are only 1-2 lines long. It's important to have someone follow up to ensure the physician conducted a thorough assessment, rather than taking mom or dad's word for it. I'm not aware of a single case where a court visitor has gone rogue and run up a bunch of fees and expenses. I would hate to remove "will" and change to "may" and then be unsure if I'm going to

get useful reports from court visitors. There are circumstances when a court visitor can't get a physician to respond or do a home visit, but they usually just indicate that in their report. I don't think this is a problem.

Judge Cannell agreed.

Mr. Bahr: It can take quite a bit of time to get a response from a physician and it has been even more challenging lately with COVID, but that's a policy issue that could be handled on the program side. Court visitors can be instructed to make a note in the report regarding their efforts to contact a physician and move on.

#### Rule 4-401.02:

Ms. Williams reviewed the proposed amendments and public comment on behalf of Mr. Johnson. After reviewing the public comment, Mr. Johnson recommends one minor change, adding the word "portable" to the definition of "electronic device." Mr. Johnson's original concern was that people would be able to record remote proceedings from home with a device that would not necessarily be considered "portable," but the definition of electronic portable device includes personal computers (which are not easily portable), so including "portable" probably isn't an issue.

As for the public commenter's suggestion to simplify the language, that would require an entire re-write of the rule. Because remote hearings are common practice, there is some urgency to these changes and the rule as proposed is sufficiently clear. By way of background, the original purpose of the rule was to address the increasing use of electronic devices in courtrooms. The intent of the rule was to clarify that people would be permitted to silently use items such as cell phones and laptop computers in the courtroom, but no recording would be permitted. The focus of the rule was not necessarily on recording, but permitted uses. The current proposed amendment focuses more on recording.

Mr. Rice moved to approve all of the rules under this section (as amended) for recommendation to the Council that they be approved as final with an effective date of November 1st. Judge Connors seconded the motion. The motion passed unanimously.

#### **(4) 4-202.02. Records classification**

Ms. Williams: HB 206 went into effect on October 1, 2020. Judges are now required to consider an individual's ability to pay a monetary bail amount any time a financial condition of release is ordered. The Judicial Council recently adopted a new matrix that recommends monetary bail amounts based on an individual's gross household income and number of dependents. In order to provide judges with that information at the time an initial release decision is made, law enforcement will begin asking defendants those two questions and submitting the answers to the court electronically via the probable cause system.

Rule 4-202.02 classifies affidavits of indigency as Private records, but as it is currently written, the rule would not cover the two data elements because the answers would not be submitted as part of an affidavit. The proposed amendment at line 142 would cover both affidavits of indigency and the financial data elements as Private records. Programming required to submit and capture the two data elements has not yet been completed so there isn't a rush to approve the rule amendment at this time.

With no further discussion, Judge Cannell moved to approve the rule as proposed for recommendation to the Council that it be published for comment. Mr. Rice seconded the motion. The motion passed unanimously.

#### **(5) 4-403. Electronic and signature stamp usage** **3-104. Presiding judges**

#### Rule 3-104

Ms. Williams reviewed the proposed amendments on behalf of Mr. Johnson. The proposed amendments at lines 132-134 identify district court presiding judges (PJs) as the signing judge on all automatic expungement orders in the presiding judge's district, including those in justice courts. Judge Cannell questioned whether district court presiding judges have jurisdiction to sign expungement orders in justice court matters. After further discussion, the committee asked Ms. Williams to follow-up with Mr. Johnson regarding the committee's concerns and email members with Mr. Johnson's response. The committee will vote via email whether to approve the rule as drafted for recommendation to the Council that it be published for comment.

Judge Cannell moved to approve the proposed amendment to rule 3-104, provided Mr. Johnson determines that district court presiding judges have jurisdiction to sign orders for justice courts, and the committee votes via email to approve those amendments. However, if district court PJs lack jurisdiction, he moved that the rule be amended to make justice court PJs the signing judges for justice court cases and district court PJs the signing judge in district court cases. Judge Heward seconded the motion. The motion passed unanimously.

#### Rule 4-403

Ms. Williams reviewed the proposed amendments on behalf of Mr. Johnson. Following a brief discussion, Judge Connors moved to approve the rule as drafted for recommendation to the Council that it be published for comment. Judge Cannell seconded the motion. With no objections, the motion passed unanimously.

#### **(6) 3-419. Office of Fairness and Accountability:**

Ms. Williams incorporated Judge Connor's feedback from the last meeting. The AOC is currently interviewing for the director position. Judge Pullan asked Ms. Williams to hold off on additional amendments to the rule until the new director is on board and can provide input. The committee made no changes to the proposed rule.

#### **(7) Old business/new business:**

Ms. Williams reported that Bart Olsen has prepared a packet of all of the proposed amendments to Human Resource (HR) policies. Because the revisions are so extensive, Mr. Olsen is proposing that he email Policy and Planning members a memo outlining the amendments. Members would conduct a review of the policies on their own time and provide feedback to Mr. Olsen prior to the November meeting. At the November meeting, the committee would review those policies flagged by members for discussion. Judge Pullan was in favor of Mr. Olsen's proposal and requested an executive summary of the proposed changes. Ms. Williams will report back to Mr. Olsen and add the HR policy revisions to the committee's November agenda.

#### **(8) ADJOURN:**

With no further items for discussion, Judge Cannell moved to adjourn the meeting. Mr. Rice seconded the motion. With no opposition, the meeting adjourned at 2 pm. The next meeting will be on November 6, 2020 at 9 am via WebEx video conferencing.