

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

Webex video conferencing  
November 6, 2020: 9 am – 5 pm

<b>MEMBERS:</b>	<b>PRESENT</b>	<b>EXCUSED</b>	<b>GUESTS:</b>
Judge Derek Pullan, <i>Chair</i>	•		Paul Barron
Judge Brian Cannell	•		Brent Johnson
Judge Augustus Chin	•		Justice Christine Durham
Judge David Connors	•		Judge Christine Johnson
Judge Michelle Heward	•		Judge Barry Lawrence
Mr. Rob Rice	•		Judge Heather Brereton
			Dr. Jennifer Yim
			Bridget Romano
			Bart Olsen
			Jeremy Marsh
			Shane Bahr
			Judge Judith Atherton
			Cathy Dupont
			<b>STAFF:</b>
			Keisa Williams
			Minhvan Brimhall

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

Judge Pullan welcomed the committee to the meeting. The committee considered the minutes from the October 2, 2020 meeting. With no changes, Rob Rice moved to approve the minutes as drafted. Judge Heward seconded the motion. The motion passed unanimously.

**(2) Proposed amendments to senior judge rules:**

- 1-305. Board of Senior Court Judges
- 3-104. Presiding Judges.
- 3-108. Judicial Assistance
- 3-113. Senior Judges
- 3-501. Insurance Benefits Upon Retirement
- 11-201. Senior Judges
- 11-203. Senior Justice Court Judges

Judge Pullan welcomed Judge Atherton and Cathy Dupont.

Judge Atherton: The impetus behind the rule changes was to clean up and clarify a few technical issues like reappointments and how to appeal the denial of an appointment because the rules hadn't been reviewed in quite some time. There were no substantive changes. The appointment language was moved to rule 3-108.

Ms. Dupont: This started over a year ago when the Board of Senior Judges realized that some of the rules didn't match current practice. For example, there weren't enough senior judges to fill the board seats, and the board

typically only meets annually at the judicial conference. The Board changed the organizational structure to just five board members and the meeting requirement to once a year (rule 1-305). They can meet more often if needed.

The more technical changes were made after receiving questions from TCEs and judges about when senior judges could be appointed and for what reasons. For example: When do TCEs/judges have to seek permission from the Management Committee if they think the need for a senior judge may exceed 14 days? When can TCEs/judges appoint a senior judge without first considering whether a sitting judge can cover the case or calendar? There was a lot of confusion because the answers were spread across three different rules. The Board marshaled all of those provisions into one rule (rule 3-108).

Another change stemmed from a request by the education department for the ability to pay senior judges to serve as mentors for newly appointed judges (3-113). The education department tried to make that change back in 2008, but the Council chose not to adopt it due to budget constraints. Unfortunately, COVID presents similar budget constraints, but with the backlog of jury trials, the circumstances may be different. Also in rule 3-113, is a proposed increase in compensation for senior judges for non-judicial service days, such as attending conferences and CLEs. Currently, the compensation is \$25 for a half-day and \$50 for a full day. The proposed increase is \$50 for a half-day and \$100 for a full day.

Pullan: In light of our current budgetary constraints, what is the impetus behind the request for an increase in compensation? That may need to go through the Budget and Fiscal Management Committee. Do we have the money and where would it come from?

Ms. Dupont: The impetus behind the increase was a request from a board member. The amounts haven't been adjusted in at least a decade.

Another proposed change relates to grand jury service. The statute allows an active senior judge to serve on a grand jury. Judge West currently serves on a grand jury and he has submitted a request for reimbursement under the "education and community service day" rate. Reimbursement for the higher "judicial service day" rate requires an order of appointment from a presiding judge, and the "judicial day" rate section in the rule doesn't contemplate grand jury service. Judge Davis is about to retire. He has a pending request for appointment as a senior judge because he also wants to serve on the grand jury. Grand jury service should be added to the list of things that qualify for reimbursement at the "judicial service day" rate. The other option is to pay those rates out of the grand jury budget, but that budget has historically been \$800 per year and is really only meant to cover travel. This is a policy consideration and it's not included in the proposed rule drafts for review today.

After discussion, the Committee voted to amend the rule to compensate grand jury service under the "judicial service day" rate. Ms. Dupont will make that change.

Judge Pullan: The Judicial Council has expressed concerns with the incentive benefit compensation. Right now, if someone applies for senior judge status and they meet the qualifications, the request is automatically granted. When the Council met in February 2020, they had concerns about that practice. Every time the Council approves a senior judge, there is cost associated with that decision. What is that cost?

Judge Atherton: After retirement, judges receive medical benefits for seven (7) years. At the end of 7 years, they become eligible for incentive benefits. The court pays half of the medical benefits and half of the incentive benefits for both the judge and their spouse. Currently, ten (10) judges fall in that category. The intent appears to be to ensure senior judges receive the same (or close to the same) compensation as sitting judges. For example, sitting judges receive their full salary when attending a conference, but senior judges only receive \$50. The incentive benefit seems to even things up a bit.

The only costs associated with senior judges in the first seven years of service is for bar dues and conferences. There is a small education fund of about \$900, but it is rarely used because it's traditionally reserved for out-of-state travel. It could be used to pay for bar conventions and dues.

Judge Connors: For senior judges in the first seven years, the cost seems de minimis. If so, it may be worth having more judges to draw from. The Council could conduct a detailed review of someone's senior judge status just prior to the end of that 7-year period before deciding whether to recertify that judge. The Council could look at the judge's individual record, conduct an interview, determine whether they had an equal opportunity to serve, and ask about the reason for declined assignments.

The Committee discussed incentive benefits and judicial days worked for current senior judges from 2016-2020, including the difference in appellate service.

Judge Pullan: Is there a way to systemically and objectively determine the number of senior judges we need across the state? The Council could then make a decision about granting senior judge applications based on need, instead of automatically granting senior judge status and incurring unnecessary costs.

The data suggests that appellate senior judges are used so infrequently that we may not need them. As a district court judge, I have sat by assignment on the Supreme Court several times. Is that a better way to do it? There may be good reasons to have them. For example, after retirement it might make sense for a justice to remain on a pending case. Our data suggests we are not using them, but why? We need input from the appellate courts.

Ms. Dupont: This year the days worked numbers are way down, but when the pandemic restrictions ease up, the needs will rise again. It is also hard to predict when we might have a need due to death, illness, or unusual events. There is value in having senior judges ready to serve when unexpected things happen. I'm not sure how to plan for those circumstances.

In the rule for appointment, in most cases, TCEs must first attempt to use sitting judges to cover the case or calendar. If the TCE can't cover it with a sitting judge, they can then look to senior judges. At that point, the TCEs are in a hurry to find someone. An email is sent out to all of the active senior judges asking for help with coverage. Senior judges are saying it is a race and whoever answers the email first generally gets the appointment. Some of the senior judges aren't quick enough to respond so they never get appointed. No one is keeping a record of which judges are accepting or declining assignments.

Judge Atherton: Another difficulty is the lack of notice. Senior judges may have pre-existing plans when a need suddenly arises. Several times, I have accepted an assignment and then the morning of the event I'm notified that I'm no longer needed. There is a level of frustration when the parameters for "days worked" doesn't account for times when you've accepted an assignment but aren't needed at the last minute.

Judge Connors: There should be a rotating selection list to ensure all judges have an opportunity to accept or decline an assignment. TCEs or Presiding Judges would go down the list until someone accepts. A senior judge could explain the reason for declining an assignment.

Judge Pullan agreed. We ought to be keeping track of that data. Judge Connors' recommendation would also account for any conflicts of interest that require recusal. The list could be split into 3-4 sections covering various parts of the state. Another idea is for senior judges to designate their availability, for example, the second and fourth week of every month.

Judge Pullan: Another concern relates to qualification for those with minimal days worked. How do senior judges keep up with changing technology and changes in the law?

Judge Heward: Are there instances when a particular senior judge is targeted for a particular case or calendar based on their knowledge of a case or their area of expertise? Are some of the judges who haven't served in a long time not being asked because things have changed so much since they last served?

Both Judge Atherton and Judge Connors provided examples of instances in which specific judges have been requested based on that judge's experience with a particular case, or their expertise in a certain area of the law.

Ms. Dupont: Another question posed by the Council was whether there should be an age limit of 75 for senior judges. That is purely a policy question. Senior judges are certified once every three years until the age of 75, at which point they must be certified every year.

Mr. Rice: The rule states that senior judge appointments can be made to reduce a critical backlog. What does that mean? Who defines "critical backlog"? How would that be accounted for when determining the number of senior judges needed?

The Committee created a working group to study and make recommendations to Policy and Planning on rule drafts, policy issues, and overall improvements to the senior judge program, incorporating feedback from the appellate courts on their needs. The working group should provide a status report to Policy and Planning in December and final recommendations in January. The working group will consist of:

- Judge Atherton (senior judge representative)
- Rural TCE over both district and juvenile court
- Urban TCE
- Judge Connors (P&P and Council representative)
- Cathy Dupont will staff the working group

The working group's first task will be a recommendation to the Judicial Council about whether to consider approving pending applications for recent (or soon to be) retired judges, and whether to consider or wait to consider pending applications for recertification of senior judges past their first seven years.

**(3) Proposed amendments to the following rules:**

- 4-403. Electronic and Signature Stamp Use
- 3-104. Presiding Judges
- 3-108. Judicial Assistance

Mr. Johnson: The proposed rule amendments relate to automatic expungements. It's unclear whether this will work from a technological standpoint. How often do trial court judges use the words "dismissed with prejudice" or "dismissed without prejudice" when dismissing a case?

Judge Connors: We often use "dismissed without prejudice" early in a case when a prosecutor hasn't quite figured out if they have enough evidence to move forward.

Judge Pullan: The further you get into a case, if it were dismissed on the eve of trial for example, it might be "dismissed with prejudice," but that's very rare. The only time it might happen is if the prosecution files a case and then finds out that the information provided to them was false. There was no factual basis for the charge. In that case, the parties might stipulate to a dismissal with prejudice.

Judge Chin: It is the same at the justice court level. When the case is old and there are no witnesses to proceed, I remind prosecutors that the case may be dismissed with prejudice.

Mr. Johnson: Some judges don't believe the words "with prejudice" or "without prejudice" are appropriate in the criminal context because it's meaningless. It's ultimately a double jeopardy issue based on the statute of limitations. That may pose a problem. How do we accurately identify dismissals with and without prejudice? The statute specifically identifies those cases "dismissed with prejudice" as eligible for automatic expungement. When you pull a list of cases using the magic phrase "dismissed with prejudice," the number is surprisingly low. That may be because the practice isn't necessarily consistent from court to court and judge to judge.

Judge Connors: There may be a serious case in which the prosecution decides it doesn't have enough evidence to proceed that day. Usually the prosecution prepares an order of dismissal that says, "dismissed without prejudice." If the prosecution finds better evidence, they will file again. In the interim, if the first case wasn't prosecuted is it automatically expunged? The prosecution wouldn't be prevented from filing the new case unless the statute of limitations has run or double jeopardy attaches.

Mr. Johnson: There is a question as to whether we should proceed with these kinds of data integrity issues. If/when those issues are resolved, a mechanism needs to be in place in the rule.

Judge Pullan: At the last meeting, the committee discussed whether justice court judges should be signing expungement orders for justice court matters.

Mr. Johnson: I understand that the committee feels technology shouldn't be driving the decision. I agree that policy should be driving the programming and not vice versa. If the system can be programmed to identify a district court judge for district court cases, programming for the justice courts could probably work the same way. From a technological perspective, one area of concern is how to update the system when a signing judge has left the bench. It's important to tie it to a presiding judge because if the presiding judge changes and we happen to miss it, that judge would still be on the bench.

Paul Barron: We have an administrative judge field in CORIS that assigns the presiding judge for each district and for each of the courts within that district. I don't know how that is populated in the justice courts. It would certainly be possible to create additional tables and track a justice court presiding judge in the same way, but it would be a little bit more complex to implement because of the multitude of justice courts.

Mr. Johnson: The justice courts now have a single presiding judge in each district so there would only be eight (8) of them. From a legal standpoint, I think a district court judge could be the signing judge for both district and justice courts by assignment. The decision is a policy matter. That also goes back to the issue of whether the assignment should occur by rule or by administrative order from the Chief Justice on a regular basis.

I think we should fall back on the administrative order. In reviewing the statute, it provides for the assignment of judges by the Chief Justice as the presiding officer of the Council. You could argue that the statute shouldn't control what the court does, but to make certain there aren't any questions, we may want to use an administrative order.

Judge Pullan: Could the administrative order identify a presiding judge by position, rather than by name?

Mr. Johnson: There is potential for that, but the statute specifically requires that all assignment orders have a limited duration. We do something similar now in those districts where juvenile court judges cover district court cases. In December of every year, the Chief Justice signs a new order authorizing a juvenile judge, by name, to handle district court work. We could have the Chief sign orders every year authorizing presiding judges to sign automatic expungement orders for the district, but it may be best to assign them by name. There is an argument that the Chief Justice could at least appoint the presiding judge for that judge's term because that would be of limited duration. Every time the presiding judge changed, the Chief could sign a new order. That might help keep track of the changes. I think the term for presiding judges may be different for every district.

My recommendation is to use administrative orders. The proposed amendment to rule 3-108 would remain the same, except presiding judges in justice courts would sign for all justice court cases in the district.

Judge Connors moved to approve the proposed changes to rule 3-108 with Mr. Johnson's amendment and for the Chief to appoint presiding judges by administrative order, with a recommendation to the Judicial Council that the rule be published for comment. Judge Chin seconded the motion and it passed unanimously.

#### **(4) Abusive Conduct Policy:**

- CJA 2-111. Compliance with the CJA and CJC

- CJC Chpt. 12. Terminology
- Canon 2.12. Supervisory Duties
- Canon 2.3. Bias, Prejudice, Harassment
- 67-26-202. Abusive conduct complaint, investigation, administrative review process

Mr. Johnson: In the last legislative session, the legislature mandated that certain policies apply to judges and court employees. It also mandated the incorporation of processes followed by other agencies. The approach I recommend is to add the abusive conduct policy to the Code of Judicial Conduct (CJC), and to amend CJA rule 2-111 slightly to allow all employees to report failures to comply with the CJC to the presiding judge of the Council. The Council does not have the authority to discipline judges. That authority resides solely with the Judicial Conduct Commission. By placing this in the CJC, it provides the JCC with a standard and the ultimate authority they need to terminate a judge who violates the abusive conduct policy in an egregious way. The Council's limited authority in addressing violations of the CJC, outlined in CJA rule 2-211, is to investigate and refer the issue to the JCC. Because we are in new territory with the legislature telling the Judicial Council to create a policy that is so specific to a particular topic, reasonable minds may differ as to whether this is the best approach.

If P&P agrees with that approach, the next step is to take to the proposed CJC changes to the Supreme Court.

Mr. Rice: I read it as a companion to the HR rule. I think it does a nice job of creating a complaint avenue for employees, and it seems like a reasonable solution.

Judge Heward motioned to approve the proposed amendments to rule 2-111 pending Supreme Court approval of the companion amendments to the CJC. Mr. Rice seconded the motion and it passed unanimously.

#### **(5) Rules back from public comment:**

- CJA 3-413. Judicial Library Resources (expedited effective date of 8/21/20)

Ms. Williams: After a 45-day comment period, no public comments were received. The rule was approved on an expedited basis. If there are no changes to the rule, no further action is needed.

After discussion, the Committee made no changes to the rule and took no further action.

#### **(6) CJA Appendix J. Ability-to-Pay Matrix:**

Ms. Williams: The Council adopted the Ability-to-Pay Matrix in response to HB 206, with an October 1, 2020 effective date. The Council's Standing Committee on Pretrial Release and Supervision has received feedback that the matrix appears to eliminate judicial discretion to set a monetary bail amount higher than an individual can afford to pay, and that it caps the maximum monetary bail amount at \$5,000. That is not the case. The matrix provides recommended monetary bail amounts using the poverty guidelines and an individual's risk of failing to appear in court, but judges have discretion to deviate from those amounts and can set an amount outside an individual's ability to pay. The Pretrial Release Committee added the proposed language in an effort to clear up any confusion. The new columns in the chart on the left-hand side of the page are not a substantive change. Those numbers still reflect the poverty guidelines. The changes were necessary to match the ranges listed in the columns in the chart on the right-hand side of the page for programming purposes.

Judge Connors asked for clarification on the PSA FTA Risk Score. Judge Pullan asked for clarification on the percentages listed next to the FTA risk scores.

Ms. Williams: The failure to appear (FTA) numbers (1-6) correspond with the failure to appear risk score on the PSA. That does not reflect the number of times an individual has failed to appear. The score is determined using an algorithm that takes into account all 9 factors on the PSA and converts a raw score into the scaled 1-6 score.

The percentages listed next to the FTA score reflect the average rate of appearance for those individuals with the same risk score in the national PSA validation study. In creating the PSA, researchers studied 1.5 million cases across federal and state courts in both rural and urban jurisdictions. They then followed defendants for two years. For those individuals who scored an FTA1, they appeared (on average) 90% of the time. Those who scored an FTA2 appeared, on average, 85% of the time, etc. It's important to remember that these tools provide a statistical prediction. They cannot tell you what a specific individual will or won't do.

Judge Pullan: When a person fails to appear, their failure rate in my court is 100%. Do we really have to wait for that person's FTA score to reach a "4" to issue a warrant to get them back to court?

Ms. Williams: No. Judges can, and do, issue warrants following a single failure to appear and you have the discretion to deviate from the recommended amounts on the matrix. These are fact-based decisions and every circumstance will be different. It's difficult to determine what dollar amount or condition will adequately incentivize a particular individual to appear in court. The matrix is meant to provide guidance and assistance in conducting an ability-to-pay analysis and determining the least restrictive conditions necessary to ensure appearance.

Judge Connors: Putting this into practice is very difficult. It will take time to achieve consistency across the board.

After discussion, the committee made several amendments to the proposed language.

Judge Cannell motioned to approve the matrix, with the Committee's amendments, for recommendation to the Council that the matrix be approved on an expedited basis and sent out for public comment. Judge Connors seconded and the motion passed unanimously.

#### **(7) Courthouse attire language in jury summons and CORE/CARE notices:**

Ms. Williams: CJA rule 4-411 went into effect on November 1, 2020. The language on the jury summons (page 2) conflicts with the rule. Should that entire paragraph be removed, or should the language be amended?

Mr. Rice: If there haven't been any reports of related issues with prospective jury pools, I would delete it.

No jury pool issues were reported to Ms. Williams or Mr. Barron.

Judge Cannell: Rule 4-411 states that all contrary statements must be removed, so the paragraph should be deleted.

Judge Pullan: A jury summons is an order to appear. Do we place someone who does not have business attire in a position where they have to choose whether or not to comply with a judicial order? The existing language should be replaced with a statement that jurors must "dress appropriately," followed by a reference to CJA rule 4-411.

After further discussion, the Committee agreed.

Ms. Williams: Language regarding attire has already been centrally removed from all CARE notices, but a question remains as to CORIS.

Mr. Barron: Each court location can customize the language in their notices in CORIS. Currently, 10 district courts have a custom note addressing prohibited or required attire. Justice courts haven't been checked yet. We could send an email to courts with attire-related notes asking them to delete the language entirely, or require them to use specific language with a reference to the rule. I don't recommend having the IT Department delete the notes centrally because court locations have the ability to create them again.

Ms. Williams: This might be a training issue. Some clerks of court have already deleted the language from their notices.

After further discussion, the Committee determined that court locations should be instructed to either delete their notes entirely, or be directed to change the language to match the revised summons – “dress appropriately” with a rule reference.

Judge Connors moved to approve the change to the summons and the Committee’s decision on the directive to all court locations. Mr. Rice seconded the motion and it passed unanimously.

Ms. Williams and Mr. Barron will work together to make the changes.

### **8) 3-101. Judicial Performance Standards:**

Judge Pullan welcomed guests.

Judge Lawrence: The Board of District Court Judges’ (BDCJ) intention behind the rule draft is not to skirt responsibility. The issue lies solely with circumstances beyond a judge’s control. This came to the board’s attention two years when, despite JPEC’s recommendation of retention because the circumstances were outside of those judges’ control, negative statements were posted publicly indicating that the judges hadn’t complied with the cases under advisement standard.

Utah Code 78A-2-223 states that a trial judge shall decide all matters submitted for final determination within two months of submission, unless circumstances causing the delay are beyond the judge’s control. The statute recognizes that judges shouldn’t be penalized, or found non-compliant, for situations outside that judge’s control. The rule should reflect that as well and the issue should be resolved by the Council before it goes to the Judicial Performance Evaluation Commission (JPEC). The Commission isn’t aware of the court’s processes, so the board feels that the Council should have the ability to excuse conduct that is beyond a judge’s personal control. That is a pretty high standard. We are talking about cases that are sitting in a basket in the courthouse somewhere for 90 days before they are finally brought to the judge’s attention. The argument that it’s harmless error because no judge has been affected by it is unsatisfactory because we shouldn’t wait for a judge to be unfairly not retained before the issue is addressed. It is unfair for a judge to have a blemish on their annual report when they didn’t do anything wrong. The board feels very strongly about this issue.

With respect to Judge Pullan’s proposed draft, I think it makes things more complicated than they need to be and I disagree that a judge should be deemed non-compliant (with an explanation) for things beyond their control. They are compliant under the statute. It’s also a little internally inconsistent because paragraph (4) seems to indicate that a judge would be compliant, but paragraph (6)(D) says they wouldn’t be compliant.

Judge Pullan: The new definition of “case under advisement” seems to get at the issue you discussed and the issue we all fear, that a notice to submit sits on a clerk’s desk for 90 days before making it to a judge. Under the new definition, that case wouldn’t be considered “under advisement” until it reached the judge. Would the new definition resolve the issue?

Judge Johnson: The board recommended the new definition and felt like it addressed the main problem, but there are always going to be circumstances that you don’t foresee. For that reason, the board felt that paragraph (6) was an important catchall for unforeseen circumstances that the Council ought to be able to weigh in on.

Mr. Bahr: One example was a tax case that was heard in one district and then transferred to another district. It was already under advisement, so the receiving judge was penalized even though he didn’t see it until after the 90 days.

Ms. Romano: We noticed the same inconsistency with subsection (4). JPEC doesn’t have any concerns with respect to broadening the definition of what it means for a case to be under advisement. I think the new definition will capture most circumstances. Previously, we discussed circumstances when the clock is compromised. A judge may



be aware that the clock is ticking, but is unable to respond because of circumstances beyond their control. We are struggling with how best to accommodate judges' desire for fairness and the Council's desire for the ability exercise some discretion, with JPEC's obligation to conduct an evaluation and make recommendations according to the statute.

Justice Durham: No one on JPEC thinks a judge should be unfairly penalized for circumstances outside of his or her control. The concerns we've raised have to do with where the discretion to determine compliance lies. I think there is a significant problem with the statute. The statute sets time standards for the judicial branch. The Constitution gives the judiciary the power to govern the administration of justice. The Council sets those standards. I don't think the Council is beholden to the statute. In addition, that statute contradicts the governing statutes for JPEC, which gives to the commission all the power with respect to final determinations regarding standards and recommendations to the voters.

We are not at all concerned with the Council's investigation and their opinion about what should be excused. The issue is whether it is the Council's role to excuse or whether it is JPEC's role to excuse. JPEC's adapted rule draft makes it clear that JPEC wants to hear from the Judicial Council and that we would give great deference to the Council's expertise with respect to the way the system works.

Dr. Yim: Concerning the situation with the two justice court judges that Judge Lawrence referred to, it is true that those judges were found to be non-compliant with the case under advisement standard. JPEC listened carefully to the situation with each of those judges and voted unanimously to recommend that the judges be retained. We published detailed information in our narratives explaining why we found the judges' conduct in both of those situations to be absolutely acceptable and that the public should not be concerned at all about that determination. I don't see any harm to those judges as result of that process. I do not see JPEC's evaluative process as retributive in any way. That is not what the commission sees as its role. The process is designed to help judges be the best judges they can be, to ensure Utah has the strongest possible judiciary, and to keep the public informed.

Judge Connors: The question is who decides the issue of compliance or non-compliance. If the statutory standard is that I have 60 days, except for matters that are beyond my personal control, isn't it the district court judge who ought to be the first one making the decision of compliance? That is what the declaration form is all about. After that, is it the Council or JPEC that gets to evaluate more carefully whether it was or was not within the judge's personal control? If the Judicial Council says it was not within their personal control, you do not have a non-compliant judge.

Justice Durham: The Judicial Council gets to investigate and offer a compliance recommendation and an explanation, but JPEC isn't bound by it. JPEC will do its own investigation and judges get a full hearing.

Ms. Romano: It is the judge's first obligation to view his or her calendar and his or her compliance and self-report. If the judge believes they have complied, with the exception of circumstances beyond their control, then they make the information available. If the Council agrees with the judge, who has the authority to "excuse" the non-compliance?

Dr. Yim: I have learned that there is a real desire for the Council to be heard on these hard cases. I think that's reasonable. I suspect that JPEC would very much welcome information from the Council, including an explanation about circumstances beyond a judge's control. There is no desire to exclude the Council in any way from having input in this process, but it's important to consider the public optics. It shouldn't look to the voters like the judiciary is trying to cover up performance issues. In overcoming a presumption that a judge not be retained, JPEC has always been willing to take the creditability hit from the perspective of voters that we are a legitimate group willing to fairly evaluate judges. That has been true even when a judge has a judicial sanction in their record that looks terrible to voters. We know that voters don't know enough about the judiciary to understand how the system works.

Judge Heward: I appreciate the system we have and appreciate that JPEC is taking the hit so that it doesn't sound self-serving on the part of the judiciary. I would suggest that voices are more impactful when there are more opinions. If the Council were to say a judge is compliant, but JPEC decides something different, that is pretty pointed and people are going to notice. None of our judges want to be in that position. If the Council makes the determination that the judge is compliant because of a circumstance outside of a judge's control and JPEC agrees, that is also powerful. The Board of Juvenile Court Judges fully supports the recommendations and concerns expressed by the Board of District Court Judges.

Judge Cannell: I understand the need for transparency and providing good information to voters, but if a determination is made that circumstances were beyond a judge's control, why find a judge non-compliant? It is not consistent with the statute, constitutional or not. The problem is the negative inference in a public record.

Judge Pullan: I have been persuaded that the Judicial Council ought to have the discretion by rule to determine that a judge is non-compliant, even if that judge's self-declaration says that they are. If the Judicial Council has credible information that the self-declaration isn't true, the Council ought to be able to determine that the judge is non-compliant. That would improve optics.

Another consideration is what the standard should be and how to incorporate the "beyond control" exception. If the Council says "non-compliant with explanation" and provides supporting materials to JPEC, JPEC would have more information and likely reach the same conclusion. Today, the Council simply says "non-compliant." I don't think the Council has any interest in certifying judges who are not meeting the standards. We ought to be thinking about how the systems function independent of one another, creating a check on powers.

The inconsistency in my proposed rule draft could be resolved by creating three (3) categories instead of four (4): compliant, non-compliant, and compliant with explanation.

Ms. Romano: JPEC proposed similar changes, but chose "non-compliant with explanation" to avoid the optics of conflicting determinations by the Council and JPEC.

Justice Durham: The judge is not compliant with the current standard and therefore it is excusable.

Judge Connors: According to the statute, if in fact the circumstances were beyond the judge's control, there is no technical non-compliance. There is no standard mandating that judges decide, within 60 days, things that are outside of their control. The Council could always set a different standard. Who gets to make the final determination is a different question.

The Committee discussed self-reporting and determined that the self-declaration form should be modified. If a judge declares a case wasn't decided within 60 days, there should be a section for the judge to explain whether and why it was beyond his or her control.

Ms. Romano: JPEC could potentially modify the form to get us closer to where you want to be. Subsection (4) of the rule could be modified to include a requirement that judges provide a written explanation and any supporting documentation to the Council for review, along with the self-declaration form.

Judge Brereton: The new proposed amendments to the rule haven't been reviewed by the BDCJ. I think the board would like an opportunity to weigh in.

Judge Johnson: "Compliance with an explanation" undermines the certification. It is an asterisk and will leave a mark. If the only reason a decision was past 60 days is due to something outside of a judge's control, they are compliant. We shouldn't undermine the judge's credibility by putting an asterisk by their name and suggesting there is some story behind it.

Judge Cannell agreed with Judge Johnson. Making that information public doesn't make the judge a better judge.

After further discussion, the Committee made no changes to the proposed amendments to subsection (2) and the definition of a case under advisement. Subsection (6) was amended to include three categories: Compliant, compliant with explanation, and non-compliant, which may include a judge who self-certified compliance but the Council has credible information inconsistent with that certification.

Dr. Yim: I like the draft. It takes everyone's best interests into consideration and it's not dissimilar from the changes we made. I will take it to the full commission at its December 15<sup>th</sup> meeting. Judge Pullan will attend on behalf of Policy and Planning.

Judge Pullan recommended that the comment period be extended to account for JPEC's January meeting. Ms. Williams will include the rule draft on the Council's November 23<sup>rd</sup> consent calendar.

Judge Connors moved to approve the rule draft as amended with a recommendation to the Council that the rule be published for a 60-day comment period. Judge Cannell seconded and the motion passed unanimously.

#### **(9) HR Policies:**

Mr. Olsen reviewed the memo he distributed to the Committee along with the proposed policy drafts, and his recommendation that the policies be considered as a whole, rather than piecemeal.

After discussion, the policies were assigned to each committee member for review as follows:

- HR 1-5 – Judge Pullan
- HR 6-7 – Judge Cannell / Judge Heward
- HR 8-9 – Rob Rice
- HR 10-14 – Judge Connors
- HR 15-17 – Judge Chin

Committee members will make any proposed amendments in the Google doc or send them to Mr. Olsen, and will report back to the Committee at the December meeting.

#### **(10) ADJOURN:**

With no further items for discussion, Judge Chin moved to adjourn the meeting. No seconded the motion. With no opposition, the meeting adjourned at 2:27 pm. The next meeting will be on December 4, 2020 at noon via Webex video conferencing.