UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

Webex video conferencing
February 5, 2021: 12 pm -2 pm

MEMBERS:	**PRESENT**	**EXCUSED**
Judge Derek Pullan, *Chair*	•	
Judge Brian Cannell	•	
Judge Samuel Chiara	•	
Judge David Connors	•	
Judge Michelle Heward	•	
Mr. Rob Rice	•	

GUESTS:

Paul Barron
Bart Olsen
Jeremy Marsh
Jordan Murray
Judge Mary Noonan
Loni Page
Chris Palmer
Heidi Anderson
Karl Sweeney

STAFF:

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 January 8, 2021 meeting. Judge Connors noted a few typos omitting "Judge" in front of Judge Pullan and Judge Chiara's names. With no other changes, Judge Connors moved to approve the draft minutes subject to those amendments. Rob Rice seconded the motion and it passed unanimously.

(2) Proposed grant policies and procedures:

Judge Pullan: The lively discussion and close vote (7/6) on this issue demonstrates that the Judicial Council is a robust, policy-making body. The Council made this Policy and Planning's number one priority. Jordan Murray is the new grants coordinator. He will provide an overview of the memorandum, flowchart, and calendar to give us a general idea of the proposed policies. The plan today is for Policy and Planning to provide Mr. Murray with some feedback and direction.

Mr. Murray: The materials under tab 2 outline the steps we have accomplished thus far. The goal is to put guardrails in place to help guide the court's grant governance in the future, particularly as it relates to the new grant coordinator position. We've created a compliance calendar for the full calendar year that includes all of the active grants in the court's portfolio. We are working on a five-year retrospective review (or audit) of all grants to ensure that we've complied at every step along the way, and to identify any areas in which we need to double back and make sure we're appropriately following state and federal guidelines. The plan is to present those findings to the Judicial Council later this month.

We are working on a standardized process to solicit feedback within the court system to identify needs and determine how we can address those needs with grant funding. Beyond that, how do we present those needs to the Budget and Fiscal Management Committee and the Judicial Council, and how do we prioritize grants that should be pursued for the coming year? Mr. Sweeney and I met with the National Center for State Courts to research practices in other states. We have materials from Maryland, Nevada, Kentucky, and a few others, and we

are reaching out to them for more information. We don't want to reinvent the wheel, but we do want to identify best practices and tailor them to our unique needs in Utah.

Mr. Sweeney: There are no criteria for seeking grants. Up until now, if you wanted a grant and you had the time, you applied for it. We are seeking to enforce some of the same rigor that we impose on our budgets. How well does this grant accomplish the mission of the courts? You may not be able to accomplish your mission if you are pulled in too many directions, and with little results for the work. Ensuring the grant aligns with the courts' mission will become part of the vetting process. We also need to maintain flexibility. Prioritization decisions at the beginning of the year may change throughout the year. The policy should allow us to take an opportunistic approach if funding becomes available for a particular need that meets criteria, no matter where it was on the original prioritization list.

Judge Connors: I don't have any general issues with the memo as written, but I have some concerns about the three-day reporting deadline in Section 3. Is three days enough time to review and approve deliverables and get them filed in a timely manner?

Mr. Sweeney: That issue came up last week and we are considering increasing the deadline.

Judge Connors: In section (3)(e), I would use the words "will be used" rather than "sought". I wouldn't want to place an undue burden on our IT resources.

Mr. Sweeney: That section relates to a lesson learned. An employee obtained a grant that involved writing, research, and IT work. They went directly to the IT department to find an available contractor. However, the available contractor didn't have the entire skill set needed for that particular grant. Hiring the right contractor is critical. Rather than taking whoever is offered or available, it's much better to pay the appropriate amount and find the right person.

Mr. Rice: I'm having difficulty connecting the prioritization process in section (1)(a) with the criteria set forth in section (2). In section (1), it says the Supreme Court will prioritize grants that relate to Constitutional powers, but then it goes on to say in (2) that the Budget and Fiscal Management Committee will use different criteria to prioritize grants. Which of those sections control?

Mr. Murray: The language regarding prioritization in section (1)(a) may not be ideal. I don't think the intent was for (1)(a)(i-iv) to constitute the criteria by which the Supreme Court would make decisions, but rather it's meant to cover, generally, those things within the Supreme Court's jurisdiction. Section (2) outlines the criteria for how potential grant opportunities would be assessed.

Judge Pullan: I'm having a hard time reconciling the flowchart with the language in the memorandum. The box for grants within the Supreme Court's jurisdiction is sitting all by itself. There is no line suggesting Judicial Council involvement. The box for grants within the Judicial Council's jurisdiction is connected to a comprehensive process. Section (1)(a) of the memo suggests that Supreme Court requests will be subject to analysis by the grants coordinator. We should be clear that the Supreme Court intends to use the grants coordinator for at least some of this work.

CJA Rule 3-105 (effective May 1, 2021) outlines the procedures for issues raised in Judicial Council meetings that implicate the exclusive jurisdiction of either the Court or the Council. The body with exclusive jurisdiction takes ownership. Periodically, issues involve concurrent jurisdiction. In those instances, the rule outlines a process for negotiating whether one body will take primary ownership or whether those issues will be addressed via a joint effort. I have no problem with the Court using their own process for issues within their exclusive jurisdiction; however, I think that is going to be rare. At the very least, the grant money will run through accounting, so accounting and grant coordinator resources will be used. What if the grant requires hiring FTEs? The Council would have to be involved. We need to ensure that the proposed rule is consistent with rule 3-105, and that the flowchart is amended to reflect the process contemplated in 3-105.

Judge Connors: What grants fall within the list in section (1)(a)? If you took an overly expansive view of what those words mean, you could say everything falls within the governance of the practice of law.

Mr. Sweeney: We received an email indicating that grants related to the regulatory sandbox would fall within that list. Grant funding for that project is imminent, it just hasn't made it on the list yet.

Mr. Rice: It would be helpful to have a list of the universe of grants out there so we understand what the topics are. For example, the regulatory sandbox, collecting data to assist our fairness and equity efforts, and pro bono activities. I'm looking for a list of representative examples that allow us to develop criteria in the real world.

Judge Cannell: I agree. One of the challenges I had at the Council meeting was a lack of information about what we may be losing if we didn't act quickly. This is a great start and the process is very helpful, but I think we need prior notice and direction about what is coming up and what's already in the bucket.

Mr. Sweeney: We have such a list ready. We will ensure it includes the Utah Bar Foundation and get it out to everyone.

Judge Connors: Is the grant for the Utah Office for Victims of Crime a court grant or one for the State of Utah?

Mr. Murray: It is a court grant. It renews each year through the Utah Office for Victims of Crime. It's not a traditional grant where we pursue and apply for the grant each year. The state gets an allotment of guaranteed funds from the federal government and is the administering body. The state makes an award to the court, but it is considered a grant for our purposes because it is subject to reporting and other requirements necessary to maintain compliance.

Judge Pullan: At what point should the Judicial Council be involved in this process? If the Council isn't presented with a grant proposal until after all of the application resources have been expended and there is a $1M dollars on the table, it will be hard for the Council to turn down. There will already be organizational momentum behind it. Because the application process itself is expending organizational resources, the Council should be authorizing the application at some point.

Mr. Murray: I agree. I hope we wouldn't encounter that situation routinely. If we do, then we need to reassess. It should be a rare exception. The ideal process would allow the Judicial Council an opportunity to review and approve a grant before court resources have been overly invested.

Judge Pullan: Under this proposal, grants can begin at the TCE level. That many cooks in the kitchen may be very hard to manage organizationally. It says the grant coordinator will meet with the Council annually. What happens at that meeting? Is that when the Council is presented with potential grants for that year or the next year, and we prioritize which ones we want to apply for?

Mr. Sweeney: Yes, that is the plan for now. We could also meet quarterly.

Judge Pullan: Rules vetted by stakeholders tend to be more broadly accepted and implemented. I don't want to leave anyone out. The boards of judges should probably review the final product and Mr. Murray should take a look at the list of stakeholders to see if anyone else in our organization should weigh in. Any proposed amendments to the accounting manual should be reviewed by the Accounting Manual Review Committee.

Judge Connors: When does the Executive Appropriations Committee or the Legislative Fiscal Analyst get involved?

Judge Noonan: The law requires that the legislature be notified of grants at certain amounts, usually after the fact. We need to be very careful about grants that involve hiring FTEs, or that put the legislature in a difficult position to continue funding for projects that become critical to operations. We could establish a preference for grants with

some form of deliverable product that do not require additional staff or resources to implement that product on an ongoing basis. We should be able to absorb the costs because we've changed our business practices, or we've found additional capacity or efficiencies that allow us to continue to support the product in a way that does not impact the bottom line.

Judge Pullan: Is there a standard of practice for agencies to approach the legislature early on about federal grants? How does that work? As a matter of policy, I would like to approach the legislature even on medium Tier grants. They may have the same interest and I want to be respectful of the other branches.

Judge Noonan: That is a good question. We will have to do a deeper dive and report back.

Mr. Sweeney: The requirements in the flowchart come directly from the legislature. We cannot accept Tier 3 funds until the legislature has approved the grant in a general or special session. I agree that the judiciary could have a stricter policy than what the legislature imposes.

Judge Pullan: This cements the wisdom of not lifting the moratorium until we have a better understanding of these things. It also raises the question of the grant coordinator's job description. How will his time be best spent? The point at which he touches the grant applications seems important.

Judge Noonan: The moratorium will lapse by the next Council meeting, so the Council will need to readdress it or let it lapse.

Mr. Murray: Justice Himonas mentioned that a regulatory sandbox grant is urgent, and we just completed a grant assessment for an e-filing project at the appellate level. I am working with Larissa Lee and Nick Stiles to identify next steps. No timelines have been ironed out, but an e-filing grant may be an opportunity.

Judge Noonan: CARES funding may become available. Those funds are routed through the Bar Foundation so we wouldn't be administering it, but it could still be considered grant money.

Mr. Sweeney: Future CARES money will probably be handled the same way it was originally. The state is aware of our request and we are waiting to see how much we get.

After further discussion, the Committee agreed that this issue is too important to rush. It will remain the committee's first priority, but the rule must be well crafted and stakeholders must have input. The issue will be added to the February Council agenda as a separate item and Judge Pullan will provide a report on the Committee's progress. Mr. Murray and Mr. Sweeney will work on proposed changes to the Accounting Manual, and will work with Ms. Williams on a proposed rule draft, including the grant coordinator's duties. Mr. Murray and Mr. Sweeney will report back to Policy and Planning at its March 5th meeting.

(3) Rules back from public comment:

- CJA 3-101. Judicial Performance Standards
- CJA 3-108. Judicial Assistance

Ms. Williams: No comments were received on either rule. I reached out to Dr. Yim on rule 3-101. JPEC has no objection to 3-101 as drafted and is not recommending any changes. Dr. Yim expressed her hope that the court will amend its self-declaration forms to ensure compliance with 3-101.

Judge Pullan asked Ms. Williams to review the forms to ensure they comply with rule 3-101 and report back to the Committee.

Judge Heward moved to forward rules 3-101 and 3-108 as drafted to the Judicial Council for final approval. Mr. Rice seconded and the motion passed unanimously.

(4) CJA 4-206. Exhibits:

Ms. Williams: Rule 4-206 is on the agenda for feedback and direction, with a substantive discussion at the March 5th meeting.

Ms. Page: The rule seeks to address issues identified in the 2019 audit on exhibits. We added a section on digital exhibits and we've had success with it in district courts. In the seventh district, parties submit exhibits electronically via email, either on a drive or as PDF files. We dump everything into a Google drive folder that the judge can view. If an exhibit is admitted, it's moved to a separate "received" folder. We are using the same custodian in charge of physical exhibits to handle digital exhibits so there is no additional administrative burden. So far, we've received a lot of positive feedback from clerks and judges.

Mr. Palmer: The appellate court was involved in drafting the rule and they are changing their procedures for digital exhibits as well.

Judge Chiara: I follow the same process. I view the exhibits before the hearing and move them to a "received" folder. Judicial assistants drag and drop the exhibit into the folder and a notice is sent to parties that the file has been reviewed. Once the exhibit has been admitted, the folder is secured to prevent changes.

Ms. Anderson: I am in full support of this process from an IT standpoint. We just need to pay attention over the next few months to see if this impacts Google drive data or requires more support.

After further discussion, the Committee asked Ms. Page and Mr. Palmer to seek feedback on the rule draft from the boards of district, justice, and juvenile court judges, and bring it back to the Committee for substantive review.

(5) HR policies:

- 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 Chiara

Mr. Olsen: Every committee member devoted time to each section. I recommend that we prioritize items flagged for discussion in the materials. Ms. Anderson is here to discuss HR 5-3 and 6-9 on career service and career service exempt status for employees of the IT department. In section 5, IT employees hired after January 1, 2019 who had already achieved career service status will be grandfathered. They will retain that status unless they choose to move into a different career service exempt position. That is an existing practice but it was never added to the HR policies. I think it's important to be transparent and spell out current practices in the policy. HR 6-9 is related. The policy comes from an Executive Branch rule created for the Department of Technology Services. It doesn't move any positions to career service exempt status, it outlines the process we would follow to get there.

Mr. Olsen explained the difference between career service status and career service exempt status.

Ms. Anderson: This is very important. IT employees are given administrative access to our networks, applications, systems, and buildings. An employee with that kind of access has the ability to take down the entire court system. I believe that security risk necessitates a higher level of scrutiny for those employees. In addition, technology changes rapidly and drastically. What is considered standard knowledge today may change in two years. My expectation is that my staff stay up to date and keep their skills current. If an individual hired as a group administrator doesn't have the desire to learn, or doesn't have the skill set to adapt, when we move to a new tool, I need to hire someone else to meet that need. IT personnel must be willing and able to evolve their skill set with changes in technology.

Judge Chiara: I certainly understand the heightened risk with some of those positions, but I'm wondering why we wouldn't provide the same level of due process for those employees?

Mr. Olsen: We would still follow something similar to the due process procedures for career service status employees. The problem is that meeting the definition of due process can be very time consuming and we often get bogged down in the details. For a department like IT that has to move quickly and make decisions around changing technology, it is sometimes better to fall a little short of full due process in order to meet business needs. In the Executive Branch, the way this has played out in practice is that the Department of Technology Services implemented a process that resembles due process, but when there are cases that need to move quickly, they are able to do so without requirements that tie their hands. The concern early on when they made this change was that it would simply be a tool the department could use to get rid of a bunch of employees they didn't like. What actually happened is that most employees stayed, and the department was better equipped to respond to business needs and the timelines associated with those needs.

Mr. Rice: I am encouraged that this policy is modeled after the Executive Branch's rules and regulations. It surprises me that you can take away a property right with an administrative rule. Is a career service exempt position a common thing in the public sector?

Mr. Olsen: In the Department of Technology Services (DTS), just about every position is career service exempt. One way DTS got around the property right issue was to offer a monetary incentive for folks to convert to career service exempt. Employees could choose not to take the incentive and preserve their career service status. There are still a small handful of employees at DTS who chose not to convert.

Ms. Anderson: All new positions in IT are career service exempt, so 30% of my staff are already there. I am not suggesting that we force people to convert. We could offer an incentive like DTS. It also doesn't have to happen right now, but I am recommending that we move all IT positions to career service exempt.

After further discussion, Mr. Rice moved to approve HR05-3 as drafted. Judge Chiara seconded and the motion passed unanimously.

Ms. Olsen: In HR04-4(6), Judge Pullan recommended adding the full list of protected classes. My response was that including the full list could be daunting in practice. Gender is the easiest class to diversify, followed by age and race/ethnicity. The other classes are much more difficult to diversify on a hiring panel.

Judge Chiara: I think it's okay as is. I don't know that changing it would cause people setting up a hiring panel to go looking for members of another protected class. Religion is a protected class, but I don't think we want employees to ask someone about their religious beliefs to diversify a panel. Gender and race is a good place to start.

Judge Pullan: I don't want to create procedural obstructions every time we hire someone. As long as we're training employees to try to diversify interview panels, I am comfortable with that.

After further discussion, Judge Chiara moved to approve HR04-4(6) as drafted. Judge Heward seconded and the motion passed unanimously.

Mr. Olsen: I spoke to Brent Johnson about Judge Pullan's question on HR04-15(4)(a) and (c). This policy addresses when the results of a criminal background check may result in management deciding not to hire a candidate. Mr. Johnson and I replaced "crimes of financial turpitude" with "fraud." Neither of us knew what that meant. There are crimes of "moral" turpitude, but not "financial" turpitude. Judge Pullan's question to Mr. Johnson was whether adding references to the criminal code would clarify intent without making it too broad or too limiting. Mr. Johnson said he's comfortable with the code citations because it's prefaced by, "including but not limited to."
Judge Chiara: I am wondering about the necessity of it being a felony conviction. Many crimes are reduced to misdemeanors in a plea bargain. A hiring manager may not want to hire a candidate with a conviction for forgery or unlawful use of a financial transaction card, for example, which may have been reduced to a class A misdemeanor.

Judge Pullan: We might want to avoid creating discretion for hiring managers to disqualify an otherwise qualified candidate (who is now 30 years old) on the basis of a retail theft or infraction when he was 18 years old. There may be a good reason for a felony / misdemeanor distinction.

Mr. Rice: There is a body of law that arises in Title 7 cases where the EEOC takes the position that there is a distinction between felonies and misdemeanors, and that employers have a little bit more latitude to make employment decisions based on felonies. There is a pretty clear line drawn between misdemeanors and felonies and employers have less discretion to fire individuals because of misdemeanors. I think it warrants keeping the felony/misdemeanor distinction in the rule. I like using the term "may" with respect to not hiring people with felony convictions, because there may be circumstances when the law would say the fact that it's a felony isn't good enough. If someone has a 10-12 year old felony conviction (even something worse than a shoplifting conviction), that may not be a sufficient basis for firing them. It appears that the language in (c) was meant to characterize severe misdemeanors, where I think employers do have some increased latitude, but some of that language seems to be pulled from the felony section, which is a little bit troubling.

Mr. Olsen: The process HR typically follows is to consider the age of the offense and whether it is pertinent to the job. HR would coach hiring managers through these issues and would likely ask for Mr. Johnson's input before making a decision.

After further discussion, (a) remain unchanged, (b) was deleted, and (c) was amended to read, "A misdemeanor conviction involving crimes of violence against people or destruction of property, identity theft, fraud, or other similar offenses."

Judge Connors made a motion to approve the language as amended. Judge Chiara seconded the motion and it passed unanimously.

Mr. Olsen: Judge Chiara recommends including "political views" in HR 15-1(3)(a) addressing workplace harassment.

Mr. Rice: The legislature enacted a new statute with very specific language about protecting employees and their ability to engage in political discussions in the workplace, provided they were not disrupting the workplace. We should ensure the proposed language is consistent with that statute.

Mr. Marsh: I worry about adding political views here because it could contradict other protections listed in that section. Adding it would make it very difficult for us to enforce the policy. For example, someone's political view is that they support white supremacy and are against equality for other ethnicities or people with a different skin color, or someone says, "My political view is that every believer in Islam is a terrorist, so I believe you are a terrorist." That would be hard for HR to investigate from a practical perspective because those statements would be protected.

Judge Cannell: Doesn't the catchall at the end of the paragraph, "or any other category protected by federal, state or applicable local law," cover it?

Judge Pullan: I agree with Mr. Marsh. Adding political views may make it difficult to enforce other parts of the policy because political views may encompass discrimination against protected classes.

Judge Chiara: Being in one of these categories does not license you to harass another category. A religious person could attempt to hide behind the shield of religion in a similar way that they might try to hide behind the shield of a political view. My concern is someone coming into work and getting harassed for having a political bumper sticker. Regardless of persuasion, there is a lot of impetus right now to try to silence speech. I don't want to see anyone harassed for their political views. Many people hold their political beliefs as closely as they do their religious beliefs. The original purpose of the first amendment was to protect political and religious speech.

Mr. Marsh: We don't have the resources to investigate all of the potential opposing views, or when someone is offended by a bumper sticker. Incorporating an exhaustive list in a code of ethics seems more appropriate than to tie it into this policy.

Mr. Rice: The categories enumerated in the policy are all statutorily recognized protected classes. That list is 100% risk free because Congress says you can't harass anyone on those bases. I agree with Judge Chiara, especially in this day and age, but political beliefs are not statutorily protected. In light of the legislature's recent announcement, it makes me a little nervous to expand statutorily recognized protected categories to another classification. Congress and the Utah legislature require us to have an anti-harassment policy in place to respond to what is, statutorily, a violation of the law. The law is driving this practice. I am concerned that by adding political beliefs, we would be bumping into state statute.

After further discussion, Judge Connors made a motion that "political beliefs" not be included in the policy. Mr. Rice seconded. Judge Chiara and Judge Cannell opposed. The motion passed by majority vote.

Judge Heward: No discussion is needed on HR07-1(10), I just wanted to make the Committee aware of it. Judge Cannell and I support the changes. It closes the loop for extensive use of leave.

Mr. Olsen: We have had a number of employees "gaming the system" by using their FMLA leave and then taking off again after enough leave has been accrued. Management was required to retain the employee, making it almost impossible to keep the business of the court moving forward. This policy is copied verbatim from an Executive Branch rule. After four months of cumulative leave in a 24-month period, the employee may be separated from employment regardless of paid leave status, unless prohibited by law. The law protects the three-month period of FMLA, so that would not count against the four-month cumulative leave count.

Judge Connors moved to send the HR Policies and Procedures Manual to the Judicial Council for approval. Judge Cannell seconded the motion and it passed unanimously.

Mr. Olsen will prepare a memorandum for the Judicial Council to help focus the discussion on significant items and rules that are a departure from the past, and will work with Judge Noonan to get on the Council's next meeting agenda.

(6) ADJOURN:

With no further items for discussion, the meeting adjourned at 2:55 pm. The next meeting will be March 5, 2021 at noon via Webex video conferencing.