UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

Webex video conferencing
March 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
Jordan Murray
Jon Puente
Karl Sweeney
Nancy Sylvester
Brent Johnson

STAFF:

Keisa Williams
Minhvan Brimhall

(1) Welcome and approval of minutes:

Judge Connors agreed to act as Chair until Judge Pullan was able to join. The committee considered the minutes from the February 5, 2021 meeting. Judge Heward moved to approve the minutes as drafted. Rob Rice seconded the motion and it passed unanimously.

(2) Grant project update:

Mr. Murray: We have been working to incorporate the Committee's feedback from the meeting last month. For example, we updated the grant approval flowchart to provide more specificity about the Supreme Court's jurisdiction and compiled a time sensitive grant table. The time sensitive grant table was presented to the Budget and Fiscal Management Committee and the Judicial Council. Those will be monitored continuously. I am continuing to conduct a five-year retrospective assessment of grant compliance. Mr. Sweeney is taking the lead on revising and drafting new language for CJA rule 3-411 and updates to the accounting manual. Ultimately, the goal is for grant work to be guided by three documents - rule 3-411, the accounting manual, and a grants manual.

Mr. Sweeney: The grants manual will be long, with more than 10 pages covering several different areas. Similar to what Bart Olsen did with HR policy revisions, we may pair up with Committee members to review various subsections. The first thing we should have ready is a framework for the grants manual.

(3) 1-204. Executive Committees:

Mr. Sweeney: Ms. Williams incorporated the Budget and Fiscal Management Committee's (BFMC) proposed amendments to rule 1-204. Currently, the rule is fairly restrictive in terms of how long someone can serve as Chair. With the amount of financial knowledge required for the BFMC, the committee recommends that the Chair be allowed to serve for at least two years. The proposed amendment allows the BFMC the flexibility to elect a new Chair whenever they feel it's warranted.

Judge Connors: Judicial Council member terms are three years. How could a Chair be elected for longer than that term? Executive Committee members must be members of the Judicial Council, but the proposed sentence doesn't say that Chairs must be members of the Council.

Judge Chiara: Council members can serve up to two, 3-year terms, so Chairs could potentially serve longer than three years if they remained on the Council for two terms.

Ms. Williams: Added, "Chairs must be members of the Council" to the end of (6). The proposed amendments reflect current practice. Policy and Planning has not elected or re-elected Judge Pullan every year. With most executive committees, the Chair usually remains until they choose to step down or another member expresses and interest. It takes some time for Chairs to get their feet under them. The proposed language would allow each committee to elect their respective chairs on a schedule deemed appropriate by that committee. The only other changes were to formatting. As we're amending rules, I'm trying to make them easier to read by adding bolded headings. The change in (8) updates the language to match other rules.

Mr. Rice moved to approve the changes to rule 1-204 as amended. Judge Cannell seconded and the motion carried unanimously.

(4) CJA 2-103. Open and Closed Meetings:

Mr. Johnson: In a recent meeting of the Council, it became apparent that this rule wasn't updated when safeguarded records were added as a new category a few years ago. "Safeguarded records" has been added as one of the reasons a Council meeting may be closed.

Judge Heward moved to approve rule 2-103 as drafted. Judge Chiara seconded and the motion passed unanimously.

(5) Rules back from public comment:

- CJA Appendix J. Ability-to-Pay Matrix

Ms. Williams: There are several competing bills on pretrial reform, with one that appears to "repeal" most of the provisions included in HB 206 last year (HB 220). Michael Drechsel, under the direction of the Legislative Liaison Committee, made it very clear during the committee hearing and in conversations with bill sponsors that the court will continue to follow the Constitution, the law, and act within its authority to promulgate rules of procedure. He noted that if the intent of the legislature in passing HB 220 is that the court will no longer consider ability to pay or would go back to a charge-based bail schedule, that was not the case.

The bill sponsor, Rep. Schultz, asked the Legislative Research and General Counsel's Office for an opinion on whether HB 220 would make the State vulnerable to a lawsuit. The Legislative Counsel published a brief memo, essentially saying that nothing in HB 220 prevents the Court from continuing to consider ability-to-pay, or requires the Court to return to using a charge-based bail schedule. In fact, the memo states that long as the Court continues to keep those "guardrails" in place, the State is safe. Outside of that, if the court removes their guardrails, the equation may be different.

The Pretrial Committee reviewed all of the public comments and felt that the concerns were well taken, but most expressed policy-based concerns outside of the courts' control – like the elimination of cash bail. Working within a system in which cash bail exists, we have to come up with some way to conduct an individualized ability to pay analysis. After a robust discussion, the Pretrial Committee does not recommend any amendments to the Matrix and is recommending that it be adopted as final. It was adopted on an expedited basis prior to being sent out for comment, so if Policy and Planning agrees that no changes are necessary, it won't need to go back to the Judicial Council. It would remain in effect. While it was out for public comment, the 2021 federal poverty guidelines were published so I had to update the poverty guideline chart on the left-hand side of the Matrix. That will happen every year.

Judge Connors: Without the statutory backstop, are other rules in place that allow us to adopt the ability to pay matrix?

Ms. Williams: There is nothing in our rules that would prevent the adoption of the Matrix if HB 220 were to become effective. Some of the Rules of Criminal Procedure (URCrP) reference the bail section of the code instead of incorporating the ability-to-pay language, so the Pretrial Committee is putting together a package of recommended amendments to the URCrP for consideration by the Supreme Court's Advisory Committee on the URCrP. Final recommendations should go to the Supreme Court prior to any statutory changes, but nothing in the rules currently would prevent judges from considering ability to pay or using this Matrix. In looking at caselaw, I believe it's pretty clear that an ability-to-pay analysis is required.

Judge Connors: There are statutory references in the Matrix. Will those need to be changed?

Ms. Williams: Those references are correct right now, but they will need to be changed if the bill goes into effect. If it's signed by the Governor, the bill would be effective on May 5, 2021.

Judge Cannell moved to adopt the Ability-to-Pay Matrix as final as drafted. Mr. Rice seconded and the motion passed unanimously.

(6) Changing "mail" to "send":

- 3-306.05
- 4-103
- 4-202.04
- 4-202.05
- 4-202.06
- 4-202.07
- 4-510.05
- 4-701

Mr. Johnson: Currently, rule 4-103 requires that notice be mailed. In an electronic age, many notices can and are being sent electronically by email or otherwise. I propose changing "mail" to "send" in rule 4-103 to allow for various delivery options. Ms. Williams went through all of the rules, changing "mail" to "send" where appropriate to allow for the same flexibility. One issue is whether Policy and Planning feels like "send" is the right substitute for "mail."

Judge Pullan: Do we define "send"?

Mr. Johnson: No, but "send" is used in Utah Code and other rules. Some of the proposed rule drafts include a list of the various delivery options, "documents may be sent by mail, email, or hand-delivery." That clarification could be added to all of the proposed rules.

Mr. Rice: Have we vetted all of the practical applications to ensure the court can verify that notice was sent to the correct email address?

Mr. Johnson: The rules of civil procedure allow emailing in certain circumstances. I don't believe these rules, as drafted, will create any issues, but we can certainly take a closer look at the practical aspects.

Mr. Barron: One of the concerns we have with the rules of civil procedure is whether emails returned as undeliverable would be monitored as closely as a physical letter would be. If something is mailed via the postal service and it's not deliverable, the letter would be stamped as undeliverable and returned to the sender. Some of our emails are sent from generic email accounts and the returns aren't monitored to confirm delivery. There may be associated costs with creating new email accounts depending on whether notices will be sent from individual clerk email accounts, team email accounts, or the generic utcourts.gov account we're currently using.
Judge Connors: Does "send" mean successfully sent, or does "send" just mean emailed with no indication of

whether or not it was received?

Mr. Barron: Is it good enough knowing that we sent it to the last email address on record?

Ms. Williams: What about including a provision that says, if notice is sent by email and it comes back undeliverable, it must then be mailed?

Judge Connors: How do we handle this in the rules now when a letter comes back undeliverable?

Mr. Johnson. We haven't addressed it in the rules. I think it's just a procedure clerks follow. A copy is included in the file with a note that the letter was returned. If it's a notice to dismiss, for example, the court would go ahead and dismiss. The person suffers the consequences of not keeping an accurate address on file with the court. The rules of civil procedure state that individuals have an obligation to keep their addresses up to date. I believe attorneys have an obligation to try and track a person down to verify that notice was in fact served, whereas with the court it's a little different.

Ms. Williams: These rules only address what the court is required to do. If our current procedure with physical mail is to scan the envelope into the file and note that it was undeliverable, can't an undeliverable email be saved as a PDF and uploaded into the file the same way? Isn't that just as good?

Mr. Johnson: I think it's probably just as good, the problem is monitoring the email account so that court personnel know it was undeliverable. That may just be a training issue.

Mr. Barron: It's also a technology issue because many automated emails are sent from a generic email account that isn't monitored. We would need to change the process to send them from a clerk's email account, a team email account, or some other account that is monitored.

Mr. Rice: It might be a good idea to build into each of these rules some responsibility on the part of the participant to keep a current email address on file.

Judge Pullan: Some of these rules relate to parties who have a due process right to notice, and others relate to internal court communications where that's not an issue. There's no need to revamp our entire system to provide notice internally, but if a party is involved, it clearly needs to be done.

Mr. Johnson: In rule 76 of the rules of civil procedure, an attorney or unrepresented party must promptly notify the court in writing of any change to that person's address, email address, phone number, or fax number. There is also a presumption that if notice is mailed, it is presumed to have been received. I think the concept of emailing documents to parties is a ship that is well out of the harbor, but building in any safeguard we can while still relying on some of the presumptions might be helpful. It sounds like we need to go back and evaluate any unintended consequences and make certain that we have contingencies in place.

Judge Pullan: Is it the receiver's decision to mark things as spam, or is there anything we can do on our end to make sure that court emails have a higher priority?

Mr. Barron: No, I don't believe there is anything we can do on our end. It could be the receiver or the receiver's email service provider who controls what is determined to be spam.

Mr. Johnson: I imagine most providers, if not all, would allow emails sent from a .gov account to go through.

Judge Heward: It makes sense to use the same method with undeliverable emails that we do with snail mail.

Judge Pullan: What document or information will we get back from an undeliverable email? Will it say, "This email doesn't exist" or "this email has been shut down" or "there was a problem with transmission, try again"?

Mr. Barron showed a couple of examples of undeliverable email notices received by the court. One said the email was blocked, another said "delivery status is notification failure." Mr. Barron said there are many more potential notices.

Mr. Rice: The volume of undeliverable messages concerns me, but at least anecdotally, there is a heightened expectation that people maintain their email accounts in such a way that they can be communicated with. In some ways, I think that justifies shifting the burden to the email recipient and away from the court. That may also cut in favor of more explicit references in the rules to participants. Judge Pullan makes a valid point about the due process issues at play, but it's such a common communication form I think there is justification in shifting some of the burden to the recipient.

Judge Pullan: It seems to me that the policy question is, do we want to create an obligation on the litigant to keep his or her email address up to date? If so, it doesn't matter if we track undeliverables.

Judge Chiara: In both civil and criminal case, if I call the case and someone fails to appear, I look in Workspace to see if they received notice. If my clerk has photocopied the envelope stamped by the post office as undeliverable, I know that we sent notice and I can see that we sent it to the address they provided to the court. Emailed notice wouldn't be any different, provided the clerk records any email failure notice in CORIS. I've caught errors on the court's part, where we sent notice to a different address than what the party had on file. In those instances, I can instruct the clerks to resend notice to the correct address.

Ms. Sylvester: The rules of civil procedure committee just encountered this issue last week. Rule 5 was amended to state that if service was made by email and returned as undeliverable, service must then be made by regular mail if the person has provided a mailing address. Service is complete upon the attempted email service for purposes of meeting any time period. The committee borrowed that language from another state.

Judge Connors: That seems to presume that a record is made of the fact that the email was undeliverable.

Judge Pullan: It would be helpful to know what backstops are in place before allowing emailed notice. I think we need a better idea of what the practices are across the state. Is there a way to assess whether we have a uniform system in place?

Ms. Williams will work with Mr. Johnson, Mr. Barron, and Ms. Sylvester and report back to the Committee with more detailed information about what's happening now, what needs to happen, and what it will take to create a uniform system.

(7) CJA 3-101. Judicial Performance Standards:

- Self-declaration forms
    - Justice Courts
    - District & Juvenile Courts
    - Court of Appeals
- JPEC certification letter

Ms. Williams: This is a follow up to JPEC's recommendation that the self-declaration forms be amended to ensure compliance with rule 3-101. Ms. Sylvester created Google forms from the drafts in your packet.

Ms. Sylvester: There are different forms for justice courts, district and juvenile courts, and the appellate courts. The first page provides instructions on who should be using the form, when it should be turned in, and what information must be sent to the Judicial Council. The second page explains how to calculate under advisement numbers with a link to a spreadsheet with a built-in formula and examples.
Judge Heward: What is the definition of an "exceptional case"? Is it just a case that took over 2 months, or does it

mean a case with hundreds of pages of exhibits? If we took “exceptional cases” out, does it still mean the same thing?

Ms. Sylvester: That term has been on our forms for a while. I think what it means is that you can have a certain number of cases under advisement overall, and then a certain number per year. It may be a good idea to define “exceptional cases” in paragraph one.

Ms. Williams: The term “exceptional cases” is found in Rule 3-101(3)(c)(i). I agree that it is somewhat unclear.

Judge Pullan: I don’t want to do anything that disrupts what has become a term of art to justices and court of appeals judges.

Ms. Sylvester put “exceptional cases” in parenthesis at the end of question 1 as a way to define it. After discussion, the Committee agreed that was the best solution.

Judge Connors: There is also a monthly declaration form asking whether judges have held anything under advisement more than 60 or 90 days. Is that an outdated form? My judicial assistant sends it to me every month. The latest says, “draft version February 2018,” and is addressed to presiding judges.

Judge Pullan: I also complete a monthly form, but it only asks about cases past 60 days.

Ms. Sylvester: That requirement is found in Rule 3-104. Once a month, each judge shall submit a statement notifying the state level administrator of the percentage of any cases under advertisement for more than two months and the reason why the case or issue continues to be held under advisement. The presiding judge submits a monthly list of the cases held under advisement for more than two months. If the case is held under advisement for an additional 30 days, the state level administrator shall report that back to the Council. That’s why it asks about cases under advisement for 90 days.

Judge Heward: Will the answers to both questions 1 and 2 be reported to JPEC?

Ms. Sylvester: Both have historically been reported.

After further discussion, Ms. Sylvester was asked to send links to the Google forms to the Committee for testing purposes. Judge Heward moved to approve the use of Google Forms, the content of the forms in so much as it matches the requirements in rule 3-101, and the direction staff is heading to identify internal procedures for reporting and submission. Judge Cannell seconded and the motion carried unanimously.

(8) ADJOURN:

With no further items for discussion, the meeting adjourned at 1:40 p.m. The next meeting will be on April 2, 2021 at noon via Webex video conferencing.