UTAH JUDICIALCOUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

Webex video conferencing
May 7, 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
Nathanael Player
Judge Farr
Chris Palmer
Loni Page
Dr. Jennifer Yim
Jon Puente
Jim Peters
Nancy Sylvester

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 April 2, 2021 meeting. With one minor correction in the 3rd paragraph on page 2 (correcting the rule reference in the motion to advance rule 2-211), Judge Connors moved to approve the minutes as amended. Judge Cannell seconded the motion. The motion passed unanimously.

(2) 4-403. Electronic signature and signature stamp use:

Mr. Player: The proposed amendments correspond with changes to Rules 7A and 7B of the rules of civil procedure, effective on May 1, 2021. The new rules replace the order to show cause (OSC) process with a "motion to enforce." Similar to the OSC process, a moving party files an ex parte motion and the court issues an order. Under new URCP 7A(c)(4) and new URCP 7B(c)(4), the resulting order is an order to "appear personally or through counsel" instead of an "order to show cause." The Forms Committee approved plain language forms consistent with this process, titling the model order "Order to Attend Hearing." The Clerks of Court have expressed concern that they do not have authority to sign an "Order to Attend Hearing" on behalf of a judge because CJA 4-403(1) only mentions orders to show cause. The proposed amendment will allow clerks and judicial assistants to process motions to enforce with an electronic signature or signature stamp.

We usually try to avoid referencing a specific subsection in a rule so that it doesn't become outdated every time a rule changes, but we think it's necessary here in order to make it clear that clerks and JAs have the authority to use stamps to issue the order to attend the hearing, and not necessarily the substantive order after the hearing.

Judge Cannell: I prefer the specificity as opposed to a general reference.

Judge Pullan: Does the new motion to enforce require the filing of an affidavit in support of the motion?

Mr. Player: No, it doesn't necessarily require an affidavit. You can file a verified motion.

Mr. Barron: Do we need a separate document type in the E-filing environment or is the generic "proposed order" sufficient? It's possible to add a separate document type to identify a motion for enforcement distinctly, as opposed to just "motion" or whatever other language is typed on the end of the document title. That question can be taken up with the clerks of court. It doesn't need to be in the rule.

Ms. Page: I can raise that with the clerks of court at our next meeting.

Judge Cannell moved to approve the rule as drafted with a recommendation to the Judicial Council that it be approved on an expedited basis. Judge Heward seconded and the motion carried unanimously.

(3) 4-206. Exhibits:

Judge Pullan: A 2019 performance audit found significant room for improvement in how the courts are handling and storing exhibits. In some parts of the state, we were not complying with our own rule. Mr. Palmer and others have done a remarkable amount of work evaluating where we are throughout the state and then proposing new standards. This rule is the culmination of that effort

Mr. Palmer: We met with the Board of District Court Judges, Board of Justice Court Judges, and Board of Juvenile Court Judges. Judge Farr will address justice court concerns. This is an almost complete rewrite of rule 4-206. The State Audit found that a lot of law enforcement evidence requiring a chain of custody was being mishandled. Recently, we added procedures for digital exhibits to accommodate remote proceedings via Webex.

Judge Farr: The board of justice court judges completely understands the issues identified in the audit and the need for this rule. It makes a lot of sense. The board's concern is its applicability to justice courts. Most justice court judges do not physically take evidence at trial. Trials rarely last longer than a day, and because appeals are de novo, exhibits are filed in the district court.

If the parties have evidence, the court views it, but it remains in the custody of the parties. The court never takes it. As a result, there are no storage facilities or locations. The board would feel much more comfortable if the rule noted that justice courts have discretion, or included a statement that, "justice courts don't take evidence." It would be a heavy lift for justice courts to comply with the marking and storage requirements in the rule.

Judge Pullan: Is there anything in this rule that requires justice courts to depart from current practice? The rule says, "physical exhibits received during trial, other than those in paragraph (2)(A), must be placed in the custody of the clerk of court or designee. Digital exhibits received as evidence by the court during the trial shall be stored electronically in accordance with (2)(C)." In every court, there is a period of time when physical exhibits are received during the trial and are in the possession of the clerk. That could be 20 minutes in justice court. As soon as that time period ends, you jump directly to the disposal section.

Once something is received into evidence, the court to some degree becomes responsible for its integrity. Even though multi-day trials in justice courts are rare, they do happen. In those instances, evidence shouldn't go back to the parties prior to disposition.

Judge Connors: (3)(B) also says exhibits "received by the court" must be held at least until the time for appeal has expired, which would put those exhibits in the clerk's custody for some period of time.

Judge Farr: My concern is the language, "exhibits other than those in paragraph (2)(A) will remain in the custody of the clerk." Paragraph (2)(A) addresses bulky items, biohazards, etc., which we rarely have. The rule seems to suggest that anything other than those bulky items would remain in the custody of the clerk. Justice courts often see small items of drug paraphernalia that wouldn't fit under (2)(A). The language in (2)(B) suggests paraphernalia would be placed in the custody of the clerk. Appeals are another issue identified by the Board. Justice courts don't retain evidence. It all stays with the parties. If the parties choose to appeal, the parties take whatever evidence

they feel is appropriate to the district court.

Judge Heward: To me, drug paraphernalia would fit under (2)(A) and remain in the custody of the party.

Judge Connors: I recommend adding a separate provision to make it clear that exhibits in justice court can or shall be immediately returned to the parties upon conclusion of the trial and preserved by the parties until the time for appeal has expired.

Judge Heward: In parental rights cases, we have been receiving large video and audio files that have been difficult for the clerks to manage. If those are deemed "bulky" items that would fall under (2)(A) and be retained by the parties, we would have the same integrity concerns.

Mr. Palmer: The digital evidence contemplated under (2)(A) was intended to apply to things like computers and body cameras.

Ms. Page: As a practical matter, could the court require large digital files to be submitted on a USB or CD that could be physically stored?

Judge Connors: In the 2nd district, at the conclusion of a preliminary hearing, the prosecution usually asks to withdraw their exhibits. At that point, I ask the defense counsel if they have an objection to withdrawing exhibits on the theory that if they're going to file a motion to set aside the bind over, they probably don't want those exhibits removed.

Judge Chiara: That does present an interesting issue. Because the rule applies "to all trials," it doesn't apply to preliminary hearings (or any evidentiary hearing) and we'd be required to hold chain of custody evidence. The rules of criminal procedure clearly distinguish trials and preliminary hearings. I recommend expanding the applicability of the rule to "evidentiary proceedings."

Judge Pullan: I like limiting the rule to trials, but building in discretion so that the court could require evidence received during an evidentiary hearing to be maintained in accordance with this rule. I'm not sure that we want to formalize every evidentiary hearing to this degree. That could become a burdensome administrative task.

Judge Heward: In child welfare cases, the disposition on the original petition is called a dispositional hearing. That is the hearing from which a parent can appeal, but we continue to work with that parent for another 12 to 18 months. A termination petition could also be filed, so we have trials that may be appealed from the beginning, and then final orders, which can be appealed but not for another 12 to 18 months down the road.

Judge Pullan: There is an inconsistency in (3)(B). (3)(B) says, "Upon final disposition of the case and after the time for appeal has expired or all appeals have been resolved, exhibits in the court's custody shall be disposed of or returned to the offering parties pursuant to paragraph (5)." But then (5) says that exhibits may or shall be disposed of "90 days after the time for appeal has expired, or the statute of limitations for post-conviction relief, including the time for appeal from post-conviction relief has expired, whichever is later." So under (3)(B), we can dispose of exhibits after appeal, but under (5), we keep them longer. I recommend removing the timing language in (3)(B) and simply referencing (5).

After further discussion, the following amendments were made:

- Added to Applicability: "In the discretion of the court, this rule may apply to any proceeding in which exhibits are introduced."
- Added to (2)(A): "paraphernalia" and ...original digital storage media "such as a hard drive or computer"
- Added to (2)(B): Digital exhibits received as evidence by the court during the trial shall be stored electronically or on digital media "such as a thumb drive and stored in accordance with paragraph (2)(C)"
- Added to (3)(B): "In courts not of record, upon final disposition of the case, all exhibits shall be returned

to the parties."

- (3)(B) was amended in part to read: "…upon final disposition of the case, exhibits in the court's custody shall be disposed of pursuant to paragraph (5)."

Judge Connors moved to approve the rule as amended with a recommendation to the Judicial Council that it be published for comment. Judge Cannell seconded and the motion passed unanimously.

(4) 4-401.02. Possession and use of portable electronic devices:

Dr. Yim: JPEC has engaged in a lengthy process of trying to find ways to conduct a more substantive evaluation of justice court judges with very low caseloads. We hired the Gardner Institute at the University of Utah to do an assessment and they recommended electronic observation. Following the pandemic, Webex became a much more viable option. We having been using Webex to conduct electronic observation of these basic evaluation courts as part of our pilot project and we would like to continue to do so. JPEC is requesting adoption of the proposed language in (2)(D).

Judge Cannell moved to approve the rule as amended with a recommendation to the Judicial Council that it be published for comment. Judge Connors seconded and the motion passed unanimously.

(5) 3-419. Office of Fairness and Accountability (NEW):

Mr. Puente: Policy and Planning has reviewed this rule a few times already. I've made a few minor amendments.

Judge Connors: In line 93, is "People of Color" a defined term? In line 99-100, it talks about issues related to race, gender, ethnicity, ethnicity, age, disability, sexual orientation, marital status, veteran status. How does all of that fit within the term "People of Color?"

Mr. Puente: When talking about race and ethnicity, or individuals or groups outside of the dominant culture, the vernacular is moving away from the term "minority" and moving toward use of the term "People of Color." I agree that, technically, veterans and those with a lower socio-economic status for example aren't minorities. We could use the term "protected class" or "persons from historically marginalized communities."

One concern to consider is that if a term is too broad, it can dilute what we're trying to accomplish. The focus is to remove any bias, but someone could argue that we are biased against people with red hair. I recommend limiting the language to groups that have been historically marginalized.

Judge Heward: With that goal in mind, I recommend adding limiting language to (3)(B) as well.

Ms. Williams: Paragraph (4) was added because Mr. Puente will be presenting a memo to the Management Committee recommending the creation of an ad hoc committee, or a standing committee, to assist with developing the strategic plan.

Judge Pullan: In supporting efforts to diversify the bench, I recommend adding "support efforts to diversify the bar and bench" to (2)(C), to clarify that the judiciary will support the pipeline effort.

Judge Chiara: I am concerned with adding the term "anti-racism" to (3)(A) and (3)(B). If you look up "anti-racism" in Merriam Webster, it's a clear and simple definition and something that it would seem any reasonable person would agree with. But over the last several years, the term "anti-racism" has come to mean different things to different groups and has become a point of contention and even division. For example, Abraham Kennedy's book, "How to be an anti-racist", is one view of what "anti-racism" means. That view is distinct from Dr. Martin Luther King Junior's vision of "anti-racism" and different than Thomas Sowell's vision of anti-racism. "Anti-racism" is a contested concept nationally and a mutating word in our culture right now. It could also encompass a political doctrine. "Bias" is a clearly defined word and we all know what it means because it's a legal concept. "Equal

protection" and "due process" are also clearly defined because they have been developed in caselaw over a period of 200 years. I recommend using the term "bias" or "racial bias" instead.

The following amendments were made to the rule draft:

- (2)(B): added "support efforts to diversify the bar and bench"
- (3)(A)(iii): added the "Utah" Judicial Institute
- (3)(A)(iii)(b): replaced "anti-racism" with "racial bias"
- (3)(B): replaced "People of Color" with "for persons in historically marginalized communities"

After further discussion, Judge Chiara moved to approve the rule as amended with a recommendation to the Judicial Council that it be published for comment. Judge Connors seconded and the motion passed unanimously.

(6) Rules back from public comment:

- **1-204. Executive Committees**
- **2-103. Open and Closed Meetings**

Ms. Williams: No comments were received and the proposed amendments are relatively minor. I do not recommend any additional amendments.

Judge Connors moved to approve the rules as proposed with a recommendation to the Judicial Council that they be approved as final. Judge Cannell seconded and the motion passed unanimously.

(7) 1-205. Standing and ad hoc committees:

Ms. Williams: Judge Harmond, chair of the Standing Committee on Pretrial Release and Supervision, recommends the proposed changes to committee membership.

The recommendation to remove the representative from the Utah Insurance Department is based on the request from Reed Stringham included in the packet. A representative from the Victims' Council has been attending committee meetings as a guest over the last year. She provides a perspective that we feel is critical to the committee's work. Mr. Puente supports adding a member from a local community organization supporting diversity, equity, and inclusion efforts. Law enforcement are integral to and interested in these issue. Police agency perspectives are not always perfectly aligned with the sheriffs.

Judge Cannell moved to approve the rule as amended with a recommendation to the Judicial Council that it be published for comment. Judge Heward seconded and the motion passed unanimously.

(8) 4-202.02. Records Classification:

Ms. Williams: The clerks of court requested the addition of "when the minor is a party" to line 167. I think it already says that in line 163, but because this has been such a point of confusion for clerks, it may not hurt to reiterate it more clearly in line 167. I also recognize that there is a training component and the clerks and others are working on that side of the issue.

Judge Connors moved to approve the rule as amended with a recommendation to the Judicial Council that it be published for comment. Judge Heward seconded and the motion passed unanimously.

(9) 4-412. Court seals (NEW):

Ms. Williams: Mr. Johnson and I are on the fence about whether this rule is necessary. When the pandemic hit, a judge had masks made that included the court seal and offered to sell them to employees at cost. The judge didn't seek permission or talk to anyone about it beforehand. Following that incident, Mr. Johnson was asked to consider

whether we should institute a rule. I think this could easily be remedied with training and/or clear language in the style guide. Mr. Johnson and I don't have a good understanding of how the court seal is being used across the state right now, but this has never been identified as an issue before.

Judge Connors: Have the court seals been trademarked or copyrighted? If so, we would have the authority of federal trademark law in terms of how we regulate the use of our seals. I don't think we need a rule, but I would ask our General Counsel's office whether we should consider trademarking or copywriting court seals.

Ms. Williams will research and report back to the committee on the trademark/copyright question.

Judge Connors moved not to adopt a rule on court seals. Judge Cannell seconded and the motion passed unanimously.

(10) Update: URCP rule 5 and CJA amendments re email notifications and "undeliverable" emails:

Ms. Williams: In February, I recommended changing "mail" to "send" in several CJA rules, allowing notices and other documents to be sent via email where appropriate. Policy and Planning asked whether the amendments conflicted with the rules of civil procedure, and how the clerks would monitor and capture undeliverable emails. Recent proposed amendments to URCP rule 5 specifically touch on this issue. The rule 5 amendments went out for public comment, and several comments were received. Ms. Sylvester said the URCP Committee is willing to hold off on taking rule 5 back to the Court for final approval until the mechanics on undeliverable emails can be worked out.

Mr. Barron: IT estimates a cost of about $75,000 to create and implement group/team emails. Some courts are already using team emails, but we currently store those anywhere in our system. We only store individual clerk email addresses. If individual clerk emails are used, they could be inundated with emails from parties. If we know when rule 5 will likely go into effect, we could plan resources accordingly. Even though we are unlikely to get legislative appropriations for this, it would be prioritized at the highest level because it's a rule change. The question for Policy and Planning and the Judicial Council is how to prioritize this work with other project deadlines.

Ms. Williams: Mr. Barron, Ms. Sylvester, and I will be presenting this question at the next Clerks of Court meeting. We do not need anything from Policy and Planning today. This presentation is strictly informational to keep the committee informed about our progress. We will bring the issue back to the committee, along with the clerks' recommendations, at which point we will be looking for a policy decision on prioritizing the programming project.

I think this is somewhat urgent because we don't know how long the Supreme Court is willing to wait on approving changes to rule 5. Considering the time it takes to get on P&P, JC, and potentially BFMC agendas, and adding in programming time and the IT deployment schedule, we may be pushing into the Fall.

ADJOURN:
With no further items for discussion, the meeting adjourned at 12:00 p.m. without a motion. The next meeting will be on June 4, 2021 at 12 PM via Webex video conferencing.