

JUDICIAL COUNCIL MEETING

Minutes

Monday, November 21, 2016

Judicial Council Room

Matheson Courthouse

Salt Lake City, Utah

Chief Justice Matthew B. Durrant, Presiding

ATTENDEES:

Chief Justice Matthew B. Durrant
Justice Thomas Lee
Hon. Ann Boyden
Hon. Mark DeCaria
Hon. Paul Farr
Hon. Thomas Higbee
Hon. David Marx
Hon. Mary Noonan
Hon. Reed Parkin
Hon. Todd Shaughnessy
Hon. Kate Toomey
John Lund, esq.

EXCUSED:

Hon. Marvin Bagley
Hon. Derek Pullan

STAFF PRESENT:

Daniel J. Becker
Ray Wahl
Jody Gonzales
James Ishida
Debra Moore
Jim Peters
Dawn Marie Rubio
Rick Schwermer
Krista Airam
Adrienne Nash
Ron Bowmaster

GUESTS:

Juli Blanch
Justice John Pearce
Hon. Michelle Heward
Hon. James Michie
Hon. Ryan Evershed
Adam Trupp

1. **WELCOME AND APPROVAL OF MINUTES: (Chief Justice Matthew B. Durrant)**

Chief Justice Matthew B. Durrant welcomed everyone to the meeting.

Motion: Judge Toomey moved to approve the minutes from the October 4, 2016 Judicial Council meeting. Judge Higbee seconded the motion, and it passed unanimously.

OATH OF OFFICE: (Chief Justice Matthew B. Durrant)

Chief Justice Durrant administered the oath of office to Judge Todd Shaughnessy.

2. **CHAIR'S REPORT: (Chief Justice Matthew B. Durrant)**

He reported on the following items:

Meeting with the Governor. He, Mr. Becker, and Mr. Schwermer met with the governor to discuss the FY 2018 budget requests, as well as, several ongoing court programs.

Arnold Foundation Visit. He met with the advanced team from the Arnold Foundation at the beginning of November. The purpose of the site visit was to assess whether the Utah courts would be designated as an approved site to use the Arnold pre-trial release assessment tool.

3. ADMINISTRATOR'S REPORT: (Daniel J. Becker)

Mr. Becker reported on the following items:

Fourth District Court TCE. Mr. James Bauer has been appointed as the Fourth District Juvenile Court TCE. Mr. Becker provided his background and work experience. He will begin working for the courts on November 28.

CCJJ/PEW Recommendations on Juvenile Justice. The recommendations, prepared by the Utah Juvenile Justice Working Group, were approved by the Utah Commission on Criminal and Juvenile Justice on November 16. The recommendations will be advanced to the legislature for consideration during the 2017 Legislative Session. Judge Michelle Heward, Judge James Michie and Judge Ryan Evershed will provide an update on the recommendations later in the meeting.

Legislative Meetings. Local legislative meetings will be held in each judicial district starting on December 7 to meet with new legislators. Judges and Council members are encouraged to attend the local meetings in their districts.

Utah State Employees Charitable Fund Drive. Mr. Becker recognized Ms. Debra Moore, Charitable Fund Drive Coordinator for the courts, and Mr. Ray Wahl, Charitable Fund Statewide Director, for their dedication and time spent in making the charitable fund drive a success.

4. COMMITTEE REPORTS:

Management Committee Report:

Chief Justice Durrant reported that the Management Committee meeting minutes accurately reflect the issues discussed. The items needing to be addressed by the Council have been placed on today's agenda.

Liaison Committee Report:

No meeting was held in November.

Policy and Planning Meeting:

Judge Parkin reported on the following items: 1) the committee continues to work on a number of rules, 2) a rule will be considered for final action later on the agenda, and 3) rules for public comment are listed on the consent calendar.

Bar Commission Report:

Mr. Lund reported on the following items:

Fall Forum. The Fall Forum was held last week. Keynote speakers included: 1) Erin Brockovich, 2) Jan Schlichtmann, 3) Governor Gary Herbert, and 4) Justice Christine Durham.

Practice Portal for Lawyers. A group gathering will be held tonight to brainstorm on how to make a better practice portal for lawyers.

Small Firm Practitioners. Ms. Grace Acosta, Third Division Bar Commissioner, has spearheaded efforts for members of the Utah State Bar to meet with small firm practitioners throughout the state to build a better connection between the Bar, and the smaller firms.

5. COUNCIL COMMITTEE ASSIGNMENTS: (Chief Justice Matthew B. Durrant)

Chief Justice Durrant recommended the following appointments: Judge Toomey to fill the vacancy on the Council for a vice chair, with Judge Randall Skanchy's term expiring; and 2) Judge Todd Shaughnessy to fill the vacancy on the Management Committee, with Judge Randall Skanchy's term expiring.

Motion: Mr. Lund moved to approve the Council committee assignments as recommended. Justice Lee seconded the motion, and it passed unanimously.

6. 2017 COUNCIL CALENDAR: (Ray Wahl)

Mr. Wahl reviewed the 2017 Judicial Council calendar. He highlighted the following relative to the 2017 Judicial Council meeting dates: 1) the State of the Judiciary is scheduled to follow the January meeting, 2) the March meeting will be held in St. George in conjunction with the Bar's Spring Convention, 3) the June meeting will be held in Duchesne at the Duchesne County courthouse, 4) the August meeting will be held in conjunction with the Council's Budget and Planning Session, and 5) the October meeting will be held at the Zermatt in conjunction with the Annual Judicial Conference.

Motion: Judge Toomey moved to approve the 2017 Judicial Council calendar as proposed. Judge DeCaria seconded the motion, and it passed unanimously.

7. CIVIL JURY INSTRUCTION COMMITTEE UPDATE: (Juli Blanch and Nancy Sylvester)

Chief Justice Durrant welcomed Ms. Blanch and Ms. Sylvester to the meeting.

Ms. Blanch highlighted the following in her update on the work of the Model Utah Civil Jury Instructions (MUJI-Civil) Committee: 1) committee membership noted, 2) committee's subject matter timeline, and 3) currently addressing the emotional distress and civil rights subject matters.

Chief Justice Durrant thanked Ms. Blanch and Ms. Sylvester for their update.

8. RULE FOR FINAL ACTION: (Nancy Sylvester)

Chief Justice Durrant welcomed Ms. Sylvester to the meeting.

Rule 4-202.02 – Records classification was amended to classify court records associated with actions for disease testing to be sealed.

The public comment period has closed with no public comments being received. The Policy and Planning Committee recommended final action be taken on the rule.

Motion: Judge Higbee moved to approve Rule 4-202.02 – Records classification for final action as recommended. Judge Toomey seconded the rule, and it passed unanimously.

9. LEGISLATIVE AND INTERIM HIGHLIGHTS: (Rick Schwermer)

Mr. Schwermer highlighted the following in his legislative update: 1) two interim sessions have been held since our last meeting, 2) court surcharge, 3) expungement amendments, 4) executive appropriations approved the Online Dispute Resolution (ODR) grant, 5) a Justice Reinvestment Initiative (JRI) report was given, 6) court fines and restitution collection, 7) surcharge on fines, 8) Utah Juvenile Justice Working Group report, 9) confirmation of Mr. Robert Neill as a judge for the Second District Juvenile Court, 10) confirmation of Mr. Anthony Howell as a judge for the Fourth District Court, 11) confirmation of Mr. Kraig Powell as a judge for the Fourth District Court, 12) confirmation of Mr. Robert Lunnan as a judge for the Fourth

District Court, 13) pre-trial bill discussion took place, 14) judiciary amendments bill file open, 15) fiscal notes on unnumbered bills has started, and 16) Fifth District Court judgeship bill file has been opened.

Mr. Becker noted that the issue of reliance on fine and fee revenue is receiving national attention.

10. FOURTH DISTRICT LOCAL RULE: (Debra Moore)

Chief Justice Durrant welcomed Ms. Moore to the meeting.

Ms. Moore reminded the Council that they approved the Fourth District local rule 10-1-407 – Time to charge, on an expedited basis for public comment, effective August 1, 2016. Ms. Moore distributed a copy of the comments received.

For clarification regarding where the rule applies, the Board of District Court Judges requested that the location be clarified on the rule. Final approval of the rule, by the Council, was requested.

The rule was highlighted as follows:

- A person arrested for a non-petty offense, who is unable to post bail and remains in custody, shall be taken before a district judge before the close of business on the fourth business day after arrest.
- If a criminal information has not been filed by the time of the hearing, the arrestee shall be discharged and the matter closed without prejudice unless the State is allowed additional time to screen and charge.
- The court shall consider a request for additional time to screen and prepare charges if presented in writing, by counsel for the State. The request shall be granted for a reasonable period of time upon a showing of good cause.
- If a criminal information has not been prepared and no order for additional time to screen and file charges has been made, the arrestee will be released without requirement for bail or surety but upon promise to appear on the first appearance calendar one week or less at a future date.

Concern was expressed with the length of time until charged. A question was asked regarding consideration of a statewide rule in this matter. Discussion took place.

Motion: Judge DeCaria moved to take no action, at the present time, on the existing local rule and send Rule 10-1-407 – Time to charge to the Pre-Trial Release and Supervision Committee for review and a recommendation back to the Council. Judge Higbee seconded the motion, and it passed unanimously.

11. JUVENILE INDIGENT REPRESENTATION COMMITTEE – INITIAL REPORT: (Justice John Pearce)

Chief Justice Durrant welcomed Justice Pearce to the meeting.

Justice Pearce highlighted the following regarding the work of the Juvenile Indigent Representation Committee: 1) committee charge, 2) timetable, 3) committee membership, 4) creation of a Contracts Subcommittee and a Representations Subcommittee, 5) committee findings, and 6) committee recommendations.

- The committee was charged to conduct a thorough assessment of the provision of indigent representation services for juveniles in delinquency cases and adults in child welfare cases before the Utah juvenile court.
- Specifically, the committee was asked to:
 - ❖ Determine what constitutes “best practices” in the delivery of delinquency and child welfare representation
 - ❖ Assess the strengths and weaknesses in the delivery of such representation
 - ❖ Assess the availability and collection of data associated with juvenile court indigent representation and make recommendations for improving such
 - ❖ Assess caseloads being carried by juvenile defense counsel and make recommendations with respect to acceptable caseloads
 - ❖ Advance recommendations which will strengthen representation contracting
 - ❖ Evaluate structures and resources and advance recommendations which will enhance the competency and quality of juvenile court indigent representation, taking into consideration both the resource/cost implications and any potential efficiency measures
 - ❖ Assess current education and training provided to defense counsel in both delinquency and child welfare cases and make recommendations for strengthening such
- Consider whether juvenile court indigent representation issues are best incorporated into the work of the newly formed Indigent Defense Commission or dealt with separately, and if combined with the work of the commission, what, if any, changes would need to be made in the commission’s responsibilities and membership.
- The Contracts Subcommittee obtained and reviewed all existing county juvenile indigent defense contracts, and they drafted two model contracts.
- The Representation Subcommittee reviewed best practices in juvenile delinquency defense cases and in parental defense child welfare cases. The subcommittee developed a set of best practice recommendations.

The findings of the Juvenile Indigent Representation Study Committee included:

- Juvenile indigent representation should be added to the Indigent Defense Commission (IDC) charge
- The Indigent Defense Commission should create a subcommittee to address juvenile issues
- Statutory amendments to the Indigent Commission to include:
 - ❖ Two new commission members
 - ❖ Assistant Director
 - ❖ Amend duties to cover juvenile representation

- Best practices for representation
 - ❖ Juvenile delinquency defense
 - ❖ Parental defense
- Data collection recommendations

The recommendations of the Juvenile Indigent Representation Study Committee included:

- The Judicial Council should propose legislation for the 2017 session in the form of the Indigent Defense Commission (IDC) statutory amendments.
- If the proposed legislation passes, the Judicial Council should provide the Indigent Defense Commission (IDC) with the committee's best practice recommendations and model contracts for consideration.
- If the proposed legislation does not pass, the Judicial Council should publish a final report with detailed recommendations and model contracts for county implementation.
- The Judicial Council should require the CARE IT team to implement the committee's data collection recommendations in future programming updates.

A final report, including the two model contracts, will be prepared for presentation to the Council at their January meeting.

Discussion took place.

Chief Justice Durrant thanked Justice Pearce, on behalf of the Juvenile Indigent Representation Study Committee, for their work on the matter of juvenile indigent representation.

12. CCJJ/PEW RECOMMENDATIONS ON JUVENILE JUSTICE: (Judge Michelle Heward, Judge James Michie, and Judge Ryan Evershed)

Chief Justice Durrant welcomed Judge Heward, Judge Michie and Judge Evershed to the meeting.

Judge Heward mentioned that she, Judge Michie and Judge Evershed participated as members of the Utah Juvenile Justice Working Group. The working group was broken into three subgroups: 1) the Pre-Adjudication Subgroup, 2) the Dispositions Subgroup, and 3) the Investment and Oversight Subgroup. The working group completed a data-driven assessment of the Utah juvenile justice system. Judge Heward reported that the Board of Juvenile Court Judges is in favor of the recommendations. Concerns with the recommendations will be discussed, with members of the Council, later in the presentation.

Judge Michie participated as a member of the Pre-Adjudication Subgroup. He highlighted the following recommendations that were agreed upon by the Pre-Adjudication Subgroup: 1) ensure that all youth receive legal counsel at every stage of the court process and that the state collaborates with counties to certify that legal representation meets high standards across Utah, 2) juvenile probation officers will no longer be allowed to screen and file charging documents, 3) streamline, on a statewide basis, how cases are handled non-judicially, 4) recommendations regarding certain school-based offenses to be handled by a statewide tiered system of graduated responses prior to court referral.

Judge Evershed participated as a member on the Investment and Oversight Subgroup. He highlighted the following recommendations that were agreed upon by the Investment and Oversight Subgroup: 1) expand investment into evidence-based programs in the community so that every judicial district in the state has access to high-quality options proven to strengthen families and reduce reoffending for youth living at home, and 2) adopt performance-based contracting to ensure the results and accountability we expect from our system.

Judge Heward participated as a member on the Dispositions Subgroup. She highlighted the following recommendations that were agreed upon by the Dispositions Subgroup where she expressed concerns: 1) promote individualized dispositions, reduce unnecessary, control-oriented probation conditions, and tailor therapeutic conditions to address a youth's assessed risks and needs; 2) tailor eligibility for removal from the home to focus state resources on youth who pose the highest risk to public safety; and 3) maximize the impact of supervision and deliver evidence-based interventions in the most effective period of time.

Relating to concerns with the proposed recommendations the Board of Juvenile Court Judges would like to see areas that unreasonably interfere with the ability of the court addressed, to include: 1) enforce its orders, 2) access services, including out-of-home services that are necessary to protect the youth and the community, 3) to ultimately determine when the courts orders have been fulfilled and to close a case, and 4) to be able to maintain meaningful drug, mental health and education courts. The Board of Juvenile Court Judges determined that these areas have the greatest impact on the core functions of court.

Discussion took place.

When preparing for review of upcoming legislation relating to the recommendations from the Utah Juvenile Justice Working Group, the Council's Liaison Committee would benefit from additional juvenile court expertise.

The effective date of any legislation will need to be addressed before any legislation is finalized and approved.

Additional juvenile court judges will be invited to meet with the Liaison Committee as they address proposed legislation resulting from the recommendations of the Utah Juvenile Justice Working Group.

Chief Justice thanked Judge Heward, Judge Michie, and Judge Evershed for their participation as members of the Utah Juvenile Justice Working Group.

13. ARNOLD FOUNDATION PRE-TRIAL ASSESSMENT TOOL: (Daniel J. Becker and Rick Schwermer)

Mr. Becker reminded the Council that in 2015 the Council's study item dealt with pre-trial release with a report and recommendations being provided to the Council in November 2015. Formation of a standing committee and adoption of a new form of pre-trial risk assessment tool were two of the recommendations that were proposed by the study committee.

Background information on review of the Arnold Foundation pre-trial release assessment tool by the Pretrial Release and Supervision Committee was provided by Mr. Becker. Details related to being designated by the Arnold Foundation as an approved site to use their pre-trial release assessment tool were shared with the Council.

An advance team from the Justice System Partners (JSP), under contract with the Arnold Foundation to implement the pre-trial release assessment tool, was onsite during November 2-4 to provide a readiness assessment in determining whether to designate Utah as an approved site to use the Arnold pre-trial release assessment tool designed to assist judges in making release/detention determinations. They met with judges, visited jails, and met with the Pretrial Release and Supervision Committee and court staff.

A report submitted by the Justice System Partners (JSP) to the Arnold Foundation Board regarding the designation of Utah as an approved site for use of the Arnold pre-trial release assessment tool will be completed by November 18. If selected as an approved site, a contract will need to be entered into with the Arnold Foundation for implementation. Funding for the implementation costs of using the Arnold pre-trial release assessment tool will be provided by the Commission on Criminal and Juvenile Justice (CCJJ).

Mr. Becker mentioned the anticipated implementation timetable.

The Harvard Law School is working with a number of jurisdictions who are in the process of implementing the pre-trial release assessment. The Harvard Law School would like to use Utah as a site to evaluate the reliance of judges in applying the tool when making release decisions. Mr. Becker noted that the Arnold pre-trial release assessment tool has already been validated as an effective risk assessment tool.

Mr. Schwermer mentioned that the pre-trial risk assessment tool is widely used in such states as Kentucky and Arizona.

The Arnold Foundation has entered into a contract with the Harvard Law School to gain insight on the affects of judges using the tool. They are interested in the statewide applications and numbers involved with pretrial release assessments.

If Utah participates in the Harvard controlled study using the Arnold Foundation's pre-trial risk assessment tool, the recommendation is to include all of Second District—Davis County, Weber County, and Morgan County, and Utah County as study participants. The districts participating in the study would use the tool on every other case.

Mr. Schwermer reviewed a handout related to pretrial services.

Discussion took place.

The Council was in agreement to proceed with implementation of the pre-trial release assessment, if Utah is selected as an approved site to use it.

Further discussion on participation in the Harvard Law School controlled study using the Arnold Foundation's pre-trial risk assessment tool will take place in an executive session later in the meeting.

14. SENIOR JUDGE CERTIFICATIONS: (Rick Schwermer)

The following judges are requesting recertification as senior judges: 1) Judge Kim Adamson, active senior justice court judge; 2) Judge Timothy Haveron, active senior justice court judge; 3) Judge Tyrone Medley, inactive senior judge; 4) Judge Leslie Scott, inactive senior justice court judge; and 5) Judge William Keetch, inactive senior justice court judge.

The following judges are requesting certification as active senior judges: 1) Judge Ron Wolthuis, active senior justice court judge; and 2) Judge Marsha Thomas, active senior justice court judge.

Motion: Judge Toomey moved to enter into an executive session to discuss matters of professional competency and possible litigation. The motion was seconded, and it passed unanimously.

Members of the Council agreed to participate in the Harvard study conditioned on an approved MOU with the Arnold Foundation and any financial issues to be resolved by Mr. Becker.

Motion: Judge Higbee moved to forward the recommendations for senior judge recertification to the Supreme Court, on behalf of the Council, for the following judges: 1) Judge Kim Adamson, active senior justice court judge; 2) Judge Tyrone Medley, inactive senior judge; and 3) Judge Leslie Scott, inactive senior justice court judge. Judge Farr seconded the motion, and it passed unanimously.

Motion: Judge Higbee moved to forward the recommendations for senior judge certification to the Supreme Court, on behalf of the Council, for the following judges: 1) Judge Ron Wolthuis, active senior justice court judge; and 2) Judge Marsha Thomas, active senior justice court judge. Judge Farr seconded the motion, and it passed unanimously.

Motion: Judge Farr moved to not certify Judge Timothy Haveron as an active senior justice court judge, but to forward the recommendation for inactive senior justice court judge certification to the Supreme Court, on behalf of the Council. Judge Higbee seconded the motion, and it passed unanimously.

Motion: Judge Parkin moved to take no action regarding the recertification of Judge William Keetch as an inactive senior justice court until the December meeting where Judge Keetch will be invited to the meeting to provide additional information to the Council prior to any action being taken. Judge Higbee seconded the motion, and it passed unanimously.

15. EXECUTIVE SESSION

An executive session was held at this time.

16. ADJOURN

The meeting was adjourned.