

JUDICIAL COUNCIL MEETING

Minutes

December 21, 2020

Meeting conducted through Webex

9:00 a.m. – 12:17 p.m.

Chief Justice Matthew B. Durrant, Presiding

Members:

Chief Justice Matthew B. Durrant, Chair
Hon. Kate Appleby, Vice Chair
Hon. Brian Cannell
Hon. Augustus Chin
Hon. David Connors
Hon. Paul Farr
Hon. Michelle Heward
Justice Deno Himonas
Hon. Mark May
Hon. Kara Pettit
Hon. Derek Pullan
Hon. Brook Sessions
Hon. Todd Shaughnessy
Rob Rice, esq.

AOC Staff:

Hon. Mary T. Noonan
Cathy Dupont
Michael Drechsel
Heidi Anderson
Shane Bahr
Kim Free
Brent Johnson
Larissa Lee
Bart Olsen
Karl Sweeney
Nancy Sylvester
Keisa Williams
Jeni Wood

Excused:

Hon. Samuel Chiara
Hon. Ryan Evershed
Jim Peters
Neira Siaperas

Guests:

Hon. James Blanch, Third District Court
Hon. George Harmond, Seventh District Court
Kristina King, OLRGG
Annie Knox, Deseret News
Hon. Barry Lawrence, Third District Court
Hon. David Mortensen, Court of Appeals
Alex Peterson, Judicial Conduct Commission
Dr. Jennifer Yim, JPEC

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

Chief Justice Matthew B. Durrant welcomed everyone to the meeting. Due to the coronavirus pandemic, the Council held their meeting entirely through Webex.

On December 7, 2020, the Council unanimously approved by email, accepting an additional \$79,000 in grant funds available through the Utah Bar Foundation (UFB) (via Salt Lake County CARES Act). UBF is the grant manager, therefore, the grant funds will be administered in the same manner as the original grant of \$206,696..

The additional funds will be used for:

- \$15,000 for 3 witness stand enclosures for jury trials during the red and yellow phase of COVID
- \$64,000 for 7 additional kiosks to allow virtual participation in court hearings. The kiosks will be placed: 2 at Matheson courthouse, 1 at West Jordan courthouse, 2 at Salt Lake City Justice Court, and 2 at the West Valley City Justice Court (these are in addition to the 3 kiosks which were approved and installed as part of the original UBF grant: 2 in Matheson and 1 in West Jordan).

On December 15, 2020 the Council unanimously approved by email a second amendment to the UBF CARES Act grant in the amount of \$92,760. The courts will repurpose \$35,714 of UBF original and first amendment grant funds which were not used due to various budget savings. The total additional funds of \$128,474 (\$35,714 + \$92,760) will be spent on the following “work from home” and “virtual or hybrid court access” projects for Salt Lake County based court employees and courthouses.

- \$22,000 for 100 computer monitors, headsets, video cameras, power cords and other technology needed to address telecommuting needs during the pandemic in Salt Lake County courthouses. \$55,000 for 50 laptops for Third District Court and appellate employees who are telecommuting during COVID
- \$12,000 for 100 monitors same conditions as above
- \$34,000 for Supreme Court conference room technology upgrades to facilitate improved capabilities to host oral arguments and other meetings from home, or if in-person attendance is needed, provide appropriate social distancing
- \$6,000 for Public Information Office radio ads regarding court access and professional voice over for the court's new Jury Safety video.

Motion: Judge Kate Appleby moved to approve the November 23, 2020 Judicial Council meeting minutes, as amended with Judge Connor’s corrections. Judge Augustus Chin seconded the motion, and it passed unanimously.

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

Chief Justice Durrant recognized Judge Appleby for her extraordinary work.

3. ADMINISTRATOR’S REPORT: (Judge Mary T. Noonan)

Judge Mary T. Noonan reviewed the memberships of the Council’s executive committees.

Management Committee	Policy & Planning Committee	Liaison Committee	Budget & Fiscal Management Committee
Chief Justice Durrant, Chair	Judge Pullan, Chair	Judge Pettit, Chair	Judge May, Chair
Judge Farr	Judge Cannell	Judge Evershed	Judge Chin
Judge May	Judge Chiara	Justice Himonas	Justice Himonas
Judge Mortensen	Judge Connors	Judge Sessions	Judge Pettit

Judge Shaughnessy	Judge Heward		
	Rob Rice		

Jonathan Puente has accepted the position of the Director for the Office of Fairness and Accountability. He will begin January 4, 2021.

Judge Noonan mentioned there have been discussions on the COVID vaccination distribution priority list. Judge Noonan will meet with Rich Saunders, Utah Department of Health, to advance a conversation about the Judiciary’s commitment to the public and the need for the vaccination. Judge Todd Shaughnessy felt the court’s front line workers should be prioritized. Judge Connors thought the public defenders should be prioritized because they interact with their clients at the jails. Judge Appleby and Judge Pettit believed in an effort to move jury trials forward, perhaps potential jurors could be considered a priority. Justice Deno Himonas said the courts have the mandate for speedy public trials so he too felt the courts should assist with ensuring public defenders receive the vaccine. Judge Pullan noted judges are more separated from people in courtrooms and thought the frontline staff should be considered a higher priority than judges. Judge Pullan said the courts should have conversations with attorneys about the court plans for safety.

4. BOARD OF DISTRICT COURT JUDGES REPORT: (Judge Barry Lawrence and Shane Bahr)

Chief Justice Durrant welcomed Judge Barry Lawrence and Shane Bahr. Judge Lawrence explained that transitioning to a virtual format in such a short amount of time has been remarkable. Judge Lawrence complimented the IT Department for their work.

- The quality of recordings of court hearings has been an issue. Judges and staff are working to ensure the recordings are clear.
- A pilot criminal jury trial is set for January 25, 2021 at the Matheson Courthouse.
- Judge Lawrence recommended the Council encourage the state to consider immunizing all frontline workers in the courthouse as soon as possible to allow courthouses to reopen.
- Eviction and addiction-related cases have risen this year.
- The Board reviewed and distributed the findings to the bench of the Legislative Audit on Fines, Fees, and Surcharges.
- The Board has been working on rule amendments.
- There is a shortage of volunteer attorneys in Post-Conviction Relief Act (PCRA) cases.
- The district judges created a searchable brief bank as a tool for judges.
- The spring conference has been reduced to two days for May, 2021.
- The Bar litigation section and Judge Andrew Stone are working on holding virtual civil jury trials.

Justice Himonas said judges are authorized to request volunteer attorney assistance from law firms. Judge Pullan questioned whether there might be grant funds through the Indigent Defense Commission that could be used for attorney assistance for PCRA cases and noted that the State should pay lawyers for this difficult work. Rob Rice will contact the Pro Bono Commission to possibly meet with the Board of District Court Judges. Justice Himonas said the

Pro Bono Commission was not receptive to his requests for assistance with PCRA cases in the past.

Judge David Connors expressed concern about his ability to access recordings of court hearings and asked about progress on converting Webex hearings to the court FTR system. Judge Lawrence noted he always records through FTR. Judge Connors virtual proceedings are always recorded through Webex. Justice Himonas recommended the Board provide guidance to the bench on recordings. Judge Noonan will address this with the IT Department. Judge Pettit has a clerk, even if it is not hers, start the FTR courtroom recordings and felt addressing this should be a priority. Some judges highly recommend or require that attorneys have headsets with microphones for better clarity on the recordings. Shane Bahr said there is a transfer process of recordings from Webex to FTR, however, there is a large backlog.

Chief Justice Durrant thanked Judge Lawrence and Mr. Bahr.

5. COMMITTEE REPORTS:

Management Committee Report:

The work of this committee is reflected in the minutes.

Budget & Fiscal Management Committee Report:

Judge Mark May noted the Utah Bar Foundation CARES Act Grant has increased to \$378,000. The Council discussed why the Utah Bar Foundation grant could only be used for needs in Salt Lake County rather than statewide needs. Rob Rice said only Salt Lake County and Utah County received CARES Act funds. The Utah Bar Foundation applied to Salt Lake County to use some of the Salt Lake County CARES Act funds for COVID related access to justice needs in the county. The Bar Foundation approached Utah County about using some of Utah County funds for COVID related access to justice needs, but Utah County did not award any to the Utah Bar Foundation.

Liaison Committee Report:

Judge Kara Pettit noted five new judges were confirmed by the Senate. The committee will begin meeting weekly January 8. The Elected Official and Judicial Compensation Committee recommended to the Legislature that judges receive the same COLA as other employees this year.

Policy and Planning Committee Report:

Judge Pullan addressed CJA Rule 3-101. The proposed amendments to Rule 3-101 establish a definition for “submitted” for purposes of the cases under advisement performance standard and clarify that judges will be considered compliant with education and cases under advisement standards if their failure to meet one or both of those standards was due to circumstances outside of the judge’s control.

Policy and Planning met with members of the Board of District Court Judges, Dr. Jennifer Yim, and two JPEC commissioners to discuss the draft rule. Both groups agreed to the rule draft.

Bar Commission Report:

Mr. Rice said the Bar Commission met on Friday and members expressed concern about the Senate’s refusal to consider the Governor’s appointment for the judicial vacancy on the Court of Appeals. The commission is working on the selection of a new director for the Utah State Bar, in anticipation of John Baldwin’s retirement in 2021.

6. PRETRIAL RELEASE AND SUPERVISION COMMITTEE REPORT: (Judge George Harmond and Keisa Williams)

Chief Justice Durrant welcomed Judge George Harmond and Keisa Williams. The committee has been working on implementation of 2020 General Session H.B. 206. They created two subcommittees (data collection and rules). They are working with local entities on data collections in hopes to create a model dashboard for the state on what processes were prior to and after H.B. 206. Judge Connors said there is a perceived lack of consistency between judges in how they review PSAs and the decisions they make. The committee has been working with law enforcement to ensure as much information can be received as possible.

Chief Justice Durrant thanked Judge Harmond and Ms. Williams.

7. CJA RULES 3-105, 3-201, 3-201.02, AND 3-301.01 FOR FINAL APPROVAL: (Keisa Williams)

Chief Justice Durrant welcomed Keisa Williams. The Judicial Council approved rule 3-105, 3-201, 3-201.02, and 3-301.01 for public comment. During the 45-day comment period, no comments were received on rule 3-201 and 3-201.02. One positive comment was received on rule 3-105. Two comments were received on 3-301.01, one positive and one negative. The Policy and Planning Committee made one amendment to rule 3-201.02 in response to the public comment. The committee recommended these rules for final approval with an effective date of May 1, 2021.

CJA Rule 3-105. Administration of the Judiciary (New)

This rule sets forth the authority of judges, courts, the Supreme Court, and the Judicial Council to administer the functions of the judicial branch and creates a process by which the Supreme Court and Judicial Council may assess and determine exclusive and predominant authority, and how those two bodies will communicate with each other when issues arise.

CJA Rule 3-201. Court Commissioners (Amend)

The proposed amendments are clarifying and not substantive.

CJA Rule 3-201.02. Court Commissioner Conduct Committee (Amend)

In July 2020, the Judicial Council reviewed and issued a ruling on findings and recommendations made by the Court Commissioner Conduct Committee. The proposed amendments address the two issues raised by the Council; more clearly define the committee’s charge and complaint procedures, and create an appeals process if the Committee dismisses a complaint without a hearing.

CJA Rule 3-301.01. State Court Administrator—Complaints and Performance Review; Complaints Regarding Judicial Officers and State Court Employees (New)

This rule establishes the Management Performance Review Committee, outlines a process for reviewing the performance of the State Court Administrator, and creates an avenue by which complaints regarding the State Court Administrator, judicial officers, and state court employees can be received, reviewed, and investigated.

Chief Justice Durrant thanked Ms. Williams.

Motion: Judge Pettit moved to approve CJA Rules 3-105, 3-201, 3-201.02, and 3-301.01 for final approval, as presented, with an effective date of May 1, 2021. Judge Brian Cannell seconded the motion, and it passed unanimously.

8. SENIOR JUDGE APPOINTMENTS AND RULES: (Cathy Dupont and Nancy Sylvester)

Chief Justice Durrant welcomed Cathy Dupont and Nancy Sylvester. The senior judge evaluation and appointment processes are governed by CJA Rule 3-111 and Rule 11-201. None of the senior judge applicants below have complaints pending before the Utah Supreme Court or the Judicial Conduct Commission.

Active Senior Judge Certifications

Judge Thomas Kay, District Court

Active Senior Judge Recertification's

Judge G. Rand Beacham

Judge Gordon J. Low

Inactive Senior Judge Certifications

Judge Mary T. Noonan

Judge Susan Weidauer

Chief Justice Durrant thanked Ms. Dupont and Ms. Sylvester.

Motion: Judge Appleby moved to approve the certification of Judge Thomas Kay (Active Senior Judge), the recertifications of Judge G. Rand Beacham and Judge Gordon J. Low (Active Senior Judges), and the certifications of Judge Mary T. Noonan and Judge Susan Weidauer (Inactive Senior Judges), as presented. Judge Cannell seconded the motion, and it passed unanimously.

Nancy Sylvester said the past practice for senior judge applications has not included contacting JPEC when vetting the applications. Ms. Sylvester will speak with Dr. Jennifer Yim on this matter. Judge Connors felt there may be information from JPEC regarding midterm evaluations or retention recommendations that the courts might want to consider when evaluating the appointment of a senior judge. Judge Appleby recommended sending this to Policy & Planning for review. Judge Pullan welcomed the discussion. Ms. Sylvester will work with Cathy Dupont and JPEC.

9. JUDICIAL CONDUCT COMMISSION (JCC) REPORT: (Alex Peterson)

Chief Justice Durrant welcomed Alex Peterson. Mr. Peterson noted there was no evidence of COVID-related complaints.

JCC Update

- 51 cases in FY20 (64 in FY19, 58 in FY18) and 29 cases in FY21
- Zero public dispositions in FY21 and zero DWW dispositions with no cases pending before the Supreme Court
- Published FY20 Annual Report
- Annualized requests for information as follows:
 - 7 for the AOC
 - 4 for JPEC
 - 8 for CCJJ
 - 13 for AJDC/CJE
- Received 339 phone call inquiries
- Prepared increased budget proposal
- GRAMA litigation regarding a DWW record
- Hold meetings virtually

Chief Justice Durrant thanked Mr. Peterson.

10. MODEL UTAH CRIMINAL JURY INSTRUCTIONS COMMITTEE REPORT: (Judge James Blanch and Michael Drechsel)

Chief Justice Durrant welcomed Judge James Blanch and Michael Drechsel. Judge Blanch thanked Mr. Drechsel for his work on the committee. The committee published for public comment a body of instructions previously adopted by the committee. Those instructions are related to:

- Defense of Habitation / Self / Others (500 series)
- DUI Instructions (1000 series)
- Assault Instructions (1300 series) – review already completed
- Homicide Instructions (1400 series)
- Sexual Offense Instructions (1600 series)
- Miscellaneous Instructions

During the comment period, the committee received more than 30 comments. The committee still has significant work left to do in considering these public comments. The committee continues its work on the Driving Under the Influence and Related Traffic instructions. The legislature passed in 2020 S.B. 238 Battered Person Mitigation Amendments. The committee has been working on instructions related to S.B. 238.

The committee makes a constant review of developing case law to ensure that jury-instruction-related issues raised in appellate case law are considered and addressed. Currently, the committee is assessing whether and how instructions might be crafted consistent with the Supreme Court's decision in Pleasant Grove City v. Terry, 2020 UT 69 (re: impossible verdicts).

Once the current projects are finalized, the committee plans to proceed with crafting instructions for Burglary and Robbery Offenses. Judge Blanch will add curative instructions to the committee's work.

Chief Justice Durrant thanked Judge Blanch and Mr. Drechsel.

11. OLD BUSINESS/NEW BUSINESS

Karl Sweeney addressed a memorandum prepared by the Clerks of Court (Clerks) in which they addressed judicial assistant's worsening morale issues as a result of the pandemic-caused workloads, which the Clerks fear will result in a high rate of turnover for JAs. As of December 21, 2020 there are 33 JA/Case Manager vacant positions. The clerks suggested that the court should find a way to address the workload issues. They suggested reducing calendars and hiring temporary help for the JAs, perhaps using retired JAs who are familiar with court processes. Karl Sweeney reported that the courts have one-time savings due to higher than budgeted turnover. The additional one-time savings could be used to temporarily hire retired JAs to supplement court staffing levels. Judge Noonan and the Budget & Fiscal Management Committee requested the Council use one-time turnover savings to fund 25 temporary JA positions for up to 6 months. Judge May noted the reason the courts have so much funding available is because there are so many JA positions vacant.

Judge Shaughnessy questioned if there are retired JAs willing to be brought back on under these terms and if this was the right time to consider bringing them back because jury trials have not begun and the need may be greater when trials resume. Justice Himonas wondered if holding off on bringing them back would increase the problem. Judge Appleby said the crisis seems to be right now and the Council could consider adding more or continuing the temporary help in the future... Judge Pullan posed three comments: 1) have the courts lost JAs due to the pandemic and if so, how many; 2) capping calendars is not a workable solution; and 3) how would the Council identify the places of greatest need. Judge Pettit believed bringing JAs back now is appropriate as the need is immediate. Judge Cannell noted the First District has not experienced the same issues as other districts. Bart Olsen said the Court could be liable to pay overtime worked by a JA, even if the JA has not reported the overtime work. Justice Himonas asked if the courts could give JAs bonuses rather than comp time to be used at a later date.

Judge Noonan responded to the questions posed by Council members. She stated that the court could use the process currently in place for filling empty JA positions to also identify the areas with the most need for temporary JA assistance. Mr. Sweeney noted the Judicial Council could consider bonuses for employees if there are surplus funds available after the court returns to the Legislature the promised savings from the June budget cuts. At this time, it looks like there may be additional one-time surplus of approximately \$300,000 - \$500,000 which could be set aside for bonuses.

The request is for \$600,000 in one-time turnover savings to be used between January 1, 2021 and June 30, 2021.

Motion: Justice Himonas moved to approve the request for using one-time turnover savings to fund 25 temporary JA positions for 6 months and encouraged Mr. Sweeney if funds

are available to set aside funding for bonuses for JAs. Judge Shaughnessy seconded the motion, and it passed unanimously.

Chief Justice Durrant was moved by the memorandum and appreciated the discussion and decision by the Council.

12. RECOGNITION OF OUTGOING JUDICIAL COUNCIL MEMBER: (Chief Justice Matthew B. Durrant)

Chief Justice Durrant thanked Judge Appleby for her service on the Council stating he could not overstate how prepared and insightful she is. Judge Appleby will be missed by the Council and the courts. Judge Shaughnessy felt Judge Appleby was a solid force, always prepared, and a great sounding board to the Management Committee as well. Judge Appleby was honored to serve the Council.

13. EXECUTIVE SESSION

Motion: Judge Appleby moved to go into an executive session to discuss a personnel matter and to discuss a budget issue. Justice Himonas seconded the motion, and it passed unanimously.

Motion: Judge Appleby moved to approve the continuance of the Westlaw contract because Westlaw offers the best value for the courts' need and because of the courts' long-term good service relationship with Westlaw. Judge Farr seconded the motion, and it passed unanimously.

14. CONSENT CALENDAR ITEMS

a) Committee Appointment. MUJI - Civil Committee appointment of Ruth Shapiro as Chair, appointment of Judge Kent Holmberg, and reappointments of Judge Keith Kelly and Lauren Shurman. Approved without comment.

b) Probation Policies 2.4, 2.7, 4.3, and 4.7. Approved without comment.

c) CJA Rule 3-108 and 3-101 for Public Comment. Approved with comments on rule 3-101 as noted in section 5 above.

15. ADJOURN

The meeting adjourned.