UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON PRETRIAL RELEASE AND SUPERVISION
MEETING MINUTES

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
September 5, 2019 – 12:00 p.m. to 2:00 p.m.

MEMBERS:	PRESENT	EXCUSED
Judge George Harmond, *Chair*	•	
Wayne Carlos		•
Kimberly Crandall		•
Judge Keith Eddington		•
Sen. Lyle Hillyard		•
Rep. Eric Hutchings	•	
Brent Johnson	•	
Comm. Lorene Kamalu	•	
Judge William Kendall	•	
Lt. Corey Kiddle		•
Pat Kimball	•	
Richard Mauro	•	
Judge Brendan McCullagh	•	
Judge Jeanne Robison	•	
Reed Stringham	•	
Cara Tangaro	•	
Marshall Thompson	•	

GUESTS:

Mark Ebel, Triton Mgmt Svcs
Renae Cowley, Foxley & Pignanelli

STAFF:

Keisa Williams
Minhvan Brimhall (recording secretary)

Welcome and Approval of Minutes (Judge Harmond):

Judge Harmond welcomed committee members and guests to the meeting. The committee considered the minutes from the May 2, 2019 meeting. With no objections or further discussion on the minutes, Richard Mauro moved to approve the minutes. Judge William Kendall seconded the motion. The committee unanimously approved the minutes.

Proposed Amendments to URCrP 9 and 9A:

Judge Harmond informed the Committee that in 2015 the Board of District Court Judges voted to change rules URCrP 9 and 9A, with the intent to improve pretrial practices. Those changes were accepted by the Supreme Court and enacted. In 2018, the rules were suspended to address judges' concerns. The current Board of District Board judges, most of whom were not

members of the Board in 2015, published amended versions of those rules for public comment. While the modifications aren't extensive, they are significant.

Ms. Williams provided an overview of the memo included in the packet. Ms. Williams' primary concern is that the rule amendments increase the time-to-file deadline, meaning people will spend longer amounts of time in jail waiting for prosecutors to file formal charges. National research has shown that even 24 hours in jail has significant consequences for individuals and families. Time in jail causes individuals to lose jobs, housing, child custody, access to medications, and it increases their risk of recidivism for up to two years following that arrest. The rule changes also apply to misdemeanors in justice court.

Ms. Williams noted that the Rules of Criminal Procedure Committee may be creating a subcommittee to take another look at URCrP 9 and 9A. Mr. Johnson reported that shortly after the 2015 amendments were enacted, the new Board of District Court Judges expressed concern that the rules as written were unworkable. The Rules of Criminal Procedure Committee conducted a survey of judges, with responses very similar to that of the Board. The Supreme Court approved suspension of the rules until such time as the Board of District Court Judges and the Rules of Criminal Procedure Committee could develop workable amendments.

The Board acted as a subcommittee of the Rules of Criminal Procedure Committee to create a draft and make recommendations. The Rules of Criminal Procedure Committee deferred to the Board as experts and published the draft version of the rules that the Board recommended for public comment. Mr. Johnson spoke to the Chair of the Rules of Criminal Procedure Committee recommending that a new subcommittee be created, with representatives from the Pretrial Committee, Boards of District and Justice Court Judges, and a few Rules of Criminal Procedure Committee members. Mr. Johnson believes there will be support for the creation of a new subcommittee.

The Committee discussed the differences between urban and rural jurisdictions' ability to comply with a shorter time-to-file deadline, including the capability of each court to conduct arraignments or first appearances via video, and the difference in local pretrial practices overall. Ms. Williams discussed the disconnect between extending the time-to-file deadline and emerging caselaw suggesting that courts must hold hearings within 24-48 hours of arrest to address an individual's ability to pay monetary conditions of release.

Judge Harmond asked if anyone from the committee would agree to participate on the subcommittee, once approved by the Board. Judge Kendall accepted the assignment to join the subcommittee as a representative of the Pretrial Committee. With no further discussion, Judge McCullagh moved to appoint Judge Kendall to the subcommittee. Reed Stringham seconded the motion. The motion was unanimously approved.

Ms. Williams is scheduled to speak with the Board of District Court Judges at the annual judicial conference and plans to discuss the concerns and recommendations of this Committee regarding URCrP 9 and 9A. Ms. Williams will also prepare an official memorandum from this

Committee to the Rules of Criminal Procedure Committee with a recommendation that they create the new 9/9A subcommittee, and if so, that Judge Kendall be included as the Pretrial Committee's representative.

After additional discussion, Judge Brendan McCullagh moved to accept Ms. Williams' proposed actions and give Ms. Williams time to meet with the Board of District Judges and provide this Committee with an update at a future meeting. Pat Kimball seconded the motion. The committee voted and the motion was unanimously approved.

Pretrial 'Ability to Pay' Analysis:

Rich Mauro asked what courts are doing now in regard to making indigency determinations when setting bail. Judge Harmond stated that primarily, indigency determinations are made with respect to whether an individual qualifies for a public defender. Right now, indigency determinations are not being made at the time monetary bail is set. Ms. Williams stated that it is an infrastructure problem. The court does not currently have an infrastructure in place which would provide judges with information about an individual's indigency status that early in the process.

Judge Robison asked if there is a model in other states for conducting ability to pay analyses when setting bail. Ms. Williams said yes. Many of the states involved in the cases she included in the packet changed their laws and practices in the midst of litigation to conform to what was ultimately the order of the court. The difference is that most jurisdictions hold initial appearances within 24-48 hours of arrest so they already have an infrastructure in place to make indigency determinations and hold due process hearings within the required timeframe. Utah courts do not.

The Vera Institute is conducting a pilot project using a calculator similar to those used to make indigency determinations related to public defenders and the ability to pay court costs, fines and fees, except this one calculates an individual's ability to pay cash bail or a secured bond. Ms. Williams is unsure how the tool works exactly and what criteria or algorithms are included to make those determinations, but to her knowledge that is the only tool of its kind right now. However, even if such a tool was available, Utah courts still have an infrastructure problem. Who would meet with the defendant to complete the form? Jail? How and when would a court receive such information in order to make such a determination? By video?

Judge McCullagh stated that in regard to the infrastructure problem, it is aspirational that the court would have the ability to make an indigency determination at the initial bail set (when reviewing probable cause affidavits within 24 hours of arrest). However, the court can absolutely make such a determination at initial appearances. That could happen now if public defenders and prosecutors are available and prepared. This Committee should focus on what things are aspirational and what things are feasible within a reasonable period of time. Ms. Williams noted that if we had a calculator like the Vera Institute, we wouldn't necessarily need counsel in attendance because the judge could ask the defendant the questions and fill in the information.

Mr. Mauro asked whether attorneys should be involved at that point in time because those indigency determinations have serious 6th Amendment implications. Once an indigency determination is made, does that then become a vested right? And if so, how do we think about what that resource looks like? Judge Harmond agreed with Judge McCullagh that we should identify what solutions are aspirational and which are practical. What should this look like and what's practical? Judge Kendall described Salt Lake County District Court's First Felony calendar. Pat Kimball stated that the Salt Lake County Pretrial Screening Unit used to have defendants fill out an affidavit of indigency, but no longer does it because it is time consuming and they do not currently have the resources to accomplish it. Mr. Mauro asked if affidavits of indigency are consistent with the Indigent Defense Act? Ms. Williams stated that courts across the state use different indigency forms. She is unsure whether those comply with the Act. Mr. Mauro asked whether indigency for the purposes of bail the same thing as indigency when appointing counsel, and should it be?

Judge Harmond said this is the kind of work he'd like this Committee to do. We should be looking at this in terms of where the Court will be in a few years? What do we think we can do and what makes sense? Ms. Williams stated that the same type of issues apply to the back end of cases when determine how much an individual can afford when setting court fines and fees. Ms. Williams noted that the AOC's IT Department recently programmed a calculator into CARE, the juvenile court system in the delinquency context. Ms. Williams spoke with the IT Department about whether that programming could be duplicated for pretrial bail sets. The IT Department said it could be because the programming is already built. It is unclear how much time that would take or how much it would cost to build, but it may be a possibility. It would just need to be funded and prioritized with all of IT's other work. Judge Kendall stated that he almost never imposes fines because if the individual already qualifies for a public defender, that determination has already been made.

Cara Tangaro stated that many individuals who don't qualify for a public defender are often having to decide whether to hire an attorney or pay a bail bondsman. They cannot afford to do both. Judge Harmond noted that the PSA doesn't rely on monetary bail. It focuses instead on the risk an individual imposes.

Ms. Williams reviewed several of the cases included in her memo in the packet. She is concerned that precedent is coming and the court will be caught off guard if we don't begin addressing it now. Judge Harmond asked whether we should be looking at the seriousness of the offense and risk analysis? Judge Kendall suggested that the Court look at the federal model which does not use monetary bail at all. Mr. Mauro asked how the caselaw is impacting pretrial reform in the broader aspect. He believes this is a bail reform issue. Judge Harmond agreed, noting California's referendum to address legislative changes related to the cases.

Ms. Williams stated that other issues found in the caselaw is that individuals are entitled to a hearing to determine whether there are any least restrictive conditions to monetary bail. Our current court rules already include the requirement that judges make that determination. The

question now is when it should take place and is the individual entitled to a hearing on the issue with appointed counsel present. The caselaw suggests that individuals have the right to make an argument to the judge that there are less restrictive conditions available and that they should qualify for them. Ms. Williams stated that she believes that may happen at bail hearings when attorneys are involved, but caselaw is saying that needs to happen within 24, 48, or 72 hours (depending on which case you're looking at), and that courts must make findings on the record. That would require more hearings, heavier dockets, public defender availability, prosecutor availability, law enforcement transports to court, etc., and most jurisdictions do not have the resources to accomplish it.

The cases talk about bail schedules which are charge-based like ours are arbitrary. Ms. Tangaro stated that many judges are routinely setting $750,000 bail and then when you get into court it is reduced to $150,000, but that isn't happening until 1-10 days later. Ms. Williams noted that many of the cases have found that if you are a right-to-bail state and you are using an arbitrary bail schedule to set bail by charge without making an ability to pay determination, especially if your intent is to set bail high enough that the person stays in jail because they are unable to pay it, you are essentially making a detention order. And a detention order requires due process.

Judge McCullagh stated that if judges are signing Informations with that intent and effect, they are violating our current rules which require judges to set least restrictive conditions. That is a problem. Ms. Williams noted that many cases state that there is a presumption that the 24-48 hour hearing rule is the constitutionally-required timeframe. The presumption is rebuttable, but prosecutors need to show, and judges need to find, that extending beyond 48 hours is constitutional in that particular case. A lot of cases require a strict scrutiny analysis when making that determination. Judge Kendall stated that FAC calendars in Salt Lake County District Court typically consist of 150 initial appearances between 8:00 a.m. and 11:00 a.m. If you add 5 minutes to each hearing, the whole system would grind to a halt. Mr. Mauro agreed. The jail often only gives public defenders a finite period of time and if the hearing isn't completed within that time period, the individual goes back to jail and has to wait another day to get back on the calendar. Mr. Mauro asked how this should be resolved. They anticipate this being a problem. The hearings are held via video if the individual is still in custody. If they aren't in custody, they appear in court. When public defenders are seeing them in jail, they have already filled out an affidavit of indigency.

Judge Kendall asked whether when individuals are booked, an affidavit of indigency could be filled out so that the DA's office can file it into our system so there's a way for judges to see it in order to make a reasoned decision. Judge Harmond stated that it would need to be driven by the Sheriff's Office. Some jails will have individuals fill those out as soon as they are capable of doing so and then the officers will provide that to court. Others will wait until we've gone through the colloquy before they ask them to fill one out. Those decisions are driven by the jails. Judge Robison stated that ideally, the court would receive those affidavits of indigency electronically along with the PC affidavit and PSA. She questioned whether the affidavit of indigency for determining whether they have the right to counsel and whether they can afford

bail would be the same factors. The Committee discussed it and felt that the two affidavits would likely be primarily the same with perhaps a few additional or different factors.

Mr. Mauro stated that the Salt Lake Legal Defenders' Office will begin the practice next week of arguing in first appearance court that their clients are eligible for release today without monetary bail because they are indigent, among other things. They plan to make similar arguments to those outlined in the caselaw and are anticipating that the court will end the calendar at 10:00 a.m. and that prosecutors will push back. He questioned how judges plan to respond when that happens. Ms. Tangaro suggested creative scheduling of the calendar. Judge Kendall noted that the calendars are extremely packed and the calendars have worked hard on scheduling. Judge Kendall said there are discussions ongoing that juvenile court judges might be able to handle the district court's FAC calendar which would free up time for additional duties on the part of district court judges. However, that would require prosecutors and defense attorneys to staff two calendars. Ms. Williams questioned whether individuals' rights would be violated if the court doesn't hold hearings on weekends. Judge Kendall stated that if the judges are provided an affidavit of indigency electronically at the time they are making a probable cause decision, they wouldn't necessarily have to hold a hearing over the weekend.

Judge McCullagh stated that it would be important to know if individuals are being held on some other warrants or charges. That may reduce the number of hearings. It may not be necessary in 100% of the cases. Ms. Williams questioned whether these requirements apply to arrests with a warrant as well. Judge Harmond said that application of the caselaw to arrests by warrant is something that needs to be considered along with warrantless arrests. Ms. Williams pointed out that in most jurisdictions in the state, first appearance court is only held once per week. Should they be holding first appearance court every day? Every three days?

Ms. Williams noted that across the country, States who have accomplished large-scale pretrial reforms had committees very similar to this one with all criminal justice stakeholders around the table because the plan has to work for everyone. It requires buy-in and support from all three branches of government. A few States were able to accomplish reforms by Court rule, but eventually they also received support from their legislatures. Ms. Williams expressed the importance of remembering that at least one State involved in these lawsuits (Harris County, TX) spent millions defending the suit, millions in settlement dollars, and then still had to implement the reforms. That's something that every stakeholder in Utah should keep in mind as we're developing these plans.

Ms. Williams asked whether the Utah Association of Counties should be brought into the discussion and made aware of these issues. Ms. Williams suggested that each Committee member report back to the groups they represent as we work through this process to ask for feedback, and then come back to the Committee with their group's stance and whether they will support the reforms the Committee is recommending. Judge Kendall suggested that the federal court's model may be informative and should be considered. In looking at 18 U.S.C 3142, it talks about the factors that judicial officers must consider when determining eligibility for release, including financial resources. Financial ability is just one small portion of the

decision. Judge McCullagh noted that Utah Code 77-20-1 already includes the factors and findings required to hold someone without bail.

Pat Kimball stated that Salt Lake County Pretrial Services has much of the information the court needs and they have been considering a way to communicate that information to judges when they are making bail sets. Mr. Mauro stated that any information provided to the judge should be available to all stakeholders. For example, defense counsel does not have access to BCI criminal histories, but prosecutors do. Ms. Williams recommended that this Committee prepare and present a comprehensive package of reforms, rather than piecemeal solutions to particular issues because they are all interconnected. There are models from other States that Utah could pull from.

Marshall Thompson stated that there are a couple of bail reform bills already in the works, one addressing felony on felony holds, and then a general bail reform bill. Mr. Thompson said he would be happy to coordinate with this group and the individuals supporting those bills in order to present a more comprehensive package of reforms. Representative Hutchings offered to help Mr. Thompson with that project. Representative Hutchings believes there is an appetite among the legislature to support bail reform, we just need to give them a good package. Mr. Thompson believes these types of reforms would really help Salt Lake County with their jail population problem. Mr. Thompson reported that one of the possibilities with the felony on felony bill is to eliminate it as an option for a no-bail hold. He said one of the frustrations of his committee is that when individuals are held in jail pretrial on a no-bail hold, they are doing significant time in jail and then doing more time in prison which is extremely wasteful. It's unclear exactly what the bill will include, but that is one of the issues the committee is concerned about.

Judge Kendall stated that another issue which should be included in a comprehensive package of reforms should address overcrowding releases, post-sentencing, on Orders to Show Cause. One recommendation is that, post-sentencing, individuals do not have a right to release nor should they be eligible for overcrowding release. Judge McCullagh suggested that the cap-management plan at the jail be revised because it does not take risk into account; it is solely charge-based. It should be evidence-based based on risk factors. Representative Hutchings stated that he just met with the Salt Lake County Sheriff about who really needs to be in jail and who can and should be diverted. He discussed the jail screening issue associated with JRI funding. They plan to reinstate screenings in Salt Lake County. Representative Hutchings stated that he is working to implement that program in a special interim session. He is also having a conversation about what other issues the legislature can help with to manage the jail population.

Representative Hutchings stated that he could look into including some of the Committee's wish list items, such as the affidavits of indigency, in the funding for screens in Salt Lake County. The Committee discussed what would be included in the wish list: financial information, screening about any other holds or warrants across the state, information on whether they are being booked on a pre- or post-conviction warrant, pretrial interviews regarding housing and ties to

the community, etc. Representative Hutchings stated that there is leftover JRI funding for data-related items (approx. $700,000) included in the CCJJ budget. If the Committee could identify a specific and really impactful item that needs to get to a specific place (like database sharing or custom programming), that might be something the funding could be allocated for. Ms. Williams suggested that the request include programming for the probable cause system which would create the functionality for inclusion affidavits of indigency. That system is owned by BCI, DPS, and the Court.

Ms. Williams recommended that the legislature allocate funding to counties to create pretrial supervision programs. Those agencies would be able to complete the affidavits of indigency for submission to the Court, along with supervision for those who qualify for non-monetary release. Ms. Williams stated that there may be a pot of money available if the bail forfeiture statute was amended. The Legislative Auditors published an audit in January 2017 which found that the Court forfeits less than 1% of bonds annually, compared to a 26% failure to appear rate. The statute allows for one of the longest grace periods in the country, six months with the possibility of an extension, when law enforcement picks individuals up on warrants within 30 days. That means that the bondsmen aren't doing what they are statutorily mandated to do, and the State is footing the bill for it. The bondsmen get to keep their money without doing the work. If the statute were amended to limit the grace period to 30-60 days and make it easier to forfeit bonds that money could be allocated to counties to create pretrial supervision programs and/or allocated for pretrial reforms.

Commissioner Kamalu explained a new diversion program in Davis County beginning in November. Representative Hutchings described a new JJS Diversion program in Ogden which has saved $5 million in 18 months. Diversion programs should be considered in any pretrial reform package.

Developing Model Pretrial Service Programs:

Judge Harmond stated that in keeping with current research on pretrial as well as probation supervision, the legislature asked the Utah Sentencing Commission to review and restructure supervision through AP&P. They've been asked to look at the length of time and how probation is handled, including identifying specific risks and needs and how to address them. That dovetails with what we're talking about and also what we do with pretrial services. The Sentencing Commission has recommended, based on research, shorter terms of probation, specified treatment to address specific risks and needs which have been identified. That is consistent with what the Arnold Foundation told us at the beginning of this process about how over-supervision results in increased recidivism.

Judge Harmond would like to see a more simplified model of pretrial supervision, especially for rural areas. Should pretrial supervision in rural areas consist solely of telephonic contact? The Court has a telephonic reminder system but it is tied to a case number and for individuals released pretrial there is no case number. The Committee discussed text vs. phone reminders. The committee discussed other possible solutions, including creating a kiosk in which the defendant could create a personalized log-in to access their court information. The court is

working to implement a MyCase account which would offer those services. The kiosk may also be offered in an app. Representative Hutching asked whether phone numbers could be gathered by the screening unit and input into an automated text reminder system. He stated that the e-filing system could be amended to require more data points which would allow the Court to match PCs and PSAs to a case file when it's opened. Judge McCullagh recommended adding phone numbers as a data element of e-citations. Mr. Johnson stated that permission is required before a text can be sent to defendants and the request for permission cannot be via an initial text. It would need to be via a written agreement.

Judge McCullagh suggested that old legislation be revived that would allow justice court judges magisterial authority which might help with FAC calendars. Mr. Johnson stated that the Legislative Liaison Committee has determined that we will need to find a sponsor for that bill because it is policy-related. Mike Drechsel may be working on finding a sponsor again next session.

Ms. Williams asked whether this is something that should be presented to UAC. Commissioner Kamalu agreed that a presentation to UAC would be beneficial. She asked Ms. Williams to send her an email reminder and she will work on getting Ms. Williams on the agenda to discuss text/call reminders. Pat Kimball recommended that pretrial supervision offices not be operated by law enforcement or prosecutors because individuals are less likely to provide information.

Judge Kendall recommended that fingerprint machines be installed in District Court to capture SID numbers. Mr. Johnson noted that the Court may have identified a source of grant funds for fingerprint machines. Ms. Williams will send an email to the Committee with a wish list for Representative Hutchings related to technology and data.

Other Items:

Due to the amount and urgency of work needed, the committee determined it would be best to hold monthly meetings for the foreseeable future. The next meeting will be scheduled for Thursday, October 3rd. A meeting invite will be sent to the committee members.

For the next meeting, the committee will continue their discussion on how model pretrial programs should look. Ms. Williams will review various county pretrial programs throughout the state to see how they contact their clients regarding upcoming hearings and how clients make contact with pretrial officers when required. Do they use a software program, or require actual contact with a person.

The Committee identified several items for the queue:

- drafting a proposal for a model pretrial program including reminders and check-ins (focusing on utilizing technology and apps);
- updates on URCrP 9 and 9A;
- identifying pretrial outcome data the court should be tracking (not urgent);
- conducting more caselaw analysis and begin developing a plan around ability to pay and due process reforms (urgent);

- identify short and long-term goals and steps to accomplish those goals;
- list of session items for bill files; and
- model for how re-entry programs could connect at the pretrial phase to provide front-to-back support.

Adjourn:

There being no further business, the meeting was adjourned with no motion. The meeting adjourned at 2:10 pm. The next meeting is scheduled for October 3, 2019, at 12 pm (noon).