UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING AGENDA

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
October 4, 2019 – 12:00 p.m. to 2:00 p.m.

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Pullan
12:05	Rule back from public comment • *CJA 6-506 Procedure for contested matters filed in the probate court*	Action	Tab 2	Nancy Sylvester
12:15	(New) CJA 4-411. Courthouse Attire	Action	Tab 3	Nancy Sylvester
12:30	CJA 1-205 Standing and Ad Hoc Committees • *Remove Online Court Assistance Committee member from the Committee on Resources for Self-represented Parties and the Committee on Court Forms*	Action	Tab 4	Keisa Williams
12:40	Caselaw re: Ability to Pay Analysis and Procedural Due Process in the Pretrial Context • *FYI - Potential for future court process and policy changes*	Discussion	Tab 5	Keisa Williams
12:55	Evidence Audit Status Report (CJA 4-206) • *Fed.R.CIV.P.83-5. Custody and Disposition of Trial Exhibits*	Discussion	Tab 6	Judge Mary Noonan Brent Johnson
1:20	HR 440 - Education Assistance • *Eliminate the provision allowing the Deputy Court Administrator to approve education assistance requests over the presumed maximum*	Action	Tab 7	Brent Johnson
1:30	HR 550 - Harassment Policy • *CJA 3-103. Administrative Role of Judges* • *CJA 3-104. Presiding Judges* • *Code of Judicial Conduct - Canon 2.3. Bias, Prejudice, and Harassment*	Action	Tab 8	Rob Rice Brent Johnson
2:00	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/policyplan/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Friday of each month from 12:00 noon to 2:00 p.m. (unless otherwise specifically noted):

2019 Meetings:
November 1, 2019 – **9:00 a.m. to 5:00 p.m.**
December 6, 2019

TAB 1

Minutes - September 6, 2019

UTAH JUDICIAL COUNCIL
POLICY AND PLANNING COMMITTEE
MEETING MINUTES

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
September 6, 2019 – 12:00 p.m. to 2:00 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge Derek Pullan, *Chair*	•	
Judge Brian Cannell	•	
Judge Augustus Chin	•	
Judge Ryan Evershed	•	
Judge John Walton	•	
Mr. Rob Rice	•	

GUESTS:

Judge Mary Noonan
Chris Palmer

STAFF:

Keisa Williams
Michael Drechsel
Minhvan Brimhall (recording secretary)

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Pullan welcomed the committee to the meeting. The committee considered the minutes from the August 2, 2019 meeting. With no additional changes, Judge Chin moved to approve the draft minutes. Judge Walton seconded the motion. The committee voted and the motion was unanimously passed.

Judge Pullan welcomed Keisa Williams back to the committee. Ms. Williams will take over staffing duties of the committee from Michael Drechsel.

(2) STATE AUDIT RE: EVIDENCE, CJA 4-206 (EXHIBITS), AND *SANDOVAL V. STATE*:

On August 27, 2019, the State Auditor released Performance Audit 19-03 "An Audit of Evidence Storage and Management Among Selected Utah District and Juvenile Courts." The audit identified multiple issues requiring immediate attention by the Court. Judge Noonan provided background on the audit's findings, action planning that has already begun, and a summary of some implications for Policy and Planning.

The court failed the audit, but it has presented an opportunity to look at an area of practice in much need of attention. The focus of the audit centered around compliance with Code of Judicial Administration rule 4-206, addressing proper procedure and management in securing of exhibits and evidence. Specifically, the audit addressed property evidence, including drugs, weapons, paraphernalia, large-sized items, dangerous pieces of evidence typically the subject of chain of custody protocol.

Within 10 days of the audit, Mr. Chris Palmer was instructed to contact all trial court executive to ensure that all physical evidence was properly secured by the end the week. Judge Noonan has received confirmation that all items are now properly secured. Judge Noonan outlined three steps in the action plan for becoming compliant with the rule: 1) secure all items on site at each location, 2) come into compliance with the current rule (4-206) – this will have several administrative components, including inventory of items on site, inventory current practice (this

varies widely across all court locations), train to the current rule, and a create a disposition or disposal plan for those items that are currently on site, and 3) identify implications for policy and planning.

The audit has raised questions, not just about how to comply with the current rule, but also about what the rule should say. Mr. Palmer has reviewed current practices across the State and similar practices at the federal level. In the federal court, no evidence is held at the courthouse. For example, a federal marshal who enters the courtroom with a gun for evidence will either remove the gun from the courtroom during a lunch break, or will stay in the room with the gun during the lunch break. Judge Noonan noted that Utah courts may want to look at federal practices or some other practice to better secure and protect exhibits presented at trial. Judge Noonan noted that this is an opportunity to look at the rule and change some of the presumption and the manner in which we are to conduct ourselves in this regard.

Judge Noonan and Mr. Palmer recently met with the TCE's. Four deliverables were identified. 1) Within the next 10 days, Brent Johnson will be releasing a memorandum to all presiding judges with guidance on this issue, including a proposed order that PJ's may want to sign to effectuate the management of evidence in the short term. 2) The Second District Court developed a local procedure based on the current rule with practical steps to aide them in managing property evidence. The AOC will distribute their practice to all TCE's and Clerks of Courts for consideration/implementation. 3) The AOC will pause any destruction of property that may already be in local evidence rooms or evidence safes. The destruction or disposal of items that may currently be on site is on hold until further notice. Everything will remain secured. 4) Within 10 days of this date, a proposed action plan will be developed, including recommended timeframes for Policy and Planning to consider the issue. Judge Noonan noted that the goal is to have the action plan approved, implemented, and come into compliance with the current rule within the next 2-3 months. Judge Noonan would like PJ's to be educated and the evidence custodian at each site trained as quickly and efficiently as possible. The action plan should allow Policy and Planning the opportunity to consider the larger issue of whether or not the court should take a completely different trajectory with respect to these issues and recommend a wholesale rule change.

Judge Pullan noted that in civil cases, he receives numerous exhibits into evidence which sit on his bench when they take a break, but the courtroom is locked. Judge Pullan expressed concern about moving toward a policy requiring documentary evidence to be booked into an evidence room. Many times the judge brings the exhibits into chambers.

Judge Noonan stated that in some court locations documents in civil cases are being placed in the evidence room, however, the majority do not. The focus of this work will be on vulnerable property. Ultimately, Policy and Planning will need to determine and define which items must be locked up and which do not.

After discussion, the Committee determined that this item should be included on the committee's agenda until action on its part is required. Judge Noonan and Mr. Palmer will provide a status report at future meetings and will keep the committee updated on the AOC's progress. Judge Pullan stated that his sense is that courts generally should not be in the business of acting as an evidence room. In light of the *Sandoval* case, the committee is interested in learning about the federal court model, and how it could be implemented in state court.

(3) HR550 – HARASSMENT POLICY:

Rob Rice provided an update on the harassment policy. The Human Resources Committee considered the policy as it is currently drafted. There are two outstanding issues: 1) drafting and 2) policy/administrative. The minor drafting items can be easily cleaned up at the next HR meeting. The HR Committee raised process questions regarding the complaint and investigation procedure section. There is a reference to the Human Resources Department following up with an investigation, and the Committee considered whether the policy should identify who would conduct that investigation. In Mr. Rice's view, the policy doesn't need to reflect that level of detail. That's a function of the Human Resources Department knowing how to respond to a complaint and knowing how it's going to be investigated. The policy is on the HR Committee's agenda for review at the October meeting. Mr.

Rice believes the policy may be in final form after the October HR meeting and ready for review by the P&P Committee by November. Mr. Rice also noted that the harassment policy will be briefly addressed during the anti-discrimination session at the annual judicial conference next week.

Judge Chin discussed sections 2.2.4, noting that any unwelcome sexual flirtations would be inappropriate so there shouldn't be a need for "or inappropriate." Judge Pullan questioned whether the language in 2.2.5 was too vague. "Statements about an individual's body" could include a judge commenting on an employee showing up to work in a boot on their ankle from an injury over the weekend. Mr. Rice proposed changing the language to "unwelcome or inappropriate statements about an individual's body or sexuality."

Mr. Rice also noted that the HR Committee raised a question about whether employees know who the managers, supervisors, or members of management are. Mr. Rice recommended that the court allow employees to report to any supervisor or manager with whom they feel comfortable. The question is, what in the AOC or what in the courts is the equivalent of a supervisor or manager with whom they feel comfortable reporting sexual harassment.

Mr. Drechsel noted that some locations have multiple levels of management for reporting and the policy is written in a manner that any manager may be identified as someone the employee may report to. The committee discussed that it may be helpful to list the chain of management (clerks of court, TCEs, judges, etc.) within the rule as guidance to help in identifying whom to report. Mr. Drechsel will be meeting with the HR Committee on October 1st and will address this area of concern.

Judge Pullan noted at the June P&P meeting, that Judge Pullan, Judge Walton and Judge Cannell were assigned to create a process by which the state court administrator's performance could be reviewed, as well as other high level managers within the AOC. The committee discussed where a person goes to report when the complaint is made against the HR Director. Mr. Rice recommended having multiple points of contact when addressing complaints against high-level managers. This would create room for safety and comfort for the employee to express their concern in an open and welcoming environment. The committee noted that any manager with state-wide authority would be one in which an employee may report concerns of a high-level manager.

Judge Pullan suggested listing those employees considered high-level managers in the policy. Mr. Rice expressed concern because identifying a discrete group of employees (i.e., high-level administrators), in some ways could have a chilling effect for employees who want to complain about those individuals because the policy itself sets them apart, possibly suggesting that it's a bigger deal to complain about those people than anyone else. We could look at strengthening the sections that already do a good job of making it clear that everyone is subject to this policy from low-level employees all the way up to Supreme Court justices. In looking at section 5.2, Judge Pullan questioned whether judges should be in the reporting chain. Mr. Rice stated that this policy is intended to convey that supervisors and managers have a special obligation under the law to investigate and stop the harassment conduct. Because judges are in a position of authority, they have an obligation to make sure HR gets involved in a situation and stops the harassment.

After discussion, the Committee asked that the policy be put back on the agenda after the HR Committee has completed their work and provided any additional recommendations for review. Mr. Rice will make additional changes to the policy and send it to Mr. Drechsel for review. Mr. Drechsel will discuss the changes with the HR Committee and provide an update to Policy and Planning on another date.

(4) RULES BACK FROM PUBLIC COMMENTS:

Mr. Dreschel reported that CJA 4-401.02 has recently returned from public comment. One comment was received. The comment focused on allowing hearings to be broadcasted publicly as a means to avoid the need for submitting records requests. The comment does not address the basis of the rule.

This committee duly considered the comment and determined no additional changes to the rule were needed. CJA 4-103 has also returned from public comment. No comment was received. With no further discussion, Judge Walton moved to approve CJA 4-101.02 and CJA 4-103 as drafted and moved that they be submitted to the Judicial Council for final approval. Judge Cannell seconded the motion. The motion was unanimously approved.

Mr. Drechsel will prepare a memorandum to the Judicial Council for final approval of CJA 4-401.02 and 4-103.

(5) UPDATE TO PROBLEM-SOLVING COURT CERTIFICATION CHECKLIST:

At the August Judicial Council meeting, Judge Fuchs addressed a concern with the council regarding criteria #2 on the problem solving court checklist. The criteria indicate that the drug court would be responsible for tracking whether disadvantage groups are completing the program at the same rate as other groups. Judge Fuchs indicated that unless IT is able to create an automated process to track this information and store it in an accessible database, it would not be prudent for the courts to track it. The Council recommended changing the title of the criteria from "Presumed Certification Checklist" to "Non-Certification-Related Best Practice Standard." Mr. Drechsel noted that he has made the change as requested in the draft.

Mr. Drechsel questioned whether the court needed to wait for an IT solution, or whether there was a way to track it manually now. Utah County captures race in its drug court application. Washington County does not include a question about race on their application. Uintah County allows individuals to self-identify certain information but it does not identify whether they are a disadvantage participant. Race is not asked in Cache/Box Elder County. After discussion, the committee determined that courts should not be required to track that information until an IT system is available.

Mr. Rice moved to adopt Mr. Drechsel's provision to change "Presumed Certification Checklist" to "Non-Certification-Related Best Practice Standard." Judge Cannell seconded the motion. The committee voted and the motion was unanimously passed.

Mr. Drechsel and Ms. Williams will follow-up with the courts' IT department to identify an approximate completion date or where the project falls on IT's priority list.

(6) REPEAL OF CJA 10-1-202:

CJA 10-1-202 is a local supplemental rule in Second District Court. The rule is no longer being used in practice. The Second District is requesting that the rule be repealed and it has been vetted by Mr. Johnson.

With no further discussion or concerns by the committee, Judge Evershed moved to repeal CJA 10-1-202 and forward to the Judicial Council for public comment. Judge Cannell seconded the motion. The committee unanimously approved the motion.

(7) CJA 1-205 STANDING AND AD HOC COMMITTEES:

Code of Judicial Administration 1-205 defines memberships for all Judicial Council standing committees, including the Resources for Self-represented Parties Committee and the Committee on Court Forms. An OCAP Committee representative is listed as a member on both of those two committees, however, the OCAP committee no longer exists. It is recommended that the OCAP position be removed from the membership list on both of these committees.

Mr. Drechsel spoke with Nancy Sylvester who staffs the Committee on Self-represented Parties, as well as Mr. Johnson who staffs the Forms Committee. Mr. Johns does not have any objection to removing this person from the

Forms Committee. Ms. Sylvester stated the current representative from the OCAP committee provides valuable contribution to the committee and she expressed concern that losing that individual would greatly diminish the work of the Self-represented Parties Committee.

Ms. Williams stated that the Self-represented Parties Committee has 17-18 members, so losing one shouldn't negatively impact their work. The committee can allow a person to attend the meeting and continue to provide meaningful insight. They wouldn't be a voting member, but could still fully participate. In the alternative, the committee has the ability to propose an amendment to their committee membership creating a different position or title in order to retain the expertise they're concerned about losing.

Judge Walton noted that it would be helpful for this committee to understand the role an OCAP person adds to these respective committees and determine whether their expertise should remain with the committee. The committee discussed various language changes that would allow for modification of the committee membership: "Court Services Director or designee" or "OCAP Advisory Group member." Judge Pullan noted that it would be beneficial to understand the Self-Rep Committee's concerns and preferences in losing the OCAP member.

After further discussion, Judge Cannell moved to table rule 1-205 until Ms. Williams is able to gather more information from the Self-Rep Committee's staff. This will be discussed at a future meeting.

(8) MISCELLANEOUS ITEM:

Mr. Drechsel stated that the April 2020 Policy and Planning Committee meeting is scheduled for Friday April 3rd, which is the same day as the Spring Conference. P&P will be meeting in March to discuss legislative updates. The committee opted to cancel the April 3, 2020 meeting.

(9) ADJOURN

With no further items for discussion, Judge Cannell moved to adjourn the meeting. Judge Walton seconded the motion. The meeting adjourned at 1:15 p.m. The next meeting will be held on October 4, 2019 at 12:00 pm (noon).
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TAB 2

CJA 6-506. Procedure for Contested Matters Filed in the Probate Court

NOTES: Probate rules CJA 6-506 and URCP 26.4 are back from comment. The public comments are attached and include Nancy's analysis of them. The revised drafts are based on the comments. The Civil Rules Committee will address the URCP 26.4 comments at its meeting on September 25.

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Policy and Planning Committee
From: Nancy Sylvester
Date: September 25, 2019
Re: Probate rules 6-506 and 26.4 back from comment

Probate rules 6-506 and 26.4 are back from comment. The public comments are attached and include my analysis of them. Also attached are CJA Rule 6-506 and URCP Rule 26.4, which contain my edits based on the comments. The Civil Rules Committee will address the 26.4 comments at its meeting on September 25.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

URCP Rule 26.4, CJA Rule 6-506

URCP026.04. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code. New. Carves out the circumstances under which an objection to a probate petition may be made, as well as the initial disclosures and timelines for discovery.

CJA06-506. Procedure for contested matters filed in the probate court. New. Codifies a long-standing probate mediation practice in the Third District, makes probate mediation statewide, institutes a pre-mediation conference, and addresses the role of interested persons.

https://www.utcourts.gov/utc/rules-comment/2019/06/24/rules-of-civil-procedure-and-code-of-judicial-administration-comment-period-closes-august-8-2019/.

Comments

Anonymous

(1)(B): "Upon the filing of a written objection with the court in accordance with Rule 26.4(c)(2) of the Utah Rules of Civil Procedure, all probate disputes will be automatically referred by the court to the Alternative Dispute Resolution (ADR) Program under Rule 4-510.05 of the Utah Code of Judicial Administration, unless the court waives mediation" should be changed to allow private mediators to also mediate contested probate disputes or allow the ADR program to contract private mediators to mediate contested probate disputes.

Nancy's response:

This comment addresses CJA 6-506. In the Third District, where this program first piloted many years ago, mediation has always been done through the ADR program. The court has an interest in using mediators vetted through the ADR program from a consumer protection standpoint.

Jeffrey Bahls

Both of these proposed rules are poorly constructed and are not designed for the fair and orderly administration of an estate.

The URCP 026.4 rule has been designed to favor the apparent personal representative or the first person/entity to file petition for appointment as the personal representative. The time frames for objection, notice and response are ridiculously short. For an ill disposed petitioner could easily take control of an estate where the family is in turmoil due to a sudden death or there is a huge distance/ time problem. Under the proposed URCP 026.04 there is almost no time for a family member with an

interest in the estate to learn what is going on, find and hire skilled counsel, gather information, and file an objection. In this day and age with scattered families not only over the US but world wide this proposed rule fails to take in these practical considerations. Where there is a disabled person involved, a frequent occurrence, it is even more difficult for him or her to operate within the confines of the proposed rule.

Nancy's response:

This comment addresses URCP 26.4. Regarding the time frame issues he raises, paragraph (c)(3)(D) allows departure from the timing of disclosures for any reason, which could include the distance issue. (c)(4)(D) allows the same. It probably makes sense to add the same type of provision to paragraph (c)(2), as follows: "The court may modify the timing for filing a written objection for any reason justifying departure from these rules."

The CJA 06-506 is equally deficient. The issues in an estate are typically (1) valuation of assets; (2) management of the estate; (3) distribution of those assets; (4) expenses of administration; (5) tax issues; (6) fees of personal representative; and (7) conflicts of interest. Mediation is a good way of resolving many of the more mundane property distribution issues in a particular estate and maybe some management and expense issues. Most of the remaining categories are not easily address by mediation. These are most frequently complicated issues of fact (like valuation, expenses, and management) and of law (like taxes, conflicts, fees of the personal representative, and distribution). As presently drawn the mandatory nature of the rule is an obstacle to the very flexibility that is needed to mold the role of the court to particular situations. The time frames for response and action is also not well served for the same reasons previously discussed. I would suggest that rule require the court to hold a mandatory conference on these issues once raised after a filing and a response to determine if mediation is a reasonable way to resolve the issues or whether discovery and hearing or the filing of briefs on pure matters of law be appropriate. This is particularly important where minors and disabled persons are involved. The rule as drawn only favors personal representatives who want to cram down a result, novel a good result.

Nancy's response:

This comment addresses CJA 6-506. I would suggest that the rule already does what the commenter would like to see done in providing that the court can waive mediation. But perhaps the rule could be bolstered in (1)(C), for example, by adding a provision that says something to the effect of "determining whether the case contains complicated issues of fact and law that are better resolved in the ordinary court of litigation rather than through mediation."

Jeff Skoubye

CJA06-506 line 83 and 84 has a strikeout that makes no sense and needs to be corrected. I believe the stricken language should not be stricken.

Nancy's response:

This comment addresses CJA 6-506. I agree that the stricken language should remain in. This was an oversight.

Earl Tanner

I agree that the strike-outs in proposed CJA06-506 lines 83 and 84 seem inappropriate.

I would add that the "informal trial under Rule 4-1001" at line 107 puzzles me since I can't find such a rule in CJA.

Nancy's response:

This comment addresses CJA 6-506. I agree that the stricken language at lines 83 and 84 should remain in. This was an oversight. The informal trial rule language at line 207 should be stricken, though. That rule is still in the pipeline.

Proposed Rule 26.4 at lines 62-63 requires pretrial disclosures no later than 14 days before the hearing. Rule 26(a)(5)(B) sets that date at 28 days before the hearing and requires a counter designation at 14 days that includes objections to depositions and exhibits. Lines 62-63 should be stricken and the usual rules retained.

Nancy's response:

This comment addresses URCP 26.4. The commenter makes a good point. If paragraph (d) is kept in, it should be titled, "Pretrial disclosures under Rule 26(a)(5)." But I think he's right that this paragraph may be redundant to (c)(5) unless we want to make the point that "trial" in Rule 26(a)(5) also refers to evidentiary hearings.

ADR Committee of the Judicial Council

Proposed addition to Rule 6-506 (1)(C):

Insert additional provision as new (iii) "selecting the mediator or determining the process and time frame for selecting the mediator. The mediator shall be selected as provided in Code of Judicial Administration Rule 4-510.05(4),"

Nancy's response:

This comment addresses CJA 6-506 and what will occur at the premediation conference. This could be wordsmithed since these subparagraphs are offset by commas, but the ADR Committee has suggested a good addition.

Andrew Riggle

The Disability Law Center (DLC) is the state's protection and advocacy agency for Utahns with disabilities. We are also a member of the Working Interdisciplinary Network of Guardianship Stakeholders.

The DLC is concerned by lines 13-14, which require an objection to a petition be made at a hearing and filed in writing within 7 days. A respondent may fear objecting publicly, especially if a parent or other individual whose relationship is important to him or her is the petitioner. Relatedly, for physical, sensory, cognitive, or other reasons, a respondent may find it difficult to submit an objection in writing. Therefore, we recommend language be added clarifying that a court should offer assistance to a respondent in filing an objection using his or her preferred method or means of communication.

The DLC appreciates the reference in lines 32-34 to the statute's preference for limited guardianship or conservatorship. However, we think it will be reinforced by not only identifying what alternatives, if any, have been explored, but whether and how come each was found to be inappropriate or inadequate. This could be accomplished by including language similar to "If any of these alternatives exist, why are they not sufficient to support or protect the respondent?," as found in the Bench Book under "Questions a Judge Should Consider in Determining Capacity, Appropriate Guardian, and Limited Guardianship."

Thank you for your time and consideration of our feedback. If you have questions or would like more information, please do not hesitate to contact us.

Nancy's response:

This comment addresses URCP 26.4. Regarding lines 13-14, as I mentioned above, a provision in (c)(2) could be added, as follows: "The court may modify the timing for filing a written objection for any reason justifying departure from these rules." And also add to that, "If a respondent is unable to object in writing due to disability or related circumstance, the court may accept an objection filed using the person's preferred means of communication." I am a bit concerned about putting in the rule that the court will assist the respondent in objecting to the petition because the court's role is to act on information it receives, and I would be concerned about a perception that the court favors the respondent in providing too much assistance. I think this would be a good opportunity for the court to appoint a court visitor to investigate the respondent's circumstances and preferences and/or appoint counsel. Regarding lines 32-34, I think this paragraph already assumes what the commenter proposes. The rule asks petitioners to tell the court how the guardianship or conservatorship may be limited.

Andrew Riggle

The Disability Law Center (DLC) is the state's protection and advocacy agency for Utahns with disabilities. We are also a member of the Working Interdisciplinary Network of Guardianship Stakeholders.

Given that lines 12-14 of CJA 06-506 require all matters under Title 75 in which an objection is filed to be referred to mediation, the DLC agrees with Mr. Bahls comment, "that [the] rule require the court to hold a mandatory conference on these issues once raised after a filing and a response to determine if mediation is a reasonable way to resolve the issues or whether discovery and hearing or the filing of briefs on pure matters of law be appropriate. This is particularly important where minors and disabled persons are involved."

Regardless of whether it occurs as a result of mediation or a hearing, guardianship and, to a lesser extent, conservatorship can lead to the elimination of some or all of a respondent's civil rights. Therefore, the DLC strongly recommends that lines 29-30 and 49-51 include the requirement of counsel from UCA 75-5-303(2)(b), and follow the process in 75-5-303(5)(d) if a respondent is not represented by counsel.

If mediation is mandated, line 82's requirement that the parties share the cost of mediation could be problematic or prohibitive for many respondents with disabilities who may wish to object, but often have little in the way of income or assets.

Thank you for your time and consideration of our feedback. If you have questions or would like more information, please do not hesitate to contact us.

Nancy's response:

This comment addresses CJA 6-506. Regarding lines 12-14, as I mentioned above, perhaps the rule could be bolstered in (1)(C), for example, by adding a provision that says something to the effect of "determining whether the case contains complicated issues of fact and law that are better resolved in the ordinary court of litigation rather than through mediation." Regarding the requirement of counsel, I would instead add a provision to paragraph (1)(C) that says something to the effect of, "ensuring that the respondent has been provided counsel or that the process provided in Utah Code section 75-5-303(5)(d) has been followed." Regarding line 82, this concern may be addressed in line 87, which involves a waiver of mediation fees.

Rule 6-506. Procedure for contested matters filed in the probate court.

Intent:

To establish procedures for contested matters filed in the probate court.

Applicability:

This rule applies to matters filed under Title 75, Utah Uniform Probate Code when an objection is made orally or in writing upon the record (a "probate dispute").

Statement of the Rule:

(1) **General Provisions.** When there is a probate dispute:

(1)(A) Rule 4-510.05 of the Utah Code of Judicial Administration and Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution apply.

(1)(B) Upon the filing of a written objection with the court in accordance with Rule 26.4(c)(2) of the Utah Rules of Civil Procedure, all probate disputes will be automatically referred by the court to the Alternative Dispute Resolution (ADR) Program under Rule 4-510.05 of the Utah Code of Judicial Administration, unless the court waives mediation.

(1)(C) After an objection has been filed, and unless the court has waived mediation, the court will schedule the matter for a pre-mediation conference for purposes of the following:

(1)(C)(i) determining whether the case contains complicated issues of fact and law that are better resolved in the ordinary court of litigation rather than through mediation;

(1)(C)(ii) ensuring that the respondent has been provided counsel or that the process provided in Utah Code section 75-5-303(5)(d) has been followed;

~~(1)(C)(i)~~(1)(C)(iii) determining all interested persons who should receive notice of mediation;~~,~~

(1)(C)(iv) determining whether any interested person should be excused from mediation~~,~~;

~~(1)(C)(ii)~~(1)(C)(v) selecting the mediator or determining the process and time frame for selecting the mediator, ~~. The mediator shall be selected~~ as provided in Code of Judicial Administration Rule 4-510.05(4)~~,~~;

~~(1)(C)(iii)~~(1)(C)(vi) determining the issues for mediation~~,~~;

~~(1)(C)(iv)~~(1)(C)(vii) setting deadlines~~,~~;

~~(1)(C)(v)~~(1)(C)(viii) modifying initial disclosures if necessary and addressing discovery~~,~~;

~~(1)(C)(vi)~~(1)(C)(ix) determining how mediation costs will be paid; and

~~(1)(C)(vii)~~(1)(C)(x) entering a mediation order.

(1)(D) The court will send notification of the pre-mediation conference to petitioner, respondent, and all interested persons identified in the petition at the hearing and any objection as of the date of the notification. The notification will include a statement that

Comment [NS1]: This is an amendment by the ADR Committee.

(1)(D)(i) the interested persons have a right to be present and participate in the mediation, the interested persons have a right to consult with or be represented by their own counsel, and the interests of the interested persons cannot be negotiated unless the interested persons specifically waive that right in writing; and

(1)(D)(ii) unless excused by the court, an interested person who fails to participate after receiving notification of the mediation may be deemed to have waived their right to object to the resolution of the issues being mediated.

(2) **Procedure**

(2)(A) **Objections.** A party who files a timely written objection pursuant to Rule of Civil Procedure 26.4 is required to participate in the court-ordered mediation unless the court upon motion excuses the party's participation.

(2)(B) **Involvement of Interested Persons.**

(2)(B)(i) Any notice required under this rule must be served in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(2)(B)(ii) Once mediation is scheduled, the petitioner must serve notice of the following to all interested persons:

(2)(B)(ii)(a) The time, date, and location of the scheduled mediation;

(2)(B)(ii)(b) The issues to be mediated as provided in the pre-mediation scheduling conference order;

(2)(B)(ii)(c) A statement that the interested persons have a right to be present and participate in the mediation, that the interested persons have a right to consult with or be represented by their own counsel, and that the interests of the interested persons cannot be negotiated unless the interested persons specifically waive that right in writing; and

(2)(B)(ii)(d) a statement that, unless excused by the court, an interested person who fails to participate after being served notice of the mediation may be deemed to have waived their right to object to the resolution of the issues being mediated.

(2)(B)(iii) Additional issues may be resolved at mediation as agreed upon by the mediating parties and the mediator.

(2)(B)(iv) Once the mediation has taken place, the petitioner must notify all interested persons in writing of the mediation's outcome, including any proposed settlement of additional issues.

(2)(B)(iv)(a) An excused person has the right to object to the settlement of any additional issue under (2)(B)(iii) within 7 days of receiving written notice of the settlement.

(2)(B)(iv)(b) Any objection to the settlement of additional issues must be reduced to a writing, set forth the grounds for the objection and any supporting authority, and be filed with the court and mailed to the parties named in the petition and any interested persons as provided in Utah Code § 75-1-201(24).

(2)(B)(iv)(c) Upon the filing of an objection to the settlement of additional issues, the case will proceed pursuant to paragraphs (2)(C) through (2)(I).

(2)(C) **Deadline for mediation completion.**

(2)(C)(i) Mediation must be completed within 60 days from the date of referral.

(2)(C)(ii) If the parties agree to a different date, the parties must file notice of the new date with the court.

(2)(D) **Mediation Fees.**

(2)(D)(i) If the estate or trust has liquid assets, and the personal representative, trustee, guardian, or conservator, as applicable, is a mediating party, the estate or trust must pay the mediator's fees.

(2)(D)(ii) Otherwise, the disputing parties will share the cost of the mediation but may later request reimbursement from the estate or trust if the estate or trust has liquid assets.

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(2)(D)(iii) A party may petition the court for a waiver of all or part of the mediation fees if the party cannot afford mediator fees or for other good cause.

(2)(D)(iv) If the court grants a waiver of mediation fees, the party must contact the ADR Director who will appoint a pro bono mediator.

(2)(E) **Initial disclosures.** Within 14 days after a written objection has been filed, the parties must comply with the initial disclosure requirements of Rule 26.4 of the Rules of Civil Procedure.

(2)(F) **Discovery once a probate dispute arises.** Except as provided in Rule 26.4 of the Rules of Civil Procedure or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(2)(G) **Completion of mediation.** Upon completion of mediation, the parties will notify the Court of the mediation's resolution pursuant to Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution.

(2)(H) **Written settlement agreement.** If mediation results in a written settlement agreement, upon a motion from any party, the court may enter orders consistent with its terms. The filing of an objection under paragraph (2)(B)(iv)(a) does not preclude the court from entering orders consistent with the resolved issues.

(2)(I) **Remaining issues.** If issues remain to be resolved after the conclusion of mediation, the parties must request a pretrial conference with the assigned judge to establish the deadlines for any supplemental initial disclosures, fact discovery, expert disclosures, expert discovery, and readiness for trial~~, and to inform the parties of the availability of an informal trial under Rule 4-1001~~.

Rule 26.4. Provisions governing disclosure and discovery in contested proceedings under Title 75 of the Utah Code.

(a) **Scope.** This rule applies to all contested actions arising under Title 75 of the Utah Code.

(b) **Definition.** A probate dispute is a contested action arising under Title 75 of the Utah Code.

(c) **Designation of parties, objections, initial disclosures, and discovery.**

(c)(1) **Designation of Parties**. For purposes of Rule 26, the plaintiff in probate proceedings is presumed to be the petitioner in the matter, and the defendant is presumed to be any party filing an objection. Once a probate dispute arises, and based on the facts and circumstances of the case, the court may designate an interested person as plaintiff, defendant, or non-party for purposes of discovery. Only an interested person who has appeared will be treated as a party for purposes of discovery.

(c)(2) **Objection to the petition**.

(c)(2)(A) Any oral objection must be made at a scheduled hearing on the petition and then reduced to writing within 7 days, unless the written objection has been previously filed with the court. If a respondent is unable to object in writing due to disability or related circumstance, the court may accept an objection filed using the person's preferred means of communication.

(c)(2)(B) A written objection must set forth the grounds for the objection and any supporting authority, must be filed with the court, and must be mailed to the parties named in the petition and any interested persons as provided in Utah Code § 75-1-201(24), unless the written objection has been previously filed with the court.

(c)(2)(C) If the petitioner and objecting party agree to an extension of time to file the written objection, notice of the agreed upon date must be filed with the court.

(c)(2)(D) The court may modify the timing for filing a written objection for any reason justifying departure from these rules.

(c)(2)(D) In the event no written or other objection under paragraph (c)(2)(A) is timely filed, the court will act on the original petition upon the petitioner's filing of a request to submit pursuant to Rule 7 of the Utah Rules of Civil Procedure.

(c)(3) **Initial disclosures in guardianship and conservatorship matters.**

(c)(3)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed:

(c)(3)(A)(i) any document purporting to nominate a guardian or conservator, including a will, trust, power of attorney, or advance healthcare directive, copies of which must be served upon all interested persons; and

(c)(3)(A)(ii) a list of less restrictive alternatives to guardianship or conservatorship that the petitioner has explored and ways in which a guardianship or conservatorship of the respondent may be limited.

This paragraph supersedes Rule 26(a)(2).

(c)(3)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code:

(c)(3)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(3)(D) The court may modify the content and timing of the disclosures required in this rule or in Rule 26(a) for any reason justifying departure from these rules.

(c)(4) **Initial disclosures in all other probate matters.**

(c)(4)(A) In addition to the disclosures required by Rule 26(a), and unless included in the petition, the following documents must be served by the party in possession or control of the documents within 14 days after a written objection has been filed: any other document purporting to nominate a representative after death, including wills, trusts, and any amendments to those documents, copies of which must be served upon all interested persons. This paragraph supersedes Rule 26(a)(2).

(c)(4)(B) The initial disclosure documents must be served on the parties named in the probate petition and the objection and anyone who has requested notice under Title 75 of the Utah Code.

(c)(4)(C) If there is a dispute regarding the validity of an original document, the proponent of the original document must make it available for inspection by the contesting party within 14 days of the date of referral to mediation unless the parties agree to a different date.

(c)(4)(D) The court may modify the content and timing of the disclosures required in this rule or in Rule 26(a) for any reason justifying departure from these rules.

(c)(5) **Discovery once a probate dispute arises**. Except as provided in this rule or as otherwise ordered by the court, once a probate dispute arises, discovery will proceed pursuant to the Rules of Civil Procedure, including the other provisions of Rule 26.

(d) **Pretrial disclosures under Rule 26(a)(5), ~~objections~~.** The term "trial" in Rule 26(a)(5)(B) also refers to evidentiary hearings for purposes of this rule. ~~No later than 14 days prior to an evidentiary hearing or trial, the parties must serve the disclosures required by Rule 26(a)(5)(A).~~

TAB 3

(New) CJA 4-411. Courthouse Attire

NOTES:

Earlier this year, the Self-represented Parties Committee asked the Judicial Council to pass a resolution stating that no person will be denied access to a courthouse or courtroom based on their manner of dress. The Council was supportive and sent the request over to the Policy and Planning Committee with instructions to work on appropriately tailoring a resolution that balanced the need for decorum and safety with the need for keeping our courts open.

The Policy and Planning Committee asked that Mike Drechsel and Nancy Sylvester draft a rule, which would be much more enforceable than a resolution and allow the appropriate space to address the concerns on all sides. Brent Johnson provided input and the Self-represented Parties Committee approved the draft.

RULE AMENDMENT REQUEST
Policy and Planning

Policy and Planning is an executive committee of the Judicial Council and is responsible for recommending to the Council new and amended rules for the Code of Judicial Administration and the Human Resource Policies and Procedures Manual.

Instructions: Unless the proposal is coming directly from the Utah Supreme Court, Judicial Council, or Management Committee, this Request Form must be submitted along with a draft of the proposed rule amendment before they will be considered by the Policy and Planning Committee. **Once completed, please e-mail this form and the proposed rule changes to Keisa Williams at keisaw@utcourts.gov**.

REQUESTER CONTACT INFORMATION:

Name of Requester:	E-mail:	Phone Number:	Date of Request:
Self-represented Parties Committee	nancyjs@utcourts.gov	801-578-3808	09/24/2019

RULE AMENDMENT:

Rule Number:	Location of Rule:
4-411	Code of Judicial Administration

Brief Description of Proposed Amendment:

The purpose of the rule is to address courthouse attire. The rule contains provisions addressing 1) open courts, personal attire, and judicial officer decision-making; 2) minimum personal attire standards; 3) health and safety; 4) the integrity of court proceedings and decorum; and 5) contrary statements.

Reason Amendment is Needed:

Earlier this year, the Self-represented Parties Committee asked the Judicial Council to pass a resolution stating that no person will be denied access to a courthouse or courtroom based on their manner of dress. The Council was supportive and sent the request over to the Policy and Planning Committee with instructions to work on appropriately tailoring a resolution that balanced the need for decorum and safety with the need for keeping our courts open. The Policy and Planning Committee asked that Mike Drechsel and I draft a rule, which would be much more enforceable than a resolution and allow the appropriate space to address the concerns on all sides. Mike and I drafted the rule with the input of Brent Johnson and I ran the rule past the Self-represented Parties Committee, which approved the draft.

Is this proposal urgent?

- ◯ No
- ◯ Yes

If Yes, provide an estimated deadline date and explain why it is urgent:

List all stakeholders:

All Utah justice courts, district courts, juvenile courts, and appellate courts.

Select each entity that has approved this proposal:

- ☐ Accounting Manual Committee
- ☐ ADR Committee
- ☐ Board of Appellate Court Judges
- ☐ Board of District Court Judges
- ☐ Board of Justice Court Judges
- ☐ Board of Juvenile Court Judges
- ☐ Board of Senior Judges
- ☐ Children and Family Law Committee
- ☐ Court Commissioner Conduct Committee
- ☐ Court Facility Planning Committee
- ☐ Court Forms Committee
- ☐ Ethics Advisory Committee
- ☐ Ethics and Discipline Committee of the Utah Supreme Court
- ☑ General Counsel
- ☐ Guardian ad Litem Oversight Committee
- ☐ Judicial Branch Education Committee
- ☐ Judicial Outreach Committee
- ☐ Language Access Committee
- ☐ Law Library Oversight Committee
- ☐ Legislative Liaison Committee
- ☐ Licensed Paralegal Practitioner Committee
- ☐ Model Utah Civil Jury Instructions Committee
- ☐ Model Utah Criminal Jury Instructions Committee
- ☐ Policy and Planning member
- ☐ Pretrial Release and Supervision Committee
- ☑ Resources for Self-represented Parties Committee
- ☐ Rules of Appellate Procedure Advisory Committee
- ☐ Rules of Civil Procedure Advisory Committee
- ☐ Rules of Criminal Procedure Advisory Committee
- ☐ Rules of Evidence Advisory Committee
- ☐ Rules of Juvenile Procedure Advisory Committee
- ☐ Rules of Professional Conduct Advisory Committee
- ☐ State Court Administrator
- ☐ TCE's
- ☐ Technology Committee
- ☐ Uniform Fine and Bail Committee
- ☐ WINGS Committee
- ☐ NONE OF THE ABOVE

If the approving entity is not listed above, please list it here:

Requester's Signature:

/s/ Nancy J. Sylvester

Supervisor's Signature (if requester is not a manager or above):

FOR POLICY AND PLANNING USE ONLY

Proposal Accepted?

- ☐ Yes
- ☐ No

Queue Priority Level:

- ☐ Red
- ☐ Yellow
- ☐ Green

Committee Notes/Comments:

Date Committee Approved for Public Comment:

Date Committee Approved for Final Recommendation to Judicial Council:

Rule 4-411. Courthouse attire.

Intent:

To ensure that Utah's courts are open in accordance with Article 1, Section 11 of the Utah Constitution while balancing the need for decorum in court proceedings and safety of all persons having business in Utah's courthouses.

Applicability:

This rule applies to all Utah justice courts, district courts, juvenile courts, and appellate courts.

Statement of the Rule:

(1) **Open courts, personal attire, and judicial officer decision-making.**

(1)(a) Except as provided in paragraphs (2), (3), and (4), no person having business in any court shall be denied access to a courtroom or courthouse based on the person's manner of dress or appearance.

(1)(b) All courthouse or courtroom access decisions made in accordance with this rule shall be done by a judicial officer on a case-by-case basis. Judicial officer includes a judge or court commissioner.

(1)(c) The role of a court bailiff, court security, or court staff in decisions made under this rule is limited to enforcement.

(2) **Minimum personal attire standards.**

(2)(a) A person may be denied access to a court if the person is not wearing a shirt, pants, and shoes or equivalent attire that adequately covers genitalia, buttocks, and breasts at or below the top of the areola.

(2)(b) Equivalent attire includes articles of clothing such as dresses, tank or halter tops, skirts, shorts, and sandals.

(2)(c) A breastfeeding mother shall be given special consideration in the enforcement of this paragraph with respect to the covering of breasts.

(3) **Health and safety.**

(3)(a) A person may be denied access to a court if the person has, or appears to have, a communicable disease that could jeopardize the health and safety of other persons having business at the court.

(4) **Integrity of court proceedings and decorum.**

(4)(a) A person may be denied access to a courtroom if, in the opinion of the judicial officer having control of the courtroom, the person's attire would jeopardize the integrity of the court proceedings by:

(4)(a)(i) detracting from or disrupting the proceedings;

(4)(a)(ii) introducing prejudice to any party to the proceedings; or

(4)(b)(iii) introducing safety concerns generally.

(4)(b) The judicial officer shall enter a decorum order when the judicial officer is concerned that the integrity of the court proceedings may be jeopardized due to the above, or similar, circumstances.

(5) **Contrary statements.**

(5)(a) All statements contrary to this policy are hereby rescinded, including those expressed in any courthouse, courtroom, website, or policy manual, and shall be removed.

MEMORANDUM

To: The Utah Judicial Council

From: The Committee on Resources for Self-represented Parties

Date: May 6, 2019

Re: Request for Resolution Regarding Open Access to the Courts

This letter is written on behalf of the Committee on Resources for Self -represented Parties. Ours is a standing committee tasked with "study[ing] and mak[ing] policy recommendations to the Judicial Council concerning the needs of self-represented parties." UT R J ADMIN Rule 3-115(1). Part of our statutory duties are to "recommend measures to the Judicial Council, the State Bar and other appropriate institutions for improving how the legal system serves self-represented parties." Rule 3-115(2).

Recently, an issue has come to our attention that we find extremely troubling. We have learned that people have been denied access to courthouses and courtrooms based on their appearance and/or dress. Frankly, when the issue was raised, we thought it was an anachronism from days long passed. However, much to our chagrine, we have confirmed recent instances where bailiffs have prevented people from entering courthouses, and judges have prevented people from entering their courtroom – based on their appearances or dress. *Let me be clear, our Committee feels strongly that under no circumstance should a person who has legitimate business in the Court be prevented access from a courtroom or courthouse based on dress or appearance.*

I remind this Council of our State's Constitution, which provides:

> *All courts shall be open*, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay*; and no person shall be barred from prosecuting or defending before any tribunal in this State,* by himself or counsel, any civil cause to which he is a party.

UT CONST Art. 1, § 11. (Although there has been much written about the substantive implications of this provision, it appears to express -- clearly and unambiguously -- that people shall not be denied access to a courthouse or courtroom to protect or assert their legal rights.)

We have many serious concerns about these practices. First and foremost, our committee is concerned about the disproportionate impact such a policy has on underprivileged citizens, who may not have the means to dress in a manner appropriate for an idiosyncratic bailiff, clerk, or judge; or, who lacks the understanding of the court process and the need to present oneself a certain (subjective) way. (Not to mention the inherent fairness that a person who is showing up at court to contest an eviction, may be closed out of their premises and wearing the only clothes they have.) Excluding a person from a courthouse or courtroom may also result in distrust of the judiciary, and unneeded embarrassment of a person who is simply showing up to protect their rights.

Second, such a practice, where bailiffs and judges – primarily males – make determinations regarding appropriate attire, "decency" and "modesty" is inherently sexist. We have learned of various instances where this has happened; *all* have involved women being denied access to the courthouse or courtroom by male judges and bailiffs. (In fact, at least one judge acknowledged preventing a woman from coming into their courtroom because she was wearing a halter top, which he deemed to be "immodest.")

Third, such a practice has the potential for bringing into play biases and prejudices which may be racially, culturally, and ethnically based. Although, we are aware of no instance where this has happened, we simply point out the danger of having a decision made affording people rights and denying people rights, based on their appearance. Utah is increasingly becoming more diverse – racially, ethnically, and culturally. What might be acceptable cultural dress for one person might be deemed inappropriate by another. No one should be denying access to people based on that subjective determination. These are dangerous practices that should not be countenanced by this branch of government.

Accordingly, we ask this body to issue a Resolution to all courts and court personnel in this state, and to all citizens of this State, as follows:

"NO PERSON (INCLUDING ANY PARTY, WITNESS, VICTIM, JUROR, OR LAWYER) WHO HAS BUSINESS IN ANY COURT, SHALL BE DENIED ACCESS TO A COURTROOM OR COURTHOUSE BASED ON THEIR MANNER OF DRESS AND/OR APPEARANCE."

We believe that this body should support and adopt this Resolution. Upon that happening, it would be our hope and intent that it be implemented by the Courts as follows:

1. Rescind all contrary statements. Any statements in any policies, including those expressed in any courthouse, or courtroom, or those stated on any website or policy manual, should be taken down. And, at the entrance to each courthouse in the State, there should be a sign with the above language on it.

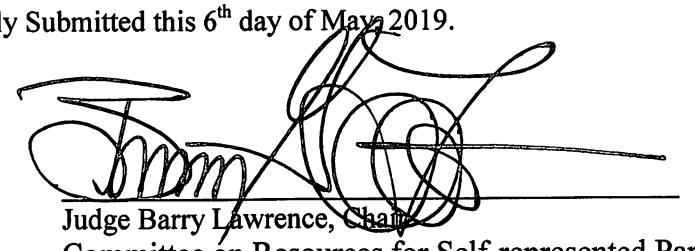
2. All Bailiffs and Law Enforcement personnel working in courthouses shall be notified and trained of the Resolution and shall not deny access to people from courthouses and courtrooms.

3. All Court personnel shall be notified and trained of the Resolution and shall not deny access to people from courthouses and courtrooms.

4. All Judges shall be notified of the Resolution. Nothing in this Resolution impacts or dictates the manner in which a Judge responds to a person that he or she perceives is inappropriately dressed or whose presence they deem sub-par; a judge simply must afford these persons access to the courtroom and process. Similarly, this does not impact the manner in which a Judge may set appropriate decorum and/or safety standards for his or her courtroom, and does not prevent a judge from acting as he or she sees fit to further the administration of justice and/or as a matter of fairness to the parties. The Resolution simply states that every person has a right to physical access to the courtroom; and that right cannot be denied based on dress or appearance.

. We sincerely hope the Council will adopt this simple and common sense measure for ensuring open access to the courts in this State as promised by our State's Constitution.

Respectfully Submitted this 6th day of May 2019.



Judge Barry Lawrence, Chair
Committee on Resources for Self-represented Parties

TAB 4

CJA 1-205. Standing and Ad Hoc Committees

NOTES:

The Judicial Council formerly had a standing committee called the Online Court Assistance Committee. That committee no longer exists. Two of the membership lists of the remaining standing committees (the Committee on Resources for Self-Represented Parties and the Committee on Court Forms) include "one member of the Online Court Assistance Committee."

Because the Online Court Assistance Committee no longer exists and other members are involved in ongoing OCAP projects, the Committee on Court Forms has asked to remove the OCAP position from its membership.

The Committee on Self-Represented Parties prefers to maintain the position. While the OCAP Committee has been dissolved, those members will continue to serve the court in an unofficial capacity as an "advisory group." I am recommending that the language for the Self-Rep Committee (lines 117-118) be amended to "one member from the OCAP Advisory Group."

Rule 1-205. Standing and Ad Hoc Committees.

Intent:

To establish standing and ad hoc committees to assist the Council and provide recommendations on topical issues.

To establish uniform terms and a uniform method for appointing committee members.

To provide for a periodic review of existing committees to assure that their activities are appropriately related to the administration of the judiciary.

Applicability:

This rule shall apply to the internal operation of the Council.

Statement of the Rule:

(1) **Standing Committees.**

(1)(A) **Establishment.** The following standing committees of the Council are hereby established:

(1)(A)(i) Technology Committee;

(1)(A)(ii) Uniform Fine Schedule Committee;

(1)(A)(iii) Ethics Advisory Committee;

(1)(A)(iv) Judicial Branch Education Committee;

(1)(A)(v) Court Facility Planning Committee;

(1)(A)(vi) Committee on Children and Family Law;

(1)(A)(vii) Committee on Judicial Outreach;

(1)(A)(viii) Committee on Resources for Self-represented Parties;

(1)(A)(ix) Language Access Committee;

(1)(A)(x) Guardian ad Litem Oversight Committee;

(1)(A)(xi) Committee on Model Utah Civil Jury Instructions;

(1)(A)(xii) Committee on Model Utah Criminal Jury Instructions;

(1)(A)(xiii) Committee on Pretrial Release and Supervision; and

(1)(A)(xiv) Committee on Court Forms.

(1)(B) **Composition.**

(1)(B)(i) The Technology Committee shall consist of:

(1)(B)(i)(a) one judge from each court of record;

(1)(B)(i)(b) one justice court judge;

(1)(B)(i)(c) one lawyer recommended by the Board of Bar Commissioners;

(1)(B)(i)(d) two court executives;

(1)(B)(i)(e) two court clerks; and

(1)(B)(i)(f) two staff members from the Administrative Office.

(1)(B)(ii) The Uniform Fine/Bail Schedule Committee shall consist of:

(1)(B)(ii)(a) one district court judge who has experience with a felony docket;

(1)(B)(ii)(b) three district court judges who have experience with a misdemeanor docket;

(1)(B)(ii)(c) one juvenile court judge; and

(1)(B)(ii)(d) three justice court judges.

(1)(B)(iii) The Ethics Advisory Committee shall consist of:

(1)(B)(iii)(a) one judge from the Court of Appeals;

(1)(B)(iii)(b) one district court judge from Judicial Districts 2, 3, or 4;

(1)(B)(iii)(c) one district court judge from Judicial Districts 1, 5, 6, 7, or 8;

(1)(B)(iii)(d) one juvenile court judge;

(1)(B)(iii)(e) one justice court judge; and

(1)(B)(iii)(f) an attorney from either the Bar or a college of law.

(1)(B)(iv) The Judicial Branch Education Committee shall consist of:

(1)(B)(iv)(a) one judge from an appellate court;

(1)(B)(iv)(b) one district court judge from Judicial Districts 2, 3, or 4;

(1)(B)(iv)(c) one district court judge from Judicial Districts 1, 5, 6, 7, or 8;

(1)(B)(iv)(d) one juvenile court judge;

(1)(B)(iv)(e) the education liaison of the Board of Justice Court Judges;

(1)(B)(iv)(f) one state level administrator;

(1)(B)(iv)(g) the Human Resource Management Director;

(1)(B)(iv)(h) one court executive;

(1)(B)(iv)(i) one juvenile court probation representative;

(1)(B)(iv)(j) two court clerks from different levels of court and different judicial districts;

(1)(B)(iv)(k) one data processing manager; and

(1)(B)(iv)(l) one adult educator from higher education.

(1)(B)(iv)(m) The Human Resource Management Director and the adult educator shall serve as non-voting members. The state level administrator and the Human Resource Management Director shall serve as permanent Committee members.

(1)(B)(v) The Court Facility Planning Committee shall consist of:

(1)(B)(v)(a) one judge from each level of trial court;

(1)(B)(v)(b) one appellate court judge;

(1)(B)(v)(c) the state court administrator;

(1)(B)(v)(d) a trial court executive;

		(1)(B)(v)(e)	two business people with experience in the construction or financing of facilities; and
		(1)(B)(v)(f)	the court security director.
	(1)(B)(vi)	The Committee on Children and Family Law shall consist of:	
		(1)(B)(vi)(a)	one Senator appointed by the President of the Senate;
		(1)(B)(vi)(b)	one Representative appointed by the Speaker of the House;
		(1)(B)(vi)(c)	the Director of the Department of Human Services or designee;
		(1)(B)(vi)(d)	one attorney of the Executive Committee of the Family Law Section of the Utah State Bar;
		(1)(B)(vi)(e)	one attorney with experience in abuse, neglect and dependency cases;
		(1)(B)(vi)(f)	one attorney with experience representing parents in abuse, neglect and dependency cases;
		(1)(B)(vi)(g)	one representative of a child advocacy organization;
		(1)(B)(vi)(h)	one mediator;
		(1)(B)(vi)(i)	one professional in the area of child development;
		(1)(B)(vi)(j)	one representative of the community;
		(1)(B)(vi)(k)	the Director of the Office of Guardian ad Litem or designee;
		(1)(B)(vi)(l)	one court commissioner;
		(1)(B)(vi)(m)	two district court judges; and
		(1)(B)(vi)(n)	two juvenile court judges.
		(1)(B)(vi)(o)	One of the district court judges and one of the juvenile court judges shall serve as co-chairs to the committee. In its discretion the committee may appoint non-members to serve on its subcommittees.
	(1)(B)(vii)	The Committee on Judicial Outreach shall consist of:	
		(1)(B)(vii)(a)	one appellate court judge;
		(1)(B)(vii)(b)	one district court judge;
		(1)(B)(vii)(c)	one juvenile court judge;
		(1)(B)(vii)(d)	one justice court judge; one state level administrator;
		(1)(B)(vii)(e)	a state level judicial education representative;
		(1)(B)(vii)(f)	one court executive;
		(1)(B)(vii)(g)	one Utah State Bar representative;
		(1)(B)(vii)(h)	one communication representative;
		(1)(B)(vii)(i)	one law library representative;
		(1)(B)(vii)(j)	one civic community representative; and
		(1)(B)(vii)(k)	one state education representative.

(1)(B)(vii)(l) Chairs of the Judicial Outreach Committee's subcommittees shall also serve as members of the committee.

(1)(B)(viii) The Committee on Resources for Self-represented Parties shall consist of:

(1)(B)(viii)(a) two district court judges;

(1)(B)(viii)(b) one juvenile court judge;

(1)(B)(viii)(c) two justice court judges;

(1)(B)(viii)(d) three clerks of court – one from an appellate court, one from an urban district and one from a rural district;

(1)(B)(viii)(e) one member of the Online Court Assistance ~~Committee~~ Program Advisory Group;

~~(1)(B)(viii)(e)~~(1)(B)(viii)(f) one representative from the Self-Help Center;

~~(1)(B)(viii)(f)~~(1)(B)(viii)(g) one representative from the Utah State Bar;

~~(1)(B)(viii)(g)~~(1)(B)(viii)(h) two representatives from legal service organizations that serve low-income clients;

~~(1)(B)(viii)(h)~~(1)(B)(viii)(i) one private attorney experienced in providing services to self-represented parties;

~~(1)(B)(viii)(i)~~(1)(B)(viii)(j) two law school representatives;

~~(1)(B)(viii)(j)~~(1)(B)(viii)(k) the state law librarian; and

~~(1)(B)(viii)(k)~~(1)(B)(viii)(l) two community representatives.

(1)(B)(ix) The Language Access Committee shall consist of:

(1)(B)(ix)(a) one district court judge;

(1)(B)(ix)(b) one juvenile court judge;

(1)(B)(ix)(c) one justice court judge;

(1)(B)(ix)(d) one trial court executive;

(1)(B)(ix)(e) one court clerk;

(1)(B)(ix)(f) one interpreter coordinator;

(1)(B)(ix)(g) one probation officer;

(1)(B)(ix)(h) one prosecuting attorney;

(1)(B)(ix)(i) one defense attorney;

(1)(B)(ix)(j) two certified interpreters;

(1)(B)(ix)(k) one approved interpreter;

(1)(B)(ix)(l) one expert in the field of linguistics; and

(1)(B)(ix)(m) one American Sign Language representative.

(1)(B)(x) The Guardian ad Litem Oversight Committee shall consist of:

(1)(B)(x)(a) seven members with experience in the administration of law and public services selected from public, private and non-profit organizations.

(1)(B)(xi) The Committee on Model Utah Civil Jury Instructions shall consist of:

(1)(B)(xi)(a) two district court judges;

(1)(B)(xi)(b) four lawyers who primarily represent plaintiffs;

(1)(B)(xi)(c) four lawyers who primarily represent defendants; and

(1)(B)(xi)(d) one person skilled in linguistics or communication.

(1)(B)(xii) The Committee on Model Utah Criminal Jury Instructions shall consist of:

(1)(B)(xii)(a) two district court judges;

(1)(B)(xii)(b) one justice court judge;

(1)(B)(xii)(c) four prosecutors;

(1)(B)(xii)(d) four defense counsel;

(1)(B)(xii)(e) one professor of criminal law; and

(1)(B)(xii)(f) one person skilled in linguistics or communication.

(1)(B)(xiii) The Committee on Pretrial Release and Supervision shall consist of:

(1)(B)(xiii)(a) two district court judges;

(1)(B)(xiii)(b) one juvenile court judge;

(1)(B)(xiii)(c) two justice court judges;

(1)(B)(xiii)(d) one prosecutor;

(1)(B)(xiii)(e) one defense attorney;

(1)(B)(xiii)(f) one county sheriff;

(1)(B)(xiii)(g) one representative of counties;

(1)(B)(xiii)(h) one representative of a county pretrial services agency;

(1)(B)(xiii)(i) one representative of the Utah Insurance Department;

(1)(B)(xiii)(j) one representative of the Utah Commission on Criminal and Juvenile Justice;

(1)(B)(xiii)(k) one commercial surety agent;

(1)(B)(xiii)(l) one state senator;

(1)(B)(xiii)(m) one state representative;

(1)(B)(xiii)(n) the Director of the Indigent Defense Commission or designee; and

(1)(B)(xiii)(o) the court's general counsel or designee.

(1)(B)(xiv) The Committee on Court Forms shall consist of:

(1)(B)(xiv)(a) one district court judge;

(1)(B)(xiv)(b) one court commissioner;

(1)(B)(xiv)(c) one juvenile court judge;

(1)(B)(xiv)(d) one justice court judge;

(1)(B)(xiv)(e) one court clerk;

(1)(B)(xiv)(f) one appellate court staff attorney;

(1)(B)(xiv)(g) one representative from the Self-Help Center;

(1)(B)(xiv)(h) the State Law Librarian;

(1)(B)(xiv)(i) the Court Services Director;

~~(1)(B)(xiv)(j) one member selected by the Online Court Assistance Committee;~~

~~(1)(B)(xiv)(k)~~(1)(B)(xiv)(j) one representative from a legal service organization that serves low-income clients;

~~(1)(B)(xiv)(l)~~(1)(B)(xiv)(k) one paralegal;

~~(1)(B)(xiv)(m)~~(1)(B)(xiv)(l) one educator from a paralegal program or law school;

~~(1)(B)(xiv)(n)~~(1)(B)(xiv)(m) one person skilled in linguistics or communication; and

~~(1)(B)(xiv)(o)~~(1)(B)(xiv)(n) one representative from the Utah State Bar.

(1)(C) **Standing committee chairs.** The Judicial Council shall designate the chair of each standing committee. Standing committees shall meet as necessary to accomplish their work. Standing committees shall report to the Council as necessary but a minimum of once every year. Council members may not serve, participate or vote on standing committees. Standing committees may invite participation by others as they deem advisable, but only members designated by this rule may make motions and vote. All members designated by this rule may make motions and vote unless otherwise specified. Standing committees may form subcommittees as they deem advisable.

(1)(D) **Committee performance review.** At least once every six years, the Management Committee shall review the performance of each committee. If the Management Committee determines that committee continues to serve its purpose, the Management Committee shall recommend to the Judicial Council that the committee continue. If the Management Committee determines that modification of a committee is warranted, it may so recommend to the Judicial Council.

(1)(D)(i) Notwithstanding subsection (1)(D), the Guardian ad Litem Oversight Committee, recognized by Section 78A-6-901, shall not terminate.

(2) **Ad hoc committees.** The Council may form ad hoc committees or task forces to consider topical issues outside the scope of the standing committees and to recommend rules or resolutions concerning such issues. The Council may set and extend a date for the termination of any ad hoc committee. The Council may invite non-Council members to participate and vote on ad hoc committees. Ad hoc committees shall keep the Council informed of their activities. Ad hoc committees may form sub-committees as they deem advisable. Ad hoc committees shall disband upon issuing a final report or recommendations to the Council, upon expiration of the time set for termination, or upon the order of the Council.

(3) **General provisions.**

(3)(A) **Appointment process.**

(3)(A)(i) **Administrator's responsibilities.** The state court administrator shall select a member of the administrative staff to serve as the administrator for committee appointments. Except as otherwise provided in this rule, the administrator shall:

(3)(A)(i)(a) announce expected vacancies on standing committees two months in advance and announce vacancies on ad hoc committees in a timely manner;

(3)(A)(i)(b) for new appointments, obtain an indication of willingness to serve from each prospective appointee and information regarding the prospective appointee's present and past committee service;

(3)(A)(i)(c) for reappointments, obtain an indication of willingness to serve from the prospective reappointee, the length of the prospective reappointee's service on the committee, the attendance record of the prospective reappointee, the prospective reappointee's contributions to the committee, and the prospective reappointee's other present and past committee assignments; and

(3)(A)(i)(d) present a list of prospective appointees and reappointees to the Council and report on recommendations received regarding the appointment of members and chairs.

(3)(A)(ii) **Council's responsibilities.** The Council shall appoint the chair of each committee. Whenever practical, appointments shall reflect geographical, gender, cultural and ethnic diversity.

(3)(B) **Terms.** Except as otherwise provided in this rule, standing committee members shall serve staggered three year terms. Standing committee members shall not serve more than two consecutive terms on a committee unless the Council determines that exceptional circumstances exist which justify service of more than two consecutive terms.

(3)(C) **Expenses.** Members of standing and ad hoc committees may receive reimbursement for actual and necessary expenses incurred in the execution of their duties as committee members.

(3)(D) **Secretariat.** The Administrative Office shall serve as secretariat to the Council's committees.

Effective May 1, 2019

TAB 5

Ability to Pay Analysis and Procedural Due Process in the Pretrial Context

NOTES:

A growing number of cases across the country are consistently holding that setting bail without first considering an individual's ability to pay the amount set may be in violation of their constitutional rights. Most of the cases are requiring courts to hold a hearing to make those determinations within 24-48 hrs of arrest. As you can imagine, if that were to become the law in Utah, it would significantly alter the way the Courts do business and we do not currently have the funding or infrastructure in place to accomplish it.

The Standing Committee on Pretrial Release and Supervision is spearheading a project to identify any potential impact in Utah, and hopes to have a reform proposal ready to present to the Judicial Council early next year. The Pretrial Committee will also be working with the Rules of Criminal Procedure Committee on related amendments to URCrP Rules 9 and 9A.

I am not looking for substantive feedback from you at this point because it isn't ripe for action on the part of Policy and Planning, but I thought it was important to make you aware of it. The Pretrial Committee has asked that I inform all stakeholders of the project. I have already presented to the BDCJ and am set to present to the BJCJ, TCEs, and CoCs. I am also requesting time at local bench meetings throughout the State.

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

September 27, 2019

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

M E M O R A N D U M

TO: **Policy and Planning Committee**

FROM: **Keisa Williams**

RE: **National Caselaw re: Ability to Pay Analysis and Procedural Due Process in the Pretrial Context**

Over the last several years, in both state and federal cases across the country, courts are consistently holding that it is an unconstitutional deprivation of due process and equal protection rights under the 14th Amendment to set monetary conditions of pretrial release without first considering, among other things, an arrestee's ability to pay the amount set.

Most of the cases are requiring that courts hold a hearing, with full due process protections, to make those determinations within 24-48 hrs of arrest. As you can imagine, that would significantly alter the way our courts do business, and we do not currently have the funding or infrastructure in place to accomplish it.

While none of the cases discussed below are precedential, I believe several are persuasive and I have become increasingly concerned that some Utah courts' (and other criminal justice stakeholders') application of the state's pretrial release laws and court rules may not be constitutionally upheld if challenged in court. As of today, I am aware of at least 24 cases across fourteen states and four federal circuit courts in which pretrial ability to pay analyses are at issue. Many more cases address the related issue of determining an individual's ability to pay when setting court fines and fees. While different, the legal analysis is very similar.

The purpose of this memo is to provide a brief overview of two of the cases I believe to be most representative of the overarching legal analysis and findings in the majority of the cases I identify below, and to begin a conversation about whether urgent reforms are needed – particularly the development and implementation of procedures surrounding ability to pay analyses in the pretrial context.

The Judicial Council's Standing Committee on Pretrial Release and Supervision has identified this issue as critical, and plans to conduct a deep-dive into the caselaw and any potential impacts in Utah.

Below are some, but not all, of the cases I have identified which address ability to pay analyses in bail sets. **Some citations may be outdated.*

State:

- *In re Kenneth Humphrey*, 19 Cal. App. 55th 1006 (2018) (Court of Appeal of the State of California, First Appellate Division, Division Two)
- *Robinson et al., v. Martin, et al.,* Case no. 2016 CH 13587 (Circuit Court of Cook County, IL, County Department, Chancery Division)
- *Brangan v. Commonwealth*, 80 N.E.3d 949 (Mass. 2017)(Supreme Judicial Court of Massachusetts)
- *Scione v. Commonwealth*, Case no. SJC-12536 and *Commonwealth, v. David W. Barnes*, Case no: SJC-12540 (Supreme Judicial Court of Massachusetts)
- *State v. Brown*, 338 P.3d 1276 (2014)(Supreme Court of New Mexico)
- *People ex rel. Desgranges, Esq. on behalf of Kunkeli v. Anderson*, Case no. 90/2018 (Supreme Court of the State of New York, County of Dutchess)
- *Philadelphia Community Bail Fund v. Magistrate Bernard, et al.,* Case no. 21 EM 2019 (Supreme Court of Pennsylvania, Eastern District)

Federal:

- *Buffin v. City and County of San Francisco, et al.,* Case no. 4:15-cv-04959-YGR (U.S. District Court for the Northern District of California)
- *Kandace Kay Edwards v. David Cofield, et al.,* Case no. 3:17-cv-321-WKW (U.S. District Court for Middle District of Alabama, Eastern Division)
- *Schultz, et al. v. State of Alabama, et al.,* Case no. 5:17-cv-00270-MHH (U.S. District Court for the Northern District of Alabama, Northeastern Division)
- *Walker v. City of Calhoun, GA* (*"Walker I"*), 2016 WL 361612 (N.D. Ga. Jan. 28, 2016)
- *Walker v. City of Calhoun, GA* (*"Walker II"*), 682 F. App'x 721, 724-25 (11th Cir. 2017)
- *Walker v. City of Calhoun, GA* (*"Walker III"*), 2017 WL 2794064) (N.D. Ga. June 16, 2017)
- *Caliste v. Cantrell*, Case no. 2:17-cv-06197-EEF-MBN (U.S. District Court, Eastern District of Louisiana)
- *United States v. Mantecon-Zayas*, 949 F.2d 548 (1st Cir. 1991)
- *Ross v. Blount*, Case no. 2:19-cv-11076-LJM-EAS (U.S. District Court for the Eastern District of Michigan, Southern Division)
- *Dixon v. St. Louis*, Case no. 4:19-cv-00112-AGF (U.S. District Court, Eastern District of Missouri, Eastern Division)
- *Collins v. Daniels*, Case no. 1:17-cv-00776-RJ-KK (U.S. District Court for the District of New Mexico)
- *Collins v. Daniels*, Case no. 17-2217 and 18-2045 (U.S. Court of Appeals for the 10th Circuit)
- *ODonnell v. Harris County, Texas, et al.,* Case no. 4:16-cv-01414 (U.S. District Court for the Southern District of Texas, Houston Division)
- *ODonnell v. Harris County, Texas, et al. (ODonnell I)*, 892 F.3d 147 (5th Cir. 2018)
- *ODonnell v. Goodhart. (ODonnell II)*, 900 F.3d 220 (5th Cir. 2018)
- *Daves, et al., v. Dallas County, Texas, et al.,* Case no. 3:18-CV-0154-N (U.S. District Court for the Norther District of Texas, Dallas Division)

Buffin, et al., v. City and County of San Francisco, et al., 2018 WL 424362 (U.S. District Court, N.D. California)

Issues: *(*Excluded issue related to CBAA's intervenor status)*

1. Whether the use of San Francisco's Felony and Misdemeanor Bail Schedule as a basis for defendant Sheriff to release detainees prior to arraignment, where those detainees do not have the means to afford the amounts set forth therein, significantly deprives detainees of their fundamental right to liberty?
2. Whether plausible alternatives exist which would allow for their release?
3. Whether the continued use of such a schedule violates the Due Process and Equal Protection clauses of the United States Constitution?

Holding: "Plaintiff's motion for summary judgement is granted…" "The evidence demonstrates that the Sheriff's use of the Bail Schedule significantly deprives plaintiffs of their fundamental right to liberty, and a plausible alternative exists which is at least as effective and less restrictive for achieving the government's compelling interests in protecting public safety and assuring future court appearances. Operational efficiency based upon a bail schedule which arbitrarily assigns bail amounts to a list of offenses without regard to any risk factors or the governmental goal of ensuring future court appearances is insufficient to justify a significant deprivation of liberty."

"…the Court will issue an injunction enjoining the Sheriff from using the Bail Schedule as a means of releasing a detainee who cannot afford the amount but will delay issuing the injunction pending briefing."

Certified Class: All pre-arraignment arrestees (1) who are, or will be, in the custody of the sheriff, (2) whose bail amount was set by the bail schedule, (3) whose terms of pretrial release have not received an individualized determination by a judicial officer, and (4) who remain in custody for any amount of time because they can't afford to pay.

Facts: Plaintiff #1 was 19 yrs old and was arrested for grand theft of personal property. Bail amount set at $30,000 ($15,000 for each booking charge) pursuant to the bail schedule. She couldn't afford to pay. DA's office decided not to file charges and she was released. Despite having been detained on a Mon. night, she was never taken to court on Tues. or Wed. for an initial appearance. She was released Wed. night after spending 46 hrs in custody. She lost her job.

Plaintiff #2 was 29 yrs old and was arrested for assault with force likely to cause great bodily injury. Bail was set at $150,000 ($75,000 each for 2 counts). She couldn't afford to pay. After 29 hrs in jail and prior to her initial appearance, she was released after her uncle paid an initial down payment to a bondsman of $1,500 on a $15,000 non-refundable premium. Her sister and grandmother co-signed. DA's office did not file formal charges. Her family members were still obligated to pay the $15,000 premium.

The San Francisco superior court established the bail schedule, which is comprised principally of a three-columned table that identifies an "offense" or penal code section, a short "description" thereof, and a fixed "bail" amount. The Sheriff consults the bail schedule to determine an arrestee's bail amount. The Sheriff locates each "booking charge," tabulates the amounts designated per charge, and releases the

detainee upon payment of that sum. "The Sheriff applies the process mechanically, making no individualized assessment regarding public safety, flight risk, ability to pay, or strength of evidence."

"Under state law, some arrestees may apply to a magistrate for pre-arraignment release on lower bail or on his or her own recognizance (OR). The application can be made without a hearing. Ironically, individuals charged with certain offenses are ineligible to apply pre-arraignment for either OR release or a reduction in bail, but if they pay the applicable amount under the Bail Schedule, the Sheriff may release them."

In setting bail, a judge or magistrate may consider the information included in a report prepared by investigative staff (pretrial staff) employed by the court for the purpose of recommending whether a detainee should be released on his/her OR. For arrestees eligible for OR release, pretrial staff prepare a packet including the PSA, summary of criminal history, and police report. The packet is presented to the duty judge at arraignment.

"In terms of timing, the evidence unequivocally demonstrates that arrestees who post the full amount of bail listed on the Bail Schedule can secure release more quickly than any other category of arrestees. This is true even when an arrestee who posts the full bail amount has been charged with a more serious offense than the indigent arrestee." "…a wealthy arrestee who is charged with a violent offense can be released from custody within a matter of hours, while an indigent arrestee can remain incarcerated for as many as five days before seeing a judicial officer or the case is discharged for 'lack of evidence.'"

Analysis:

Strict Scrutiny review applies to plaintiffs' Due Process and Equal Protection claims.

- Heightened scrutiny is required by the U.S. Supreme Court's *Bearden-Tate-Williams* line of cases,[1] particularly "where fundamental deprivations are at issue and arrestees are presumed innocent."
- Because the Sheriff's use of the Bail Schedule implicates plaintiffs' fundamental right to liberty, "any infringement on such rights requires a strict scrutiny analysis."
- Distinguished *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) and *ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018)*("ODonnell II")*, and aligned with the dissenting opinions in those two cases.
- *ODonnell II* is a split decision of the 5th Circuit arising from *procedural* due process claims. That case's passing reference to the appropriateness of "rational basis review" ignores its own decision in *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018)("*ODonnell I*") calling for "heightened scrutiny."
- Indigent arrestees detained prior to their individualized hearings solely because they cannot afford secured money bail do not receive any "meaningful consideration of other possible alternatives" that would enable their pre-hearing release.
- Rather, they "share two distinguishing characteristics" which trigger heightened scrutiny: (1) "because of their impecunity they [are] completely unable to pay for some desired benefit"; and

[1] *Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971); and *Williams v. Illinois*, 399 U.S. 235 (1970)

(2) "as a consequence, they sustain an absolute deprivation of a meaningful opportunity to enjoy a benefit."[2]

- In *Walker*, a split 11th Circuit court vacated a preliminary injunction based on *procedural* due process arguments. This court finds that *Walker's* reasoning regarding *procedural* due process does not bear on the analysis of plaintiffs' equal protection and *substantive* due process claims here. Walker didn't challenge the amount and conditions of bail *per se*, but the process by which those terms are set.
- This court does not share the same view on the principle of liberty as the *Walker* court.
- In cases involving the fair treatment of indigents in the criminal justice system, "[d]ue process and equal protection principles converge."[3] Constitutional questions in that context require "a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose…" Those means are not hard and fast but must be tested. The question is under what standard.

There is <u>no 48-hour safe harbor window</u> for making indigency determinations.

- In *Gerstein*, the Supreme Court held that the 4th Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. 420 U.S. at 124-25. The Court did not specify what would meet the promptness standard, instead noting that "the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.* At 123.
- The Supreme Court noted a *presumption*, not a safe harbor.
- The *McLaughlin* Court made clear that the 48-hour presumption was rebuttable. A probable cause hearing held within 48 hours may nonetheless be unconstitutional "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." 500 U.S. 44, at 56 (1991). In the dissent, Scalia said 48 hours was arbitrary and argued that given the data available, law enforcement needed only 24 hours to obtain probable cause review.
- The 48 hour presumption must be viewed in context. Nothing stopped the lower court from taking Plaintiff #1 to court on Tuesday morning, 10 hrs after she was booked, or even on Wednesday. Had it done so, Plaintiff would have seen a judge who could have made a release determination. Holding her 4 ½ times longer and well after the court closed on Wednesday suggests that the gov't is unjustifiably taking advantage of the 48-hr window. Such delay for delay's sake has been condemned by the Supreme Court (referencing *McLaughlin*).

A <u>significant deprivation of liberty</u> has occurred.

- The existence of a significant deprivation is not a threshold requirement *triggering* strict scrutiny, but rather the first inquiry in a strict scrutiny analysis.
- All parties agree that cash and the posting of a surety bond are the fastest ways to be released. The use of the bail schedule results in longer statutory detention of the plaintiff class.
- In determining significance, the time differential is but one component of the analysis. "Significance" is measured by more than just a difference in hours. The real world consequences of such a deprivation can include loss of employment, housing, public benefits, child custody,

[2] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973)
[3] Referring to the rule of law established by the *Bearden-Tate-Williams* cases

and the burden of significant long-term debt due to a short period of detention. Many detainees plead guilty (or no contest) at an early stage in the proceedings to secure their release.

- Given the consequences which flow from extended pre-arraignment detention, the court finds the deprivation significant.

Plausible alternatives exist which are consistent with the government's compelling interests.

- Plaintiffs bear the burden of identifying a plausible alternative that is less restrictive and at least as effective at serving the government's compelling interests: protecting public safety and assuring future court appearance.
- The burden is not high, and it need not rise to the level of scientific precision.[4]
- Plaintiffs' proposed alternative is to rely solely on the PSA. In enacting S.B. 10,[5] the government *itself* concurs that the alternative is plausible. Unlike current reliance on the bail schedule, S.B. 10 requires all jurisdictions to generate a PSA for each arrestee, *prior to arraignment*, to determine eligibility for release, with low- and medium-risk individuals to be released OR prior to arraignment *without review by the court*.
- The court declined to address the constitutionality of S.B. 10. "The wholesale elimination of bail is outside the scope of this action."
- The argument that the plaintiffs' proposed alternative would pose "insurmountable administrative" problems for the Sheriff in determining which arrestees can "afford" bail is unfounded. Other jurisdictions have detainees execute affidavits for determining ability to pay.[6]
- The court referenced a study report conducted by the California Chief Justice's Pretrial Detention Reform Workgroup as additional evidence that a plausible alternative to the current system exists.

The proposed alternative is less restrictive than and at least as effective as the Bail Schedule in serving the government's compelling interests, and does not perpetuate the deprivation of one's liberty.

- The record is devoid of *any* evidence showing that the Bail Schedule considers either of the government's articulated goals: public safety and appearance.
- There is no requirement for any input, data collection, deviation reports, or comparative data in putting together the bail schedule.
- Defendants admit that there are no peer-reviewed studies that have empirically addressed questions specifically regarding the effectiveness of bail schedules, and that such schedules are simply used for "operational efficiency."
- Absent any evidence justifying the bail schedule as a means for accomplishing the government's compelling interests, the court finds that "operational efficiency" does not trump a significant deprivation of liberty. Delay until the end of the 48 hours appears to have become operational protocol.
- Merely assigning a random dollar amount to a code section does not address an actual person's ability or willingness to appear in court or the public safety risk a person poses. At most, all that

[4] *See, e.g., Ashcroft*, 542 U.S. at 666-68 and *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009)

[5] August 20, 2018, Governor Brown signed the California Money Bail Reform Act (S.B. 10) into law, which was originally set to go into effect on October 1, 2019. However, a referendum to overturn S.B. 10 qualified for the November 3, 2020 statewide ballot. Approval by a majority of voters will be required before S.B. 10 can take effect.

[6] *See, e.g., Walker*, 901 F.3d at 1253 and *ODonnell II*, 900 F.3d at 222.

can be discerned is that the amounts are so high as to keep all arrestees detained except for those who can afford to be released.

- This practice replaces the presumption of innocence with the presumption of detention.
- Accordingly, the Bail Schedule, which merely associates an amount of money with a specific crime, without any connection to public safety or future court appearance, cannot be deemed *necessary*. In fact, the use of such an arbitrary schedule may not even satisfy an analysis under a rational basis review. The presumption of detention is not rationally related to a legitimate government purpose.[7]

Walker v. City of Calhoun, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016)(*"Walker I"*) and *Walker v. City of Calhoun, GA* (*"Walker III"*), 2017 WL 2794064) (N.D. Ga. June 16, 2017)(incorporating its findings in *Walker I* and issuing another preliminary injunction with more specificity pursuant to the 11th Circuit in *Walker v. City of Calhoun, GA* (*"Walker II"*), 682 F. App'x 721, 724-25 (11th Cir. 2017)(vacating on grounds that the district court's order in *Walker I* was insufficiently specific).

Issue:

1. Whether Defendant violated the Plaintiff class's 14th Amendment rights by jailing them because of their inability to pay fixed amounts of secured money bail?
2. Whether Plaintiff is entitled to an order preliminarily and permanently enjoining Defendant from enforcing its post-arrest money-based detention policies against Plaintiff and the class?

Holding:

1. Plaintiff's Motion for Preliminary Injunction is granted.
2. Defendant is ordered to implement post-arrest procedures that comply with the Constitution, and further orders that, unless and until Defendant implements lawful post-arrest procedures, Defendant must release any other misdemeanor arrestees in its custody, or who come into its custody, on their own recognizance or on an unsecured bond in a manner otherwise consistent with state and federal law and with standard booking procedures.
3. Arresting officers, jail staff, or the court – as soon as practicable after booking – must verify that an arrestee is unable to pay secured or money bail via a sworn affidavit of indigency. The affidavit of indigency must be evaluated within 24 hrs after arrest.
4. The affidavit must include information about the arrestee's finances and the opportunity for the arrestee to attest indigency, defined as "less than 100 percent of the applicable federal poverty guidelines."
5. Defendant may not continue to keep arrestees in its custody for any amount of time solely because the arrestees cannot afford a secured monetary bond.

Certified Class: All arrestees unable to pay for their release who are or will be in the custody of the City of Calhoun as a result of an arrest involving a misdemeanor, traffic offense, or ordinance violation.

Facts: Plaintiff is 54-yr-old unemployed man with a mental health disability and income of $530/mo. in Social Security disability payments. Plaintiff has a prescription for medication for his mental disorder and must take the medication every day. He was arrested for being a pedestrian under the influence of alcohol, a misdemeanor with no possible jail sentence and a fine not to exceed $500. He was held in jail on $160 cash bond for 5 days before filing suit.

[7] *See* Chemerinsky, Erwin, Constitutional Law Principles and Policies, 5th Edition, at 706.

At the time the case was filed, Defendant rarely, if ever, deviated from the scheduled secured money bail amounts. Defendant did not allow post-arrest release on recognizance or with an unsecured bond prior to initial appearance. Defendant held weekly court sessions on Mondays, and new arrestees who could not post bond had to wait until the following Monday to see the judge. Defendant did not hold court on the Monday following Plaintiff's arrest, due to the Labor Day holiday. Plaintiff was not scheduled to appear in court until 11 days post-arrest. Plaintiff was released 6 days following arrest (1 day after the filing of this suit) by stipulation of the parties.

After the case was filed, and while this case was pending, the Municipal Court issued a standing order altering its bail policy as follows:

- Re-adopted the bail schedule for state offenses, with cash bail set at an amount no more than the expected fine with applicable surcharges should the accused later enter a plea or be found guilty.
- As an alternative to cash bail, arrestees can use their driver's license as collateral, or "make secured bail by property or surety" at an amount "twice that set forth in the schedule."
- If they can't meet those conditions, they shall be brought before a judge within 48 hrs of arrest for an initial appearance. They shall be represented by court-appointed counsel, and will be given the opportunity to object to the bail amount, including on the basis of indigency.
- The court shall determine whether the accused is unable to post a secured bail because he/she is indigent, making an individualized determination based upon the evidence provided.
- If the court finds the person indigent, he shall be subject to release on recognizance without making secured bail, with notice of the date for the next proceeding or trial.
- If no hearing is held within 48 hrs, the accused shall be released on a recognizance bond.
- On charges of a violation of city code (vs. state law), arrestees shall be release on an unsecured bond in the amount established by the bail schedule.

Analysis:

Plaintiff has a substantial likelihood of succeeding on the merits of his claims.

- Keeping individuals in jail solely because they cannot pay for their release, whether via fines, fees, or cash bond, is impermissible.[8]
- Any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause.
- The Equal Protection Clause generally prohibits "punishing a person for his poverty."[9] This provision has special implications as it relates to depriving a person of his liberty.
- This is especially true where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime.[10] In *Pugh*, the 5th Circuit observed that a bond schedule that did not take into account indigency would fail to pass constitutional muster.

[8] *Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)

[9] *Bearden v. Georgia*, 461 U.S. 660, 671 (1983)

[10] *See Pugh*, 572 F.2d at 1056 ("We view such deprivation of liberty of one who is accused but not convicted of crime as presenting a question having broader effects and constitutional implications than would appear from a rule stated solely for the protection of litigants.").

- Although the standing order attempts to remedy the deficiencies of the earlier bail policy, it simply shortens the amount of time that indigent arrestees are held in jail to 48 hours. However, any detention based solely on financial status or ability to pay is impermissible.
- Generally, an individual's indigence does not make them a member of a suspect class. However, detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classification.
- Because the new bail order treats those who can afford to pay the bail schedule amount differently than those who can't, it was subject to heightened scrutiny.

The amended bail policy does not deprive Plaintiff of his standing.

- There is no guarantee that Defendant will not revert back to its previous bail policy at some point. Further, the Standing Order gives rise to some of the same concerns as the previous bail policy. For the same reason, the standing order does not render this case moot.
- Given Plaintiffs evidence that he is indigent, it is entirely foreseeable that Plaintiff might be subject to arrest and detention in violation of his rights even under the new Standing Order.
- The Plaintiff is not challenging the requirements or provisions of a state statute or bail schedules *per se*.

Plaintiff has suffered irreparable harm.

- Plaintiff has suffered an improper loss of liberty by being jailed simply because he could not afford to post money bail. This constitutes irreparable harm.[11]

The balance of harms favors Plaintiff.

- Defendant's contention that modifying its bail system will create significant administrative and procedural problems and will result in the release of individuals who pose a risk or danger to the community is unpersuasive.
- Defendant fails to acknowledge that its current system of releasing arrestees as soon as they post bond does nothing to address either of those concerns.
- Any difficulties Defendant may suffer if the Court grants injunctive relief are not so significant as to outweigh the important constitutional rights at issue.

Public interest supports preventing the violation of a party's constitutional rights.

- "It is always in the public interest to prevent the violation of a party's constitutional rights."[12]
- "Upholding constitutional rights surely serves the public interest."[13]

[11] *See Rodriguez v. Providence Cmty. Corrs., Inc.*,Case No. 3:15–CV–01048, —– F.Supp.3d ——–, ——–, 2015 WL 9239821, at 9 (M.D.Tenn. Dec. 17, 2015) (finding that irreparable harm requirement was satisfied based on "the unconstitutional liberty deprivation which stems from Defendants' practice of jailing probationers on secured money bonds with[out] an indigency inquiry").

[12] *See Simms*, 872 F.Supp.2d at 105

[13] *See also Giovani Carandola, Ltd.*, 303 F.3d at 521

Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018)(*"Walker IV"*)

Issue: What process does the Constitution require in setting bail for indigent arrestees?

Holding:

1. *Younger* abstention was not warranted;
2. City was not immune from § 1983 liability;
3. Due process and equal protection, rather than the Eighth Amendment, applied to indigent arrestee's claims;
4. Bail schedule order was not subject to heightened scrutiny *(Dissenting opinion would have imposed strict scrutiny)*;
5. District court abused its discretion in granting preliminary injunction requiring municipal court to make indigency determination with respect to arrestees within 24 hours;
6. District court abused its discretion in issuing preliminary injunction requiring municipal court to adopt affidavit-based process for determining indigency;
7. Arrestee failed to establish that he was likely to succeed on the merits of his claim that municipal court's standing bail order violated equal protection and due process; but
8. Arrestee's claim challenging original bail policy was not moot.
9. The district court may enjoin a return to the City's original bail policy, but the district court erred in also enjoining the entirely constitutional standing bail order. The preliminary injunction is vacated and the case is remanded to the district court for further proceedings.

Analysis:

Younger does not apply.

- Younger doesn't readily apply because Walker is not asking to enjoin any prosecution.[14]
- Walker does not ask for pervasive federal court supervision of State criminal proceedings, but merely asks for a prompt pretrial determination of a distinct issue which will not interfere with subsequent prosecution.
- At the very least, the district court could reasonably find the relief Walker seeks is not sufficiently intrusive to implicate *Younger*. The district court did not abuse its discretion and was not required to abstain.

City is not immune from §1983 liability.

- Georgia law indicates that the City has the authority to set bail policy. The State's broad grant of authority enables the City to regulate bail and the City already does so.
- Georgia's Uniform Municipal Court Rules, as promulgated by the Supreme Court of Georgia, recognize that "[b]ail in misdemeanor cases shall be set as provided in [State statutes], *and as provided by applicable municipal charter or ordinance.*"
- The district court did not err in finding that the City could directly regulate bail if it wished to and so may be held responsible for acquiescing in an unconstitutional policy and practice by its Municipal Court and its police.

[14] *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975),

The 14th Amendment, rather than the 8th Amendment, applies to Plaintiff's claims.

- The 8th Amendment doesn't apply because the right at issue here is equal protection, not the protection against excessive bail.
- If the 8th Amendment did apply, the Plaintiffs would lose because the 8th Amendment says nothing about whether bail shall be available at all, but is meant merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.[15]
- Bail is not excessive under the 8th amendment merely because it is unaffordable. The basic test for excessive bail is whether the amount is higher than reasonably necessary to assure the accused's presence at trial. As long as that's the reason for setting the bond, the final amount, type, and other conditions of release are within the discretion of the releasing authority.
- The district court correctly evaluated this case under due process and equal protection of the 14th Amendment.
- The decisive case is *Pugh v. Rainwater*. The court weighed the State's compelling interest in assuring appearance at trial with an individual's presumption of innocence and constitutional guarantees. 572 F.2d 1053, 1056 (5th Cir. 1978).
- *Pugh* held that the "demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail."
- Therefore, the "incarceration of those who cannot" meet a master bond schedule's requirements, "without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."
- Walker's claim, like the plaintiffs' in *Rainwater*, doesn't challenge the amount and conditions of bail *per se*, but the process by which those terms are set.
- In *Bearden v. Georgia*, the court explained that "[d]ue process and equal protection principles converge in the Court's analysis" of cases where defendants are treated differently by wealth. Under Due Process, "we generally analyze the fairness of relations between the criminal defendant and the State." Under Equal Protection, we address "whether the State has invidiously denied one class of defendants a substantial benefit available to another class."[16]

Bail Schedule order was not subject to heightened scrutiny.

- In *Rainwater*, the court approved the "[u]tilization of a master bond schedule" without applying any heightened form of scrutiny. It upheld the scheme because it gave indigent defendants who could not satisfy the master bond schedule a constitutionally permissible secondary option: a bail hearing at which the judge could consider "all relevant factors" when deciding the conditions of release.
- In *Bearden*, mere diminishment of a benefit (as opposed to an absolute deprivation of a meaningful opportunity to enjoy that benefit) was insufficient to make out an equal protection claim: "[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."
- Under the new bail order, indigent defendants suffer no absolute deprivation of pretrial release, rather they must merely wait some appropriate amount of time to receive the same benefit as the more affluent.

[15] *Carlson v. Landon*, 342 U.S. 524 (1952)
[16] 461 U.S. 660, 661, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)

- After such a delay, they arguably receive preferential treatment by being release on recognizance without have to provide any security. Such a scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence.
- Similarly, in *Salerno*, the Supreme Court's analysis was much closer to a relatively lenient procedural due process analysis than any form of heightened scrutiny.[17] Rather than asking if preventative detention of dangerous defendants served a compelling or important State interest and then demanding narrow tailoring, the Court employed a general due process balancing test between the State's interest and the detainee's.
- Even if *Salerno* did embrace a form of heightened scrutiny, we do not believe it applies in this case because the City is not seeking to impose any form of preventative detention. Walker was released, and the standing bail order guarantees release within 48 hours of arrest to all indigent defendants.

Indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest.

- Relying on *County of Riverside v. McLaughlin* (500 U.S. 44, 55 (1991)) – making probable cause determinations within 48 hours of arrest complies with the promptness requirement.
- This court expressly rejects a 24 hour bright-line limitation.
- *McLaughlin* allows detention for 48 hours before even establishing probable cause. The Court expressly envisioned that one reason is so that PC hearings could be combined with bail hearings and arraignments. The city can take 48 hours to set bail for someone held *with* probable cause.
- The 5th Circuit in *ODonnell* recently imported the *McLaughlin* 48-hour rule to the bail determination context. They held that a 24-hour limit was a heavy administrative burden and therefore too strict.
- The court expressly did not decide whether a jurisdiction could adopt a system allowing for longer than 48 hours to make a bail determination because the city's system sets 48 hours.

An affidavit-based procedure for indigency determinations is not required.

- Federal courts should give States wide latitude to fashion procedures for setting bail.
- Directly on point, the bail rule upheld in *Rainwater* was based on formal hearings at which judges would consider the arrestee's financial resources, just as the Standing Bail Order provides.
- Even if *Rainwater* were not dispositive, however, there is no constitutional basis for the district court's imposition of its preferred method of setting bail.
- The City may have had good reasons for preferring a judicial hearing to a purely paper-based process for evaluating indigency. It may reasonably prefer that a judge have the opportunity to probe arrestees' claims of indigency in open court.
- Whatever limits may exist on a jurisdiction's flexibility to craft procedures for setting bail, it is clear that a judicial hearing with court-appointed counsel is well within the range of constitutionally permissible options.

[17] 481 U.S. at 741, 107 S.Ct. 2095.

TAB 6

State Audit re: Evidence, CJA 4-206 (Exhibits), and *Sandoval v. State*

NOTES:

On August 27, 2019, the State Auditor released Performance Audit 19-03 “An Audit of Evidence Storage and Management Among Selected Utah District and Juvenile Courts.” The audit identified multiple issues requiring immediate attention by the Court.

At the last meeting, Judge Noonan and Chris Palmer reported on the AOC’s plan for addressing the audit’s findings. The Committee asked that this issue be included on all future P&P agendas as a status update, until such time as action is required on the part of P&P.

Brent Johnson has been heavily involved in the process and recommends codifying, as soon as possible, the concept that parties will be keeping custody of any exhibits that cannot be transmitted to the appellate court. Brent will be discussing a similar Utah Federal District Court rule on the custody and disposition of trial exhibits (attached).

Utah Federal Court Rules
United States District Court for the District of Utah
Civil Rules
Fed.R.CIV.P. 83 Rules by District Courts; Judge's Directives: Attorneys

D.Ut. DUCivR 83-5

DUCivR 83-5. Custody and Disposition of Trial Exhibits

Currentness

(a) Prior to Trial.

(1) *Marking Exhibits.* Prior to trial, each party must mark all the exhibits it intends to introduce during trial by utilizing exhibit labels in the format prescribed by the clerk of court. Electronic labels are allowed. Plaintiffs must use consecutive numbers; defendants must use consecutive letters. If the number or nature of the exhibits makes standard marking impracticable, the court may prescribe an alternate system and include instructions in the pretrial order.

(2) *Preparation for Trial.* After completion of discovery and prior to the final pretrial conference, counsel for each party must (i) prepare and serve on opposing counsel a list that identifies and briefly describes all marked exhibits to be offered at trial; and (ii) afford opposing counsel opportunity to examine the listed exhibits. Said exhibits also must be listed in the final pretrial order. Exhibits are part of the public record and personal information should be redacted pursuant FRCiv P 5.2 and DUCiv R 5.2-1.

(b) During Trial.

(1) *Custody of the Clerk.* Unless the court orders otherwise, all exhibits that are admitted into evidence during trial and that are suitable for filing and transmission to the court of appeals as a part of the record on appeal, must be placed in the custody of the clerk of court.

(2) *Custody of the Parties.* Unless the court otherwise orders, all other exhibits admitted into evidence during trial will be retained in the custody of the party offering them. Such exhibits will include, but not be limited to, the following types of bulky or sensitive exhibits or evidence: controlled substances, firearms, ammunition, explosive devices, pornographic materials, jewelry, poisonous or dangerous chemicals, intoxicating liquors, money or articles of high monetary value, counterfeit money, and documents or physical exhibits of unusual bulk or weight. With approval of the court, photographs may be substituted for said exhibits once they have been introduced into evidence.

(c) After Trial.

(1) *Exhibits in the Custody of the Clerk.* Where the clerk of court does take custody of exhibits under subsection (b)(1) of this rule, such exhibits may not be taken from the custody of the clerk until final disposition of the matter, except upon order of the court and execution of a receipt that identifies the material taken, which receipt will be filed in the case.

(2) *Removal from Evidence.* Parties are to remove all exhibits in the custody of the clerk of court within fourteen (14) days after the mandate of the final reviewing court is filed or, if no appeal is filed, upon the expiration of the time for appeal. Parties failing to comply with this rule will be notified by the clerk to remove their exhibits and sign a receipt for them. Upon their failure to do so within fourteen (14) days of notification by the clerk, the clerk may destroy or otherwise dispose of the exhibits as the clerk deems appropriate.

(3) *Exhibits in the Custody of the Parties.* Unless the court orders otherwise, the party offering exhibits of the kind described in subsection (b)(2) of this rule will retain custody of them and be responsible to the court for preserving them in their condition as of the time admitted, until any appeal is resolved or the time for appeal has expired.

(4) *Access to Exhibits by Parties.* In case of an appeal, any party, upon written request of any other party or by order of the court, will make available any or all original exhibits in its possession, or true copies thereof, to enable such other party to prepare the record on appeal.

(5) *Exhibits in Appeals.* When a notice of appeal is filed, each party will prepare and submit to the clerk of this court a list that designates which exhibits are necessary for the determination of the appeal and in whose custody they remain. Parties who have custody of exhibits so listed are charged with the responsibility for their safekeeping and transportation if required to the court of appeals. All other exhibits that are not necessary for the determination of the appeal and that are not in the custody of the clerk of this court will remain in the custody of the respective party, such party will be responsible for forwarding the same to the clerk of the court of appeals on request.

Credits

[Effective September 1, 1997. Amended effective December 1, 2013.]

U. S. Dist. Ct. Rules D.Utah, Civil DUCivR 83-5, UT R USDCT CIV DUCivR 83-5

Local federal district and bankruptcy court rules and ECF documents are current with amendments received through June 15, 2019. All other local federal district and bankruptcy court materials are current with amendments received through April 1, 2019.

End of Document

TAB 7

HR 440 - Education Assistance

NOTES:

The proposed change to the HR Personnel Policies and Procedures Manual eliminates the provision allowing the Deputy Court Administrator to approve education requests that are over the presumed maximum. There is a need for a hard and fast cap because granting exceptions reduces the amount available to others.

EDUCATION ASSISTANCE 440

PURPOSE

Court employees are encouraged to seek further education to perform their jobs more effectively and to enhance their professional development. The Human Resources Department may assist an employee in the pursuit of educational goals by granting a subsidy of educational expenses to Court employees under specified circumstances.

SCOPE

This policy is subject to availability of funds and applies to Career Service and Career Service Exempt employees who have been employed by the Courts for a period of at least one (1) year and have successfully completed a probationary period.

POLICY AND PROCEDURE

1. Conditions of Education Assistance.

    1.1 Education Assistance may not exceed $5,250 per employee in any one fiscal year (July 1st - June 30th)~~, unless approved in advance by the Deputy State Court Administrator~~**.** Tuition costs shall not be carried into the next fiscal year for reimbursement.

    1.2 Employees are encouraged to attend course(s) during non-working hours. In the alternative, management may flex an employee's work schedule to allow the employee to attend course(s).

    1.3 If management requires an employee to attend an educational program or course, the Courts shall pay the full cost.

    1.4 The Education Assistance Program does not reimburse the cost of textbooks.

2. Eligibility.

    2.1 The employee must be pursuing a Bachelor's or Master's degree at an accredited university or college, unless otherwise approved by the Director.

    2.2 The employee's educational program must provide a benefit to the Courts.

3. Request for Education Assistance.

    3.1 The Director shall allocate education assistance twice a year.

- Education Assistance applications for summer and fall terms will be accepted from June 1st through July 15th.
- Education Assistance applications for spring terms will be accepted from November 1st through December 15th.

3.2 All employees applying for education assistance shall complete the Education Assistance application with the appropriate information and approving signatures and submit to the Human Resources Department.

3.3 Unless there are sufficient funds to satisfy all applications, education assistance will be awarded by random drawings in July and December.

4. Reimbursement.

4.1 An employee shall complete an Education Assistance Contract, approved and issued by the Human Resources Department, documenting participation in the Education Assistance Program and agreeing to repay any education assistance money received in the twenty-four (24) months immediately preceding termination from Court employment.

4.2 The employee shall disclose all scholarships, subsidies and grant monies provided to the employee for the educational program.

- The amount reimbursed by the Courts may not include funding received from any scholarships, subsidies or grant monies.

4.3 To be reimbursed, an employee must complete the approved course(s) with a final GPA of 2.0 or better. If the course is only offered on a pass/fail basis, the employee must receive a passing grade.

4.4 To be reimbursed, the employee must submit the following documentation:

- Education Assistance Contract;
- FI048 Employee Reimbursement/Earnings Request Form;
- Proof of grades (GPA of 2.0 or better); and
- Proof of tuition payment

4.5 The employee shall be responsible for determining if the reimbursement amount is taxable income.

TAB 8

HR 550 - Harassment Policy

NOTES:

Rob Rice prepared a revised draft of the courts' new harassment policy based on P&P's feedback at the last meeting. Brent Johnson has identified three companion rules (listed below) that he believes will ultimately need to become part of the discussion. The code provision will need to be reviewed by the Supreme Court, but Brent recommends that all four items be discussed as a whole when the Harassment Policy is considered.

- CJA 3-103. Administrative Role of Judges
- CJA 3-104. Presiding Judges
- Code of Judicial Conduct. Canon 2.3. Bias, Prejudice, and Harassment

Human Resources Policy 550 – Discrimination and Harassment

1. The judicial branch is committed to providing a work environment free from all forms of discrimination and harassment based on the following: sex, gender, age, ancestry, national origin, race, color, religious creed, mental or physical disability or medical condition, sexual orientation, gender identity or expression, marital status, military or veteran status, genetic information, or any other category protected by federal, state or applicable local law. In addition to the protections provided by this policy, commissioners, judges and justices are prohibited under the Utah Code of Judicial Conduct from manifesting bias or prejudice or engaging in harassment.

Comment [1]: Is this true for commissioners?

2. **Sexual harassment.**

   2.1 The judicial branch strictly prohibits and will not tolerate sexual harassment of any kind by any individual, employee, commissioner, judge or justice. It bears emphasis that this policy prohibits sexual harassment by any employee of the judicial branch, regardless of their position, including Administrative Office of the Courts executives and commissioners, judges and justices. This policy also addresses sexual harassment by contractors, vendors, and other third parties who affect the workplace environment. Sexual harassment may include any conduct of a sexual nature that is unwelcome and makes a reasonable person feel that the work environment is intimidating, offensive or hostile. Sexual harassment may occur between people of the opposite sex or the same sex. Sexual harassment may also include non-sexual comments, threats or actions that display hostility toward a person in the workplace because of gender.

   2.2 All types of unlawful offensive, hostile and intimidating behavior are prohibited by this policy. The following list is not intended to be all-inclusive, but illustrates kinds of behavior that may be considered forms of sexual harassment, and are strictly prohibited:

      2.2.1 Offering a job benefit in return for sexual favors.

      2.2.2 Taking or threatening to take an adverse action against an individual who refuses sexual advances.

      2.2.3 Other advances or requests of a sexual nature.

      2.2.4 Sexual flirtations.

2.2.5 Unwelcome or inappropriate statements about an individual's body or sexuality.
2.2.6 Sexually degrading words to describe a person.
2.2.7 Gestures of an obscene or sexually suggestive nature.
2.2.8 Humor or jokes of a sexual nature.
2.2.9 Posters, pictures, cartoons, toys or objects of a sexual nature.
2.2.10 Leering or staring that is offensive.
2.2.11 Any unwelcome touching or other physical contact with an individual.
2.2.12 Hostile comments toward employees in the workplace because of gender.
2.2.13 Sexting, texting, emailing, or any other form of communication of a sexually suggestive nature.

3. **Other types of harassment.**

3.1 Harassment based on an individual's race, color, religion, religious affiliation, age, national origin, ancestry, mental or physical disability or medical condition, sex, gender, sexual orientation, gender identity or expression, genetic information, marital status, military or veteran status or any other category protected by federal, state or local law is prohibited under this policy and will not be tolerated. It bears emphasis that this prohibition applies to any employee of the judicial branch, regardless of their position, including Administrative Office of the Courts executives and commissioners, judges and justices. This policy also addresses other types of harassment by contractors, vendors and other third parties who affect the workplace environment.

3.2 All types of unlawful offensive, hostile and intimidating behavior are prohibited by this policy. The following list is not intended to be all-inclusive, but illustrates kinds of behavior that may be considered forms of harassment, and are strictly prohibited.

3.2.1 Telling racial, ethnic, disability, age-related or other types of degrading jokes.
3.2.2 Making racial, ethnic, or religious slurs, and other forms of degrading name calling.
3.2.3 Making threats or intimidation based on a category protected by the judiciary's policies.
3.2.4 Possessing written or graphic material or communications in the workplace that is offensive based on a category protected by the judiciary's policies or that violates universal standards of conduct.
3.2.5 Texting, emailing, or any other form of communication of that is offensive, hostile or intimidating.

4. **Retaliation.**

4.1 The judiciary also prohibits retaliation against persons who make reports of discrimination or harassment or who provide assistance during an investigation. Retaliation will not be tolerated and will be considered a serious form of misconduct which can result in disciplinary action up to and including immediate termination of employment. This policy specifically protects every employee from retaliation by any other employee of the judiciary and includes retaliation by commissioners, judges and justices.

5. **Reporting Procedures.**

5.1 Any employee who believes they have been subject to, have witnessed, or are aware of discrimination or harassment by any employee, commissioner, judge or justice, individual or entity is strongly encouraged to report the incident. All employees can report discrimination, harassment, or retaliation verbally or in writing by any of the following methods:

5.1.1 By contacting directly to a supervisor to whom the employee is comfortable reporting such matters.

5.1.2 By contacting directly a trial court executive, director, or any court-level administrator.

5.1.3 By contacting Human Resources at *insertpositionhere@utcourts.gov* or *(801) ###-#### (contact info for a position, not a specific person, so the info doesn't change)*.

5.1.4 By contacting any commissioner, judge or justice.

5.1.5 By contacting the State Court Administrator, Deputy State Court Administrator, or Assistant State Court Administrator.

5.2 Commissioners, judges, justices, court executives and administrators, supervisors and managers must report any complaints or misconduct under this policy promptly to an appropriate authority, including but not limited to a member of management at or associated with their location, or a Human Resources representative for further action.

5.3 Upon receipt, Human Resources must promptly forward any complaint of discrimination, harassment, or retaliation to ____*who?*____ for investigation and resolution by ____*who?*____.

6. **Confidentiality.**

6.1 All reports will be investigated promptly and thoroughly in as confidential a manner as possible. Information will be disclosed only on a need-to-know basis for the purpose

Comment [2]: Does this include contractors, etc? It seems like "others" are often creating the issues . . . .so the policy needs to provide appropriate direction and specificity on this.

ROR: I view this as an enforcement & HR issue, not as a drafting issue.

Comment [3]: Who is actually "any member of management"? TCE, CoC? Team manager? Case manager? TCE is listed in the following paragraph as well.
ROR: Excellent question; requires discussion.

Comment [4]:

Comment [5]: We need some input from new HR director on correct mechanism

Comment [6]: Who does HR forward these complaints to? Who conducts the investigation and "resolution"?

ROR: This is an enforcement issue, not a drafting issue. I think this should just say HR will conduct an investigation.

of investigating and resolving the complaint. Upon conclusion of an investigation, the complaining party will be advised that the investigation has been completed and appropriate action taken. Any person accused of misconduct will be notified of the investigation results and any remedial action.

7. **Corrective Action.**

7.1 Violation of this policy will be considered a serious form of misconduct which can result in disciplinary action up to and including immediate termination of employment.

8. **Definitions.**

8.1 "Harassment" is unwelcome conduct toward an individual because of sex, gender, age, ancestry, mental or physical disability or medical condition, marital status, race or color, national origin, religion, religious affiliation, sexual orientation or gender identity or expression, genetic information, military or veteran status, or any other category protected by federal, state or local law when the conduct creates an intimidating, hostile or offensive work environment that causes work performance to suffer, or negatively affects the terms and conditions of the individual's employment.

8.2 "Sexual Harassment" is a form of harassment that is based on a person's sex or that is sex-based behavior. It is also sexual harassment for anyone in a position of authority to tie hiring, promotion, termination or any other condition of employment to a request or demand for sexual favors.

8.3 "Retaliation" refers to any action that is done to punish someone for reporting harassment or discrimination, participating or providing assistance in an investigation of harassment or discrimination, or any action that might discourage an employee from bringing a complaint. For example, it would be improper to refuse to promote an employee or reduce pay because the employee reported harassment.

Effective May/November 1, 20___

Comment [7]: Will these be included in this specific policy or will these go in with all of the other "Definitions" in the HR code?

ROR: In my view, these go in this policy, not in a global definition form.

Rule 3-103. Administrative Role of Judges.

Intent:

To establish the administrative duties and responsibilities of individual judges.

Applicability:

This rule shall apply to all judges of courts of record and not of record.

Statement of the Rule:

(1) It is the duty and responsibility of individual judges to cooperate with judges from all levels of courts, their presiding judges, their respective Boards, and the Council in the development and implementation of court policy, goals, and rules of administration.

(2) In courts of record, it is the duty and responsibility of individual judges to consult with the presiding judge and to encourage court employees to consult with court executives on matters of judicial administration. In courts not of record, it is the responsibility of individual judges to consult with the presiding judge and to encourage court employees to consult with the justice court administrator on matters of judicial administration.

(3) It is the duty and responsibility of individual judges to report any circumstances of discrimination or harassment of which they become aware, including discrimination of harassment by a judge, justice, commissioner, or any employee. The report shall be made to the presiding judge or presiding officer of the Judicial Council if the allegations involve a judge, justice, or commissioner. The report shall be made to the presiding judge or the director of human resources if the allegations involve an employee.

(~~3~~ 4) It is the duty and responsibility of individual judges to manage their court responsibilities consistently with the administrative goals of the Council and the fair and efficient administration of justice.

(4~~-~~5) It is the duty and responsibility of individual judges to give prior notice of their absence from the court for vacation or education purposes to the presiding judge, to determine when additional administrative or judicial assistance is necessary, and to convey that need in a timely manner to the presiding judge.

(~~5~~ 6) In multi-judge jurisdictions, individual judges shall provide recommendations and directives to the court executive and the Administrative Office through the presiding judge.

Effective May 1, 2019

Rule 3-104. Presiding Judges.

Intent:

To establish the procedure for election, term of office, role, responsibilities and authority of presiding judges and associate presiding judges.

Applicability:

This rule shall apply to presiding judges and associate presiding judges in the District and Juvenile Courts.

Statement of the Rule:

(1) **Election and term of office.**

(1)(A) **Presiding judge.** The presiding judge in multi-judge courts shall be elected by a majority vote of the judges of the court. The presiding judge's term of office shall be at least two years. A district, by majority vote of the judges of the court, may re-elect a judge to serve successive terms of office as presiding judge. In the event that a majority vote cannot be obtained, the presiding judge shall be appointed by the presiding officer of the Council to serve for two years.

(1)(B) **Associate presiding judge.**

(1)(B)(i) In a court having more than two judges, the judges may elect one judge of the court to the office of associate presiding judge. An associate presiding judge shall be elected in the same manner and serve the same term as the presiding judge in paragraph (1)(A).

(1)(B)(ii) When the presiding judge is unavailable, the associate presiding judge shall assume the responsibilities of the presiding judge. The associate presiding judge shall perform other duties assigned by the presiding judge or by the court.

(1)(C) **Removal.** A presiding judge or associate presiding judge may be removed as the presiding judge or associate presiding judge by a two-thirds vote of all judges in the district. A successor presiding judge or associate presiding judge shall then be selected as provided in this rule.

(2) **Court organization.**

(2)(A) **Court en banc.**

(2)(A)(i) Multi-judge courts shall have regular court en banc meetings, including all judges of the court and the court executive, to discuss and decide court business. The presiding judge has the discretion to excuse the attendance of the court executive from court en banc meetings called

for the purpose of discussing the performance of the court executive. In single-judge courts, the judge shall meet with the court executive to discuss and decide court business.

(2)(A)(ii) The presiding judge shall call and preside over court meetings. If neither the presiding judge nor associate presiding judge, if any, is present, the presiding judge's designee shall preside.

(2)(A)(iii) Each court shall have a minimum of four meetings each year.

(2)(A)(iv) An agenda shall be circulated among the judges in advance of the meeting with a known method on how matters may be placed on the agenda.

(2)(A)(v) In addition to regular court en banc meetings, the presiding judge or a majority of the judges may call additional meetings as necessary.

(2)(A)(vi) Minutes of each meeting shall be taken and preserved.

(2)(A)(vii) Other than judges and court executives, those attending the meeting shall be by court invitation only.

(2)(A)(viii) The issues on which judges should vote shall be left to the sound discretion and judgment of each court and the applicable sections of the Utah Constitution, statutes, and this Code.

(2)(B) Absence of presiding judge. When the presiding judge and the associate presiding judge, if any, are absent from the court, an acting presiding judge shall be appointed. The method of designating an acting presiding judge shall be at the discretion of the presiding judge. All parties that must necessarily be informed shall be notified of the judge acting as presiding judge.

(3) **Administrative responsibilities and authority of presiding judge.**

(3)(A) **Generally.**

(3)(A)(i) The presiding judge is charged with the responsibility for the effective operation of the court. He or she is responsible for the implementation and enforcement of statutes, rules, policies and directives of the Council as they pertain to the administration of the courts, orders of the court en banc, and supplementary rules. The presiding judge has the authority to delegate the performance of non-judicial duties to the court executive. When the presiding judge acts within the scope of these responsibilities, the presiding judge is acting within the judge's judicial office.

(3)(A)(ii) Caseload. Unless the presiding judge determines it to be impractical, there is a presumption that the judicial caseload of the presiding judge shall be adjusted to provide the presiding judge sufficient time to devote to the management and administrative duties of the office. The extent of the caseload reduction shall be determined by each district.

(3)(A)(iii) Appeals. Any judge of the judicial district may ask the Chief Justice or Judicial Council to review any administrative decision made by the presiding judge of that district.

(3)(B) **Coordination of judicial schedules.**

(3)(B)(i) The presiding judge shall be aware of the vacation and education schedules of judges and be responsible for an orderly plan of judicial absences from court duties.

(3)(B)(ii) Each judge shall give reasonable advance notice of his or her absence to the presiding judge consistent with Rule 3-103(4).

(3)(C) **Authority to appoint senior judges.**

(3)(C)(i) The presiding judge is authorized to use senior judge coverage for up to 14 judicial days if a judicial position is vacant or if a judge is absent due to illness, accident, or disability. Before assigning a senior judge, the presiding judge will consider the priorities for requesting judicial assistance established in Rule 3-108. The presiding judge may not assign a senior judge beyond the limits established in Rule 11-201(6).

(3)(C)(ii) The presiding judge will notify the State Court Administrator when a senior judge assignment has been made.

(3)(C)(iii) If more than 14 judicial days of coverage will be required, the presiding judge will promptly present to the State Court Administrator a plan for meeting the needs of the court for the anticipated duration of the vacancy or absence and a budget to implement that plan. The plan should describe the calendars to be covered by judges of the district, judges of other districts, and senior judges. The budget should estimate the funds needed for travel by judges and for time and travel by senior judges.

(3)(C)(iv) If any part of the proposed plan is contested by the State Court Administrator, the plan will be reviewed by the Management Committee of the Judicial Council for final determination.

(3)(D) **Court committees.** The presiding judge shall, where appropriate, make use of court committees composed of other judges and court personnel to investigate problem areas, handle court business and report to the presiding judge and/or the court en banc.

(3)(E) **Outside agencies and the media.**

(3)(E)(i) The presiding judge or court executive shall be available to meet with outside agencies, such as the prosecuting attorney, the city attorney, public defender, sheriff, police chief, bar association leaders, probation and parole officers, county governmental officials, civic

organizations and other state agencies. The presiding judge shall be the primary representative of the court.

(3)(E)(ii) Generally, the presiding judge or, at the discretion of the presiding judge, the court executive shall represent the court and make statements to the media on matters pertaining to the court and provide general information about the court and the law, and about court procedures, practices and rulings where ethics permit.

(3)(F) **Docket management and case and judge assignments.**

(3)(F)(i) The presiding judge shall monitor the status of the dockets in the court and implement improved methods and systems of managing dockets.

(3)(F)(ii) The presiding judge shall assign cases and judges in accordance with supplemental court rules to provide for an equitable distribution of the workload and the prompt disposition of cases.

(3)(F)(iii) Individual judges of the court shall convey needs for assistance to the presiding judge. The presiding judge shall, through the State Court Administrator, request assistance of visiting judges or other appropriate resources when needed to handle the workload of the court.

(3)(F)(iv) The presiding judge shall discuss problems of delay with other judges and offer necessary assistance to expedite the disposition of cases.

(3)(G) **Court executives.**

(3)(G)(i) The presiding judge shall review the proposed appointment of the court executive made by the State Court Administrator and must concur in the appointment before it will be effective. The presiding judge shall obtain the approval of a majority of the judges in that jurisdiction prior to concurring in the appointment of a court executive.

(3)(G)(ii) The presiding judge for the respective court level and the state level administrator shall jointly develop an annual performance plan for the court executive.

(3)(G)(iii) Annually, the state level administrator shall consult with the presiding judge in the preparation of an evaluation of the court executive's performance for the previous year, also taking into account input from all judges in the district.

(3)(G)(iv) The presiding judge shall be aware of the day-to-day activities of the court executive, including coordination of annual leave.

(3)(G)(v) Pursuant to Council policy and the direction of the state level administrator, the court executive has the responsibility for the day-to-day supervision of the non-judicial support staff and the non-judicial administration of the court. The presiding judge, in consultation with

the judges of the jurisdiction, shall coordinate with the court executive on matters concerning the support staff and the general administration of the court including budget, facility planning, long-range planning, administrative projects, intergovernmental relations and other administrative responsibilities as determined by the presiding judge and the state level administrator.

(3)(H) **Courtrooms and facilities.** The presiding judge shall direct the assignment of courtrooms and facilities.

(3)(I) **Recordkeeping.** Consistently with Council policies, the court executive, in consultation with the presiding judge, shall:

(3)(I)(i) coordinate the compilation of management and statistical information necessary for the administration of the court;

(3)(I)(ii) establish policies and procedures and ensure that court personnel are advised and aware of these policies;

(3)(I)(iii) approve proposals for automation within the court in compliance with administrative rules.

(3)(J) **Budgets.** The court executive, in consultation with the presiding judge, shall oversee the development of the budget for the court. In contract sites, the court executive shall supervise the preparation and management of the county budget for the court on an annual basis and in accordance with the Utah Code.

(3)(K) **Judicial officers.** In the event that another judge or commissioner of the court fails to comply with a reasonable administrative directive of the presiding judge, interferes with the effective operation of the court, abuses his or her judicial position, exhibits signs of impairment or violates the Code of Judicial Conduct, the presiding judge may:

(3)(K)(i) Meet with and explain to the judge or commissioner the reasons for the directive given or the position taken and consult with the judge or commissioner.

(3)(K)(ii) Discuss the position with other judges and reevaluate the position.

(3)(K)(iii) Present the problem to the court en banc or a committee of judges for input.

(3)(K)(iv) Require the judge or commissioner to participate in appropriate counseling, therapy, education or treatment.

(3)(K)(v) Reassign the judge or commissioner to a different location within the district or to a different case assignment.

(3)(K)(vi) Refer the problem to the Judicial Council or to the Chief Justice.

(3)(K)(vii) In the event that the options listed above in subsections (i) through (vi) do not resolve the problem and where the refusal or conduct is willful, continual, and the presiding judge believes the conduct constitutes a

violation of the Code of Judicial Conduct, the presiding judge shall refer the problem to the Council or the Judicial Conduct Commission.

(3)(L) **Cases under advisement.**

(3)(L)(i) A case is considered to be under advisement when the entire case or any issue in the case has been submitted to the judge for final determination. The final determination occurs when the judge resolves the pending issue by announcing the decision on the record or by issuing a written decision, regardless of whether the parties are required to subsequently submit for the judge's signature a final order memorializing the decision.

(3)(L)(ii) Once a month each judge shall submit a statement on a form to be provided by the State Court Administrator notifying the presiding judge of any cases or issues held under advisement for more than two months and the reason why the case or issue continues to be held under advisement.

(3)(L)(iii) Once a month, the presiding judge shall submit a list of the cases or issues held under advisement for more than two months to the appropriate state level administrator and indicate the reasons why the case or issue continues to be held under advisement.

(3)(L)(iv) If a case or issue is held under advisement for an additional 30 days, the state level administrator shall report that fact to the Council.

(3)(M) **Board of judges.** The presiding judge shall serve as a liaison between the court and the Board for the respective court level.

(3)(N) **Supervision and evaluation of court commissioners.** The presiding judge is responsible for the development of a performance plan for the Court Commissioner serving in that court and shall prepare an evaluation of the Commissioner's performance on an annual basis. A copy of the performance plan and evaluation shall be maintained in the official personnel file in the Administrative Office.

(3)(O) **Magistrate availability.** The presiding judge in a district court shall consult with the presiding judge in the justice court of that judicial district and the justice court administrator to develop a rotation of magistrates that ensures regular availability of magistrates within the district. The rotation shall take into account each magistrate's caseload, location, and willingness to serve.

(3)(P) **Reporting discrimination or harassment.** The presiding judge shall report to the trial court executive or of the human resource department of discrimination or harassment by any employee received from any source. allegations

RULE 2.3

*Bias, Prejudice, and Harassment**

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, color, sex, gender, gender identity or expression, ancestry, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, ~~or~~ political affiliation, military or veteran status, genetic information, or any other category protected by federal, state, or applicable law, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall take reasonable measures to require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, color, sex, gender, gender identity or expression, ancestry, religion, national origin, ethnicity, disability,

age, sexual orientation, marital status, socioeconomic status, ~~or~~ political affiliation, military or veteran status, genetic information, or any other category protected by federal, state, or applicable law, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or

prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Examples of sexual harassment include but are not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.