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

Webex video conferencing
August 6, 2020 – 12 p.m. (noon) to 1:30 p.m.

MEMBERS:	PRESENT	EXCUSED
Judge George Harmond, Chair	x	
Heidi Anderson		x
Wayne Carlos		x
Judge Keith Eddington	x	
Josh Graves	x	
Rep. Eric Hutchings	x	
Andrea Jacobsen	x	
Brent Johnson	x	
Comm. Lorene Kamalu	x	
Judge William Kendall	x	
Cpt. Corey Kiddle	x	
Joanna Landau	x	
Richard Mauro	x	
Judge Brendan McCullagh	x	
Judge Jeanne Robison	x	
Reed Stringham	x	
Cara Tangaro	x	
Yvette Rodier-Whitbe	x	

GUESTS:

Dep. Chief Shanda Gonzalez
Michael Drechsel
Rep. Pitcher
Lt. Warnick
Dyon Flannery (for Wayne Carlos)
Jojo Liu
Paul Barron (for Heidi Anderson)
Brody Arisita (for Heidi Anderson)

STAFF:

Keisa Williams
Minhvan Brimhall (recording secretary)

Welcome and Approval of Minutes:

Judge Harmond welcomed committee members and guests to the meeting. The committee considered the minutes from the July 2, 2020 meeting. With no objections or further discussion on the minutes, Judge Robison moved to approve the minutes. Cara Tangaro seconded the motion. The minutes were unanimously approved.

Ability-to-Pay Matrix:

Ms. Williams: I worked with Judge McCullagh to amend the ability-to-pay matrix per the committee's guidance at the last meeting. The recommended amounts are now tied to both the poverty guidelines and the failure to appear risk score on the PSA. I added some notes to the bottom. I also added the appearance rate percentage next to each FTA score, showing the average appearance rate for individuals in the PSA validation study. For scores 1-3, the failure to appear rates were very high (FTA 1 = 90%, FTA 2 = 85%, FTA 3 = 80%). When the predicted appearance rate is so high, I think it might be difficult to find that monetary bail is least restrictive and necessary to reasonably ensure appearance, especially considering the presumption of own recognizance release, a requirement that judges impose the least restrictive conditions, and that an individual's ability-to-pay be considered,. There was a significant drop in the appearance rate between FTA 3 and 4 (from 80% to 69%), so that seems like a reasonable place to start recommending monetary bail.

Judge McCullagh: I recommend condensing the poverty guideline table into three columns, 100%, 150%, and 200%, and the FTA risk table into four columns, $\leq$100%, 101%-150%, 151%-199%, and 200+%. The committee agreed.

Mr. Mauro: Are the recommended amounts meant to be maximum recommended amounts, or are they intended to be presumptive amounts?

Ms. Williams: I propose that they be recommended maximum amounts, much like the old bail schedule. The judges have discretion to deviate up or down.

Mr. Mauro: I suggest that the recommended amounts be adjusted down in certain boxes because by changing the categories, there are now big jumps from $100-$1500 and $250-$750, with not a lot of change in income.

Ms. Williams: Does the committee want to recommend these as maximum amounts or just recommended affordable amounts?

Ms. Rodier-Whitbe: I still think the numbers are low, but the more I've thought about this I realize the focus should be on educating victims. I doubt there will be much support in the beginning, but the more victims learn and see how it works I think it will be okay. I know victims will also feel that the numbers are low, but education will help. I support these numbers.

Judge Harmond: Ability-to-Pay is only half of the analysis. The matrix looks at failure to appear risk. Judges will also analyze public safety risk.

Rep. Hutchings: We need to be very clear about exactly what we are doing. I am not exactly sure where to stand on this. I have been with the Judiciary Committee long enough to know that protective orders feel good, but they don't really accomplish much. A protective order is a great way to remind the alleged offender to behave, unfortunately, in scenarios like that there is no magic bail amount high enough to truly protect the victim. This matrix relates to appearance.

We really need to find resources and tools that address an individual's threat level, and not necessarily their ability to pay.

Ms. Williams: I have been focusing on the constitutionality of how money is used in this context. In a right to bail state, if the offense doesn't qualify for a no-bail hold, it is unconstitutional to set a monetary condition of release outside someone's ability to pay with the express intention that they remain incarcerated, unless you are going to provide them with a full due process hearing within 48 hours of arrest. We need to educate on constitutionality and we have to separate the two different analyses: 1) risk of failing to appear, and 2) risk to victims and public safety. I agree with Rep. Hutchings. Money is related to failure to appear, not public safety.

Mr. Graves: I agree. There will be institutional challenges to changing those kinds of traditional approaches. When a prosecutor is asking for a high bail amount, we need to stop and ask why? It's because they don't want the person released. My concern isn't the money. I think it makes sense to tie it to the poverty rate, but how are we ensuring that the financial information reported by the defendant is accurate? How are we collecting that data? I would also be interested in how the tools are assessing threats before it gets to our office. We will be trying to articulate in a pretrial detention motion our concerns for the victim and the community, but the initial release decision will have been made before we have an opportunity to address the court.

Ms. Williams: I agree. I think one of the reasons we've used money as a means to detain is because judges have to make decisions with very little information. They don't have the ability to talk to the defendant or the attorneys, or hear from the prosecutor about victim safety. Prosecutors don't file cases for several days or weeks after the initial decision is required. That gap in time is an infrastructure issue that would require extensive reform. If we were able to hold an initial appearance with counsel present within 48 hours of arrest, judges could delay making that initial decision until they have more information and a meaningful hearing. That is why I am so excited about Salt Lake County and what Judge Kouris is working on with the DA's office, the jail, pretrial services, and arresting agencies.

There is now a process for prosecutors to file motions for pretrial detention, and a presumption of detention for criminal homicide and first degree felonies. If we were able to shorten that timeline, per the statute, judges could delay making a decision until after a detention hearing in very serious cases. Those are the kinds of mechanisms we can use to constitutionally detain someone deemed a risk to public safety.

Rep. Hutchings: Going back to the victim's element, is there a list of crimes involving physical harm to another person or threat of physical harm that we could use in the decision process?

Judge McCullagh: It would make sense to look at the list of offenses in 77-20-1(2) that allow people to be held without bail. Those categories could be broader. The legislature is empowered by the Constitution to determine those categories.

Ms. Williams asked that the committee approve the ability-to-pay matrix, as amended, and recommend to the Judicial Council that the matrix be adopted as final and implemented statewide. If approved by the Committee, Ms. Williams will meet with the Management Committee next week to get this on the Judicial Council's main agenda in August.

Mr. Mauro moved to approve the matrix with a recommendation that portions of Ms. Williams' memo explaining the ability-to-pay analysis, along with instructions on how to use the matrix, be incorporated. Judge McCullagh seconded. The motion passed unanimously. Ms. Williams will send a revised version of the matrix (incorporating the committee's amendments) to the committee via email before presenting it to the Management Committee.

Proposed Amendments to the Rules of Criminal Procedure:

Ms. Williams: The proposed amendments to the rules of criminal procedure included in the packet were presented to the Supreme Court's Advisory Committee on the Rules of Criminal Procedure. The advisory committee created a subcommittee specifically to address these amendments. Ms. Landau and Mr. Johnson are on the subcommittee. We've had one meeting so far and have two more scheduled. The rule drafts include a few of my own notes, feedback from Judge Bates, and notes from the prosecutor representative on the subcommittee. The rules committee is at the beginning of its process so these will likely change, but I wanted to get your feedback and recommendations to take back to the subcommittee.

Some of these changes are non-substantive and simply clarify language or bring the rules in line with new definitions in HB 206. Some are changes that I think we need to make to improve data collection and reporting. My proposal to reduce the time-to-file deadline to two days is an attempt to shorten that problematic window between a judge's initial release decision at the PC phase with very little information, and an initial appearance where judges are provided with much more information from attorneys. That would allow for better, more informed decisions regarding risk. I have no doubt I am going to get a lot of pushback, but I think if Salt Lake County can make it happen, we would have a good model for other jurisdictions.

Rule 4

Ms. Williams: I added a requirement that prosecutors make a reasonable effort to obtain the defendant's current address and include it in the Information. This is a chronic issue that results in unnecessary warrants. When a person is arrested, the jail is not asking for current contact information. According to the numbers the SLDA's office ran, 52% of people are sitting in jail for four days until the time-to-file deadline runs and prosecutors don't even know they're there. Prosecutors have no idea that a person has even been arrested until they get a police report from an arresting agency days or weeks later. At that point, because no good address was obtained and recorded, prosecutors are requesting warrants instead of issuing a summons. Then the person is arrested again on the same offense. There may, of course, be good reasons why prosecutors can't get a current address. The defendant could be homeless. The prosecutor representative on the subcommittee was worried that the proposed language as written makes it sound like prosecutors are going to be required to do a full investigation to ensure or verity

that the address is current. He is working on revised language to make it clear that an investigation isn't required.

Ms. Landau: A substantive portion of the subcommittee's discussion centered on the question of responsibility. If it's not the prosecutor's job to find a current address, who's job is it? Maybe law enforcement?

Ms. Jacobsen: This is a very frustrating issue for pretrial services. We have been working more closely with the DA's office. Oftentimes when the client is picked up on the warrant, they have been meeting with a pretrial case manager and are compliant with all of their pretrial supervision conditions. Pretrial has their contact information. It is frustrating how much information we have that we could be sharing, but there is either a lack of education or an inability to share the data. If prosecutors would contact pretrial when they're about to file a case, we could give them the client's contact information and let them know that the client is compliant with supervision. We could also help facilitate getting the client a copy of the summons and a court date. Clients are more likely to give pretrial accurate information than the jail staff. We are already interviewing every client booked into the jail and we're asking for email addresses and references that pretrial staff uses to try to track them down. We need more coordination and collaboration between the various agencies.

Judge McCullagh: The idea behind (b)(3) in the current rule is that when prosecutors file, I need to know whether the defendant was released and under what conditions. The executive branch should know that, and pretrial can help them.

Ms. Williams: I am also proposing a requirement that prosecutors provide an SID number. That number is a unique identifier that we can use for many purposes. We can match documents to cases and provide a link for judges that shows all of the cases associated with a particular individual. That gives judges a much better picture of the person's criminal history. Because we aren't getting an SID from prosecutors at case initiation, we can't link the cases.

Rule 6

The first proposed amendment addresses the same issue with getting a current address. The rest of the amendments relate to requirements in HB206 on ability-to-pay, etc.

Rule 7 and 7A

The first amendment clearly defines "bail" as release, and "monetary bail" as money. The substantive changes require judges to consider pretrial release at the initial appearance, unless a party requests a continuance and a judge makes a good cause finding. In many jurisdictions, judges won't address release at initial appearance, they make the defendant wait for 1-2 weeks to talk to an assigned judge. Alternatively, prosecutors will often request continuances in every case to give them time to talk to victims, even though they are required under the victims' rights statute to do that already. Another issue is that defense counsel is often not appointed until the initial appearance. They have 5 minutes to talk to the defendant before they have to

argue for release. If they "lose," they have to show a material change in circumstances in order to address it again, so they will often advise the client to wait.

Ms. Landau: This rule change helps makes things more consistent across jurisdictions. We see a variety of practices with first appearances and what defense attorneys can actually achieve at first appearances. I see this as an important change.

Ms. Williams asked Ms. Rodier-Whitbe if she had concerns as long as (d) provided an opportunity for a continuance to notify victims under special circumstances. Ms. Rodier-Whitbe did not have an issue with the rule as drafted.

The committee discussed the idea of reducing the time-to-file deadline to two days. Ms. Williams noted that the time-to-file recommendation would not be included in the rule drafts going to the Supreme Court on HB 206-related changes at this time. That proposal is considered a long-term project that will require a lot of discussion, consideration, collaboration, and coordination.

Rule 41

This is the new unsecured bond forfeiture rule. The forfeiture process for secured bonds outlined in statute is inapplicable to unsecured bonds, making this rule necessary. I am meeting with the management committee next week and I want to clarify that this committee is recommending to the Judicial Council that they encourage the use of unsecured bonds when appropriate. Is that correct?

The committee agreed.

Ms. Williams: I presented both the draft of the ability-to-pay matrix and the unsecured bond idea to the Board of District Court Judges. They didn't provide a lot of feedback, but were supportive. They really liked the ability to issue unsecured bonds. The Uniform Fine Committee provided positive feedback and expressed support of the ability-to-pay matrix. I am meeting with the Board of Justice Court Judges at the end of the month.

The committee discussed the language of Rule 41 and proposed edits.

Judge Harmond asked that the all of the rule amendments be included on the September agenda.

Programming updates

Ms. Williams: I now have IT estimates for: 1) programming to provide judges with gross household income and number of dependents in the PC system, and 2) programming changes to CORIS to be able to file uncured bonds in a way that would differentiate them from secured bonds, and create functions for the different forfeiture procedures and timelines. I am applying for a JAG grant to cover those costs. The Department of Public Safety is already working on their side of the ability-to-pay programming and they think they can complete it by October 1st. We

can use unsecured bonds on October 1st even if the programming isn't done via a manual workaround.

The committee discussed the need for practitioner training on the use of unsecured bonds, and all other reforms related to HB206.

Ms. Williams asked Mr. Graves, Mr. Mauro, and Ms. Tangaro to help her get on agendas for prosecutor and defense counsel trainings. Ms. Williams will also work on setting up training for law enforcement.

Adjourn:

There being no further business, the meeting was adjourned with no motion. The meeting adjourned at 1:43 pm. The next meeting is scheduled for September 3, 2020 at 12 pm (noon) via Webex video conferencing.