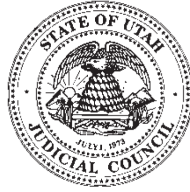

Administrative Office of the Courts

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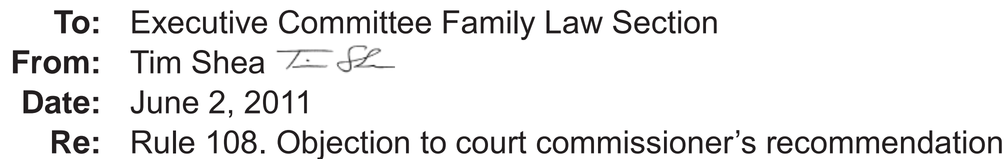
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM



To: Executive Committee Family Law Section
From: Tim Shea
Date: June 2, 2011
Re: Rule 108. Objection to court commissioner's recommendation

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The Supreme Court's Advisory Committee on the Rules of Civil Procedure has asked that I meet with you to determine whether you have any serious concerns about proposed Rule 108 or language to clarify the intent.

From the discussions during the development of Rule 108 and the comments during the public comment period, it seems obvious that there is widespread frustration with the current lack of direction for reviewing a commissioner's recommendations. To address this situation, the Second District Court developed a local rule about two years ago. When that draft was presented to the Judicial Council for its consideration, Council member Lori Nelson suggested a more thorough statement of the standards and procedures for review as well as statewide application (Districts 1 - 4).

This draft was developed by the Policy and Planning Committee of the Judicial Council, on which Ms. Nelson sits, and has been reviewed and amended by the court commissioners, the Board of District Court Judges and the Supreme Court's Advisory Committee. It has been published for comment. Before making its recommendations to the court, the advisory committee asks you to further consider the proposal.

The comments fall into three groups: those who support it; those who suggest clarifying language; and those who feel that a party should have the opportunity for a *de novo* hearing before the judge.

The model chosen for this draft was, first, to identify and follow the standards and procedures established by other law—statutes and *Salt Lake City v Ohms*, 881 P.2d 844 (Utah 1994). Paragraph (d)(2). Beyond that, the model intended to follow the requirements of due process, but also to recognize the limits of due process. That analysis suggests the special nature of custody issues and the need for timely examination and cross-examination of witnesses if requested. Thus, in paragraph (d)(3)(A), the objecting party has a right to a hearing *de novo* before the judge with the examination and cross examination of witnesses within the time frame established for

motions. On issues other than custody a party has the right to a hearing before the judge within the time frame for motions, but the hearing might not include examination and cross-examination of witnesses. On issues other than custody the party has a right to examine and cross-examine witnesses, but that opportunity might not come until the trial.

In paragraph (f), the rule establishes a standard of review for questions of law and fact, depending on whether the judge reviews the evidence presented to the commissioner or the evidence presented to the judge. Paragraph (c) limits the circumstances in which a party can present to the judge evidence that was not presented to the commissioner. The intent is that the judge review the case that was presented to the commissioner and not an entirely different case.

Encl. Rule 108. Objection to court commissioner's recommendation
Comments to Rule 108

1 **Rule 108. Objection to court commissioner's recommendation.**

2 (a) A recommendation of a court commissioner is the order of the court until
3 modified by the court. A party may file a written objection to the recommendation within
4 14 days after the recommendation is made in open court or, if the court commissioner
5 takes the matter under advisement, within 14 days after the minute entry of the
6 recommendation is served. A judge's counter-signature on the commissioner's
7 recommendation does not affect the review of an objection.

8 (b) The objection must quote the findings of fact, the conclusions of law, or the part
9 of the recommendation to which the objection is made and state the relief sought. The
10 memorandum in support of the objection must explain succinctly and with particularity
11 why the findings, conclusions, or recommendation are incorrect. The time for filing,
12 length and content of memoranda, affidavits, and request to submit for decision are as
13 stated for motions in Rule 7.

14 (c) If there has been a substantial change of circumstances since the
15 commissioner's recommendation, the judge may, in the interests of judicial economy,
16 consider new evidence. Otherwise, any evidence, whether by proffer, testimony or
17 exhibit, not presented to the commissioner shall not be presented to the judge.

18 (d)(1) The judge may hold a hearing on any objection.

19 (d)(2) If the hearing before the commissioner was held under Utah Code Title 62A,
20 Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities, Utah Code
21 Title 78B, Chapter 7, Protective Orders, or on an order to show cause for the
22 enforcement of a judgment, any party has the right, upon request, to present testimony
23 and other evidence on genuine issues of material fact at a hearing de novo.

24 (d)(3) If the hearing before the commissioner was in a domestic relations matter
25 other than a cohabitant abuse protective order, any party has the right, upon request:

26 (d)(3)(A) to present testimony and other evidence on genuine issues of material fact
27 relevant to custody at a hearing de novo; and

28 (d)(3)(B) to a hearing at which the judge may require testimony or proffers of
29 testimony on genuine issues of material fact relevant to issues other than custody.

30 (e) If a party does not request a hearing, the judge may hold a hearing or review the
31 record of evidence or proffered evidence before the commissioner.

32 (f) If the judge reviews the record of the evidence or proffered evidence, the judge
33 may affirm the commissioner's findings of fact if there is sufficient evidence to support
34 them. The judge will review conclusions of law for correctness. If the judge holds an
35 evidentiary hearing or is proffered evidence, the judge will independently make findings
36 of fact and conclusions of law.

37

Comments to Rule 108.

As others have noted, much progress is needed in the areas approached in the proposed URCP 108.

1) Any non-stipulated order resulting from a hearing by proffer without sworn witnesses subject to cross-examination is contrary to Rule 101 of the Utah Rules of Evidence and basic procedural due process. Orders in family law cases, especially (but certainly not exclusively) on child custody matters, are too important to gloss over. Further, if commissioners cannot make findings of fact or conclusions of law after contested proffer hearings, there is no basis whatever for their recommendations. What are we doing?

Contested issues in family law cases should never be decided on proffer because credibility cannot realistically be judged from affidavits and statements of counsel. I don't understand why we are required to have witnesses sit in the courtroom while we talk about what they 'would' testify to, even if they've completed an affidavit, without the opportunity for cross-examination. If we're not going to allow them to speak, why are they even there? This is frustrating for parties, but even more for non-party witnesses.

So long as we are going to engage in this exercise before commissioners, any party objecting to commissioners' recommendations should be entitled to an evidentiary hearing with real evidence.

2) The issue of timing of objections vis-a-vis the conflict between specificity of the objection and the time to obtain hearing audio could be resolved by requiring a party to order the audio within 7 calendar (or 5 court) days of the hearing and to file an objection within 7 calendar (5 court) days of notification that the audio is available. I don't know the details of how the court's digital recording system is set up, but it seems that it would be possible to email .mp3 files relatively quickly.

Posted by John J. Diamond   April 18, 2011 05:46 PM

Rule 108 is a great idea and long overdue. Hearings involving hotly contested facts, before commissioners, that are conducted by proffer frequently (and they should never) result in a party getting the bum's rush.

Everett Robinson's comments about time in which to object are compelling; obtaining the audio recording of a hearing to which one wishes to object can take two weeks, but rather than extending the time for ordering a recording, here's a better, cheaper, faster idea: allow parties and their counsel to make their own recordings. The court's recording will always be the "official" record (to insure against fraud), but making people wait (and pay) to obtain a copy of the proceedings as the only means of obtaining an audio copy serves no legitimate purpose. Allowing parties/counsel to make their own recordings saves everyone (i.e., the court and the parties) time and money in this regard.

David Pedrazas's and Paul Mortensen's comments (and those like theirs) are spot on: commissioners have no business making findings of fact without an EVIDENTIARY hearing; findings of fact based on proffer are akin to publishing the results of an experiment that is merely described in theory as opposed to conducting the experiment in the lab.

Paul Mortensen is also correct in stating that objections to a commissioner's recommendation should be considered de novo (re: 108(c)), without being restricted to issues raised before the commissioner because the litigants have never yet been granted an evidentiary hearing before a judge, and because it is impossible for one to "proffer" one's case completely such that one could show that the commissioner's recommendation was incorrect because unless the hearing is a simply matter over simple/few issues, proffer hearings go by too fast to make a decent record in the first place.

Posted by Eric K. Johnson   March 12, 2011 12:49 PM

1. This rule is a badly needed clarification, and I support it in general.

2. It seems that hearings before a commissioner are in practice sometimes less formal, I believe paragraph (a) should be amended to allow for more than 14 days after an open-court recommendation. The difficulty could arise where the commissioner quickly and orally states his recommendation, but a party does not have time to write notes from which to construct an accurate objection. Audio recordings are available from the courts, but the clerks do not always make them a priority or provide them in under a week's time. (I've personally waited up to about 30 days for one.) Therefore, the rule should give a party some number of days (perhaps 7) after the providing of a recording of the hearing by the court upon a diligent request by that party. Having an audio recording would be critical if a party were to meet the requirement of paragraph (b), quoting findings, conclusions and recommendations.

3. Alternatively, a party should be permitted to make an objection in general in open court or within a number of days (perhaps 5) after a recommendation is orally made, and that party should be given a certain number of days (perhaps 7) to file a formal objection after an audio recording is made available to the party by the court.

Thank you for your efforts and kind consideration.

Posted by Everett Robinson   March 10, 2011 06:58 PM

I like the intent of Rule 108, and it is something that is a long time coming. Different standards are being applied by the judges on objections to Commissioner's recommendation throughout the districts. Some districts are conducing de novo hearings, in which the judges will hold evidentiary hearings. In the 3rd District, it seems

the judges will only overturn the Commissioner recommendation if there is an abuse of discretion. Finally there is some uniformity that will be applied throughout the districts.

My only concerns are subparagraphs e and f. When will a judge ever review a Commissioner's recommendation without an objection? In addition as noted, the Commissioner should not be making Findings of Fact without an evidentiary hearing. Also, it appears there is a different standard on such review, which adds more confusion to the process. I say just delete subparagraphs e and f in their entirety.

Posted by David Pedrazas   March 10, 2011 03:40 PM

I strongly support this new rule. I think it addresses the need for procedural opportunity for evidentiary hearing before a judge on custody and final adjudications without completely gutting the commissioner system. Knowing that the legislature WILL do something more drastic if the Judiciary does not implement a "fix" like this, I support this solution.

If the intent of hearing on order to show cause for the enforcement of a judgment (Lines 21-22), is to apply only to final orders or judgment, then I would suggest clarifying language. Otherwise, enforcement of temporary orders during the pendency of a case would come under this provision.

Posted by Stewart P Ralphs   March 10, 2011 01:20 PM

This regards proposed Rule 108.

108(b) length restrictions are not realistic for family law pleadings which usually require much detail and minutia. The courts will end up with constant motions to file overlength memoranda and litigants will have to pay for extra legal fees. The Court administrators constantly pontificate on the legal system being too expensive for middle class litigants. However, they constantly add requirements that make the system ever more expensive for middle class litigants.

108(c) Objections should be considered de novo, without being restricted to issues raised before the Commissioner because the litigants have never yet been granted an evidentiary hearing before a judge. I believe there will be, and currently are, serious due process issues related to inability of clients to obtain adequate, evidentiary hearings. One of these days the Supreme Court is going to have to rule on these problems. Every family law practitioner is constantly faced with surfacing items that have previously been overlooked by the client and opposing party, but that need to be considered as part of the whole mix. Hypertechnicalities do not belong in a system where parties are required to appear before a judge's employee rather than before the judge.

Posted by Paul W. Mortensen   March 9, 2011 09:57 AM

In URCP 108, I didn't notice any reference for time or manner to respond to an objection to a commissioner's recommendation.

Posted by Richard Hummel   March 8, 2011 07:56 AM

URCP 108. I am concerned about the last section of this proposed rule. It gives a presumption to the Commissioner that is not warranted, since evidence is only proffered. A Commissioner is not a judge, approved by the legislative branch and should not have the same rights to a presumption of correctness.

Posted by Lorie Fowlke   March 3, 2011 02:17 PM

Rule 108 - the rule as drafted is confusing as the standards of review of the commissioner's ruling in the different type of cases. Subsection (c) is clear enough, but then the next subsections state that a PO or mental health hearing, etc. may have hearing de novo. Is this separate from (c) or, is it only after the judge finds a substantial change of circumstance as provided in (c)? Does appeal from a PO recommendation based upon the record or does the appealing party have the right to turn it into an evidentiary trial before the judge? If so, then the responding party (usually the man) can just sit-back and do little before the commissioner and then ambush the petitioner in a hearing de novo before the judge. Almost every disputed protective order will end up before the judge.

The rule should be clarified to make sure it is clear whether (c) applies to all appeals or only limited types of cases, and whether the rule and right to hearing in PO and mental health cases is or is not governed by (c).

Thank you.

Posted by clark r nielsen   March 2, 2011 01:25 PM

New proposed Rule 108 has some problems in the domestic relations area. First, as already indicated by Judge Peuler, because Commissioners don't hold evidentiary hearings they don't actually make findings of fact and conclusions of law -- they only make recommendations to the judge based on the proffers of evidence they've heard. Second, as a result, it is unclear what might constitute "sufficient evidence" to uphold a Commissioner's recommendation in such a situation if no hearing is held by the Judge. This standard should be clarified. Perhaps it should be that a Commissioner's recommendation should be upheld if the evidence proffered to the Commissioner was sufficient to support the Commissioners recommendation based on a preponderance of

the evidence, but only if such evidence would have been admissible in an evidentiary hearing before the Judge?

Posted by David Milliner   March 2, 2011 12:11 PM

The last paragraph should be amended, since some commissioners do not hold evidentiary hearings; therefore, they would not make findings of fact and conclusions of law. The paragraph should refer to their recommendations, instead.

Posted by Sandra Peuler   March 2, 2011 09:28 AM

The posted summary of the change to Rule 64D says it requires the creditor to "meet and confer" with the garnishee. The Rule itself, wisely, states that the creditor must have in good faith "conferred or attempted to confer with the garnishee." I would agree with the proposed Rule change, but not the summary.

Posted by Duke Edwards   March 2, 2011 09:21 AM