Agenda
Advisory Committee on Rules of Civil Procedure

May 25, 2011
4: 00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Approval of minutes.	Tab 1	Fran Wikstrom
Rule 83. Vexatious litigants.	Tab 2	Judge Randall Skanchy
Disqualification of collaborative lawyers	Tab 3	Steve Johnson
Consideration of comments. Rule 64D. Writ of garnishment. Rule 101. Motion practice before court commissioners. Rule 108. Objection to court commissioner's recommendations.	Tab 4	Tim Shea
Rule 65C. Post-conviction relief.	Tab 5	Judge Kate Toomey
Rule 4. Process.	Tab 6	Tim Shea

Committee Web Page: http://www.utcourts.gov/committees/civproc/

Meeting Schedule

August 3, 2011
September 28, 2011
October 26, 2011
November 16, 2011
January 25, 2012

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday April 27, 2011
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Francis J. Carney, Terrie T. McIntosh, Honorable Kate Toomey, Honorable Lyle R. Anderson, James T. Blanch, Honorable Derek P. Pullan, Lincoln L. Davies, Robert J. Shelby, W. Cullen Battle, W. Todd Shaughnessy, David Moore, David W. Scofield, Barbara L. Townsend, Steven Marsden

EXCUSED: Honorable David O. Nuffer, Leslie W. Slaugh, Jonathan O. Hafen, Lori Woffinden, Sammi V. Anderson

STAFF: Timothy M. Shea

I. APPROVAL OF MINUTES:

Mr. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom entertained comments from the committee concerning the March 23, 2011 meeting minutes. Mr. Carney moved to amend the third paragraph, section II of the minutes. He further moved to include in section III a paragraph referencing the committee's discussions concerning *Drew v. Lee* and disclosures from non-retained experts. The committee approved the minutes as amended.

II. SIMPLIFIED DISCLOSURE AND DISCOVERY RULES:

The committee studied each of the disclosure and discovery rules, and debated the suggested amendments, before releasing the current version of the rules for the forty-five day comment period.

Mr. Battle questioned which party bore the burden of proof if a party objected to a discovery request under standard discovery? Mr. Battle moved to amend Rule 26(b)(3) to indicate the party seeking discovery <u>always</u> has the burden of showing proportionality and relevance. He indicated the current version of Rule 26 and its comment did not fully resolve the issue, but suggested the burden is shifted only where a party seeks discovery beyond standard discovery. Mr. Battle also moved to amend Rule 26's Committee Note to indicate the party seeking discovery always has the burden of showing the request is relevant and satisfies the standards of proportionality. The committee unanimously approved both motions.

Mr. Wikstrom asked the committee to address the Rules one-by-one for substance and form.

Mr. Carney moved to amend Rule 8's Committee Note to omit the citation and reference to *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989) as it refers to motions for summary judgment under Rule 56. The committee approved the motion.

Mr. Carney directed the committee's attention to Rule 9(l)(2) addressing allocation of fault. He noted the need to amend the subsection to omit the reference to 'discovery plan' as the simplified rules no longer contemplate parties entering into a discovery plan. Mr. Carney discussed the history of Rule 9(l) and its connection to the Liability Reform Act. Mr. Blanch discussed his concern that parties identify those they contend are at fault as soon as practicable. Judge Pullan also noted the rule should encourage parties to identify potentially at fault parties early on in the litigation. The committee discussed when it was appropriate to identify potentially at fault non-parties, for example, as soon as practicable, in a responsive pleading, in initial disclosures, at the deadline for amendment of pleadings, at the close of discovery, or ninety days before trial. Mr. Marsden questioned the circumstance where one party would be unaware of a potentially at fault non-party.

The committee discussed inserting the language of Rule 9(l)(2) into Rule 26(a)(1). After addressing a party's right to move for good cause shown to allocate fault to a non-party ninety days before trial, Mr. Smith moved to strike the reference to discovery plan in Rule 9(l)(2). The committee unanimously approved the motion.

The committee next addressed Rule 16 and the amendments to subsections (a)(5) and (b) regarding mediation and ADR. The suggested amendments would allow the court in its discretion or upon motion to order the parties to appear for mediation or other ADR processes. The amendment, in subsection (b), would require a party to certify there were no pending motions; that mediation or other ADR processes were complete or excused; and disclosures and discovery were complete before the court could set a matter for trial.

The committee discussed its concern that when ADR or mediation is ordered neither may be successful. Mr. Carney, in particular, noted his observations as a mediator in this regard. Mr. Battle questioned whether 'disclosures' meant not only initial disclosures, but pretrial disclosures.

Mr. Battle moved to remove the word 'disclosures' in subsection (b). Mr. Smith moved to remove the phrase "no pending motions" in subsection (b). Mr. Battle moved to include the word 'required' before mediation in the same subsection. The committee unanimously approved the three motions. The committee further approved the suggested amendment to subsection (a)(5).

The committee next discussed Rule 26(a)(3)(D) and non-retained experts. Mr. Battle questioned whether the rule needs to specifically state that a party is entitled to depose a non-retained expert. The committee believed it was clear you could take the non-retained expert's deposition. However, Mr. Blanch moved to strike the language in the last sentence of Rule 26(a)(3)(D) that states, "must be taken within 28 days after the expert witness is disclosed." The committee unanimously approved the motion.

Judge Pullan questioned (1) whether the time to depose experts was in addition to fact depositions, and (2) where in Rule 26 it was included? After debating whether the current version of the rules addressed the issue, Mr. Shaughnessy and Mr. Battle suggested amending Rule 26(c)(5) and the corresponding table to amend the phrase, "standard discovery," where appropriate, to state, "standard fact discovery." The committee unanimously approved the motion.

Mr. Battle suggested amending Rule 26(c)(6)(B) to require a party to not only move and sign a statement for extraordinary discovery, but set forth the reasons why extraordinary discovery is necessary and proportional and certify the party has reviewed and approved a discovery budget. The committee agreed parties should explain the reasons why extraordinary discovery is necessary and believed a certification would be appropriate. The committee therefore approved the motion.

Mr. Shaughnessy brought to the committee's attention that Rule 26's Committee Note indicated that the parties' 26(a)(1) disclosure obligations do not commence while a motion to dismiss is pending. He was not clear if the committee reached a consensus on the issue, but the committee noted its belief that this was accurate.

Judge Pullan subsequently questioned whether discovery motions suspended or tolled discovery time limits? Mr. Wikstrom and Mr. Shelby commented that the committee agreed that a party makes its motion, but continues to engage in discovery. The committee further noted the last sentence of Rule 37(d) specifically addressed the issue.

The committee next addressed Rule 29. The committee questioned why subsection (a) should not be moved to Rule 30 dealing with depositions. Mr. Battle suggested moving the language in Rule 29(a) and creating a subsection Rule 30(i), Deposition procedures. The committee approved.

Ms. McIntosh questioned whether we needed Rule 29(b), in light of the language in Rule 26? Mr. Wikstrom noted its importance if there was a question whether parties by stipulation could opt for extraordinary discovery.

Finally, Mr. Carney moved to amend Rule 37(e)(2) to state, "may impose appropriate sanctions for the failure to follow its orders …." He pointed out the Utah Court of Appeals noted a grammatical error in the rule. The committee approved the amendment.

The committee agreed to submit the current version of the rules as amended for comment. The committee further agreed to add an additional meeting on its schedule for August 3, 2011 to consider comments.

III. ADJOURNMENT:

The meeting adjourned at 6:20 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, May 25, 2011, at the Administrative Offices of the Courts.

Tab 2

Rule 83. Vexatious litigants.

(a)(1) "Vexatious litigant" means a person, including an attorney acting pro se, who, without legal representation, does any of the following.

(a)(1)(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person.

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person repeatedly re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person repeatedly files unmeritorious pleadings or other papers, repeatedly files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter, repeatedly conducts unnecessary discovery, or repeatedly engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(1)(D) The person purports to represent or to use the procedures of a court other than a court created by or under the authority of the Constitution of the United States, including a tribal court, the constitution of a state or territory of the United States, or the laws of a foreign nation.

(a)(1)(E) The person has been found to be a vexatious litigant within the preceding seven years.

(a)(2) “Claim” and “claim for relief” mean a petition, complaint, counterclaim, cross-claim or third-party complaint.

(b) The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to furnish security to assure payment of the moving party’s reasonable expenses, costs and attorney fees incurred in the action if the court finds that the party is a vexatious litigant and that there is no reasonable probability that the vexatious litigant will prevail in the claim against the moving party. The court shall identify the amount of the security and the time within which it is to be furnished. If security is not furnished as ordered, the court shall dismiss the claim against the moving party with prejudice.

(c) No determination made by the court in ruling on the motion is a determination of any issue in the action.

(d) The court may, on its own motion or the motion of any party, enter an order requiring a vexatious litigant to obtain, before filing any future claim for relief, legal representation or leave to file the claim. The court may impose other conditions designed to assist the court in curbing the vexatious litigant's particular abusive behavior. The motion must be based upon the ground, and supported by a showing, that the party is a vexatious litigant.

(e) If the motion is granted, the pre-filing order is effective indefinitely unless the court orders a shorter period. After five years a person subject to a pre-filing order may apply to the court that entered the order to vacate the order. The clerks of court shall notify the Judicial Council of any determination that a person is a vexatious litigant subject to a pre-filing order and that a pre-filing order has been vacated. The Judicial Council shall disseminate a list of those persons to the clerks of court of this state.

(f) A person subject to a pre-filing order must apply for leave to file by written communication to the presiding judge of the court where the claim for relief is proposed to be filed or, if an action is pending, by filing a written motion in the action. The application or motion must include:

(f)(1) the reasons why the proposed claim is based on a good faith dispute of the facts or based on existing law or a good faith argument for the extension, modification, or reversal of existing law;

(f)(2) an oath, affirmation or declaration under criminal penalty that the proposed claim is not for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(f)(3) a copy of the proposed petition, complaint, counterclaim, cross-claim, or third-party complaint; and

(f)(4) the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(g) If an application is submitted for a proposed action, the presiding judge shall consider and decide the application ex parte. If a motion is filed in a pending action, the parties and court shall follow Rule 7. The judge shall grant leave to file if the claim:

(g)(1) is based on a good faith dispute of the facts or based on existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(g)(2) is not for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter.

The judge may require the person to furnish security as a condition of leave to file.

(h) Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the application or motion. There is no appeal of the decision on an application.

(i) If a vexatious litigant is subject to a pre-filing order, the clerk of court shall require with the claim for relief leave to file or proof of legal representation. If the leave to file requires security, the clerk of court shall require with the claim for relief proof of security. If the clerk of court accepts for filing a claim by a vexatious litigant who has not obtained leave to file or legal representation required by a pre-filing order, the claim shall be dismissed with prejudice when the mistake is discovered. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

Tab 3

STEVEN G. JOHNSON
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December 7, 2010

Honorable Christine M. Durham
Chief Justice, Utah Supreme Court
450 South State Street
P. O. Box 140210
Salt Lake City, UT 84114-0210

Re: Advisory Committee on the Rules of Professional Conduct

Dear Chief Justice Durham:

At the request of the Administrative Office of the Courts, the Court's Advisory Committee on the Rules of Professional Conduct considered whether those Rules should be amended to include a provision regarding disqualification of collaborative attorneys in certain cases. After review of the issue, it was the unanimous vote of the committee that hard and fast disqualification rules do not fit well in the ethical rules of the Rules of Professional Conduct. For this reason, it is felt that the Rules of Professional Conduct should *not* be amended to provide for the disqualification of collaborative attorneys.

Such disqualification provisions are more procedural than ethical and perhaps are better placed in a body of rules which provide for disqualification of attorneys before a tribunal.

The committee also considered the issue of whether the ABA Model Rules for Client Trust Account Records should be adopted in Utah. After discussion of the Model Rules and OPC's history with client trust account problems, it was felt by the committee that the current Utah Rules of Professional Conduct are adequate. They not only give guidance to attorneys as to how they should care for client properties in their control or possession, but also provide protections for clients regarding their funds which are in the possession of their attorneys. It was also felt that the Model Rules would be a significant burden on solo and small firm attorneys. For these reasons we do not feel that the ABA Model Rules for Client Trust Account Records should be adopted by the Court at this time.

Sincerely,

Steven G. Johnson

(Excerpt)

MINUTES OF THE SUPREME COURT'S ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Law and Justice Center
645 South 200 East
Salt Lake City, UT
December 6, 2010
5:00 pm

ATTENDEES		EXCUSED	ABSENT
Steve Johnson, Chair	Gary Sackett	Gary Chrystler	Judge Mark May
Diane Abegglen	Stuart Schultz	John Soltis	
Nayer Honarvar	Paula Smith	Leslie Van Frank	
Judge Paul Maughan	Paul Veasy		
Trent Nelson	Billy Walker		
Kent Roche	Earl Wunderli		
Judge Stephen Roth			

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3. SUBCOMMITTEE REPORT: DISQUALIFICATION OF COLLABORATIVE LAWYERS UNDER THE UTAH UNIFORM COLLABORATIVE LAW ACT

Mr. Johnson introduced the topic to committee members. During the 2010 legislative session, the Utah Uniform Collaborative Law Act ("the Act") was passed. Prior to its enactment, a procedural provision of the Act concerning disqualification of collaborative lawyers and their law firms under certain circumstances was removed at the recommendation of the Administrative Office of the Courts.

Specifically, the following language was removed from the Act prior to its passage:

> 78B-19-109. Disqualification of collaborative lawyer and lawyers in associated law firm.
> (1) Except as otherwise provided in Subsection (3) a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.
> (2) Except as otherwise provided in Subsection (3) and Sections 78B-19-110 and 78B-19-111, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under Subsection (1).
> (3) A collaborative lawyer or a lawyer in a law firm with which the collaborative

lawyer is associated may represent a party:
(a) to ask a tribunal to approve an agreement resulting from the collaborative law process; or
(b) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or designated household member if a successor lawyer is not immediately available to represent that person. In that event, Subsections (1) and (2) apply when the party, or designated household member is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of that person.

In October 2010, the Supreme Court asked this committee to consider whether the Rules of Professional Conduct should be amended to include similar language (possibly as a new subsection to Rule of Professional Conduct 1.16). Mr. Johnson appointed a subcommittee, consisting of Stuart Schultz, Trent Nelson and Earl Wunderli, to consider the question and report back to the committee as a whole.

Mr. Schultz reported that the subcommittee debated whether the proposed language belongs in the Rules of Professional Conduct or some other body of rules. The subcommittee concluded that, in light of the reference in the statute to the Rules of Professional Conduct, an addition to existing Rule 1.16 was appropriate. After review of the issue, the full committee determined that the proposed disqualification rules do not fit well in the Rules of Professional Conduct and may be better placed in a body of rules which provides for disqualification of attorneys before a tribunal.

Gary Sackett made a motion that the committee recommend to the Court that the Rules of Professional Conduct not be amended to provide for disqualification of collaborative lawyers, and that disqualification rules may be better placed in a body of rules which provides for disqualification of attorneys before a tribunal. Judge Maughan seconded the motion and it passed unanimously. Mr. Johnson will prepare a letter advising the Supreme Court of the committee's recommendation.

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Tab 4

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: May 17, 2011
Re: Rules for final action

The comment period for the following rules has closed, and they are ready for your final recommendations.

(1) Rule Summary

URCP 064D Writ of garnishment. Amend. Requires the creditor to meet and confer with the garnishee before attempting to impose liability on the garnishee.

URCP 101. Motion practice before court commissioners. Amend. Deletes a paragraph that is incorporated into new Rule 108.

URCP 108. Objection to court commissioner's recommendation. New. Establishes a procedure for objecting to a court commissioner's recommendations. Establishes standards of review.

(2) Web Comments

Utah State Courts Rules - Published for Comment

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

Prior to 9-11 and the continual march towards protected identity, assets, and sealed or cloaked public records, an inquiry with a potential garnishee often made sense. Now, my experience of a decade in the new envirnoment shows me it would be another wasted and costly "i" to dot along with the numerous "t's" we have been made to cross in the post judgment arena of late.

Even if we get lucky and the garnishee will talk to us is (j)(2)(B) seriously suggesting we have to create another uncompensated pleading. Let's not clutter the rules by adding (j)(2)(B). The court can get to the bottom of any negotiations at the hearing and if settlement can be reached the motivation to document it is already there in the system.

Posted by Richard C. Terry March 2, 2011 10:14 AM

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

(3) Email Comments

Attached after the rules

Encl. Draft Rules

Rule 64D. Writ of garnishment.

(a) Availability. A writ of garnishment is available to seize property of the defendant in the possession or under the control of a person other than the defendant. A writ of garnishment is available after final judgment or after the claim has been filed and prior to judgment. The maximum portion of disposable earnings of an individual subject to seizure is the lesser of:

(a)(1) 50% of the defendant's disposable earnings for a writ to enforce payment of a judgment for failure to support dependent children or 25% of the defendant's disposable earnings for any other judgment; or

(a)(2) the amount by which the defendant's disposable earnings for a pay period exceeds the number of weeks in that pay period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable.

(b) Grounds for writ before judgment. In addition to the grounds required in Rule 64A, the grounds for a writ of garnishment before judgment require all of the following:

(b)(1) that the defendant is indebted to the plaintiff;

(b)(2) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state;

(b)(3) that payment of the claim has not been secured by a lien upon property in this state;

(b)(4) that the garnishee possesses or controls property of the defendant; and

(b)(5) that the plaintiff has attached the garnishee fee established by Utah Code Section 78A-2-216.

(c) Statement. The application for a post-judgment writ of garnishment shall state:

(c)(1) if known, the nature, location, account number and estimated value of the property and the name, address and phone number of the person holding the property;

(c)(2) whether any of the property consists of earnings;

(c)(3) the amount of the judgment and the amount due on the judgment;

(c)(4) the name, address and phone number of any person known to the plaintiff to claim an interest in the property; and

(c)(5) that the plaintiff has attached or will serve the garnishee fee established by Utah Code Section 78A-2-216.

(d) Defendant identification. The plaintiff shall submit with the affidavit or application a copy of the judgment information statement described in Utah Code Section 78B-5-201 or the defendant's name and address and, if known, the last four digits of the defendant's social security number and driver license number and state of issuance.

(e) Interrogatories. The plaintiff shall submit with the affidavit or application interrogatories to the garnishee inquiring:

(e)(1) whether the garnishee is indebted to the defendant and the nature of the indebtedness;

(e)(2) whether the garnishee possesses or controls any property of the defendant and, if so, the nature, location and estimated value of the property;

(e)(3) whether the garnishee knows of any property of the defendant in the possession or under the control of another, and, if so, the nature, location and estimated value of the property and the name, address and phone number of the person with possession or control;

(e)(4) whether the garnishee is deducting a liquidated amount in satisfaction of a claim against the plaintiff or the defendant, a designation as to whom the claim relates, and the amount deducted;

(e)(5) the date and manner of the garnishee's service of papers upon the defendant and any third persons;

(e)(6) the dates on which previously served writs of continuing garnishment were served; and

(e)(7) any other relevant information plaintiff may desire, including the defendant's position, rate and method of compensation, pay period, and the computation of the amount of defendant's disposable earnings.

(f) Content of writ; priority. The writ shall instruct the garnishee to complete the steps in subsection (g) and instruct the garnishee how to deliver the property. Several writs may be issued at the same time so long as only one garnishee is named in a writ. Priority among writs of garnishment is in order of service. A writ of garnishment of

earnings applies to the earnings accruing during the pay period in which the writ is effective.

(g) Garnishee's responsibilities. The writ shall direct the garnishee to complete the following within seven business days of service of the writ upon the garnishee:

(g)(1) answer the interrogatories under oath or affirmation;

(g)(2) serve the answers on the plaintiff; and

(g)(3) serve the writ, answers, notice of exemptions and two copies of the reply form upon the defendant and any other person shown by the records of the garnishee to have an interest in the property.

The garnishee may amend answers to interrogatories to correct errors or to reflect a change in circumstances by serving the amended answers in the same manner as the original answers.

(h) Reply to answers; request for hearing.

(h)(1) The plaintiff or defendant may file and serve upon the garnishee a reply to the answers, a copy of the garnishee's answers, and a request for a hearing. The reply shall be filed and served within 10 days after service of the answers or amended answers, but the court may deem the reply timely if filed before notice of sale of the property or before the property is delivered to the plaintiff. The reply may:

(h)(1)(A) challenge the issuance of the writ;

(h)(1)(B) challenge the accuracy of the answers;

(h)(1)(C) claim the property or a portion of the property is exempt; or

(h)(1)(D) claim a set off.

(h)(2) The reply is deemed denied, and the court shall conduct an evidentiary hearing as soon as possible and not to exceed 14 days.

(h)(3) If a person served by the garnishee fails to reply, as to that person:

(h)(3)(A) the garnishee's answers are deemed correct; and

(h)(3)(B) the property is not exempt, except as reflected in the answers.

(i) Delivery of property. A garnishee shall not deliver property until the property is due the defendant. Unless otherwise directed in the writ, the garnishee shall retain the property until 20 days after service by the garnishee under subsection (g). If the garnishee is served with a reply within that time, the garnishee shall retain the property

and comply with the order of the court entered after the hearing on the reply. Otherwise, the garnishee shall deliver the property as provided in the writ.

(j) Liability of garnishee.

(j)(1) A garnishee who acts in accordance with this rule, the writ or an order of the court is released from liability, unless answers to interrogatories are successfully controverted.

(j)(2)(A) If the garnishee fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property or the balance of the judgment, whichever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee's failure. If the garnishee shows that the steps taken to secure the property were reasonable, the court may excuse the garnishee's liability in whole or in part.

(j)(2)(B) The creditor must attach to the motion for an order to show cause a statement that the creditor has in good faith conferred or attempted to confer with the garnishee in an effort to settle the issue without court action.

(j)(3) No person is liable as garnishee by reason of having drawn, accepted, made or endorsed any negotiable instrument that is not in the possession or control of the garnishee at the time of service of the writ.

(j)(4) Any person indebted to the defendant may pay to the officer the amount of the debt or so much as is necessary to satisfy the writ, and the officer's receipt discharges the debtor for the amount paid.

(j)(5) A garnishee may deduct from the property any liquidated claim against the plaintiff or defendant.

(k) Property as security.

(k)(1) If property secures payment of a debt to the garnishee, the property need not be applied at that time but the writ remains in effect, and the property remains subject to being applied upon payment of the debt. If property secures payment of a debt to the garnishee, the plaintiff may obtain an order authorizing the plaintiff to buy the debt and requiring the garnishee to deliver the property.

(k)(2) If property secures an obligation that does not require the personal performance of the defendant and that can be performed by a third person, the plaintiff may obtain an order authorizing the plaintiff or a third person to perform the obligation and requiring the garnishee to deliver the property upon completion of performance or upon tender of performance that is refused.

(l) Writ of continuing garnishment.

(l)(1) After final judgment, the plaintiff may obtain a writ of continuing garnishment against any non exempt periodic payment. All provisions of this rule apply to this subsection, but this subsection governs over a contrary provision.

(l)(2) A writ of continuing garnishment applies to payments to the defendant from the effective date of the writ until the earlier of the following:

(l)(2)(A) 120 days;

(l)(2)(B) the last periodic payment;

(l)(2)(C) the judgment is stayed, vacated or satisfied in full; or

(l)(2)(D) the writ is discharged.

(l)(3) Within seven days after the end of each payment period, the garnishee shall with respect to that period:

(l)(3)(A) answer the interrogatories under oath or affirmation;

(l)(3)(B) serve the answers to the interrogatories on the plaintiff, the defendant and any other person shown by the records of the garnishee to have an interest in the property; and

(l)(3)(C) deliver the property as provided in the writ.

(l)(4) Any person served by the garnishee may reply as in subsection (g), but whether to grant a hearing is within the judge's discretion.

(l)(5) A writ of continuing garnishment issued in favor of the Office of Recovery Services or the Department of Workforce Services of the state of Utah to recover overpayments:

(l)(5)(A) is not limited to 120 days;

(l)(5)(B) has priority over other writs of continuing garnishment; and

(l)(5)(C) if served during the term of another writ of continuing garnishment, tolls that term and preserves all priorities until the expiration of the state's writ.

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Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order shall be by motion which, unless made during a hearing, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. A party may file and serve with the motion a memorandum supporting the motion. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response; reply. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) As used in this rule “attachments” includes all records, forms, information and affidavits necessary to support the party’s position. Attachments for motions and responses regarding alimony shall include income verification and a financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, a financial declaration and a child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party’s position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If attachments necessary to support the responding party’s position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the time required in subsections (b) or (c), the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing. A separate notice of hearing on counter motions is not required.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show cause to believe a party has violated a court order.

(j) Motions to judge. The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be to the judge.

~~(k) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion under Rule 7 within ten days after the recommendation is made in open court or, if the court~~

~~commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.~~

Rule 108. Objection to court commissioner's recommendation.

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

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

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

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

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

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

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

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

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

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

From: wmerrill wmerrill <wmerrill@WALTERTMERRILL.COM>
To: Tim Shea <tims@email.utcourts.gov>
Date: 3/2/2011 7:38 PM
Subject: Rule 64D amendment

Tim,

When I clicked on comments it didn't prompt me to put in my information and wouldn't allow me to make comments. No one else has left one either. My only comment is questioning why the Garnishee is getting two chances to not respond instead of one. I'm not in favor of the amendment.

Walt Merrill

From: Lincoln <lincoln@utahbar.org>
To: "tims@email.utcourts.gov" <tims@email.utcourts.gov>
Date: 3/3/2011 6:56 PM
Subject: FW: [UtahStateBarNews] Notice of Proposed Amendments to Utah CourtRules

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From: Legal - Suh'dutsing [legal@suhdutsingllc.com]
Sent: Thursday, March 03, 2011 18:46
To: USBListserv
Subject: RE: [UtahStateBarNews] Notice of Proposed Amendments to Utah Court Rules

Rule 64D. I object to meeting with the creditor before action is taken against the garnishee. That will cost a client more funds and almost always the garnishee is attempting to protect the creditor as a family member or friend. The courts may exercise the discretion based upon the garnishee's reason for ignoring the order. Furthermore, most garnisee's won't talk to us when we call or it takes multiple requests. Litigation is expensive enough.

-----Original Message-----
From: utahstatebarnews-bounces@postmaster.utahbar.org [mailto:utahstatebarnews-bounces@postmaster.utahbar.org] On Behalf Of Tim Shea
Sent: Wednesday, March 02, 2011 8:47 AM
To: Bar Postmaster
Subject: [UtahStateBarNews] Notice of Proposed Amendments to Utah Court Rules

The Supreme Court and the Judicial Council invite comments to proposed amendments to the following court rules. The comment period expires April 20, 2011.

Summary of proposed amendments

Rules of Civil Procedure
URCP 064D Writ of garnishment. Amend. Requires the creditor to meet and confer with the garnishee before attempting to impose liability on the garnishee.
URCP 101. Motion practice before court commissioners. Amend. Deletes a paragraph that is incorporated into new Rule 108.
URCP 108. Objection to court commissioner’s recommendation. New. Establishes a procedure for objecting to a court commissioner’s recommendations. Establishes standards of review.

Rules of Criminal Procedure
URCrP 013. Pretrial conference. Amend. The change makes a defendant's waiver of the right to appear at a pretrial conference subject to court approval. Occasionally judges want defendants at pretrial conferences because of the substantive issues that are discussed.

Rules of Appellate Procedure
URAP 024. Briefs. Amend. The proposed change creates a word limit for briefs rather than a page limit. A principal brief may have up to 14,000 words. Word limits are established for all other types of briefs.

URAP 027. Form of briefs. Amend. The proposed change will make 14 point typeface the standard rather than 13 point type.
URAP 038B. Qualifications and duties for appointed counsel. Amend. This amendment describes the scope of representation for appointed counsel. The rule clarifies that representation is required through a petition for writ of certiorari to the Utah Supreme Court, if such a petition is warranted, or if it is necessary to respond to a State petition.

Code of Judicial Administration
CJA 01-0205. Standing and ad hoc committees. Amend. Modifies the membership on the Judicial Outreach Committee.
CJA 03-0114. Judicial outreach. Amend. Modifies the scope of the committee's responsibilities.
CJA 04-0202.02. Records classification. Amend. Classifies as private financial declaration in domestic relations cases and their supporting attachments and child protective order cases. Classifies as a protected record audit records concerning the security of a court facility.
CJA 04-0403. Signature stamp use. Amend. Permits a clerk to use a judge’s signature stamp for orders dismissing cases under URCP 3 and URCP 4(b), in addition to the existing authority to do so for dismissals under Rule 4-103.
CJA 04-0613. Jail prisoner transportation. Amend. Amends the rule to conform to a new agreement between the courts and counties.
CJA 06-0401. Domestic relations commissioners. Amend. Makes amendments to conform to proposed Rule of Civil Procedure 108.
CJA 06-0601 Mental health commissioners. Amend. Makes amendments to conform to proposed Rule of Civil Procedure 108.

How to view redline text of the proposed amendments

To see proposed rule amendments and submit comments, click on this link to: http://www.utcourts.gov/resources/rules/comments/. Then click on the rule number.

How to submit comments

You can comment and view the comments of others by clicking on the "comments" link associated with each body of rules. It's more efficient for us if you submit comments through the website, and we encourage you to do so. After clicking on the comment link, you will be prompted for your name, which we request, and your email address and URL, which are optional. This is a public site. If you do not want to disclose your email address, omit it. Time does not permit us to acknowledge comments, but all will be considered.

After submitting your comment on the webpage, you probably will get an error message, but your comment has been delivered to a buffer, and I will publish it at the earliest opportunity.

Submit comments directly through the website or to:

Tim Shea
Email: tims@email.utcourts.gov Please include the comment in the message text, not in an attachment.
Fax: 801-578-3843
Administrative Office of the Courts

POB 140241
Salt Lake City, Utah 84114-0241

One method of submitting a comment is sufficient.

From: Lincoln <lincoln@utahbar.org>
To: "tims@email.utcourts.gov" <tims@email.utcourts.gov>
Date: 3/2/2011 9:40 AM
Subject: FW: [UtahStateBarNews] Notice of Proposed Amendments to Utah CourtRules

Sir

_____
From: dunnron@aol.com [dunnron@aol.com]
Sent: Wednesday, March 02, 2011 08:51
To: USBListserv
Subject: Re: [UtahStateBarNews] Notice of Proposed Amendments to Utah Court Rules

A stupid idea, this:

URCP 064D Writ of garnishment. Amend. Requires the creditor to meet and

confer with the garnishee before attempting to impose liability on the

garnishee.

Sometimes you're in a knife fight with a clever debtor to find assets.
If you don't garnish it when you find it, it disappears down a rat hole.

Terrible policy.

Pandering like this won't do any good: it'll still be the lawyer's fault.

R

-----Original Message-----
From: Tim Shea <tims@email.utcourts.gov>
To: Bar Postmaster <utahstatebarnews@postmaster.utahbar.org>
Sent: Wed, Mar 2, 2011 8:47 am
Subject: [UtahStateBarNews] Notice of Proposed Amendments to Utah Court Rules

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record audit records concerning the security of a court facility.

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Submit comments directly through the website or to:

Tim Shea

Email: tims@email.utcourts.gov<mailto:tims@email.utcourts.gov> Please include the comment in the

message text, not in an attachment.

Fax: 801-578-3843

Administrative Office of the Courts

POB 140241

Salt Lake City, Utah 84114-0241

One method of submitting a comment is sufficient.

From: Lyle Hillyard <lhillyard@utahsenate.org>
To: Stewart Ralphs <sralphs@lasslc.org>
CC: <ricks@email.utcourts.gov>, John Fellows <jfellows@utah.gov>
Date: 2/14/2011 6:08 PM
Subject: Re: SB 183 Custody Amendment

I have heard about this proposal shown in the attached rule. We had a serious debate about the role of commissioners several years ago in the Senate. The strong feeling in the Senate was that if Commissioners are making final rulings that are binding on the Judge and can only be changed by new evidence as proposed then commissioners should be appointed by the advice and consent power of the Senate. We resolved that problem by making it clear that you were entitled to a trial de novo before the District Court Judge with an objection This rule opens that wound again and I don't know if the courts want every commissioner appointed by the Governor and confirmed by the Senate.

>>> Stewart Ralphs <sralphs@lasslc.org> 2/14/2011 5:17 PM >>>

Dear Senators:

I write regarding SB 183 Custody Amendments, sponsor Senator Luz Robles, which will be heard by your Senate Judiciary Committee on Wednesday morning. I write in an individual capacity, not on behalf of the Family Law Section of the Bar, which has not given our section permission to take a position on this bill to-date.

I would urge you to oppose SB 183. I sent Sen. Robles a detailed explanation of my opposition below and believe it succinctly sets forth my arguments of why this bill is both unnecessary and imprudent. In short, the court will be promulgating a new rule that directly addresses Sen. Robles' constituents complaint that temporary custody orders be heard on an evidentiary basis by a judge.

Stewart Ralphs
Executive Director
Legal Aid Society of Salt Lake

Senator Robles:

As I mentioned in our meeting last week, there is indeed a pending court rule that directly addresses the issue of guaranteeing an evidentiary hearing before a judge regarding temporary orders of custody. I have attached it for your consideration. The Rule will be "published" for public comment by the courts at the end of this month. Thereafter, it will be formally adopted by the Supreme Court as a new rule. The relevant portions of the new proposed rule is as follows:

23 (d)(3) If the hearing before the commissioner was in a domestic relations matter
24 other than a cohabitant abuse protective order, any party has the right, upon request:
25 (d)(3)(A) to present testimony and other evidence on genuine issues of material fact

26 relevant to custody at a hearing de novo;

As to SB 183, the proposed changes in Lines 40-41, are NOT appropriate because this is the section dealing with actions for temporary separation cases – not divorce and parentage cases. Although temporary custody could theoretically be dealt with in a temporary separation order case, it is not as likely as divorce and parentage. In any event, the new rule above addresses the issue for ANY domestic case dealing with temporary custody hearings (divorce, parentage, temporary separation order).

Similarly, with the new rule, Lines 158-162 in SB 183 are not necessary. Further, the proposed language in these requiring an evidentiary hearing in ALL cases, not just those involving temporary custody orders, would be a HUGE burden on the courts and would be accompanied by a huge fiscal note.

Finally, regarding the issue of time of filing the parenting plan. I talked with the Court officials about this issue. They too echoed my concern about NOT requiring a parenting plan at the beginning of a case. The language at Lines 168-169 throws the door wide open and invites games, stalling strategies, and more litigation – precisely what public policy should be trying to avoid. They also are as incredulous as I was of ANY instances where a court, commissioner or judge, would refuse to accept a filing of a parenting plan PRIOR to the case being certified for trial. Further, the rules of civil procedure are based on the premise that courts are to liberally grant leave to file amended pleadings throughout the pendency of a case. Therefore, unless PROOF of such occurrence has taken place, I would respectfully request that you reconsider leaving in this provision of the bill. A party should be required to "lay their cards on the table" at the beginning of a case. Until there is a showing of a real problem that commissioners and judges are refusing to allow later filing of parent plans, this is a solution looking for a problem that would only invite more litigation and costs.

Having addressed all the issues, I would respectfully request that you pull this bill in its entirety.

I will be sending your bill to the Family Law Section, but can guess with some confidence, that the section would take a strong position against the bill – given the fact that the main issue is directly addressed by an appropriate new rule.

Respectfully yours,

Stewart Ralphs
Legal Aid Society of Salt Lake

Tab 5

Rule 65C. Post-conviction relief.

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of

those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of pro bono counsel. Pursuant to Section 78B-9-109, if any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication. Section 78B-9-202 governs the appointment and payment of counsel in death penalty cases.

~~(j)~~ (k) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the

motion. No further pleadings or amendments will be permitted unless ordered by the court.

~~(k)~~ (l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

~~(k)(1)~~ (l)(1) consider the formation and simplification of issues;

~~(k)(2)~~ (l)(2) require the parties to identify witnesses and documents; and

~~(k)(3)~~ (l)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

~~(l)~~ (m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

~~(m)~~ (n) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

~~(n)~~ (o) Orders; stay.

~~(n)(1)~~ (o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

~~(n)(2)~~ (o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

~~(n)(3)~~ (o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

~~(o)~~ (p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

~~(p)~~ (q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Advisory Committee Notes

Tab 6

Rule 4. Process.

(a) Signing of summons. The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b)(i) Time of service. In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative.

(b)(ii) In any action brought against two or more defendants on which service has been timely obtained upon one of them,

(b)(ii)(A) the plaintiff may proceed against those served, and

(b)(ii)(B) the others may be served or appear at any time prior to trial.

(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.

(c)(3) If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Method of Service. Unless waived in writing, service of the summons and complaint shall be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process;

(d)(1)(B) Upon an infant (being a person under 14 years) by delivering a copy of the summons and the complaint to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(d)(1)(C) Upon an individual judicially declared to be of unsound mind or incapable of conducting the person's own affairs, by delivering a copy of the summons and the complaint to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and the complaint to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(d)(1)(E) Upon any corporation not herein otherwise provided for, upon a partnership or upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy of the summons and the complaint to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and the complaint to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and the complaint to the county clerk of such county;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and the complaint to the superintendent or business administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and the complaint to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy of the summons and the complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy of the summons and the complaint to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) Service in a foreign country. Service in a foreign country shall be made as follows:

(d)(3)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(3)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(3)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(3)(B)(ii) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the individual personally of a copy of the summons and the complaint or by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(d)(3)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(4) Other service.

(d)(4)(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall

set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

(d)(4)(B) If the motion is granted, the court shall order service of process by ~~publication or by~~ other means~~, provided that the means of notice employed shall be~~ reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.

(d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made~~ and shall be published in the English language~~.

(e) Proof of Service.

(e)(1) If service is not waived, the person effecting service shall file proof with the court. The proof of service must state the date, place, and manner of service. Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent authorized by appointment or by law to receive service of process. If service is made by a person other than by an attorney, the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, the proof of service shall be made by affidavit.

(e)(2) Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to paragraph (d)(3)(C), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(3) Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(e)(4) Date of service endorsed on copy. The person making service shall, at the time of service, endorse on the document served, the date of service and the person's name.

(f) Waiver of Service; Payment of Costs for Refusing to Waive.

(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 20 days from the date on which the request is sent to return the waiver, or 30 days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.

(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.

(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.

(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.

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