Civil Rules Advisory Committee
Minutes of Meeting, April 24, 2015

Present: Justice Jim Jones, Chair; Judge Stephen Hippler, Judge John Butler, Jennifer Brizee, Neil McFeeley, Keely Duke, Clay Gill, Robert Anderson, Pat Brown, William Gigray, and Cathy Derden. Also present: Senior Judge David Day, Chair of Civil Rules Update Committee.

Recommendations from Civil Rules Update Committee. In the spring of 2014, the Supreme Court appointed a special committee to review the Idaho Rules of Civil Procedure to simplify, clarify and modernize the language, and to create a consistent structure and format along with a more useful table of contents. The Committee is chaired by Senior Judge David Day. In 2007 the Federal Rules of Civil Procedure were updated with similar objectives. Since the Idaho Rules of Civil Procedure are based on the federal rules, the Committee has compared them. If the 2006 version of the federal rule is the same as the current Idaho rule, the 2007 updated version of the same rule is being used. The Committee has also strived to keep the same numbering of the rules so that established case law will be maintained.

The Committee's charge does not include making substantive changes; however, it does include identifying and making recommendations for substantive changes to the Civil Rules Advisory Committee for consideration. The Update Committee has not finished its review but submitted to this committee the recommendations identified to date in the sections on Pleadings and Motions and the section on Discovery. The formatting reflects the new format that is part of the update project and the intent is that any substantive changes will not go into effect until the updated version is adopted- hopefully July of 2016.

The first general recommendation is that all time frames be multiples of seven as follows: change 20 days to 21, 30 days to 28, 10 to 14, and 5 to 7. The Committee voted in favor of this proposal.

Other recommendations:

Rule 11. Add additional language found in the federal rule on the procedure for a motion for sanctions and the sanction.

Adopt new Rule 11.2(a)(2) on Successive Applications for Orders or Writs; Motions for Reconsideration.

Rule 12(e). Delete the last part of current rule regarding actions on account.

Rule 13(f). Delete this rule on omitted counterclaims.

Rule 26(b)(1)(B) and (C). Add sections that are found in the federal rule but not the Idaho rule regarding limits on electronically stored information and limits on frequency and extent of discovery.

Rule 26(b)(5)(B). Add federal provisions to clarify the obligation when privileged information is received by mistake until the claim of privilege is resolved.

Rule 26(c). Add a meet and confer requirement to rule on seeking protective orders.

Rule 26(f). Add a statement on the effect of a signature on statements of fact.

Rule 29. Add a statement on stipulations to extend time needing court approval if it would interfere with the time set for trial, or if approval is required by other order of the court.

Rule 30(b)(3) and (5). Add in more on deposition by remote means and require the identity of all persons present.

Rule 30(d)(1). Add a sentence found in the federal rule but not in the Idaho rule that a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(4).

Rule 30(f)(4). Drop the last line in what is currently 30 (f)(3), now 30(f)(4) as not reflecting current practice.

Rule 31(a). Add language found in the federal rule on deposition by written question with leave to include where the parties have not stipulated to the deposition and the deponent has already been deposed in the case.

Rule 37(a)(5). Add a reference found in the federal rule about providing discovery after a motion to compel is filed.

Rule 37(C)(1)(c)- Add a section on failure to disclose or supplement.

Rule 37(e) Add a subsection on failure to provide electronically stored information.

All of these proposed amendments were approved.

The language of the proposed amendments is attached in a separate document. **PLEASE NOTE** the formatting, language and occasionally the subsection number reflect the new format and work of the civil rules update committee.

Rules 54 (a)and (b). The Committee was asked to review a proposed amendment from the court to add a new subsection to 54(a) on amended judgments as follows:

> (2) Amended Judgments. If the court orders an amendment to a judgment, the amendment will be effective only after the court enters an amended judgment setting forth all of the terms of the new judgment, including those terms of the prior judgment that remain in effect.
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> .

The Committee voted in favor of this proposal.

The proposal to 54 (b) is to limit it to a judgment on all claims against one or more parties as follows:

> **Rule 54(b). Judgment Upon ~~Multiple Claims or Involving Multiple Parties~~ <u>All Claims Against One or More Parties</u>.**
>
> (1) Certificate of Final Judgment**.** When <u>one or</u> more ~~than one~~ claim<u>s</u> for relief ~~is presented~~ <u>are asserted against more than one party</u> in an action, whether as a claim, counterclaim, cross-claim, or third party claim, ~~or when multiple parties are involved,~~ the court may direct the entry of a final judgment <u>resolving</u> ~~upon one or more but less than~~ all of the claims <u>asserted against one</u> or <u>more</u> <u>but less than all</u> parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment.

The Committee was not in favor of this proposal, believing there was need to retain the discretion and flexibility to grant a Rule 54(b) certificate and certify as final and appealable a decision on a particular claim.

<u>Rule 40(d)(1).</u> The Committee received a request to consider an amendment to Rule 40(d)(1)(F), which provides:

> (F) Disqualification on New Trial. After a trial has been held, if a new trial has been ordered by the trial court or by an appellate court, each party may file a motion for disqualification without cause of the presiding judge, within the time limits set forth in subparagraph (B) of this Rule.

The proposal was to also allow for disqualification in a situation where summary judgment is granted, appealed and then reversed and remanded back to the trial judge.

The Committee voted against recommending this amendment.

<u>Rule 45 (a) and (b)</u>. It was brought to the Committee's attention that due to the heading and language of Rule 45(a), Subpoena - For Attendance of Witnesses - Issuance. some judges believe an attorney can only sign subpoenas for attendance of witnesses and a clerk must sign a subpoena to obtain records, while, in other districts, attorneys are routinely allowed to sign subpoenas for records. It was suggested that one way to clear up any confusion would be to add a separate section 5 to Rule 45 (b) as follows:

> Rule 45(b). Subpoena for Production or Inspection of Documents, Electronically Stored Information or Tangible Things, or Inspection of Premises.
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> ***
>
> (5) <u>The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to command the production of or permit inspection and copying of documents, electronically stored information or tangible things or to permit inspection of premises. Provided, an attorney licensed in Idaho, as an officer of the court, may also issue and sign a subpoena to command the production of or permit inspection and copying of documents, electronically stored information or tangible things or to permit inspection of premises</u>.

The Committee voted in favor of this proposal.

Proposals from Civil Rules Update Committee

PLEASE NOTE the formatting, language, and occasionally the subsection number, reflect the new format and work of the civil rules update committee.

Rule 11. Add additional language found in the federal rule on the procedure for a motion for sanctions and the sanction as follows:

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record licensed in the State of Idaho, in the individual attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, ~~or~~ submitting***, or later advocating it***—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court must impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible

for the violation. ***A law firm may be held jointly responsible for a violation committed by its partner, associate, or employee.***

(2) Motion for Sanction. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected, without prejudice to the moving party, within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party on the motion, reasonable expenses, including attorney's fees and costs incurred for the motion, whether or not the offending document is withdrawn.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Vexatious Litigant***. In addition to any other sanction available under this rule, the court may also refer to the administrative district judge the question of whether to declare a person to be a vexatious litigant pursuant to Idaho Court Administrative Rule 59 and for relief under that rule.

(6) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) ***against a represented party for violating Rule 11(b)(2); or***

(B) ***on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned***. ***[Note these limitations are not identified in the Idaho rule but do make sense.]***

(d) ***Requirements for an Order. An order imposing a sanction must be in writing and describe the sanctioned conduct and explain the basis for the sanction***

(e) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Adopt the following new Rule 11.2(a)(2) on Successive Applications for Orders or Writs; Motions for Reconsideration.

Rule 11.2. **Successive Applications for Orders or Writs; Motions for Reconsideration**

(a) Successive Applications.

(1) ***In General*.** In any action, if an application for any order or writ is denied in whole or in part, neither the party nor the party's attorney may make any subsequent application to any other judge, except by appeal to a higher court.

(2) ***Second Order Vacated; Sanctions***. A writ or order obtained in violation of this section must be immediately vacated by the judge who issued it. The court **must** sanction a party and the attorney seeking an order or writ in violation of this rule as it may determine appropriate, including by assessing costs and attorney's fees incurred by a party in defense of the writ or order.

(3) ***Constitutional Writ After Disclosure Allowed***. A second application seeking a constitutional writ may be made if the first application and adverse ruling on the application are disclosed to the second judge. Likewise a constitutional writ may be sought from the same judge, or judge succeeding the same judge, in an action after the application was originally denied.

(4) ***Application to the Same Judge or Successor***. A party or attorney may renew an application to the same judge, or a succeeding judge, in an action after the application was originally denied; but this rule does not create the right to file a motion for reconsideration except as provided in subsection (b) of this rule.

(b) Motion for Reconsideration.

(1) ***In General*.** A motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a final judgment.

(2) ***Certain Orders not Subject to Reconsideration.*** No motion to reconsider an order of the trial court entered on any motion filed under Rules 50(a). 52(b). 55(c), 50(a), 59(e), 59.1, 60(a), or 60(b) **[verify cross-references]** may be made.

Rule 12(e). Delete the last part of the current rule regarding actions on account.

Rule 12. (e)**Motion for a More Definite Statement**. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects

complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within ***14*** days after notice of the order or within the time the court sets, the court may strike the pleading or issue. ***Note : deleting***: "~~In actions on an account it shall be sufficient to summarize all transactions on the account, and the obligor of the account shall have no right to demand a written copy of the accounting except as may be ordered by Rule 34 of these rules.~~

Rule 13(f). Delete this rule on omitted counterclaims.

~~**13 (f) Omitted Counterclaims.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.~~ Reserved]

[Note, the Federal version of this rule was abrogated in 2009, and it was noted that amendments to pleadings are governed by Rule 15 and that by stating a separate rule in 13, it was confusing and led to inconsistent results re relation back of amendments. 13 (f) will now say: Abrogated – see Rule 15]

Rule 26(b)(1)(B) and (C). Add sections that are found in the federal rule but not the Idaho rule regarding limits on electronically stored information and limits on frequency and extent of discovery as follows:

Rule 26. General Provisions Governing Discovery

(a) Discovery Scope and Limits.

(1) ***In General***.

(A) ***General Scope of Discovery***. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(B) ***Limits on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from***

such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1)(C). The court may specify conditions for the discovery.

(C) Limits on Frequency and Extent of Discovery. Unless limited by these rules or the court orders otherwise, the frequency of use of discovery is not limited. ***On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:***

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Rule 26(b)(5)(B). Add federal provisions to clarify the obligation when privileged information is received by mistake until the claim of privilege is resolved as follows.

26 (b) (5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it, and must preserve the information until the claim is resolved. After being notified, a party:

(i) must promptly return, sequester, or destroy the specified information and any copies it has;

(ii) must not use or disclose the information until the claim is resolved;

(iii) must take reasonable steps to retrieve the information if the party disclosed it before being notified; and

(iv) may promptly present the information to the court under seal for a determination of the claim.

Rule 26(c). Add a meet and confer requirement to the rule on seeking protective orders as follows:

26 (c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court where the deposition will be taken. ***The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.*** The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following

Rule 26(f). Add a statement on the effect of a signature on statements of fact as follows:

26 (f) Signing Discovery Requests, Responses and Objections

(1) ***Signature Required; Effect of Signature***. Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address and e-mail address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) ***with respect to a statement of fact, it is complete and correct as of the time it is made; and***

Rule 29. Add a statement on stipulations to extend time needing court approval if it would interfere with the time set for trial, or if approval is required by other order of the court as follows:

Rule 29. Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(b) ***other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for trial or court approval is required by other order of the court.***

Rule 30(b)(3) and (5). Add in more on deposition by remote means, and require the identity of all persons present as follows:

Rule 30. Depositions by Oral Examination

(1) ***Method of Recording***.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio or audiovisual means, but must also be simultaneously recorded by stenographic means, as provided by **Rule 30.1**.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(2) ***By Remote Means***. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), **37(a)(2), 37(b)(1),** and 45(f)(1), the deposition takes place where the deponent answers the questions.

(3) ***Officer's Duties***.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer should begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

the identity of all persons present

Rule 30(d)(1). Add a sentence that is in the federal rule but not the Idaho rule that a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(4), as follows:

Rule 30(d) (1) Objections; Conduct; Sanction; Motion to terminate or limit examination.

(1) Objections. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. ***A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(4).***

Rule 30(f)(4). Drop the last line in what is currently 30 (f)(3, but will now be (f)(4)) as not reflecting current practice.

30 f (4) ***Notice of Completion***. Upon completion of the transcript and delivery of it to the party noticing the deposition, the officer who prepared the transcript must promptly notify all the parties or their attorneys that the transcript has been completed and provided to the party noticing it.

Delete ~~"The officer who prepared the transcript shall also file with the court notice stating when the original transcript was completed and mailed, the name and address of the attorney receiving the original transcript, and the name(s) and address(es) of all person(s) receiving copies thereof."~~

Rule 31(a). Add language found in the federal rule on deposition by written question with leave to include where the parties have not stipulated to the deposition and the deponent has already been deposed in the case, as follows:

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) ***Without Leave***. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1)(C) if:

***A*. <u>the parties have not stipulated to the deposition and the deponent has already been deposed in the case; or</u>**

<u>B.</u> the deponent is confined in prison.

Rule 37(a)(5) Add reference found in the federal rule about providing discovery after a motion to compel is filed, as follows:

Rule 37 Failure to Cooperate in Discovery; Sanctions

(a)(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Discovery Is Provided After Filing). If the motion is granted—**or if the requested discovery is provided after the motion was filed**—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

Rule 37(C)(1)(c)- Add a new section on failure to disclose or supplement, as follows:

Rule 37-(c)<u>Failure to Disclose, to Supplement an Earlier Response, or to Admit.</u>

(1) <u>Failure to Disclose or Supplement. If a party fails to supplement discovery responses when required or fails to comply with a disclosure requirement ordered by the court pursuant to a Rule 16 scheduling or pre-trial order, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:</u>

(A) <u>may order payment of the reasonable expenses, including attorney's fees, caused by the failure;</u>

(B) <u>may inform the jury of the party's failure; and</u>

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi)

Note the current 37(c) will now be 37(c)(2).

Rule 37(e) Add a new subsection on failure to provide electronically stored information.

Rule 37 (e*). Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.