

**Criminal Rules Advisory Committee Meeting  
May 31, 2013**

Present: Justice Daniel Eismann, Judge John Melanson, Ken Jorgensen, Roger Bourne, Sara Thomas, Cathy Derden.

Present by phone: Judge Bevan, Anne Marie Kelso, Grant Loebbs, Kelly Mallard, JaNiece Price

**Declarations.** A new statute, I.C. § 9-1406, takes effect July 1, 2013, that allows for a declaration under penalty of perjury in place of an affidavit and swearing before a notary. I.C. § 18-5402 was also amended so that the definition of an oath includes a declaration made under penalty of perjury. The Supreme Court has already adopted new Criminal Rule 2.1, stating that “Whenever these rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code Section 9-1406.” The Committee met to consider whether other amendments were needed and whether it might be advisable to add a specific reference to declarations in rules that referred to affidavits. Specifically the Committee reviewed Rules 3, 4, 5, 5.1 and 41. Regarding search warrants it was pointed out that the Idaho Constitution refers to a search warrant issued upon affidavit. Justice Eismann noted that the Ninth Circuit has ruled a declaration under oath is the same as an affidavit under the United States Constitution. An affidavit is sworn testimony and the decision of an oath includes a declaration under penalty of perjury such that it should be treated the same.

The Committee voted to recommend the following amendments:

**Idaho Criminal Rule 3. Complaint - Initiation and Prosecution.**

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate; provided, a prosecuting attorney may, without oath or affirmation, sign a complaint before a magistrate based upon the sworn affidavit or written certification or declaration under penalty of perjury of a complainant, which shall be filed with the court. Except as otherwise provided by law or rule, all criminal proceedings shall be initiated by complaint or indictment and prosecuted thereafter by complaint, indictment or information as hereinafter provided by these rules.

**Idaho Criminal Rule 4. Warrant - Summons - Determination of Probable Cause.**

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(e) **Hearing to determine probable cause.** The probable cause hearing is an informal nonadversary proceeding. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing that there is a factual basis for the information furnished. It shall not be necessary for the defendant to be present at

such hearing or to have the right to confrontation and cross-examination of witnesses, nor shall it be necessary to permit the defendant to have or to provide the defendant with counsel. Before making the determination of whether there is such probable cause, the magistrate may require any person, other than the defendant, who appears likely to have knowledge relevant to the offense charged to appear personally and give testimony under oath. The facts which the magistrate considers in determining probable cause shall be placed either in affidavit form, or a written certification or declaration under penalty of perjury, ~~and attached to the complaint~~ or shall be testimony under oath placed upon the record. In making the determination of probable cause, the magistrate shall consider all facts as to whether an offense has been committed and whether the defendant has committed it.

It was recommended that the reference to attached to the complaint be deleted as this is not the practice.

**Idaho Criminal Rule 5. Initial Appearance Before Magistrate - Advice To Defendant - Plea in Misdemeanors - Initial Appearance on Grand Jury Indictment.**

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(c) **Determination of probable cause.** In the event the defendant was arrested without a warrant, the magistrate before whom the defendant first appears shall not hold the defendant in custody nor require bail without first making a determination as to whether there is probable cause to believe that an offense has been committed and that the defendant committed it as provided in Rule 4 unless such a finding has been made by a magistrate in a county in which the offense is alleged to have been committed. The probable cause hearing may be an ex parte hearing which does not require the presence of the defendant and shall be held within forty-eight (48) hours, including Saturdays, Sundays, and holidays, after a defendant is arrested without a warrant. The magistrate may hold the hearing on sworn statements, or written certifications or declarations under penalty of perjury, without the officer or witness present.

**Idaho Criminal Rule 5.1. Preliminary Hearing - Probable Cause Hearing - Discharge or Commitment of Defendant - Procedure.**

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(b) **Probable cause finding.** If from the evidence the magistrate determines that a public offense has been committed and that there is probable or sufficient cause to believe that the defendant committed such offense, the magistrate shall forthwith hold the defendant to answer in the district court. The finding of probable cause shall be based upon substantial evidence upon every material element of the offense charged; provided that hearsay in the form of testimony, affidavits, or written certifications or declarations under penalty of perjury, may be admitted to show the existence or nonexistence of business or medical facts and records, judgments and convictions of courts, ownership of real or personal property and reports of scientific examinations of evidence by state or federal

agencies or officials or by state-certified laboratories, provided the magistrate determines the source of said evidence to be credible. Provided, nothing in this rule shall prevent the admission of evidence under any recognized exception to the hearsay rule of evidence. The defendant shall be entitled to cross-examine witnesses produced against the defendant at the hearing and may introduce evidence in defendant's own behalf. Motions to suppress must be made in a trial court as provided in Rule 12; provided, if at the preliminary hearing the evidence shows facts which would ultimately require the suppression of evidence sought to be used against the defendant, such evidence shall be excluded and shall not be considered by the magistrate in his determining probable cause. A record of the proceedings shall be made by stenographic means or recording devices. ~~Affidavits under this rule may have the signature of the affiant and the person who administered the oath in electronic form, as well as the notary seal.~~

The Committee approved deleting the last sentence of Rule 5.1(b) as unnecessary in light of a new proposed rule on electronic signatures.

#### **Idaho Criminal Rule 41. Search and Seizure.**

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(c) **Issuance and content.** A warrant shall issue only on an affidavit or affidavits, ~~or a written certification or declaration under penalty of perjury, sworn to before a district judge or magistrate~~ or by testimony under oath and recorded and establishing the grounds for issuing a warrant. If the district judge or magistrate is satisfied that there is probable cause to believe that the grounds for the application exist, the judge or magistrate shall issue a warrant identifying the property or person and naming or describing the person or place to be searched. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis, considering the totality of the circumstances, to believe probable cause exists. Before ruling on a request for a warrant the district judge or magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses affiant may produce, provided that such proceeding shall be taken down by recording equipment and shall be considered a part of the affidavit. The warrant shall be directed to any peace officer authorized to enforce or assist in enforcing any law of the state of Idaho. It shall command the officer to search, within the specified period of time, not to exceed fourteen (14) days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(d) **Execution and return with inventory.** The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for property taken or shall leave a

copy and receipt at the place from which the property was taken. A verified return, which may be a written certification or declaration under penalty of perjury, shall be promptly made to a district court judge or magistrate in the county where a warrant for the seizure of property or a person was issued. The inventory shall be made by one of the officers executing the warrant in the presence of the person from whose possession or premises the property was taken; provided, if such person is not present, the executing officer shall make the inventory in the presence of at least one (1) credible person of age. The district judge or magistrate shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. The district judge or magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the county in which the warrant was issued or served.

The Committee recommended the language “sworn to before a district judge or magistrate” be deleted as unnecessary.

**Rule 33. Probation and Supervision.** Under Article X, Section 5 of the Idaho Constitution, the State Board of Correction has control of adult probation and parole. I.C. § 20-219 also charges the Board with the duty of supervising persons on probation or parole. There is a lot of difference around the state in how judges order supervision. Some judges attempt to dictate the level of supervision and probation officers feel the need to request a judge’s permission to have a minimal level of supervision. While the judge sets the conditions of probation, the level of supervision is in the discretion of the Board of Correction. Level of supervision refers to how often the probationer is required to meet with the probation officer, where the meetings will take place, and the method of contact. The method of contact may be in person, by phone, by written letter, etc. The Committee members were in favor of the amendment but only if some definition of level of supervision was included.

The Committee voted to recommend the following amendment to Rule 33:

**Idaho Criminal Rule 33. Sentence and Judgment.**

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(d) **Commutation of sentence and suspending or withholding judgment, conditions.** For an offense not punishable by death, the district court or the magistrates division may commute the sentence, suspend the execution of the judgment, or withhold judgment, and place the defendant upon probation as provided by law and these rules. Provided, however, that the conditions of a withheld judgment or of probation shall not include any requirement of the contribution of money or property to any charity or other nongovernmental organization, but may include the rendering of labor and services to charities, governmental agencies, needy citizens and nonprofit organizations. The conditions of a withheld judgment or probation may also include, among other lawful provisions, the following:

(1) A requirement that the defendant make restitution to a party injured by the defendant's action.

(2) A requirement that the defendant pay a specific sum of money to the court for the prosecution of the criminal proceedings against the defendant, or a sum of money not to exceed the fine and court costs which could otherwise be assessed if the sentence were not suspended or withheld, which funds shall be distributed in the manner provided for the distribution of fines and forfeitures under section 19-4705, Idaho Code.

(3) A requirement that the defendant perform voluntary services for self-education purposes as part of a positive program of rehabilitation.

(4) The level of supervision of a defendant placed on probation to the State Board of correction shall be within the exclusive discretion of the State Board of Correction. The level of supervision means the frequency, places, and method of contact with the probationer by the probation office.

Electronic Signatures. There was a proposal to allow electronic signatures on any document sent electronically and to include in that rule an allowance for an electronic notary seal whenever a seal is needed. The Committee voted to recommend the following new rule.

New Rule Idaho Criminal Rule 2.3. Electronic Signatures.

An electronic signature may be used on any document that is required or permitted under these rules and that is transmitted electronically, including a search or arrest warrant, a written certification or declaration under penalty of perjury, or an affidavit, and a notary's seal may be in electronic form.

Rule 16. Electronic Discovery. There was a proposal to include in Rule 16 a provision allowing for electronic discovery in recognition that many prosecutors are already using electronic discovery and in recognition that e-filing will be coming. The problem discussed was the redaction issue and the problem of different colored copies so that it is clear which one belongs to the defendant. There was a suggestion of different colored backgrounds or a watermark to distinguish the redacted copy and how to clearly mark one copy as redacted. The Committee also discussed the cost of printing the discovery in large cases where there are numerous documents. The issue was tabled and Ken Jorgensen volunteered to work on a draft and circulate it to the Committee.