Civil Rules Advisory Committee
Minutes of January 28, 2104, Meeting

Present: Justice Warren Jones, Chair; Judge John Stegner; Jennifer Brizee, Neil McFeeley, Keely Duke, Clay Gill, Breck Seiniger, Pat Brown, William Gigray, and Cathy Derden.

Rule 11(b)(1). At the last meeting, the Committee voted in favor of recommending an amendment that would place responsibility on the clerk for service of an order allowing an attorney to withdraw. The Committee reviewed proposed language and voted to recommend the following:

Rule 11(b)(3). Leave to Withdraw - Notice to Client.

> If an attorney is granted leave to withdraw, the court shall enter an order permitting the attorney to withdraw. After the order is entered, the clerk shall immediately serve a copy of the order on all parties in accord with Rule 77 (d). The order shall direct the party whose attorney is withdrawing ~~and directing the attorney's client~~ to appoint another attorney to appear, or to appear in person by filing a written notice with the court stating how the client will proceed without an attorney, within 20 days from the date of service ~~or mailing~~ of the order ~~to the client~~. ~~After the order is entered, the withdrawing attorney shall forthwith, with due diligence, serve copies of the same upon the client and all other parties to the action and shall file proof of service with the court. The withdrawing attorney may make such service upon the client by personal service or by certified mail to the last known address most likely to give notice to the client, which service shall be complete upon mailing~~. Upon the entry of an order granting leave to an attorney to withdraw from an action, no further proceedings can be had in that action which will affect the rights of the party of the withdrawing attorney for a period of 20 days after service ~~or mailing~~ of the order ~~of withdrawal to the party~~. If such party fails to file and serve an additional written appearance in the action either in person or through a newly appointed attorney within such 20 day period, such failure shall be sufficient ground for entry of default and default judgment against such party or dismissal of the action of such party, with prejudice, without further notice, which shall be stated in the order of the court. ~~The attorney shall provide the last known address of the client in any notice of withdrawal.~~

Rule 77(b). The Committee also voted to recommend an amendment to Rule 77(b) to insert the word "proposed" when referring to an order or judgment prepared by the parties. The change reflects the intent of the rule to require service of proposed orders before the entry of the order, as opposed to service by the attorney of a duplicate copy of the order as entered.

Rule 77(d). Notice of Orders or Judgments.

> Immediately upon the entry of an order or judgment the clerk of the district court, or magistrates division, shall serve a copy thereof, with the clerk's filing stamp thereon

showing the date of filing, by mail on every party affected thereby by mailing or delivering to the attorney of record of each party, or if the party is not represented by an attorney, by mailing to the party at the address designated by the prevailing party as most likely to give notice to such party. The prevailing party, or other party designated by the court to draft an order or judgment, shall provide and deliver to the clerk sufficient copies for service upon all parties together with envelopes addressed to each party, as provided above, with sufficient postage attached, unless otherwise ordered by the court. The clerk shall make a note in the court records of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party preparing a~~n~~ proposed order or a proposed judgment shall in addition serve a copy on each party in the manner provided in Rule 5 for the service of papers. Lack of notice of entry of an order or judgment does not affect the time to appeal or to file a post-judgment motion, or relieve or authorize the court to relieve a party for failure to appeal or file a post-trial motion within the time allowed, except where there is no showing of mailing by the clerk in the court records and the party affected thereby had no actual notice.

Rule 26(b)(4). At the last meeting the committee considered a rule change that would make a distinction between experts who are retained specifically in anticipation of litigation and percipient witnesses who are qualified to offer expert opinions based on their observations and involvement such as a treating physician. After discussion there was consensus that a distinction between retained and nonretained experts was appropriate, though the precise wording of any amendments was not agreed upon. A subcommittee was appointed to draft amendments to Rule 26(b)(4)/ The subcommittee, consisting of Judge Stegner, Keely Duke, Breck Seiniger and Cathy Derden met in December, and submitted a proposed rule with a comment that is to be published with the rule.

The Committee voted to make several changes to the subcommittee's proposal and then voted in favor of its recommendation with one opposing vote. The opposition was based on subpart (1)(ii), pertaining to experts that are not specifically retained in anticipation of litigation, and the provision the attorney is to provide "a summary of the facts and opinions to which the witness is expected to testify", rather than a complete statement of all opinions to be expressed at trial. There was concern that this might be subject to abuse since it refers to what the attorney expects and that it might place a burden on opposing counsel to flesh out the testimony with depositions. The majority of the Committee believed that with this type of expert, as opposed to a retained expert, the disclosure of what was expected was appropriate.

Rule 26(b)(4)(A). Trial Preparation - Experts.

~~Discovery of facts known and opinions held by experts expected to testify, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by interrogatory and/or deposition, including: (A)(i)~~

(1) A party must disclose to the other parties by interrogatory and/or court order, the identity of any witness it expects will testify at trial to present evidence under I.R.E. 702, 703 and 705.

(i) For individuals retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: ~~A~~ a complete statement of all opinions to be expressed and the basis and reasons therefor~~e~~; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(ii) For individuals with knowledge of relevant facts not acquired in preparation for trial and who have not been retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party do not regularly involve giving expert testimony: a statement of the subject matter on which the witness is expected to present evidence under Idaho Rule of Evidence 702, 703 or 705, and a summary of the facts and opinions to which the witness is expected to testify.

(iii) A party may depose any person who has been disclosed pursuant to this rule.

(~~ii~~ iv) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(~~iii~~ v) No party shall contact ~~an~~ a disclosed 26(b)(4)(A)(1)(i) expert witness of an opposing party without first obtaining the permission of the opposing party or the court.

(2) Draft Disclosures and Draft Reports. Any draft disclosure or draft report prepared in anticipation of litigation by any witness disclosed under this 26(b)(4)(A)(1) is protected from disclosure.

(3) Communications Between a Party's Attorney and Expert Witness. Communications between the party's attorney and any witness required to be disclosed under 26(b)(4)(A)(1), regardless of the form of the communications, is protected from disclosure, except to the extent that the communications:

(i) state the amount of compensation for the expert's services;

(ii) identify the facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Comment: The purpose of making two categories of expert witnesses under this rule is to distinguish expert witnesses specifically retained in anticipation of litigation from those

witnesses who offer expert opinions based on their observations with respect to the transaction or occurrences that are the part of the subject matter of the trial, but who are not retained for the purposes of the litigation; e.g., a treating physician, a police reconstructionist or an in-house engineer or accountant. It is recognized that witnesses falling into this second category under subpart (A)(1)(ii) may also require a fee; however, payment of this fee does not convert these witnesses into experts retained in anticipation of litigation that are described in subpart (A)(1)(i).