Civil Rules Advisory Committee
Minutes of December 6, 2013, Meeting

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

Rule 11(b)(1). This rule allows one attorney to substitute for another by the filing of a notice. Currently if a person has an attorney and then decides he or she wishes to proceed *pro se*, the attorney must file a motion to withdraw. There is an expense and delay involved in this process, including the 14 days' notice preceding the hearing, the court appearance and the 20 day stay of proceedings, which can be longer, especially in courts that hold only one motion day a month. To avoid the delay and expense, there was a proposal to allow the *pro se* party to be substituted in for the attorney representing the *pro se* party much like one attorney substitutes in for another in instances where the *pro se* person and his or her attorney agree as to the withdrawal. The notice would have to be signed by both the party appearing *pro se* and the attorney of record and an order entered providing for the substitution.

The Committee agreed the withdrawal process can cause delay but also noted that once an attorney withdraws the *pro se* person often never appears and the case is dismissed. There was concern that some time line should be included as this rule could lead to abuse if a client was not well informed and talked into allowing his attorney to withdraw right before trial since permission of the judge would not be required. The consensus was that this rule should not be amended.

However, the Committee discussed whether Rule 11(b)(3), on withdrawal of attorney and notice to client, should be amended to clarify when the 20 day stay begins. Currently this rule states that after an order is entered allowing the withdrawal, 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." The Committee believed that the obligation should be on the clerk of the court to serve the order on the client in accord with Rule 77(d), the way other orders are served, and that the 20 day period for the client to respond should begin after the clerk serves the order.

The Committee voted in favor of this change. The exact language will be circulated and voted upon after the meeting.

Rule 26(b)(4). The Committee was asked to consider 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; for example, a treating physician, police reconstructionist or an in-house accountant or engineer. It is often very difficult to get a treating physical to cooperate in providing the information currently required under this rule, such as information about prior testimony, journal articles and even a current CV. Many treating doctors simply do not want to be involved in the process and some try to impose barriers to dissuade participation by, for example, charging extraordinary amounts of money for meetings. It was suggested that the

proposed change eliminates an obligation to obtain items that are not available to counsel and in the vast majority of situations are not significant.

The rule currently requires a proponent to provide in discovery:
1. A complete statement of all opinions to be expressed and the basis and reasons therefore;
2. The data or other information considered by the witness in forming the opinions;
3. Any exhibits to be used as a summary of or support for the opinions;
4. Any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
5. The compensation to be paid for the testimony; and
6. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four year

Similar to the federal rule, under the proposed change the disclosure/discovery response related to a percipient witness/non-retained expert would be limited to:
1. 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
2. A statement of the facts and opinions to which the witness is expected to testify.

The proposed change also expressly provides that expert witnesses can be deposed. The proposed amendment was as follows:

Idaho Rules of Civil Procedure Rule 26(b)(4). 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) 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 therefore; 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.
> (2) For individuals not 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 statement of the facts and opinions to which the witness is expected to testify.
> (ii) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

> (iii) 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~~ iv) No party shall contact an expert witness of an opposing party without first obtaining the permission of the opposing party or the court.

The Committee noted that the rule as it exists is helpful as the disclosures cut down on the expense of depositions. However, 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. Several versions of a new rule were discussed. The members also discussed whether mandatory disclosure should be required as it is in the federal rules, but there was no agreement on this and it was recognized that this would be a major change that might be better addressed at a later time. .

The Committee agreed that a subcommittee should be appointed to draft amendments to Rule 26(b)(4) to be circulated as soon as possible to the Committee for a vote. Judge Stegner, Keely Duke, Breck Seiniger and Cathy Derden are on the subcommittee and will meet in December with the goal of having a phone conference to discuss and vote sometime in January.

Rule 33(a)(2). The purpose of amending Rule 33 (a)(2) is to address the signing of interrogatory answers by parties who are not persons. When representing government agencies a problem can arise as to who has authority to sign the answer on behalf of the agency as a party in the case. A proposal was made that it be amended similar to how the federal reads as follows:

> 2) Answers to Interrogatories. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the party to whom they are directed or if that party is a public or private corporation partnership, association, governmental agency or trust, by any officer or agent who must furnish the information for the answering party ~~by the person making them,~~ and the objections may be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve the original of the answers, and objections if any, within 30 days after the service of the interrogatories. The court may allow a shorter or longer time. The answers shall first set forth each interrogatory asked, followed by the answer or response of the party. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer any interrogatory.

The phrase "who must furnish the information" was questioned as it was noted that if it is an agency or a corporation the answers may come from a number of different people. It was suggested that if the word "party" was substituted for "person" then the law of agency would apply. There was a motion to amend the rule to change it to read "The answers are to be signed by the ~~person~~ party to whom they are directed and the objections may be signed by the attorney making them." The Committee voted in favor of recommending this amendment.

Rule 59(c). It was proposed that this rule be amended to provide that the form of affidavits in support of the motion for new trial must comply with the form of affidavits as provided in Rule 56(e) so that there would be some standard for these. The Committee agreed and recommended that language be added to the rule as follows:

> <u>Form and</u> Time for Serving Affidavits on Motion for New Trial.
> When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen (14) days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty one (21) days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits. <u>All affidavits filed under this rule must meet the requirements of Idaho Rule of Civil Procedure 56(e).</u>

Advancing Justice. Judge Wood, Chair of the Advancing Justice Committee, and Judge Moeller, Chair of the Rules Subcommittee of the Advancing Justice Committee, joined the Committee to discuss the work of Advancing Justice and to seek comments on some proposed rule changes. First, Judge Wood addressed concerns raised about the recommendations for modifying and implementing Idaho's time standards for case processing adopted in August 2013. Judge Wood reminded the Committee that the court has approved new time standards but as a pilot project so the rule on time standards has not been amended. The idea is for the new standards to start as a pilot program and to coincide with implementation of a new court case management system, Tyler, which is about two years out, so that data can be collected to see how the standards are working and where adjustments need to be made. More case types will be used and the new system will be able to capture data at interim case events. The goal of the Committee is to identify and eliminate causes of unnecessary delay. The standards are meant to be guidelines and used as a management tool.

Judge Moeller advised that his subcommittee had been reviewing civil and criminal rules in an attempt to identify areas that might help facilitate the goad of advancing justice by eliminating the cause of unnecessary delay. The Committee was given proposed amendments to Civil Rules 16, 56, 40(c) and 4(a) to review. The Advancing Justice Committee would like to move forward with its recommendation to amend Rules 16 and 56 but is still discussing and considering Rules 40(c) and 4(a).

Rule 16 (a) through (h) was combined into two new subsections in an effort to standardize pretrial conferences and pretrial orders. Much of the current rule was seen as duplicative so many of the subsections were combined. The committee members noted that they would need some time to review and compare it to the existing rule. The amendments to Rule 56 would require that motions for summary judgment be filed at least 90 days before trial instead of 60 days. These motions are often dispositive of the case and the court needs time to decide the motion which can result in vacating trial date. The Committee did not express any objection to this change but again comments were invited to be sent in writing,

The amendments to 40(c) and 4(a) would shorten the presumptive limit for service in both district court and magistrate court cases to four months but allow the Court to extend the period for a showing of any reasonable basis. The time frame under 40(c) for dismissal of inactive cases would be shortened to four months. It was suggested that consideration be given to including a provision in 4(a) directing the court to give the parties 14 days' notice of the intent to dismiss so that they might have an opportunity to respond with good cause. It was also questioned why good cause was being defined in 4(a).

The Committee was invited to review the proposed amendments to these rules and to send written comments and concerns to either Judge Moeller or Cathy Derden for further consideration by the Advancing Justice Committee. Comments should be sent as soon as possible as proposed rule amendments for July of 2014 will be reviewed by the Administrative Conference at the beginning of February.

Rule 57(b). The Committee was requested to revisit an amendment made to this rule in 2008, that a party with a claim against an insured "shall be joined if feasible" in a declaratory judgment action regarding the availability of coverage for that insured. It was argued that the rule change was perplexing, given that the party bringing a claim against an insured is not a party to the insurance contract and would have no standing to file briefs or make arguments when the coverage issues are being litigated. Nor could that third party file an action against the insurance company, since Idaho is not a "direct action" state. Finally, the rule change is not clear as to whether the insurance company filing the declaratory action has the burden of joining the interested third party or if the instruction is to the presiding court when considering a motion to intervene by that party. Since the main purpose appears to be simply providing notice of the action, it was suggested that the rule be amended to reflect this.

The Committee voted 8 in favor and 2 against to recommend the following amendment:

> (b) In an action seeking declaratory judgment as to coverage under a policy of insurance, any person known to any party to have a claim against the insured relating to the incident that is the subject of the declaratory action shall be ~~joined if feasible~~ provided notice of the action by the party seeking declaratory judgment.

Rule 54(a). Although this rule was amended to attempt to clarify what is needed for a final appealable judgment, there are still many judgments being remanded because they do not comply with the rule. In an attempt to further clarify the requirements several suggestions were submitted to the Committee for consideration that would require the judgment to begin with specific language. After discussion the Committee voted to recommend that this rule be amended as follows:

Rule 54(a). Judgments - Definition - Form**.**

> "Judgment" as used in these rules means a separate document entitled "Judgment" or "Decree". A judgment shall state the relief to which a party is entitled on one or more claims for relief in the action. Such relief can include dismissal with or without prejudice. A judgment shall not contain a recital of pleadings, the report of a master, the record of prior proceedings, the court's legal reasoning, findings of fact, or conclusions of law. A judgment is final if either it has been certified as

> final pursuant to subsection (b)(1) of this rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action.
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> A judgment shall begin with the words "JUDGMENT IS ENTERED AS FOLLOWS: . . ," and it shall not contain any other wording between those words and the caption. A judgment can include any findings of fact or conclusions of law expressly required by statute, rule, or regulation.

It should be noted the language about findings of fact or conclusions of law expressly required by statute, rule, or regulation is primarily for termination actions brought by Health and Welfare. For federal funding, certain specific language has to be included which would be considered a finding of fact or conclusion of law.

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Rule 54(d)(1). The Committee received a suggestion that this rule on costs be amended to include the costs of court ordered mediation, i.e. the mediator's fee, and court ordered parenting evaluations and assessments, as cost as a matter of right as these can be quite expensive. As an alternative it was suggested these be included under costs incurred by the court. The Committee was not aware of the problem and voted to take no action. This issue, as it relates to family law cases, will be referred to the Children and Families in the Courts Committee.

Changes to Rules if Family Law Rules are Adopted. The Committee reviewed a memorandum prepared by Judge David Day outlining all of the provisions of the Idaho Rules of Civil Procedure that should be deleted or amended in the event the Idaho Rules of Family Law Procedure are adopted for statewide use. The Committee voted in favor of these amendments upon condition that the Family Law Rules are in fact adopted statewide. The memorandum is attached to the minutes.

Electronic Signatures. Recently a new rule was adopted allowing for electronic signatures that reads:1(d). 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.

The rule actually originated in the Criminal Rules Advisory Committee mostly to facilitate emailing to a judge a declaration made in support of a warrant. When it was added to the Criminal Rules it was added to the Civil Rules as well. Questions have arisen by clerks as to what constitutes an acceptable electronic signature and when it can be used. Is something that is fax filed transmitted electronically for purposes of this rule? It was proposed that the rule be amended to include whether "/s/ (name of person who signed the document)" constitutes a signature.

Judge Stegner volunteered to draft language that will be circulated for a vote.

Rule 40(e). A question was previously raised about the practice of judges ordering a change of venue without a motion or consent of the parties, and whether this is allowed under Rule 40(e). While a court may raise the issue of subject matter jurisdiction *sua sponte*, the argument is that the plaintiff has the right to choose the initial venue subject to the defendant's right to challenge venue. Some judges believe that if the defendant does not make the challenge, then venue is not something the court can consider since an objection to venue can be waived. One policy concern that has been raised is whether a *sua sponte* change of venue is a disservice to the public when the parties want their case heard in the venue in which it is filed and in some cases have already reached a stipulation as to the resolution. There is also concern that a court may make a mistake by assuming proper venue without any input from the parties. While the civil rule is unclear, Criminal Rule 21 on change of venue does make clear that a motion is required. After discussion the Committee voted to recommend the following amendment:

> 40(e). Change of venue.
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> (1) A j~~J~~udge or magistrate may grant a change of venue or change the place of trial to another county in any civil action as provided by statute only upon motion by either party, and the judge or magistrate must, on motion pursuant to Rule 12(b), change the venue of a trial when it appears by affidavit or other satisfactory proof:
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The Committee meeting adjourned at 3:30 p.m.