Civil Rules Advisory Committee
Minutes of Meeting March 10, 2017

Present: Justice Robyn Brody, Chair; Judge John Butler; Judge Stephen Hippler; Jennifer Brizee; Patrick Brown; Keely Duke; Clay Gill; Neil McFeeley; Tim Walton, and Cathy Derden.

Case Information Sheet. Currently a case information sheet is required to be filed by the initiating party in certain types of civil cases, such as guardianship and adoption, and the sheet requests information about both the initiating and responding party. With the move to e-filing the Supreme Court has adopted a second civil case information sheet to be filed in all other civil cases. This sheet will be completed and filed by both the initiating and responding parties regarding that party's information. The information will be used to match parties and will be exempt from disclosure. Rule 3 currently addresses the requirement of a case information sheet and the Committee was asked to consider how to amend the rule to reflect the new requirement.

The proposal was to add to the following to the end of current rule 3(d):
Rule 3. Commencement of Action.

> (d) Case Information Sheet. In the following actions, a completed Supreme Court approved case information sheet must be filed with the complaint or petition:
> (1) guardianship,
> (2) conservatorship,
> (3) adoption,
> (4) termination of parental rights,
> (5) involuntary commitment, and
> (6) child protection act proceedings.
>
> <u>In all other actions within the scope of the Idaho Rules of Civil Procedure as defined by Rule 1(b) the party commencing the action must file a completed Supreme Court approved case information sheet at the time of filing the document that initiates the case. Any responding party and any other party joined in the case at any time must file a completed Supreme Court approved case information sheet with that party's first appearance in the case.</u> This case information sheet is exempt from disclosure according to Rule 32, Idaho Court Administrative Rules.

The Committee requested that the provision be redrafted and perhaps come first in the rule. A new draft will be sent out for a vote.

In addition, the Committee reviewed the new information sheet that has already been approved by the Supreme Court and offered some suggestions for amendments. The first is to simply state "information about party" instead of "information about party submitting document" so it is clear the information is not about the attorney submitting the filing. The second suggestion is to add a line that states "Legal name of business entity". The current form does not have a place to fill in business names.

Rule 4(d). Summons. There was a proposal to add a new subsection to Rule 4(d), summons-upon whom served, to address the situation where an attorney has confirmed that he or she is

going to represent the defendant but will not accept service on the defendant's behalf or provide the address of the defendant so the defendant can be served. This can cause of delay and expense. An argument was made that once it is confirmed the defendant is represented by counsel, then the plaintiff's attorney's duties under Idaho Rule of Professional Conduct 4.2 are triggered. This rule states that the attorney shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. For practical purposes lawyers or the courts may not consider I.R.P.C. 4.2 to apply in such circumstances, but it was pointed out that sometimes process servers relate uncounseled disclosures of information made by those being served. The proposal was to add a subsection stating that service could be accomplished by:

> (D) delivering a copy of the summons and of the complaint to any attorney who has advised the attorney for the serving party that he represents the party to be served with respect to the subject of the litigation.

The proposal raised concerns for the members. It may be unclear that a client has in fact retained the attorney for all purposes. This could also lead to court hearings over whether the defendant's attorney actually advised that he or she was representing the defendant if the advisement was not in writing. It could also call into question jurisdictional issues by requiring counsel to appear for an individual who might not otherwise be subject to the court's reach. There was discussion about difficulty serving persons living in gated communities and whether, if an insurer has a duty to defend an individual, then whether it must accept service, but this was thought to be a legislative issue. In addition, a plaintiff can ask the court for forms of relief in serving the defendant. The federal rule has a provision on waiver of service that could be considered at another time. The Committee voted not to amend Rule 4(d).

Rule 5(b). Service- how made. There was a proposal to amend Rule 5(b)(2)(E) as follows:

> (E) sending it by electronic means ~~if the person consented in writing in which event service is complete upon transmission,~~ and transmitting a notice of service by electronic means by fax or hand delivery, but electronic service is not effective if the serving party learns that the document(s) served electronically did not reach the person to be served and the serving party failed to serve a notice of service as required by this section of this rule;

It is sometimes difficult to get the other party to consent to service by e-mail. The proposal eliminates the requirement of consent, but adds the requirement that a notice of electronic service be served by fax or hand delivery to make sure no party will be prejudiced by the occasional missed emails. The challenge of faxing lengthy discovery documents to opposing counsel was noted. However, it was also noted that many of the problems and the expense involved in delivering documents for filing to the Clerk, as well as the limitations on faxing, are being solved as the courts shift to e-filing. With the e-filing system, attorneys are deemed to have consented to electronic service of documents between the parties. Ada County is now on Odyssey and all counties should be on Odyssey by the end of 2018, so the consensus was that this change was not needed.

Rule 26(b)(4) Trial preparation – experts. The proposal was to amend the rule to provide a new subsection stating:

> All motions for relief based upon an alleged failure to comply with this rule are subject to making the showing required under I.R.Civ.P. 37(a).

Before filing a motion to compel disclosure, Rule 37 (a) requires a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. The proposed amendment would add this same meet and confer requirement before motions for inadequate disclosure could be brought. Disputes over sufficiency of expert disclosures are often not raised until the eve of trial.

There was some agreement with the need for the proposed amendment and some concern expressed the rule did not clearly state what needed to be disclosed such that technical deficiencies in disclosure were raised at the last minute to exclude the testimony. The new provision would give time to correct inadequate disclosures. However, the general opinion of the committee was that the rule was clear as to what needed to be disclosed. The consensus was that this amendment was not needed.

Rule 15. Amended and Supplemental Pleadings. Before the 2016 update of the civil rules, this rule effectively read that a party could amend once as a matter of right before a responsive pleading is filed or if no responsive pleading is required, may amend at any time as a matter of right within 20 days after it is served. This left open that if it is one to which a responsive pleading is required (e.g. complaint) then if a 12(b) motion was filed without a responsive pleading also being filed, the party could still amend once as a matter of right. As amended the rule now reads:

(a) Amendments Before Trial.
(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:
(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, before the party is served with the responsive pleading or a motion under Rule 12(b), (e), or (f), whichever is earlier.

The net effect is that when a party now files a complaint, if a rule 12(b) motion to dismiss is filed without a responsive pleading, the party no longer has the right to look at a 12(b) motion and agree that there is a defect and amend to cure that defect without asking the court for permission. It was suggested the rule be amended to read consistent with the federal rule that gives that right back for 21 days.

As amended the rule would read as follows:

(a) Amendments Before Trial.
(1) Amending as a Matter of Right. ~~Course~~. A party may amend its pleading once as a matter of right ~~course~~ within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required**,** ~~before the party is served with the responsive pleading or~~ 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

The Committee voted in favor of this amendment.

Probate. The Committee was asked by a probate attorney to consider whether clarification was needed as to when and how the rules apply to probate proceedings, especially discovery. It was pointed out that a probate action is commenced by filing a petition or application which does not constitute a pleading under the rules. Some states do have a separate set of rules for probate.

The Committee noted that there are some adversary proceedings in probate where the rules apply. Without more specifics, the Committee voted to take no action on this request.

Rule 4(b)(2). Time Limit for Service. The Committee reviewed a proposal by the Advancing Justice Committee that the time for service of a complaint be reduced from six months to 90 days. Judge Gregory Moeller, who is a member of the AJC, addressed the Committee about the proposed change. The AJC is charged with looking at the judicial system and attempting to identify and reduce delay in resolving cases. The AJC was going to propose reducing the time to 120 days, hoping it could be later reduced to 90 days. However, with the federal rule recently being changed to 90 days for service, the AJC decided it was time to propose this for consideration. With the proposal was a chart showing the average time to service was 55 days.

In discussion several points were raised:
The federal rule allows service by mail and personal service takes longer- though an extension can be obtained upon a showing of good cause.
The chart used a very small case sample so its accuracy was questioned. In addition, if 55 days is the average it was questioned why the need for the amendment
This amendment could make the case more expensive and increase litigation as discovery would begin sooner and there is less time to negotiate a settlement. There is case law that negotiating a settlement is not good cause for an extension of time and certain types of property cases have to be filed quickly.
On the other hand, cases that take longer usually have more attorney time and higher fees.

Members believed the time standards for judges that are being piloted were driving this amendment. Committee members reported judges being very concerned about the standards. It was questioned why the time standards for judges are measured from the date the complaint is filed rather than served. Judge Moeller explained it had always been measured this way to get an accurate reading of the life of the case from the standpoint of the taxpayer filing the action. The new time standards being piloted do have some built in flexibility but 75 % of cases are to be resolved in six months. As it stands, the complaint may take six months to be served. Judge Moeller noted that case flow management experts recommended this reduction in time.

Justice Brody will discuss the measurement of time standards from the filing of the complaint with the justices and report back to the committee. If the standards stay as they are and are measured from the complaint, then the preliminary vote was 6 to 2 in favor of recommending the change to 90 days. The issue will be brought back to the committee for another vote.

RULE 41(e). Dismissal of Inactive Cases. Along with the proposal to reduce service time to 90 days the AJC proposed changing the time frame for dismissal of inactive cases to 90 days instead of six months and to provide the case "may" be dismissed for inactivity instead of "must" be dismissed.

The Committee was in favor of this amendment with the further amendment that language referring to the summons not being served was removed. This way it is clear that dismissal for failing to serve is pursuant to Rule 4(b)(2) and Rule 41(e) dismissal is for no action in the case after service has taken place. Notice is always given before a dismissal pursuant to Rule 41(e) and the parties have a chance to respond and let the court know the status of the case. The Committee voted in favor of amending the rule as follows:

> Rule 41(e). Dismissal of inactive cases. Any action, appeal or proceeding, except for guardianships, conservatorships, and probate proceedings, in which no action has been taken ~~or in which the summons has not been issued and served,~~ for a period of ~~6 months~~ 90 days ~~must~~ may be dismissed unless there is a showing of good cause for retention.
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> (1) Dismissal pursuant to this rule is with prejudice in the case of appeals and without prejudice as to all other matters.
>
> (2) At least 14 days prior to such dismissal, the clerk must give notice of the pending dismissal to all parties or their attorneys of record.

The meeting adjourned at noon.