

Criminal Rules Advisory Committee Minutes of Meeting October 7, 2016

Present: Justice Daniel Eismann, Chair; Judge John Melanson, Judge Patrick Owen, Judge Bruce Pickett, Judge Theresa Gardunia, JaNiece Price, Shawna Dunn, Louis Marshall, Ken Jorgensen, Jim Thomas, Kelly Mallard, Chuck Peterson, Erik Frederickson, Mike Dean, and Cathy Derden. Judge Clark Peterson attended by phone.

No Contact Order Form. The Committee was asked to review a form being considered as a possible statewide form for No Contact Orders by the Uniform Business Practices Workgroup. The form originated with the Domestic Violence Subcommittee of the Children and Families in the Courts Committee. Currently I.C.R.42 provides that each judicial district is to adopt a form but consideration is being given to a statewide form that can be loaded into Odyssey. Before considering whether the form should be required statewide, the Committee was first asked to agree on a recommended form. The DV Subcommittee sent the Committee a form noting there was objection to a number of issues, including the 18 U.S. Code § 2265(b)(2) requirement for entitlement to Full Faith and Credit. Shawna Dunn asked that the Committee also consider the form for a no contact order used in Ada County and the Committee compared the two forms. Both forms were reviewed as a model for a statewide form.

As for the proposed form from the DV Subcommittee, the following was questioned:

- this form advises that a law enforcement officer will assist with vacating premises, when this is not an option in all counties
- there is no need for the victim's birthdate or the defendant's
- just stating the order is valid in all 50 states and entitled to full faith and credit does not make it so if the order does not comply with the requirements for full faith and credit
- the options for service are incorrect as the order must be personally served.

In general, the Committee liked the following about the Ada County form:

- the expiration date at the top
- the direct opening language
- the prohibited contact with the person is addressed first and then the prohibited contact at a location (the number of feet could be left blank)
- the statement that the defendant appeared or had actual notice and an opportunity to object before entry as this is the language needed to demonstrate the order does comply with the requirements for full faith and credit as set out in 18 U.S.C. 2265. The Ada County form allows the judge to check Yes or No on the form.

There was much discussion as to whether the sentence proclaiming the order is valid in all 50 states was necessary. It was noted that Amber Moe, the Statewide DV coordinator, had stated that this language was suggested by the National Center on Protection Orders. The problem is that all orders do not meet the requirements for full faith and credit as some are entered without the defendant being present. The Committee believed that in Odyssey this form could be set up so that if the YES box was checked on the defendant appearing etc. then the language about being valid in all states could be populated into the form, and if the NO box was checked then

that language would not appear. The Committee then voted to recommend the Ada County form with that notation. In addition, in accord with the new language being in the Criminal Rules and forms, the word “shall” will be changed to “must”. This recommendation will be sent to the DV Subcommittee.

The consensus of the Committee was that a statewide form would be beneficial for all involved though the rule was not amended at this time to require one statewide form. It was the belief that using this Ada County form in Odyssey now would allow those on the system to work with it and see if there were any problems before mandating it statewide. Ada County also had a similar form for use when there were two protected persons.

Electronic Filing and Private Information. With e-filing, a number of concerns have arisen with regard to criminal cases and protection of personal information since the goal is to eventually allow the public to have online access to public documents that have been filed. Ada County is currently using Odyssey and e-filing its cases and had several recommendations to the e-filing rule and I.C.A.R. 32.

Charging documents, mug shots and judgments. The e-filing rule currently states that the parties must refrain from including or must partially redact where inclusion is necessary, certain personal identifiers and these include birth date, SS#, names of minor children, financial account numbers, driver’s license numbers and State issued personal identification card numbers. The prosecutor’s office would like to have one full piece of identifying information on the charging document and the judgment to ensure it is the right person, especially when it comes to criminal history and subsequent offenses and this would be the full birth date of the defendant. In addition, they attach a mug shot to the judgment as a way of connecting a particular defendant to a judgment and the mug shot contains a lot of personal information. Currently the mug shot is sealed in Ada County by an administrative order. The recommendation was that:

1. In the e-filing rule, make an exception to protecting private information to allow for full DOB on charging documents and judgments in criminal cases.
2. Add the mug shot with full information in I.C.A.R. 32 as exempt from disclosure.

The Committee voted in favor of both recommendations, with one member voting against.

Warrants and affidavits in support. In addition, Rule 32 currently provides that arrest and search warrants are exempt from disclosure until they are served and then are open to the public. Full information is needed so that the correct person is arrested and the original warrant can’t be redacted because law enforcement needs the detailed description/personal identifying information. In addition, prosecutors do not want a second copy floating around. Ada County requires the officer to sign for it when it is picked up and currently the officer physically takes it to the jail where it is entered in ILETS. When a person is arrested the officer compares the warrant to make sure it is the same person. The arrest warrant is then returned to the court. The supporting affidavits also contain much information not only personal to a defendant but that may be of concern to law enforcement. Some search warrants and affidavits in support of search warrants are submitted to the court and may well have personal information on them. Search warrants that involve seizing a person for things such as taking a swab or nail clipping would have the full DOB and SS#. In addition, search warrants may contain home and works

addresses, phone numbers, financial credit card information and so on that would need to be protected.

Another concern is the ability to download and copy the format of a warrant and create fake ones. There have already been two cases in Ada County where persons have been arrested and turned into the jail with a warrant printed off the Portal.

It was questioned whether warrants need to be available to the public when the fact the warrant was issued and served can be seen as well as the charge. The Committee voted to recommend that:

3. Arrest and search warrants, along with the supporting affidavits be exempt from disclosure even after they are served, so they are available to parties and not the public.

Taxpayer Identification Number. It was also noted that Federal Rule of Criminal Procedure includes an employer or taxpayer identification number as information that is protected. The Committee voted to recommend that:

4. Protection for an employer or taxpayer identification number be added to the e-filing rule.

Updated Criminal Rules. The Committee reviewed a draft of the criminal rules that updates the language of the rules and organizes them into titles. The purpose of the new draft was not to make substantive changes but some substantive changes were recommended for review by the Committee.

Rule 24. Trial Jurors. Subsection (b) addresses voir dire examination. It currently states “the prosecuting attorney, and then the attorney for the defendant, and then the attorney for each other party to the action must be permitted to ask questions . . .”. The question raised was whether the language “and then the attorney for each other party” is necessary. What other party is possible? If multiple codefendants are contemplated, it would be clearer to state: “The prosecuting attorney, and then the attorneys for each defendant,”. The Committee voted to recommend using the suggested language.

- b. Examination.** Voir dire examination of the prospective jurors drawn from the jury panel must first be conducted by the court. The prosecuting attorney, and then the attorneys for the each defendant, ~~and then the attorney for each other party to the action~~ must then be permitted to ask about the qualifications of members of the panel to sit as jurors in the action. The voir dire examination is . . .

Rule 28. Interpreters. This rule states the interpreter must be served with a subpoena as other witnesses and it was questioned if this was the law. Though the Committee members did not believe this was being done in practice, I.C. § 9-205 does contain this language. It was also noted the rule states the court “may” appoint an interpreter when it is not optional. The Committee agreed this “may” should be changed to “must” as follows:

If a witness or a party in any action does not understand or speak the English language, or has a physical disability that prevents the witness or party from fully hearing or speaking the English language, the court ~~may~~ must select, appoint, and set the reasonable compensation for an interpreter. The interpreter must be served with a subpoena as other witnesses, and must be sworn to accurately and fully interpret the testimony given at the hearing or trial to the best of the interpreter's ability. The compensation for the interpreter must be paid by the county.

Rule 31. Jury Verdict. Subsection (b) addresses partial verdicts, mistrial and retrial. The Committee voted to recommend adding the following new provision on multiple counts that is taken from the Federal Rules of Criminal Procedure as it accurately states the law and procedure in Idaho courts.

Multiple Counts. If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed and the court may declare a mistrial as to the other counts. The prosecution may retry any defendant on any count on which the jury could not agree.

Rule 33. Sentence and Judgment. The Committee voted to recommend that subsection (b) of the rule be amended to add that the judgment state the terms of probation, if any, and that subsection (d) on withheld judgments provide that an order withholding judgment include the terms of probation, if any.

Rule 33. Sentence and Judgment

(b) Judgment. The judgment of conviction must state:

- (1) the plea,
- (2) the verdict or findings,
- (3) the adjudication and sentence, and
- (4) the terms of probation if any.

(d) Commutation of Sentence and Suspending or Withholding Judgment; Conditions.

For an offense not punishable by death, the court may commute the sentence, suspend the execution of the judgment, or withhold judgment, and place the defendant on probation as provided by law and these rules. An order withholding judgment must include the terms of probation, if any. The conditions of a withheld judgment or of probation must 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 include, among other lawful provisions, the following:

Rule 34. New Trial. This rule refers to granting a new trial if required in the interest of justice when in fact it must be on grounds permitted by statute. Thus, the Committee voted to recommend the following amendment:

- (a) **In General.** On the defendant's motion, the court may vacate any judgment and grant a new trial ~~if required in the interest of justice~~ on any ground permitted by statute. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

Rule 39. Uniform Post Conviction Procedure Act. This rule has been renumbered in the updated rules so that it is in the same title as other rules on post-conviction. The Committee voted to recommend the language regarding application of the civil rules be as clear as possible as follows:

- (a) **Filing and Processing.** The petition for post-conviction relief must be filed as a separate civil case and be processed under the Idaho Rules of Civil Procedure except as otherwise ordered by the trial court. The provisions for discovery in the Idaho Rules of Civil Procedure do not apply except as and only to the extent ordered by the trial court.

Rule 41. Search and seizure. The recommendation was to update subsection (c)(4) to reflect current practice.

- (c) **Issuance of warrant.** ***

(4) *Requesting a Warrant by Telephonic or Other Reliable Electronic Means.* A judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

Rule 46. Bail or Release on Own Recognizance. Subsection (f)(2) addresses a warrant of attachment for contempt regarding the nonpayment of any sum ordered by the court. The Committee voted to move this language to the rule on contempt, Rule 42, as it applies only to contempt and is unrelated to bail.

Rule 49. Service and Filing of Papers. It was suggested that, as part of the update, service by electronic means, including email, be allowed. Members indicated this is often done currently. In addition, with the transition to Odyssey service will be by email in most cases. No consent is required in the civil rules for service of orders by the court by electronic means and it was suggested that the rules also allow service of court orders by email as this also is often done currently. The Committee voted to recommend the following:

- b. **Service by Electronic Means.** Service may be made on an attorney for a party by transmittal of a copy of the document to the office of the attorney by electronic means, including by email or facsimile. This rule does not require an attorney to have a facsimile machine.

c. Notice of Orders. Immediately on the entry of an appealable order or judgment the clerk of the court must serve a copy of it, with the clerk's filing stamp indicating the date of filing, on the prosecuting attorney and on each defendant or the attorney for the defendant. Service may be by mail or personal delivery, or to an attorney by electronic means. Mailing or personal delivery, or service by electronic means on an attorney, is sufficient notice for all purposes under these rules. Lack of notice of entry of an appealable order or judgment does not affect the time to appeal or to file a post-trial motion within the time allowed, except where there is no showing of mailing or delivery by the clerk in the court records and the party affected thereby had no actual notice.

Rule 50. Terms abolished and calendars. The recommendation in the updated rules was to delete the current Rule 50 in its entirety as obsolete. However, the Committee voted to recommend keeping the part of the rule that addresses calendars and the preference for setting criminal proceedings. This is the sentence that states: "Preference shall be given to criminal proceedings as far as practicable."

Rule 54. Appeals from the Magistrate Division. It was suggested that a subsection on service of the notice of appeal on the magistrate court be added. This provision is not in the current criminal rules, but is in the I.R.C.P. and reflects current practice. The Committee voted to recommend this addition:

c. Service of the Notice of Appeal. The party filing the appeal must immediately serve copies of the notice of appeal on the magistrate court appealed from and all other parties to the action.

In addition, subsection (o) addresses appellate briefs and states briefs must be in the same form and arrangement as provided in the Idaho Appellate Rules. The Committee voted to recommend amending this language to refer to the same content and arrangement.

(a) Appellate Briefs. Briefs must be in the same ~~form~~ content and arrangement, and must be filed and served within the time provided by, the Idaho Appellate Rules unless otherwise ordered by the district court. Only one original signed brief must be filed with the court and copies must be served on all other parties.

As part of the update, it was pointed out that Rule 2.2 on Jurisdiction of Magistrates, and the sections of Rule 33.3, addressing qualification of domestic violence evaluators be moved to the Idaho Court Administrative Rules.