

## **Criminal Rules Advisory Committee Meeting**

**September 16, 2011**

Present: Justice Daniel Eismann, Chair; Judge John Melanson, Judge Rich Bevan, Judge Theresa Gardunia, Judge James Cawthon, Judge Clark Peterson, Chuck Peterson, Ken Jorgensen, Roger Bourne, Molly Huskey, Rob Chastain, Grant Loeb, Bryce Powell, Kelly Mallard, JaNiece Price, Mike Lojek and Cathy Derden. Guest: Judge Barry Wood.

**Time Standards.** Judge Wood met with the committee as part of his role in reviewing case flow management and processing in all Idaho trial courts. He discussed the standards set out in I.C.A.R. 57 and the model time standards for state courts, noting there is a national effort to look at this issue. One reason for reviewing this issue is that there is unlikely to be an increase in the number of judges despite an increasing caseload. The purpose of the review is to increase efficiency by attempting to identify and address areas of unnecessary delay in the system. This may involve changes in the reporting and tracking of cases, as well as a discussion of how to best capture information at intermediate points in a case so as to identify the reason for a delay. Currently our standard only reflects the time between filing and disposition. Judge Wood asked for feedback on several points, such as whether there should be more case types for tracking other than just felony and misdemeanor and whether there should be intermediate time standards for points such as the preliminary hearing or pre-trial conference. The members were also asked to identify any practices, rules or statutes regarding time frames that might be causing unnecessary delay. It was noted that identifying these areas and gathering statistics can be used to support requests for funding; especially if it can be shown addressing a problem now will help save money in the long run.

Several areas were identified. Getting lab results and discovery often causes delay, which results in persons being held in the county jail for longer periods while waiting. Waiting for a PSI can cause delay in sentencing such that it might be appropriate to consider a set time when it is due instead of a "reasonable time". Rule 12(b) motions to suppress are timed off the trial date and consideration should be given to requiring these motions earlier than 14 days before trial. Defense attorneys have trouble meeting with clients which causes delay. It was reported that the Ada County Jail is making it very difficult by not allotting enough time or spaces for these meetings with defense counsel. This is a delay that costs the county money. There was also a suggestion to look at the statutes and see why there is a delay between arraignment and the entry of the plea, and a suggestion that consideration be given as to when time standards should begin to run in a case.

Members were invited to send any additional rules or statutes to be reviewed and any other problems perceived to Judge Wood.

**Rule 41(a). Out of state search warrants.** There is an issue with how judges in Idaho interpret whether they have the ability to issue a search warrant to an out of state company. Since the advent of the Internet many people conduct business or socialize via the Internet and communicate outside the borders of the State of Idaho as well as outside the borders of the United States. Information flows through computer servers owned by service providers and housed outside Idaho. These same servers will also store the user's information such as messages and pictures until they are deleted by the user. Many large Internet based companies

recognize the burdens of law enforcement and they willingly and commonly respond to out of state service of search warrants and subpoenas. While these companies are usually cooperative and willing to send the information they still want an official piece of paper giving them permission to release the information as a way of protecting themselves. However, many investigators investigating crimes such as child sexual exploitation are not able to get out of state search warrants for Internet companies who do not have an actual physical location within the borders of Idaho because judges do not believe they have authority to issue the search warrant because of the wording of I.C.R. 41(a). While law enforcement could contact law enforcement outside the state of Idaho, this is time consuming and, depending on resources and the type of case, this may not be feasible for all investigations. The same is true with a magistrate's inquiry. No subpoena can be issued because it is in the investigation stage.

It was pointed out that there is no Idaho statute that requires the judge issuing the warrant to find that the evidence is located within the same judicial district as the judge, and this is only found in the language of the rule. It was also pointed out that a district court has subject matter jurisdiction if a "prosecutable act" was committed within the state, *see* I.C. § 19-301-02, and that corporations doing business in Idaho are subject to service of legal process within Idaho, *see* I.C. § 5-515. While it was realized that an Idaho law enforcement officer does not have authority to execute the warrant outside of Idaho, it was still believed the issuance of the warrant would accomplish the stated purpose. It allows the obtaining of records where the holder of those records is willing to bring them to the state, and it also allows prosecutors to seek federal or sister-state warrants based on the Idaho finding of probable cause.

Some members were opposed to creating a document that could not be enforced on its face. There was concern this could lead to abuses if it was served on an unsophisticated person in another state who was not willing to comply and who believed he or she was required to comply. Some were also concerned that it might be used as a basis for forum shopping within the state and wanted to make sure officers in one county who wanted a warrant for something located in that county could not apply to a judge in another part of the state. However, the purpose of the proposed amendment is only to deal with the problem of a search for evidence located out of state and it is really directed at Internet records though it could also be used for cell phone records or bank records. Thus, the proposed amendment was further amended to address this concern.

The Committee voted to recommend the following amendment to I.C.R. 41(a).

**41 (a). Authority to issue warrant.** A search warrant authorized by this rule or by the Idaho Code may be issued by a district judge or magistrate within the judicial district wherein the county of proper venue is located ~~property or person sought is located~~ upon request of a law enforcement officer or any attorney for the state of Idaho. Where it does not appear that the property or person sought is currently within the territorial boundaries of the State of Idaho, such warrant may still be issued; however, no such issuance will be deemed as granting authority to serve said warrant outside the territorial boundaries of the State.

**Rule 41(e ). Search warrants.** It is becoming increasingly common for law enforcement to want to apply for search warrants by faxing the affidavit and proposed warrant to the on-call judge after hours. This does not comply with I.C.R. 41, which requires the affidavit be signed before a judge, or under oath recorded. Faxing a notarized affidavit to the judge along with a proposed search warrant to be faxed back to law enforcement is a convenient process and would seem to comply with the constitutional requirement that no warrant be issued except upon probable cause established under oath; thus, it was suggested that the rule be amended to specifically allow for this practice. It was noted that I.C. § 19-4403 just refers to supported by affidavit and does not state that it must be sworn to before the magistrate. However, the consensus of the committee was that no challenges had ever been brought to a warrant on the basis that the affidavit was faxed or that an officers was sworn over the phone. The Committee voted to take no action on this item.

**Rule 16. Discovery and inspection.** The Ada County Prosecutor's Office proposed a change to Rule 16 as to how the prosecution deals with contact information and personal identifying information for victims and witnesses. The proposal is to keep this information out of the hands of the defendant and to make it available only to defense counsel by redacting it in a way that allows defense counsel to give the police report to the defendant but not give the defendant the personal information. The identifying information would be placed in a separate document that would go only to defense counsel. If defense counsel believes the defendant needs to see it for some reason then the judge could be asked for permission. The proposal arises from a concern about the potential risk to victims and witnesses who may want to influence the testimony or harm the witnesses. The Ada County office has been redacting this information in this manner for several years. It was stressed the intention was not to keep the information from defense counsel or investigators. The proposal was to replace many of the references to defendant in Rule 16 with the term "defense counsel".

The Ada County Public Defender's Office submitted a written response in opposition as did other defense attorneys. Though Ada County has been doing this for several years one problem is that defense counsel typically receives only the redacted copy. If the unredacted copy is received it tends to be much later and sometimes it is only upon request from counsel. In addition, the address provided is sometimes the prosecutor's office. While the process appears to be working, that is mainly because most cases settle. The public defender's office asserted that the defendant is entitled to full discovery, that it is the defendant who holds that right and that withholding any information from the defendant impedes the defendant's ability to meaningfully defend himself. It was suggested the state seek a protective order if there is a need to protect information. There was also concern as to how the proposal would affect *pro se* defendants.

The counter arguments were that while the defendant has a right to discovery, he or she has no right to this particular kind of personal identifying information.

A majority of the committee then voted in favor of allowing the prosecutor to redact certain identifying information if the information was provided to defense counsel. This would not be a mandatory rule but would only allow for redaction. As to the time frame for delivering an unredacted copy, the majority voted in favor of a requiring that the unredacted copy be given within the time frame for delivery of discovery. As to how the unredacted version was to be given, the majority voted in favor of the prosecutor delivering a redacted copy on white paper and an unredacted copy on different colored paper so that the copies were clearly

distinguishable. This would make it obvious if a defendant in jail had an unredacted copy. The Committee also identified the type of information that could be redacted. In addition, the Committee voted to make the option of redacting information available to the defendant as well so that personal information of the defendant could not be given to the victim or witnesses. The same restriction would apply to the defendant's, victim's or witnesses' immediate family. The unredacted copy may not be shared without consent of the opposing counsel or an order of the court upon a showing of need.

As for a *pro se* defendant, the Committee voted in favor of recommending that, should the state redact identifying information, the state must then seek a protective order within seven days.

The proposed amendment would be a new subsection in Rule 16 as follows:

**(d) Redacting protected information from responses to discovery.** The party providing discovery may redact protected information from the information or material provided.

(1) Protected information means:

A. Contact information. The home addresses, business addresses, telephone numbers (including cell phones), and email addresses of an alleged victim, or of a witness, or of the spouse, children, or other close family members of the alleged victim or witness, and the places where any of such persons regularly go, such as schools and places of employment and worship.

B. Personal identifying information. The dates of birth and social security numbers of any persons other than the defendant.

C. Private information. Personal identification numbers (PINs), passwords, financial account numbers, information relating to financial transaction cards, and medical information protected by federal law that is not directly related to the crime charged.

(2) A prosecuting attorney who redacts protected information shall follow the following procedure:

A. If the defendant is represented by counsel, the prosecuting attorney shall serve defendant's counsel with a redacted copy of the discovery printed on white paper and with an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The defendant's attorney, including appellate counsel, shall not disclose the protected information to the defendant or to a member of the defendant's family without the consent of the prosecuting attorney or an order of the court upon a showing of need.

B. If the defendant is not represented by counsel, the prosecuting attorney shall serve the defendant with a redacted copy of the discovery and, within seven (7) days of doing so, even if the disclosure was not in response to a discovery request, shall file with the court and serve upon the defendant a motion for a protective order with respect to the redacted information.

(3) A defense attorney or defendant who redacts protected information shall serve the prosecuting attorney with a redacted copy of the discovery printed on white paper and with an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The state's attorney, including appellate counsel, shall not disclose the protected information to the alleged victim or to a member of the alleged victim's family without the consent of the defendant or an order of the court upon a showing of need.

**(d e) Failure to make written request, waiver.**

The Committee voted in favor of recommending adoption of the proposed amendment. It was noted that it is not a requirement. The state can still seek a protective order and defense can still file a motion to compel.

**Rule 6.6 Indictment.** Once a charge has been ignored by a grand jury, the prosecutor may not file an information. Idaho Constitution, Art. I. § 8. Currently there is no requirement that the grand jury's finding of no probable cause be recorded and kept; thus, it was suggested that such a requirement be added to the rule. The Committee voted to recommend the following new subsection be added to Rule 6.6 as follows:

(e) Return of no bill. If the grand jury concludes that probable cause is lacking and no indictment shall be returned, that fact shall be placed in writing and maintained under seal by the court as part of the record of that proceeding.

**Rule 25 (a). Disqualification without cause.** Currently subsection 6 of this rule sets forth the process to be followed if the presiding judge in a case wants to have a panel of judges as alternates. It was suggested that this provision be expanded to allow for a panel of alternate judges to be named in setting criminal cases for other types of hearings such as evidentiary hearings in probation violation matters, disposition hearings for probation violations, pretrial conferences, etc.. An administrative problem occurs when a senior judge is scheduled for one of these proceedings and disqualified such that it would be helpful to get the disqualification earlier in the process. The Committee voted to recommend the following amendment:

(6) Alternate judges. If the presiding judge intends to have a panel of judges as alternates to ~~try the case set for~~ preside at trial or at any other hearing or proceeding in the case, a notice or amended notice of trial setting shall include a list of judges who may alternatively be assigned to so preside at the trial if the presiding judge is unavailable to ~~try the case~~. Upon service of the notice as to the panel, each party shall have the right to file one (1) motion for the disqualification without cause as to any ~~alternative~~ judge or magistrate not later than fourteen (14) days after service of written notice listing the alternate judges or magistrates ~~who may preside at the trial of the case~~. Provided, if a party has previously exercised the right to disqualification without cause under this Rule 25(a), that party shall have no right to disqualify an alternate judge ~~or magistrate~~ under this subparagraph.

The Committee was also asked to consider adding domestic violence courts, along with drug courts and mental health courts, as courts in which disqualifications without cause may not be

exercised. However, the members found domestic violence courts to be different in that persons do not opt into these court. Persons are just placed in domestic violence courts that happened to be assigned to a particular judge. The members voted not to take action to make this change.

**Rule 54.1. Appeals from magistrate court to district court.** There are currently differences between the definitions of an appealable order from the district court to the Supreme Court and from the magistrate court to the district court. There was a proposal to amend this rule to address those differences and make the rules the same. The proposed change would, as is already the case in felonies, extend the right to the state to appeal from orders and judgments terminating the case in the defendant's favor that are not currently appealable. There was discussion of whether there was a need to make this change, and if more state's appeal would burden public defenders since the SAPD would not handle appeals to district court. The vote was to table the issue until more information was provided.

There was also a proposal to amend this rule and clarify that an order granting or denying a motion to set aside the forfeiture of bail or to exonerate bail may be appealed. The Committee voted in favor of recommending the following subsection be added to Rule 54.1.

(l) Any order granting or denying a motion to set aside the forfeiture of bail or to exonerate bail. An appeal from such an order shall not deprive the magistrate court of jurisdiction over other proceedings involving the case or stay such proceedings.

**Rule 33(e). Revocation of probation.** The Committee considered whether this rule should be amended to reiterate that a violation of probation must be willful. This is already the law but some have been concerned about revocation of probation, particularly in the area of nonpayment of fines, without a finding that it was a willful violation, especially since no finding of ability to pay is required before a fine is imposed. The Committee voted in favor of recommending the rule be amended as follows:

(e). Revocation of probation. The court shall not revoke probation except after hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing. The court shall not revoke probation unless there is an admission by the defendant or a finding by the court, following a hearing, that the defendant willfully violated a condition of probation.

**Waiver of fees.** The Committee was asked to consider a rule on waiver of fees and costs and proposed wording was discussed. However, after reviewing the statutory fees for felonies and misdemeanors, the members were concerned with the varying standards for waiving different components of the total fee. It was suggested that the statutes be reviewed and the same standard set out in each before such a rule was adopted.

**Rule 43. Presence of the defendant.** During the recent meeting of the Bail Bonds Guidelines Committee, it was questioned why the provisions set out in subsection (b) should not be made applicable to proceedings other than trial, including, for instance, sentencing or preliminary hearing. It was suggested the rule refer to "other proceedings" to clarify the authority of judges to handle these situations in proceedings other than trials. The Committee agreed the rule should be so clarified and voted to recommend the following amendments to the rule.

Rule 43. Presence of the defendant.

(a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued presence not required. The further progress of the trial to and including the return of the verdict, or the progress of any other proceeding, shall not be prevented and the defendant shall be considered to have waived defendant's right to be present whenever a defendant, initially present:

(1) Is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

(2) Who has previously been warned by the court, acts in a manner so disorderly, disruptive and disrespectful as to substantially impede or makes impossible orderly conduct of the trial or other proceeding, and the court may:

Recommendations made by this Committee will be circulated for review and comment to the Administrative Conference as well as to judges and members of the Idaho State Bar before being presented to the Supreme Court.