

**Civil Rules Advisory Committee
Minutes of November 16, 2012, Meeting**

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

Uniform Unsworn Foreign Declarations Act. Dale Higer, Chairman of the Commission on Uniform State Laws, attended to present this uniform law to the Committee for consideration. Since September 11, 2001, access to U.S. consular offices has become more restricted and the process of getting in to visit a notary public has become difficult. Even greater problems exist for those seeking statements from individuals that do not reside near a U.S. consular office. The ABA raised these concerns to the Uniform Law Commission, which resulted in this act. Under this act, if an unsworn declaration is made subject to penalties for perjury and contains the information in the model form provided in the act, then the statement may be used as an equivalent of a sworn affidavit, with certain exceptions. This act has been adopted in sixteen states and the District of Columbia.

In discussion it was noted that the federal courts have allowed the use of declarations in place of affidavits for years as a process that benefits third parties who don't have easy access or any access to a notary. It is not uncommon to have witnesses and clients located in foreign countries and examples were cited. Though some members were concerned about the term "unsworn", conceptually it is the same as swearing before a notary as in both instances the person is making a statement under penalty of perjury. It is the declarant who signs the declaration. There was general consensus that the act should be adopted as a rule; however, the act consists of a number of sections setting out definitions and a form, and a subcommittee was appointed to review the act and put it into a rule. Part of the charge of the committee is to consider citing to the treaty or statute that makes the rule enforceable. The subcommittee consists of Breck Seiniger, Keely Duke, Judge Bail, William Gigray, Dale Higer and Cathy Derden. It will report back to the committee by the end of January.

Uniform Rules Relating to the Discovery of Electronically Stored Information. Dale Higer explained that this is really more of a Model Act than a Uniform Act such that states can select what portions they want and integrate it into existing rules. A copy of the act and its prefatory note was distributed. Justice Jones informed the Committee of a pilot project in the Fourth Judicial District for 2013 involving use of a new set of Rules of Family Law Procedure. If the rules are eventually adopted statewide, then the civil rules will be revised and rules involving only family law matters will be deleted. This might be the time to consider this act.

It was noted that the discovery rules appear to be working well now and that parties are discovering electronically stored information. There is some advantage in not having the rules too specific as that can end up making the process too rigid and limiting the parties. In addition, technology changes so quickly it is better not to be too specific on this subject. The Committee voted to take no action on this agenda item as it was believed the current discovery rules are allowing the parties to get information that is needed.

Declarations as an alternative to Affidavits. The Committee again discussed the concept of having a declaration made under penalty of perjury in place of a notarized affidavit. It was believed that it would not be any harder to enforce than an affidavit and it is working in federal court and in many state courts. It is a convenience to both attorneys and third parties and this will be especially true when the Idaho courts move to electronic filing. It was pointed out that if it was going to be allowed for persons in foreign countries then it should be allowed for those in the United States. The wording of the declaration was discussed. It is important that it state “the foregoing is true and correct” and not include any language about “to the best of my knowledge” as that no longer makes it a true declaration. The Committee also wanted language that the declarant submitted to the jurisdiction of the Idaho courts. In addition, the Committee wanted the declaration and the signature to appear on the same page so it is clear the person signing it read the declaration. The declaration should also say it has the same force and effect as an affidavit so it is clear that it can be used for impeachment in the same manner as an affidavit. The Idaho Rules of Evidence were reviewed, especially Rule 801(d)(1), but it was concluded that this rule does not apply to affidavits. A statement made with a declaration attached would be a prior statement under I.R.E. 613 the same as an affidavit.

The Committee voted in favor of making a new rule, possibly 7(d) that reads:

Declarations.

If the Idaho Rules of Civil Procedure require or permit a written affidavit under oath, an individual may, with like force and effect, provide a written declaration, subscribed and dated under penalty of perjury, which shall be in the following form:

I declare under penalty of perjury under the law of the State of Idaho that the foregoing is true and correct and that by signing this declaration I am submitting myself to the jurisdiction of the State of Idaho for purposes of enforcing the penalty of perjury as it relates to this declaration.

Executed on ____ day of _____,

Signature: _____

The declaration and the signature shall appear on the same page.

Vexatious Litigant. Idaho Court Administrative Rule 59 is a new rule on vexatious litigants. The Appellate Rules Advisory Committee recently met and added an advisory in Rule 11 of the Appellate Rules that a party may be declared a vexatious litigant. That Committee also recommended that similar language be added at the end of Civil Rule 11(a)(1). The Committee was in favor of adding the following to Rule 11.

Rule 11(a)(1). Signing of pleadings, motions, and other papers; sanctions.

The court may declare a party a vexatious litigant pursuant to Idaho Court Administrative Rule 59.

Rule 69. Collection of judgments. There was a proposal to amend Rule 69 to clarify that the discovery process can be used post-judgment when attempting to execute on a judgment. Currently the judgment debtor appears for the exam but often does not bring needed information, and the exam is often done off of the record. Allowing the use of interrogatories or requests for production before the hearing allows the same discovery tools to be used to determine what assets the person may have. Then, if the person does not answer or produce, there are ways to follow up. This proposal incorporates the language utilized in F.R.C.P. 69(a)(2), concerning post-judgment discovery practices and should not diminish any of the remedies that are currently available under Idaho law.

The Committee voted in favor of the following amendments to Rule 69:

Rule 69. Execution

- (a) Process to enforce an appealable final judgment or partial judgment certified as final under Rule 54(b) for the payment of money, or a court order for the payment of money, shall be a writ of execution, unless the court directs otherwise, but no writ of execution may issue on a partial judgment which is not certified as final under Rule 54(b). Provided, a writ of execution shall not issue for an amount other than the face amount of the judgment, and costs and attorney fees approved by the court, without an affidavit of the party or the party's attorney verifying the computation of the amount due under the judgment. The clerk may rely upon such an affidavit in issuing a writ of execution. After service of the writ of execution, the sheriff shall make a return to the clerk of the court and indicate thereon the amount of the service fees and whether all of such fees were collected by the sheriff upon service of the writ of execution. Any balance of the service fees of the writ of execution not collected by the sheriff shall be added to the judgment by the clerk as provided in Rule 54(d).
- (b) The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be in accordance with the statutes of the state of Idaho and as provided in these rules.
- (c) Obtaining Discovery: In aid of the judgment or execution, the judgment creditor or successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, as provided in these

rules and may examine any person, including the judgment debtor, in the manner provided by the practice of this state.

Video conferencing and mental commitments. The Committee discussed whether a rule was needed to allow for involuntary mental commitment hearings to be held by way of video conferencing. The general practice is that the proposed patient is transported to the courtroom. In Ada County this is true unless for some reason the person is physically unable to be transported in which case the judge goes to the facility. If transported by a sheriff or law enforcement officer, then protocol requires that the person be restrained, and this can be extremely upsetting to the patient and cause safety concerns as well. In rural counties, the persons may be transported some distance. In the First District, the judges in Kootenai County go to the Kootenai Medical Center and do the hearings at the hospital, but patients are transported from Kootenai Medical Center to the courthouses in Bonner, Shoshone and Benewah Counties. I.C. § 66-329 (8) states: “If the involuntary detention was commenced under this section, the hearing shall be held at a facility, at the home of the proposed patient, or at any other suitable place not likely to have a harmful effect on the proposed patient's physical or mental health. Venue for the hearing shall be in the county of residence of the proposed patient or in the county where the proposed patient was found immediately prior to commencement of such proceedings.” It was recently questioned whether handcuffing and transporting the patient to a courthouse was in compliance with the statute since it is likely to have a harmful effect on the proposed patient’s mental health. In addition, venue under this statute may not be in the county where the patient is being transported for a hearing in some districts. While some judges indicated the need to see the potential patient in person to assess credibility, the statute contemplates driving to the facility. In addition, a proposed rule would be permissive and would be dependent upon the hospital and the courtroom having the technology to accommodate the hearing. It was noted that most hospitals have the capability of a secure video teleconference. The public defender would have to be in the room with the potential patient to answer questions and consult privately.

Questions were raised about venue and the statement in I.C. § 66-329 (8) that “venue for the hearing shall be in the county of residence of the proposed patient or in the county where the proposed patient was found immediately prior to commencement of such proceedings.” If venue is the county of residence and, for example, that is Latah County, but the person is transported to Kootenai Medical Center than do the judge and public defender have to be in Latah County? It was suggested that this be added to a list of defects in the law.

The Committee used the criminal rule on forensic testimony by video teleconference as a template and voted to recommend the following rule and that it be numbered Rule 7(b)(5):

Rule 7(b)(5). Video teleconferencing for mental commitment hearings.

Hearings concerning an initial involuntary mental commitment or a continuing involuntary commitment may be conducted by video teleconference via simultaneous electronic transmission under the following conditions:

- 1) The proposed patient must be visible and audible to the court and others physically present in the courtroom.

- 2) A proposed patient who is represented by counsel must be able to consult privately with counsel during the proceeding.
- 3) The court, proposed patient, counsel from both sides, and any witness while testifying, must be visible and audible with each other simultaneously and have the ability to communicate with each other during the proceeding.

The audio of the video teleconference shall be recorded by the court and the court shall cause minutes of the hearing to be prepared and filed in the action.

Various suggestions. There were several suggestions submitted to the committee on which no action were taken. These included eliminating the requirement in Rule 34(d) that notice of completion of discovery be filed, and moving the address block on the top left of the pleading to beneath the signature line.