Civil Rules Advisory Committee
Minutes of Meeting April 26, 2019

Present: Justice Robyn Brody, Chair; Judge Stephen Hippler; Neil McFeely; Sara Berry, Rob Anderson; Keely Duke; Tim Walton and Cathy Derden.

Participating by phone: Judge John Butler; Jon Avondet, Pat Brown and Luke Malek.

Justice Brody reminded the members of the Civil Justice Reform Task Force, chaired by Judge Molly Huskey, which was charged with examining the state's civil justice system, determining problem areas, and recommending appropriate solutions. The Task Force has issued its report and recommendations, and comments are currently being sought. The members were encouraged to review the report, to send comments and to encourage other practitioners to do the same. Judge Hippler, a member of the Task Force, noted he had done several presentations on the report and was available to do so for other groups.

Post-Judgment Attorney Fees. As a discussion item, the Committee was asked whether there should be a rule on when an attorney must file a motion for post-judgment attorney fees and costs incurred in collecting a judgment. I.C. § 12-120(5) provides a basis for an award of reasonable attorney fees and costs incurred during post-judgment attempts to collect on the judgment if the party was entitled to attorney fees and costs under the statute in the underlying proceeding that resulted in the judgment. The request must be made pursuant to I.R.C.P. 54(e). Under I.R.C.P. 54(e)(6) any objection to attorney fees must "be made in the same manner as an objection to costs as provided by Rule 54(d)(5)." Rule 54(d)(5) provides that any objection to the memorandum of costs must be made within fourteen days, and that failure to timely object to the memorandum of costs "constitutes a waiver of all objections to the costs claimed." However, there is no time frame in Rule 54 in which the request for post-judgment fees must be made. As an example, the Committee reviewed a California statute providing that "Before the judgment is fully satisfied but not later than two years after the costs have been incurred, the judgment creditor claiming costs under this section shall file a memorandum of costs with the court clerk and serve a copy on the judgment debtor."

The Committee expressed concern for the situation where a person believes the judgment has been satisfied only to later receive a judgment for additional fees, noting that many of these cases involve default judgments and persons who are self-represented. There was discussion about giving the debtor notice of costs and fees incurred before the judgment is completely paid but timing is always an issue. There was agreement that it would be appropriate to have some time limit on when the request may be made; however, it was recommended that attorneys who defend these collections claims or represent debtors in bankruptcy actions should be consulted. The Chair of the Committee will attempt to do so and bring the issue back at a later time.

Rule 4(b)(2). Rule 4 addresses summons and (b)(2) currently reads:

> If a defendant is not served within 6 months after the complaint is filed, the court, on motion or on its own after 14 days' notice to the plaintiff, must dismiss the action without prejudice against that defendant. But if the plaintiff shows good

> cause for the failure, the court must extend the time for service for an appropriate period.

The Committee was asked to consider whether any amendments should be made to Rule 4(b)(2) to provide district judges with the discretion to consider the passage of applicable statutes of limitations when deciding to grant an extension of time for service. For discussion purposes, two proposed amendments were provided: (1) adopt the federal rule's language and include an advisory note; or (2) expand the language of Rule 4(b)(2) to possibly alleviate the need for an advisory note.

The current Rule 4(m) of the Federal Rules of Civil Procedure reads:

> If a defendant is not served within 90 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period

The advisory note to the federal rule states the language "or order that service be made within a specified time" authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown – "for example, if the applicable statute of limitations would bar the refiled action."

The Committee noted that one big difference between the federal rule and the Idaho rule is that the federal rule only allows 90 days for service while the Idaho rule allows 6 months. In addition, there was concern that the federal rule provides no standard for a judge to exercise discretion as to whether the statute of limitations justifies an extension such that inconsistent results would be a problem. Staleness and preservation of evidence is also a problem if the hearing on the motion to extend time is several months after the six months have expired. The Idaho rule already allows an extension if good cause for failure to serve is demonstrated and a request to serve by publication is always an option. The consensus of the Committee was not to adopt the federal language or to expand the language of Rule 4(b)(2).

The only change recommended was to replace the reference to six months with a reference to 182 days (26 weeks) as this is a more definite time period and is consistent with the effort to have time periods in multiples of seven.