Criminal Rules Advisory Committee
Minutes of Meeting January 8, 2016

Present: Justice Daniel Eismann, Chair; Judge John Melanson, Judge James Cawthon, Shawna Dunn, Terry Derden, Grant Loebs, Ken Jorgensen, Chuck Peterson, Elizabeth Allred and Cathy Derden. Attending by phone: Judge Richard Bevan, Judge Clark Peterson, Ann Marie Kelso, Bryce Powell.

Criminal Rule 54.17. On occasion in an appeal from magistrate to district court, the district court may remand less than all of the issues back to the magistrate court. A problem arises when a notice of appeal is filed to the Idaho Supreme Court and at the same time the issue on remand is proceeding before the magistrate court and the case is going in two different directions. I.R.C.P. 83(z)(2)(A) was adopted in July 2004 to address this problem by requiring a remittitur to be issued to the magistrate court after the time for an appeal has expired and is issued only if no appeal is filed to the Supreme Court. However, there is no corresponding requirement for a remittitur after an appeal from the magistrate court to the district court in the Idaho Criminal Rules. There was a proposal to amend I.C.R. 54.17 as follows:

Idaho Criminal Rule 54.17. Appellate Review

(a) Scope of appellate review. All appeals from a magistrate shall be heard by the district court as an appellate proceeding unless the district court orders a trial de novo as provided in these rules. The scope of appellate review on appeal to the district court shall be as follows:

(~~a~~ 1) Appeal on the record. Upon an appeal from a magistrate to the district court, not involving a trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the Idaho appellate rules.

(~~b~~ 2) Trial de novo. Upon an appeal from a magistrate to the district court in which a trial de novo is ordered, such appeal shall be by trial in the district court in the same manner as a trial upon information in the district court.

(b) Remittiturs.

(1) Remittitur from district court. If no appeal to the Supreme Court is filed within forty-two (42) days after the clerk files the appellate ruling, the clerk shall issue and file a remittitur with the magistrate court from which the appeal was taken and mail copies to the parties and the presiding magistrate. The remittitur shall advise the magistrate judge that the opinion has become final and that the magistrate shall forthwith comply with the directive of the opinion.

(2) Remittitur from Supreme Court or Court of Appeals. When the Supreme Court or Court of Appeals files a remittitur with the district court in a case that was initially appealed from the magistrate division of the district court, the clerk of the district court shall mail a copy of such remittitur to the presiding magistrate.

The Committee voted in favor of recommending this amendment

Rule 16. Discovery and Inspection. In late 2014 a subcommittee was appointed composed of members of the Advancing Justice Rules Subcommittee and the Criminal Rules Advisory

Committee to consider amendments to Rule 16. In considering causes for delay related to discovery, it became apparent that the process of redacting information was causing delay and there was considerable concern about how redaction would work with the new body video recorders that many officers are now wearing. Video redaction is very difficult and time consuming and the sheer volume of these videos can be overwhelming. The subcommittee eventually approved a proposed rule that was sent to the Criminal Rules Advisory Committee. The goal of this proposal is to allow prosecutors to disclose the unredacted media to defense counsel without delay, even if there is information that needs to be protected, so that defense counsel can make decisions necessary to expedite resolution of the case. However, defense counsel would not be able to share the unredacted version with the defendant without prior consent of the State or a court order and, when shared, a defendant would not be able to retain a copy. There may not be information that needs to be redacted as the defendant may be the only one on the video or it may not contain any information that needs to be protected. If the State determines there is protected information that needs to be redacted before it is disclosed, then the State will prepare a redacted version and indicate what was redacted. If defense counsel disagrees with the redactions then a motion to compel may be filed.

After discussion, the Committee voted to make several amendments to the draft. The first was to add a sentence requiring the State to declare if the digital media contained protected information when first released. The second was to delete the statement that the defendant not be allowed to take notes as to the video. If the defendant is viewing it then a determination has already been made that the unredacted version is appropriate for the defendant to view or it has been redacted and it would be difficult for defense counsel to police note taking. In addition, a majority of the members voted in favor of deleting a subsection on the defense obligation to adhere to the rule on the basis it was unnecessary since all attorneys are obligated to follow the court rules and courts always have the power to sanction or hold an attorney in contempt.

It was clarified that this new subsection would fall under subsection (b) of current Rule 16 which addresses disclosure of evidence and materials by the prosecution upon written request. In addition it was clarified that a section on printing on colored paper would fall under subsection (d) of the current rule, redacting protected information from responses to discovery. While the entire subsection is new, the draft below indicates the amendments made to the proposed draft at the meeting.

Idaho Criminal Rule 16. Discovery and Inspection
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(b) Disclosure of evidence and materials by the prosecution upon written request.
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(9) <u>Digital Media Recordings (Audio and Video Files).</u> Upon request, the State shall release to defense counsel digital media that may or may not contain protected information as defined by this Rule. <u>The State shall declare whether the disclosure contains protected information.</u>

(A) <u>Unredacted digital media.</u> The State may release unredacted digital media to defense counsel for the purpose of expediting a resolution in a case prior to trial or hearing. The obligation of defense counsel is as follows:

(1) Defense counsel, including agents of defense counsel, may review the unredacted digital media and discuss the content of the recording with the defendant but shall not share the unredacted digital media in any manner with the defendant without prior consent of the State or an order of the court.

(2) With prior consent of the State or an order of the court, defense counsel may allow the defendant to view the unredacted digital media in the presence of defense counsel or defense counsel's agent, but defense counsel shall not allow the defendant to retain a copy of the digital media in any version, ~~or allow the defendant to take notes,~~ to take photographs, or to otherwise duplicate the digital media in any form.

(3) Defense counsel shall take reasonable steps to ensure the unredacted digital media is safely stored and cannot be accessed by anyone other than defense counsel or defense counsel's agents.

(B) Redacted digital media. If the State determines that the digital media contains protected information that requires redaction prior to disclosure, the State shall provide a redacted version of the digital media, along with a written explanation of the information that was redacted. Defense counsel may allow the defendant to view and retain a copy of any media which is redacted by the State. If defense counsel disagrees with any of the State's redactions, then prior to allowing the defendant to review any unredacted media, a Motion to Compel shall be filed and argued in accordance with these Rules.

~~Defense Obligation. In any case where the State provides digital media under section (1) or (2) above, defense counsel and defense counsel's agents must adhere to the obligations set out in this rule. Failure of defense counsel to do so may result in discipline by the court.~~

(C) Pro se Defendants. When a defendant chooses to proceed pro se, the State may release unredacted digital media to the defendant but, if the State determines that digital media should not be disclosed because it contains protected information, the State shall seek a Protective Order pursuant to section (d)(2)(B) of this Rule.

(~~9~~10) Disclosure by order of the court. ***

(d) Redacting protected information from responses to discovery.

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(4) Print on colored paper. In any case where the State provides discovery to defense counsel in an electronic format, if the attorney receiving the electronic discovery desires to print the discovery, the attorney shall print the unredacted discovery on colored paper as required by section (d)(3) of this rule.

The Committee voted in favor of recommending the proposal to amend Rule 16 as set out above.

Rule 44.1. Withdrawal of counsel. The issue of withdrawal of counsel was discussed at the Committee meeting in September 2014 and the Committees had before it a proposal from that 2014 meeting as well as a proposal from the Advancing Justice Committee. Both committees were trying to address the fact that the public defender often does not move to withdraw in criminal cases, which may leave the attorney as counsel of record years down the road on a probation violation without a new determination of indigency. The concept of automatic withdrawal of appointed counsel upon a specified event by rule was discussed but the Committee found it difficult to specify these events and believed that if an attorney failed to withdraw that was an issue between the attorney and the judges and even county commissioners. In addition, automatic withdrawal by rule makes it difficult for a court clerk to determine if counsel is still appointed. In the order of appointment some judges state at what time or upon what event the appointment terminates and it was determined that this was the better practice. If counsel needs to stay on the case, then counsel can always file a motion to be reappointed. The Committee also voted to add a section on substitution of counsel similar to that found in the Civil Rules of Procedure.

The Committee voted to recommend the following amendments to Rule 44.1.

Rule 44.1 Withdrawal and Substitution of Counsel.

(a) No attorney may withdraw as an attorney of record for any defendant in any criminal action without first obtaining leave and order of the court upon notice to the prosecuting attorney and the defendant except as provided in this rule. Leave to withdraw as the attorney of record for a defendant may be granted by the court for good cause.

(b) When an attorney is being or has been appointed to represent a defendant in any criminal action, the court may provide in the order of appointment that the attorney's representation of the defendant shall be automatically withdrawn, without leave of the court, upon the occurrence of any specified events or the expiration of a specified period of time.

(c) Provided, an attorney may withdraw at any time after the dismissal ~~final determination and disposition of the criminal action by the dismissal~~ of the complaint or information, the acquittal of the defendant, or the entry of a judgment of conviction and sentence; but in the event of conviction an attorney may not withdraw without leave of the court until the expiration of the time for appeal from the judgment of conviction. Notice of the return of service of an arrest warrant for a probation violation must be served by the court upon counsel of record if counsel has not withdrawn from representation pursuant to this rule.

(d) The attorney of record of a party to an action may be changed or a new attorney substituted by notice to the court and to all parties signed by both the withdrawing attorney and the new attorney without first obtaining leave of the court. If a new attorney appears in an action, the action shall proceed in all respects as though the new attorney of record had initially appeared for such party, unless the court finds good cause for delay of the proceedings.