Criminal Rules Advisory Committee
Minutes of Meeting September 12, 2014

Present: Justice Daniel Eismann, Chair; Judge John Melanson, Judge Richard Bevan, Judge Theresa Gardunia, Judge Clark Peterson, Bryce Powell, Justin Curtis, Roger Bourne, Grant Loebs, Ken Jorgensen, Chuck Peterson and Cathy Derden.

Advancing Justice Committee (AJC) Proposals. The Advancing Justice Committee asked this committee to review proposed amendments to Rules 5.3, 10, 12, 18, 23 and 44.1.

Rule 5.3(c). Initial appearance on probation violations. To address the issue of timely transport when a probationer is arrested in a county different from the one in which he or she was originally sentenced, the AJC proposed adding a new notice provision to subsection (c) (7) of this rule on initial appearances. The proposal was to require that notice be sent by the clerk in the county where the defendant is in custody to the clerk in the county where the defendant was originally sentenced. The AJC draft proposed amendment:

> **(c) Initial Appearance.** At the arraignment on the alleged probation violation, the court shall:
> (1) Advise the probationer that he or she is not required to make a statement and that any statement made may be used against the probationer;
> ***
> (7) If the probationer is arrested outside the county where placed on probation~~,~~ ~~advise that~~:
> (~~a~~A) Advise that ~~I~~if the probationer remains in custody, he or she will be transported and arraigned in the sentencing county within a reasonable time not to exceed fourteen (14) days. This time period may only be extended upon a showing of good cause.
> (b) Further advise that ~~I~~if the probationer posts bond, he or she will be given a date to appear before a magistrate for arraignment in the county of sentencing. At the arraignment in the sentencing county, counsel will be appointed if requested and appropriate, and the probationer will be given a time to appear before the sentencing court.
> (c) Cause the clerk to provide written notice to the clerk of the county where the probationer was placed on probation of the dates of the probationer's arrest and appearance before the court so that timely transport can be provided to the sentencing county.

The Committee agreed that transport can be a problem and that sometimes there may be no incentive for the sheriff's office to pick up a probationer, particularly if the jail is crowded. The Committee questioned whether just notifying the clerk in the sentencing county would accomplish actual notice to the sentencing judge and the prosecutor. Thus, the Committee suggested an additional sentence to the new provision (c)(7)(C) so that it would read:

> (c) Cause the clerk to provide written notice to the clerk of the county where the probationer was placed on probation of the dates of the probationer's arrest and appearance before the court so that timely transport can be provided to the sentencing

county. Upon receipt of the written notice, the clerk of the county where the probationer was placed on probation shall provide a copy of the notice to the parties in the case.

With the addition of this sentence, the Committee voted in favor of recommending this amendment.

Rule 10. Arraignment on Indictment or Information. AJC proposed amending this rule on arraignment to require that persons be arraigned within 30 days of the filing of an information or indictment. Recognizing that there are situations where an indictment is issued but the defendant is not in custody, the proposal was modified to account for cases in which a summons is issued or the defendant is arrested in another county pursuant to a warrant following an indictment. Draft proposed amendment from AJC:

> Rule 10. Arraignment on Indictment or Information. (a) In general. After an indictment or an information has been filed with the district court, the defendant must be arraigned thereon by the court. The defendant must appear in person at such arraignment. The arraignment shall take place within thirty (30) days following the filing of an information. If an indictment has been filed, the arraignment shall take place:
>
> > (1) if a summons has been issued following the indictment, within thirty (30) days of service of the summons;
> >
> > (2) if a warrant has been issued following the indictment, and if the defendant is not in custody in the county in which the indictment is filed, within thirty (30) days of the defendant's initial appearance in Idaho on the indictment;
> >
> > (3) in all other cases, within thirty (30) days of the filing of the indictment.

The Committee proposed changing the last part of subsection (2) to refer to within 30 days of the defendant's initial appearance in the county issuing the indictment instead of referring to the defendant's initial appearance in Idaho so that it would read:

> > (2) if a warrant has been issued following the indictment, and if the defendant is not in custody in the county in which the indictment is filed, within thirty (30) days of the defendant's initial appearance in the county issuing the indictment;

With this change the Committee was in favor of recommending the amendment.

Rule 12. Pleadings and Motions Before Trial - Form of Pleadings - Defenses and Objections

In too many cases a general motion to suppress is being filed that does not alert the prosecutor or the court of the items or statements sought to be suppressed so that the prosecutor knows what witnesses are required. Using language adapted from a similar Utah rule, the AJC considered the

following amendment to require more specificity in the factual grounds and legal basis for the motion but specifically wanted to refer the proposal to the Criminal Rules Advisory Committee. Draft proposed amendment from AJC:

> Rule 12. – Pleadings and Motions Before Trial - Form of Pleadings - Defenses and Objections
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> ***
>
> (c) Motions to suppress. A motion to suppress evidence shall:
>
> (1) describe the evidence sought to be suppressed;
>
> (2) set forth the standing of the movant to make the application; and
>
> (3) identify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.
>
> If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

A number of issues were discussed regarding this proposal. Does it shift the burden to the defendant to identify the exception that might apply to a warrantless search? If the defendant fails to list all specific items to be suppressed then does the defendant somehow waive an objection to the seizure of that item? Why no response from the State? Will the parties start litigating the sufficiency of the motion?

The Committee recommended deleting the proposed subsection related to standing as the prosecutor will generally know if this is going to be an issue and it is a factual issue.

The phrase in subsection (3) "to enable the court to determine what proceedings are appropriate to address them" was questioned and it appeared this might have been taken from the Utah rule. While parties could choose to submit the issue on the briefs, if one party wants a hearing the clerk schedules a hearing and the court is not involved in that determination.

Determining that the purpose of the amendment was to give more notice, the Committee voted in favor of recommending the following new subsection to Rule 12 instead of the amendment proposed by AJC:

> (c) Motions to suppress. A motion to suppress evidence shall describe the evidence sought to be suppressed and the legal basis for its suppression sufficiently to give the opposing party reasonable notice of the issues.

Rule 18. Pretrial Conference. The AJC proposed amending this rule on pretrial conference to require that the conferences be held on the record with all parties present in felony cases to help avoid post-conviction issues. However, the AJC also noted that some pretrials are simply designed to see if the case is resolved and that, if incarcerated, the defendant does not attend. The AJC referred the following draft proposed amendment:

> Rule 18. Felony Pretrial Conference
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> At any time prior to trial, the court, upon motion of any party or upon its own motion, may order one or more pretrial conferences to consider such matters as would promote a fair and expeditious trial. All pretrial conferences shall be held on the record with all parties present, including the defendant. At the conclusion of the pretrial conference, the court may ~~shall~~ file a memorandum of the matters agreed upon if appropriate. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the ~~defandant's~~ defendant's attorney or signed by the defendant if the defendant is pro se. ~~This rule shall not be invoked in a felony case where a defendant is not represented by counsel, except upon defendant's request.~~

The Committee debated the need to have every pretrial conference on the record, noting that there are different types of conferences and some may only involve whether a settlement has been reached. Substantive rulings are reduced to writing and often are the result of a separate hearing. The rule currently states that the court shall file a memorandum of the matters agreed upon at the conclusion of the pretrial conference and the proposed rule by AJC would make filing a written memorandum optional if the conference is on the record. Sometimes a Plan B judge is substituted at the last minute and needs to be aware of a pretrial ruling but, if these are not in writing, it can cause a problem, especially if the parties do not agree as to the ruling. No transcript would be available. It was suggested that a written record should be made though it does have to be in the form of a memorandum. The statement that "no admissions made by the defendant or defense counsel at the conference may be used against the defendant unless reduced to writing and signed by the defendant" was questioned as to why this would be. Unless admissions are made in the course of plea agreement and settlement, admissions made on the record should be admissible.

The Committee recommended that Rule 18 be amended as follows:

> Rule 18. Felony Pretrial Conference
>
> (a) At any time prior to trial, the court, upon motion of any party or upon its own motion, may order one or more pretrial conferences to consider such matters as would promote a fair and expeditious trial. At the conclusion of the pretrial conference, the court shall ~~file a memorandum~~ make a written record of the matters ~~agreed upon~~ decided.
> (b) The court may hold an informal settlement conference off the record. No admissions made by the defendant or the defendant's attorney at

the settlement conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the ~~defandant's~~ defendant's attorney or signed by the defendant if the defendant is self-represented. ~~This rule shall not be invoked in a felony case where a defendant is not represented by counsel, except upon defendant's request.~~

Rule 23. Trial by jury or by the court--Waiver of jury--Number of jurors. The AJC suggested amending Rule 23 (c) to permit waiver of the six person jury requirement for misdemeanors in cases involving both misdemeanor and felony charges arising out of the same incident. While trying these cases together is the most efficient, some are concerned the practice might be inconsistent with the provision in Article I, Section 7 of the Idaho Constitution on the right to jury trial that states "in cases of misdemeanors" the jury shall consist of not more than six. However, the AJC believed the provision could be reasonably interpreted to mean in cases consisting of only misdemeanors. The AJC draft proposed amendment:

Rule 23. Trial by jury or by the court--Waiver of jury--Number of jurors -

(a) Felony Cases. In felony cases issues of fact must be tried by a jury, unless a trial by jury is waived by a written waiver executed by the defendant in open court with the consent of the prosecutor expressed in open court and entered in the minutes.
(b) Misdemeanor Cases. In criminal cases not amounting to a felony, issues of fact must be tried by a jury, unless a trial by jury is waived by the consent of both parties expressed in open court and entered in the minutes.
(c) Number of Jurors. In a felony case the jury shall consist of twelve (12) jurors or any lesser number upon which the party may agree upon the record or in open court. In a misdemeanor case the jury shall consist of six (6) jurors or any lesser number upon which the parties may agree upon the record or in open court. However, if felony and misdemeanor charges are charged together on the same information or indictment in a consolidated case, as provided in I.C.R. 8(a), and at least one (1) felony and one (1) misdemeanor will be tried together before the jury, the jury shall consist of twelve (12) jurors or any lesser number upon which the party may agree upon the record or in open court.

While charges are sometimes filed separately by cities and counties, the Committee noted the proposal assumes the charges are in the same information or have already been consolidated. In addition, the Committee did not think the rule would preclude a motion to sever, if appropriate. All were in agreement with the purpose of keeping these cases together; however, further changes were suggested. The Committee recommended removing the reference to an agreed upon lesser number as no lesser number is ever considered or agreed upon. The Committee voted to recommend the following amendment:

Rule 23. Trial by Jury or by the Court - Waiver of Jury - Number of Jurors.

(a) Felony cases. In felony cases issues of fact must be tried by a jury, unless a trial by jury is waived by a written waiver executed by the defendant in open

court with the consent of the prosecutor expressed in open court and entered in the minutes.

(b) Misdemeanor cases. In criminal cases not amounting to a felony, issues of fact must be tried by a jury, unless a trial by jury is waived by the consent of both parties expressed in open court and entered in the minutes.

(c) Number of jurors. In a felony case the jury shall consist of twelve (12) jurors ~~or any lesser number upon which the party may agree upon the record or in open court. In~~ and in a misdemeanor case the jury shall consist of six (6) jurors ~~or any lesser number upon which the parties may agree upon the record or in open court.~~ However, if felony and misdemeanor offenses are charged together in the same information or indictment or consolidated in the same case and at least one (1) felony and one (1) misdemeanor will be tried before a jury, they shall be tried before the same twelve-person jury.

Rule 44.1. Withdrawal of counsel. The AJC noted 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. Consideration was given to amending the rule so that defense counsel was automatically withdrawn at the later of several specified events. The consensus was that automatic withdrawal would not apply to retained counsel as that would interfere with the attorney-client relationship, and would only apply to appointed counsel. In addition, the AJC proposed a rule allowing for a notice of substitution in criminal cases similar to I.R.C.P. 11 (b)(1), that also provided guidance for granting a continuance when counsel was substituted very near a trial date. The AJC draft proposal:

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. An appointed attorney's representation of a defendant in any criminal action shall be withdrawn automatically without leave of the court upon the occurrence of any of the following events:

(1) the expiration of the time for filing an appeal from an order dismissing a complaint, information, or indictment;

(2) acquittal of the defendant on all charges; or

(3) the latest of the following events:

(A) the expiration of the time for filing an appeal from a judgment of conviction;

(B) the expiration of the time for filing an appeal from an order withholding judgment;

(C) the expiration of the time to file a motion for correction or reduction of sentence pursuant to I.C.R. 35(b) ;

(D) if a motion has been filed for correction or reduction of sentence pursuant to I.C.R. 35(b), the expiration of the time to file a an appeal from the order on such motion;

(E) if the court has retained jurisdiction pursuant to I.C. § 19-2601(4), upon the expiration of the time for appeal from the relinquishment of jurisdiction or the order placing the defendant on probation.

~~Provided, an attorney may withdraw at any time after the 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.~~

(b). The attorney of record for the defendant in a criminal action may be changed or a new attorney substituted by notice to the court and to the State 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 may proceed in all respects as though the new attorney of record had initially appeared for such party. If a new attorney appears in an action, the court has the discretion to grant a continuance based upon the new attorney's appearance considering factors, including but not limited to the complexity of the case, the defendant's constitutional right to a speedy trial, the days remaining before the trial date, the length of the postponement that would be required if the motion were granted and such other facts as the court deems appropriate. In the event a formerly self-represented defendant has been appointed or retained counsel, or if a represented defendant desires to represent his or herself, notice must be provided as set forth above.

The Committee agreed that often appointed counsel fails to withdraw and remains on the case in later years for probation violations without there being a new determination of indigency. Appointed counsel does not have the same incentive to withdraw as retained counsel and often would be reappointed, but the practice also encourages filings by defendants. However, the Committee found the proposed rule was too complicated and made it too difficult for a clerk to determine if counsel was still appointed and needed to be given notice of filings and proceedings.

Clerks need something in the file stating that counsel has been withdrawn. A set time period for withdrawal was discussed, but the Committee was split on the concept of automatic withdrawal and found it difficult to select a particular time frame. It also believed that if there were certain circumstances that allowed for automatic withdrawal of appointed counsel then retained counsel should be able to file a notice of withdrawal in the same circumstances rather than a motion. In the order of appointment some judges state at what time 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 agreed with the proposal to add a section on substitution of counsel but did not believe it necessary to define good cause for a continuance. The Committee recommended the following amendment, with one dissenting vote:

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 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.

The changes voted on by this Committee as to Rules 5.3, 10, 12, 18, 23 and 44.1 will be sent back to the Advancing Justice Committee for consideration. However, the Committee also requested that its version of the proposed rule changes be considered by the Court if different from the final AJC version.

Rule 16. Discovery and inspection. The AJC requested members of this Committee to work with it on considering proposing substantial revisions to Rule 16 on discovery. Discussions would include but not be limited to mandatory initial disclosures, a meet and confer requirement as in the civil rules, and modifications to the redaction rules. The AJC members are Jan Bennetts and Michael Bartlett. Roger Bourne, Ken Jorgensen, Bryce Powell, Judge Bevan, Grant Loebs

volunteered to be on the subcommittee and Justin Curtis volunteered that a representative from the SAPD's office would also be involved.

Plea Advisory Form. Rule 11 refers to a plea advisory form though its use is not mandatory and the form appears in the appendix to the rules. Recently a District Judges Workgroup made revisions to the form as part of a committee looking at best practices and forms and formatting for the new Odyssey system. Their revisions were sent to this Committee and comments were invited and received and then further revisions made. The most recent version was distributed to the Committee for review. Several suggested revisions were made, including:

Question 17. Defense counsel noted that few plea agreements are binding and feared discussing both types would make a defendant question a nonbinding agreement. However, a defendant needs to be informed that the plea is nonbinding. It was suggested that the order be reversed with (a) referring to a non-binding plea and (b) referring to a binding one.

In the section on relationship with attorney, the Committee recommended deleting question 46, "Have you told your attorney everything you know about your case?" because there is no obligation for the defendant to do so. On question 47, the Committee recommended changing "have you reviewed the evidence provided to your attorney during discovery?" to "Have you had the opportunity to review the discovery provided by your attorney?" as many defendants do not review it all.

Question 61. The Committee recommended changing this question to read: "Is there anything else you want to tell the court about why you are pleading guilty?" .

Certifications. There was objection to the certification at the end of the advisory form. The certification by the defendants states the defendant has discussed each question and answer with my attorney, and defense counsel on the Committee stated they did not discuss each question with clients but send or give the form to clients to fill out and then go over certain questions with them. This particular statement in the certification is not new and appears in the current plea advisory form. The suggestion was to change this language to refer to having had an opportunity to discuss with counsel as follows:.

> I have answered the questions on pages 1-8 of this Guilty Plea Advisory Form truthfully, understand all of the questions and answers herein, have had the opportunity to discuss ~~discussed~~ each question and answer with my attorney, and have completed this form freely and voluntarily WITH A COMPLETE UNDERSTANDING OF THE CHARGE(S) TO WHICH I AM PLEADING GUILTY AND WITH KNOWLEDGE OF THE POTENTIAL CONSEQUENCES OF THIS PLEA.
>
> Furthermore, no one has forced me or threatened me to plead guilty.
>
> DATE: ____ _ DEFENDANT

In addition, the Committee objected to the certification by defense counsel that he or she had discussed in detail the questions and answers. This is the defendant's plea and the Committee recommended deleting any certification by defense counsel, though this same certification appears on the current plea advisory form.

> ~~I HEREBY ACKNOWLEDGE THAT I HAVE DISCUSSED IN DETAIL THE FOREGOING QUESTIONS AND ANSWERS WITH MY CLIENT.~~
>
> ~~DATE: ____ _ DEFENDANT'S ATTORNEY~~

The Committee also voted to recommend deleting this same attorney certification at the end of the advisory of post plea rights. These recommendations will be sent back to the District Judges Workgroup.

Rule 12 (d). Pleadings and Motions Before Trial - Form of Pleadings - Defenses and Objections. The SAPD proposed an amendment to subsection (d) of this rule on motion dates, stating the defense community had been discussing the need for a change to I.C.R. 12(d) to alter the time limit for filing a motion to suppress. Currently a motion to suppress has to be filed within 28 days of the entry of plea. Attorneys often don't have full discovery by this time and the failure to have the discovery is not always considered good cause for the court to enlarge the time to file a motion. A proposed amendment was submitted together with a summary of the timelines utilized by other jurisdictions. The proposed amendment:

> **(d) Motion Date.** Motions pursuant to Rule 12(b), except motions to suppress evidence brought pursuant to I.C.R. 12(3), must be filed within twenty-eight (28) days after the entry of a plea of not guilty or seven (7) days before trial whichever is earlier. Motions to suppress evidence brought pursuant to I.C.R. 12(3) must be filed twenty-eight (28) days before trial. In felony cases, ~~such~~ all motions brought pursuant to this rule must be brought on for hearing within fourteen (14) days after filing or forty-eight (48) hours before trial whichever is earlier. The court in its discretion may shorten or enlarge the time provided herein, and for good cause shown, or for excusable neglect, may relieve a party of failure to comply with this rule

While the Committee agreed that lack of discovery should be good cause to grant an extension for filing a motion to suppress, it was concerned the timing proposed in this rule was too close to a trial date. This would be especially true in complicated murder trials where it may be months before the trial takes place and experts and witnesses would be prepared only to have a suppression motion filed 28 days before trial. In addition, discovery may not be relevant to the suppression motion. The rule already states that the court may enlarge the time for good cause. Instead of changing the time frame, the Committee voted to recommend that a sentence be added to the rule stating that lack of access to relevant discovery may constitute good cause.

> **Motion date**. Motions pursuant to Rule 12(b) must be filed within twenty-eight (28) days after the entry of a plea of not guilty or seven (7) days before trial

whichever is earlier. In felony cases, such motions must be brought on for hearing within fourteen (14) days after filing or forty-eight (48) hours before trial whichever is earlier. The court in its discretion may shorten or enlarge the time provided herein, and for good cause shown, or for excusable neglect, may relieve a party of failure to comply with this rule. Lack of access to relevant discovery may constitute good cause for enlarging the time provided herein or relieving a party of failure to comply with this rule.

Rule 32. Standards and Procedures Governing Presentence Investigations and Reports. The Committee was asked to review this rule to determine if the provision allowing the victim to see the PSI should be more specific. Article 1, section 22(9) is the provision that gives a crime victim the right to read the presentence report relating to the crime. I.C. § 19-5306 also provides that the victim shall be allowed to read the PSI. The current rule refers to the constitutional provision but does not specifically refer to the victim. The Committee voted to recommend amending the last part of subsection (h)(1) to read:

> Neither the defendant, defendant's counsel, the prosecuting attorney nor any person authorized by the sentencing court to receive a copy of the presentence report shall release to any other person or agency the report itself or any information contained therein~~, except as provided in Article 1, Section 22(9) of the Idaho Constitution~~. However, as provided in Article 1, Section 22(9) of the Idaho Constitution, the victim has a right to read, but not to have a copy of, the presentence report. Any violation of this rule shall be deemed contempt of court and subject to appropriate sanctions.

The Committee was also requested to review subsection (h)(1) by the IDOC. When supervision of a probationer is transferred to another state under the Interstate Compact, the IDOC transfers a copy of the PSI. The IDOC wanted to make sure this was in compliance with Rule 32 and that the IDOC did not need the approval of the custodian judge in each of these cases. The Committee voted to recommend amending the rule as follows:

> (1) Custody of presentence report. Any presentence report shall be available for the purpose of assisting a sentencing court and once prepared may be released to any district judge for that purpose. After use in the sentencing procedure, the presentence report shall be sealed by court order, and thereafter cannot be opened without a court order authorizing release of the report or parts thereof to a specific agency or individual. Provided, the presentence report shall be available to the Idaho Department of Corrections so long as the defendant is committed to or supervised by the Department, and may be retained by the Department for three years after the defendant is discharged. If probation supervision is transferred to another state, the Department may provide a copy of the presentence report to the supervising entity in that state. In addition, . . .

Rule 47. Motions. The Administrative District Judges asked the Committee to consider the advisability of adopting a criminal rule similar to I.R.C.P. 7(b)(3)(D) on time limits for filing and serving motions, affidavits and briefs, but no specific proposal was submitted. The Committee noted that there are statutes, such as I.C. § 19-2912, that set a time frame for filing a certain

motion and did not want to have too many varying time frames. Judge Bevan volunteered to draft a proposed amendment and the issue will be taken up at a later time.

Rule 5.1. Preliminary hearing- probable cause hearing. According to the Idaho State Police, there is varying practice around the State as to whether NIK test results are admitted at a preliminary hearing, which would provide a sufficient basis to establish probable cause to bind a defendant over to district court. The Committee was asked to examine Rule 5.1 and determine if a rule amendment could resolve this issue to obtain uniformity in the state.

While noting that some judges might not allow the evidence, the Committee did not think this was an evidentiary problem that could be fixed by rule. It may be in some instances that a proper foundation is not being laid for the admission of the results. The Committee was of the opinion this was a training issue for prosecutors and officers to make sure the test is properly conducted and the proper foundation laid for admitting the results. It may also be a training issue for judges.