Evidence Rules Advisory Committee
Minutes of Meeting December 1, 2017

Present: Judge Molly Huskey, Chair; Scott Andrew, Amanda Brailsford, Hethe Clark, Eric Fredericksen, Wyatt Johnson, Doug Mushlitz, Michelle Points, John Rumel, Judge Tom Sullivan, Ted Tollefson, Senior Judge Steve Verby, and Cathy Derden. Member Tim Gresback participated by phone. Judge Karen Lansing and Michael Henderson also joined the meeting.

In 2015 the Supreme Court appointed a special subcommittee, chaired by Judge Lansing, to update the Idaho Rules of Evidence and to simplify, clarify and modernize the language. The subcommittee used the Federal Rules of Evidence as a model since the Federal Rules were similarly restyled a few years ago. The subcommittee's charge did not include making substantive changes; however, it did include identifying and making recommendations for substantive changes. In reviewing the Idaho rules, the subcommittee found a number of variations with the Federal Rules and made a list of substantive issues to be reviewed. In addition, Judge Lansing's subcommittee prepared a draft of the rules with some comments for the benefit of the Evidence Rules Advisory Committee, pointing out additional variations and changes made that were not considered substantive. It was noted that the subcommittee did not attempt to restyle Article V on privileges. The section on privileges will be added into the proposed draft of the rules by the subcommittee.

The Committee started by reviewing the comments to the draft of the rules that identified variations that were not considered substantive changes, and approved the following:

Rule 101. Title and Scope. Update the reference in (d)(6) so that it refers to cases under the Idaho Rules of Family Law Procedure, except as modified by I.R.F.L.P. 102.

Rule 201. **Judicial Notice of Adjudicative Facts**. Retain the last paragraph of subsection (c) on "taking notice", setting out how the court is to take judicial notice, which was added to the Idaho rule in 2007.

Rule 302. Applying Federal Law to Presumptions in Civil Cases. Retain this rule, as the Idaho State Bar Evidence Committee noted in its comment to the Idaho rule in 1985 that the rule "recognizes that parallel jurisdiction in state and federal courts exists in many instances."

Rule 303. **Presumptions in Criminal Cases.** Correct a perceived error in current subsection (b) by changing the word "on" to "or" so that it would read: "The court may submit the question of guilt or the existence of a presumed fact to the jury if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt ~~on~~ or the presumed fact beyond a reasonable doubt."

Rule 601. Competency to Testify in General. Revise subsection (b) of this rule, "claim against estate", which is the "dead man's statute." There is no counterpart in the Federal Rules of Evidence. The current I.R.E 601(b) is virtually identical to I.C. § 9-202(3), omitting only a comma that appears in the statute after the phrase "estate of a deceased person." The proposed language makes two revisions to Rule 601(b) which do not appear to be substantive. First, it

breaks down the rule into the three elements that have been identified in case law and second, it clarifies that the rule bars only testimony as to unwritten communications or agreements with the deceased.

Rule 704. Opinion on an Ultimate Issue. Omit the words "to be decided by the trier of fact" which appear in the current Rule 704, as well as its federal counterpart prior to the 2011 restyling of the federal rules. The revised federal rule refers simply to "an ultimate issue" and leaves out the words "to be decided by the trier of fact."

Rule 803. Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness. Retain the words "fetal death" as found in current subsection 803(9) though this language is not included in the federal rule. Omit the word "published" in the term "published compilations" that currently appears in subsection (17). This word was omitted in the restyled federal rules, apparently in recognition that the rise of internet compilations has further blurred the line between published and unpublished materials in the conventional sense. Retain current subsection 803(23) in the current Idaho rule with the addition of the words "unless the opponent shows that" the sources of information or other circumstances indicate a lack of trustworthiness. These words referring to the opponent already appear in subsections (6), (7), and (8) of this rule and thus it appears that the policy of placing the burden on the opponent to show a lack of trustworthiness should also apply to this subsection of the rule.

Rule 902. Evidence That Is Self-Authenticating. Revise subsection (2), domestic public documents that are not sealed but are signed and certified, by adding the words "or its equivalent" so that the requirement that another public officer who has a seal and official duties within the same entity can certify under seal -"or its equivalent"- that the signer has the official capacity and that the signature is genuine. This additional language is consistent with the federal rule.

Additionally revise subsection (11) by separating the certification of records of regularly conducted activity into two subsections, subsection (11) for domestic records, and subsection (12) for foreign records. In subsection (11) on certified domestic records of a regularly conducted activity, revise the definition of "certification" similar to F.R.E. 902(12) as follows: "As used in this subsection, "certification" means a written declaration signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the jurisdiction where the certification is signed." Remove the last two sentences regarding requirement of a final certification currently found in subsection (11) on certified foreign records of a regularly conducted activity as this is not part of federal rule or the rules of most states.

Rule 903. Subscribing Witness's Testimony. Change the reference **"**Except as provided for by statute**"** in current I.R.E. 903 to "only if required by the law of the jurisdiction that governs its validity," which is consistent with the federal rule.

Rule 904. Authentication of Medical or Dental Tests and Test Results for Diagnostic or Treatment Purposes. Use the term "items" throughout the rule for consistency. Currently, subsection (1) of the current Rule 904 refers to "items," but the other subsections of the rule refer to "documents."

Rule 1001. Definitions That Apply to This Article. Retain the reference to "sounds" in the definition of recording.

As to Rule 701, the Committee voted to retain the reference to "inference" in the rule and to also leave the reference in Rules 703 and 704. The current Rule 701 and other provisions in Article VII refer to a witness's testifying in the form of an opinion or inference, as did F.R.E. 701 prior to the 2011 restyling of the federal rules. The revised Federal Rules of Evidence omit any reference to inferences on the basis that any "inference" is covered by the broader term "opinion." The subcommittee was divided on whether to omit the word "inference." After discussion about whether an opinion and an inference are the same and, after noting the simple fact of disagreement could cause a problem with interpretation, it was decided that no change should be made.

The Committee then reviewed and voted to recommend the following substantive amendments:

Rule 103. **Rulings on Evidence**. Add a new subsection (b) found in the federal rule that states:

> **Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Rule 104. Preliminary Questions. Consistent with the federal rule, delete the reference to "criminal" in subsection (c) so that the requirement that a hearing on the admissibility of a confession be conducted outside the hearing of the jury applies to civil as well as criminal cases.

Rule 408. Compromise and Offers to Compromise. Consistent with the federal rule, add the italicized language to provide that the evidence referred to in the rule is not admissible "either to prove or disprove the validity or amount of a disputed claim *or to impeach by a prior inconsistent statement or a contradiction*." This amendment was made to the federal rule in 2006, and the comment to this amendment stated, "Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements." The Committee noted that when a settlement is being negotiated it may be more about resolution than defining the facts of what really happened and was concerned that allowing impeachment with an inconsistent statement could open it to very trivial matters.

Rule 412. Sex Crime Cases; Relevance of Victim's Past Behavior. Consistent with the federal rule, add the italicized language to subsection (b)(1) so that it refers to the possible admission of evidence of the alleged victim's past sexual behavior "if offered to prove that someone other than the defendant was the source of semen, injury, *or other physical evidence."*

Rule 604. Interpreters. Delete this rule since I.C.A.R. 52 addresses court interpreters and their qualifications.

Rule 606. Competency of Juror as Witness. Consistent with the federal rules, add another exception to the rule that jurors generally cannot testify about their deliberations during an

inquiry into the validity of a verdict or indictment, which would allow a juror to testify about whether a mistake was made in entering the verdict on the verdict form.

Rule 801. Definitions. Consistent with the federal rule, add the word "opposing" to subsection (d)(2) so that it reads: "Statement by Party-Opponent**.** The statement is offered against an opposing party. . ." In addition, add the following language at the end of subsection (d)(2):

> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

In addition, there were several other substantive amendments to the Idaho Rules of Evidence that were reviewed but not recommended for various reasons. They are as follows:

Rule 404. Character Evidence; Crimes or Other Acts. The revised F.R.E. 404(a)(2)(B) provides that the defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted the prosecutor may: (1) offer evidence to rebut it; and (2) offer evidence of the defendant's same trait. The Idaho Rules of Evidence currently do not include a provision allowing the admission of evidence of the defendant's same trait in this situation. The purpose of Rule 404(b) is to exclude evidence of character to show the defendant acted in conformity with it. The Committee was concerned that a defendant would not be able to make a self-defense claim for fear of being convicted on propensity evidence. If the defendant offered evidence of the victim's trait for violence, this would allow the State to offer evidence that the defendant had the same violent trait, which would not be relevant if self-defense was based on the defendant's state of mind and not who was the first aggressor. The Committee wanted more information on whether this rule had been shown to have a chilling effect and decided it might be advisable to simply refer this proposal to the Criminal Rules Committee for a recommendation at a later time.

Rule 408. Compromise Offers and Negotiations. The federal rule adds a provision to subsection (a)(2) that conduct or a statement made during compromise negotiations about the claim are admissible "when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority." The comment on this amendment states, "Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government." The Committee did not believe it was clear just what would be considered a "claim" and how a discussion with a local official would be considered a negotiation. This proposal was tabled until more information can be gathered and it will be considered at a future time and not as part of this update of the rules.

Rule 412. Sex Crime Cases; Relevance of Alleged Victim's Past Sexual Behavior. A second amendment was considered to subsection (b)(2), which now addresses the admission of evidence of "an alleged victim's past sexual behavior with respect to the person accused of the sex crime, if offered by the defendant to prove consent." The corresponding provision of the federal rule adds the words, "or if offered by the prosecutor." There was some concern that this would allow the prosecutor to bring in prior sexual acts between the defendant and the victim and would be seen as an exception to Rule 404(b) such that the analysis would not be undertaken. Thus, the Committee voted not to recommend the adoption of this additional language.

Rule 606. Competency of Juror as Witness. The Committee considered whether an additional exception should be added to the rule prohibiting jurors from testifying about their deliberations based on the recent decision in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017). The Colorado courts had excluded evidence, offered in connection with a motion for new trial, of statements by one of the jurors during deliberations reflecting blatant bias against Hispanics. The defendant and a defense alibi witness were Hispanic. The basis for the exclusion of the evidence was a rule of evidence very similar to IRE 606. The Supreme Court reversed, holding that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality or the jury's deliberations and resulting verdict." *Id*. at 869.

The Committee considered whether to add an exception that would allow a juror to testify "where the admission of the juror's testimony is required to protect a constitutional right", but agreed the reference to a "constitutional right" was too broad. There was also concern that just referencing racial bias would be too limiting. Currently, a defendant may rely on *Pena-Rodriquez* should he or she wish to offer similar evidence. In addition, the case is new and the standards that courts will have to apply in determining whether the evidence merits setting aside a verdict will likely be fleshed out in future cases. This is something other states will be looking at in their rules and so the Committee voted to table the issue for now and take it up at a later date.

Rule 705. Disclosure of facts or data underlying expert opinion. The first sentence in I.R.E. 705 and F.R.E. 705 does not read the same but the Committee noted that this was due to different rules on mandatory disclosure and voted not to recommend changing the Idaho Rule to read the same as the federal rule.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial. The federal rule contains an additional subsection (23) that is entirely different from the subsection (23) found in the Idaho rule. The federal provision makes an exception to the hearsay rule for the following:

> **(23) Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
>
> **(A)** was essential to the judgment; and
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> **(B)** could be proved by evidence of reputation.

The Committee discussed when this might be used and how "historic" the evidence might have to be, but decided admission of this evidence could fall under (24) the catch-all exception. The Committee voted against recommending the addition of this subsection to the rules.

Rule 1003. **Admissibility of Duplicates**. The present I.R.E. 1003 is identical to Rule 1003 of the Uniform Rules of Evidence:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

The federal rule, from the time of its adoption in 1975, has omitted the words "or continuing effectiveness." At least 14 states have also chosen to omit these words. The 2011 revision of the federal rules continues to omit the words "or continuing effectiveness". The Committee voted to omit the words, noting the question might be the continuing effectiveness of the original.