

Highlights of the 2012 Rule Amendments

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Idaho Supreme Court Rules Advisory Committees

Supreme Court Rules Advisory Committees

The following is a list of rule amendments that will go into effect on July 1, 2012, unless otherwise indicated. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/recent-amendments>

Idaho Rules of Civil Procedure

The Civil Rules Advisory Committee is chaired by Justice Warren Jones.

Rule 4(b). Summons - Form. The form of summons has been amended to include the address and phone number of the district court clerk's office where an answer is to be filed.

Rule 6(c)(6). Child Support Guidelines. The Child Support Guidelines Committee is chaired by Judge David Day. Several minor errors identified in the tax tables have been corrected. In addition an amendment clarifies adjustments to basic child support related to health insurance premiums and uncovered medical expenses.

Rule 11(b)(5). Limited Pro Bono Appearance. This new rule took effect on January 1, 2012, and allows an attorney to appear to provide *pro bono* assistance to an otherwise *pro se* party in one or more individual proceedings in an action. The attorney must file and serve a notice of limited appearance on the opposing party and has no authority to act on any matter not specified in the notice. Upon conclusion of the matters specified in the notice, the attorney shall file a notice of completion with the court, which terminates the attorney's role without the necessity of leave of the court. The purpose of the rule is to make it easier for attorneys to do *pro bono* work by allowing them to assist with one dispositive motion or one aspect of a case without then being obligated on the entire case.

Rule 16(j). Child Custody Mediation. This amendment and the amendment to Rule 16(l) were recommended by the Children and Families in the Court Committee chaired by Judge Russell Comstock. The training requirements prior to placement on the child custody mediation roster have been amended by deleting the restriction regarding on-line training courses and adding a requirement that the initial training be acquired through a single training course. The amendment also clarifies who may participate in the mediation.

Rule 16(k). Mediation of civil lawsuits. Currently this rule requires mediators to have twenty hours of additional training every two years but there is no requirement that the training be in the area of mediation; therefore, any approved CLE course meets the requirement. The new requirement is that mediators obtain five hours of additional training on mediation every three years, and this could certainly be part of the mediator's thirty hours of continuing legal education

required for the Idaho State Bar. In addition, the sponsoring organizations listed have been greatly expanded. The requirement that continuing education for mediators include at least five (5) hours of training in mediation takes effect for renewals due on or after July 1, 2013.

Rule 16(l). Parenting Coordinators. The provision which prohibits a parenting coordinator from charging a retainer has been deleted consistent with the statutory amendment to I.C. § 32-717(D) that goes into effect July 1, 2012. The rule provides that any disputes regarding fees are subject to review by the court. It also further clarifies who is entitled to receive a copy of any report prepared by a parenting coordinator.

Rule 40(d)(1). Disqualification without cause. A new exception has been added to the right to disqualification without cause for a judge hearing petitions to modify child custody orders or child support orders entered by that same judge in an earlier proceeding. Rule 60(c) on proceedings to modify child custody or child support orders provides that these motions shall be served and adjudicated in substantially the same manner as an original proceeding. The amendment clarifies that it is not a new proceeding for purposes of disqualification without cause. The same judge who entered the original decree or support order should preside over any modification.

In addition, a new provision on misuse of disqualification without cause has been added. This same provision is in the corresponding Criminal Rule so the rules will now read the same. If it appears that an attorney or law firm is using disqualifications without cause to hinder, delay or obstruct justice, or with such frequency as to impede the administration of justice, the Trial Court Administrator shall notify the Administrative Director of the Courts and request a review of the possible misuse of disqualifications without cause and possible remedial measures as set out in the rule.

Rule 45(b)(2). Subpoenas. The rule currently provides that the party serving a subpoena to command a person who is not a party to produce or to permit inspection and copying of documents or premises must serve a copy of the subpoena on the opposing party at least seven (7) days prior to service on the third party. The purpose of the seven day provision is to allow counsel for the opposing party a chance to review and object. However, the rule provides that the subpoena may be served on the non-party “at any time after commencement of the action”, and Rule 3(a) provides that an action “commences” once the complaint is filed. Thus, a plaintiff can serve a subpoena before even serving the complaint since the complaint only has to be “filed” and the action is deemed to have commenced. The problem is that the summons and complaint rarely get to defense counsel within seven days and thus the chance for a meaningful review and objection by counsel is still lost. The amendment strikes “after commencement of the action” and substitutes “after all parties have either appeared or have been defaulted, unless otherwise ordered”. The party serving the subpoena still must serve a copy of the subpoena on the opposing party at least seven (7) days prior to service on the third party, but additional language has been added that states “unless otherwise specified by the court”.

Rule 45(e)(2). Service of subpoena. New language has been added to this rule to allow service of a subpoena on a party to a legal action for attendance at a trial or hearing to be made by service on that party’s attorney.

Rule 60(c). Proceedings to modify child custody or child support orders. This rule has been amended to clarify that a proceeding to modify child custody or support shall not be deemed the commencement of an action for purposes of venue under I.C. § 5-404.

Filing Fee Schedule. Some of the filing fees have been raised \$8.00 due to the statutory increase in fees collected for the district judge's retirement fund. In addition, the schedule now has a distinction for divorces with minor children and divorces without minor children. The same distinctions have been added to motions to modify a decree. Cases involving minor children will be exempt from disclosure beginning July 1, 2012, and the separate filing fee categories will help the clerks identify these cases.

Idaho Criminal Rules

The Criminal Rules Advisory Committee is chaired by Justice Daniel Eismann. The Criminal Mediation Committee is chaired by Senior Judge Barry Wood.

Rule 6.6. Indictment. Once a charge has been ignored by a grand jury, the prosecutor may not file an information. The amendment to this rule adds a new subsection, entitled "Return of no bill", that requires the grand jury's finding of no probable cause to be recorded and kept as part of the record of that proceeding.

Rule 16. Discovery and inspection. Two new subsections have been added regarding redacting personal information from responses to discovery. The amendment allows the prosecution to keep contact information and personal identifying information for victims out of the hands of the defendant by redacting this information so that only defense counsel has access to it. The prosecutor must serve the redacted copy for the defendant and the unredacted copy for defense counsel at the same time. The unredacted copy is to be printed on paper of a color clearly distinguishable from white. As for a *pro se* defendant, should the state choose to redact identifying information, it must then seek a protective order within seven days. The same option of redaction is available to the defendant so that personal information of the defendant may be withheld from the victim or witnesses. Similarly, if the defendant chooses to redact, then an unredacted copy must be provided to the prosecutor at the same time. The rule does not mandate that personal information must be redacted from discovery responses, but only sets out the procedure for doing so.

Rule 18.1. Mediation in criminal cases. Criminal cases may include numerous defendants, and the rule now clarifies that not all defendants have to join in the request or in the mediation. Mediation may proceed with those participants that wish to join in the process. The rule also emphasizes the need for the government attorney to have settlement authority. The subsection on confidentiality has been shortened and provides an exception for the statutory duty to report child abuse, abandonment and neglect pursuant to I.C. § 16-1605. The amendments also make it clear that the mediator privilege is governed by Idaho Rule of Evidence 507. Subsection 8 of the rule was deleted as unnecessary.

Rule 25(a). Disqualification without cause. The amendment to this rule provides that a list of alternate judges may be provided for hearings other than trials.

Rule 33(e). Revocation of probation. The new language simply reiterates the law that a court shall not revoke probation unless there is an admission by the defendant or a finding by the court, following a hearing, that the defendant willfully violated a condition of probation.

Rule 41(a). Authority to issue warrant. Many people conduct business or socialize via the Internet such that information flows through and is stored on computer servers owned by service providers and housed outside Idaho. Many large Internet based companies recognize the burdens of law enforcement and are cooperative and willing to send the information but still want an official piece of paper giving them permission to release the information as a way of protecting themselves. However, investigators investigating crimes, such as child sexual exploitation, are not able to get out of state search warrants for Internet companies that do not have an actual physical location within the borders of Idaho because of the wording of I.C.R. 41(a). Thus, the rule has been amended to delete the requirement that the warrant be issued in the judicial district where the property or person is located. The warrant must be sought in the county of proper venue, but the rule specifically states a warrant may be issued for property or persons outside the state. While an Idaho law enforcement officer does not have authority to execute the warrant outside of Idaho, the amendment allowing the issuance of the warrant still accomplishes the stated purpose as it allows the obtaining of records where the holder of those records is willing to bring them to the state. It also allows prosecutors to seek federal or sister-state warrants based on the Idaho finding of probable cause.

Rule 43. Presence of the defendant. This rule provides that further progress of a trial to and including the return of the verdict shall not be prevented when a defendant, who is initially present, is voluntarily absent after the trial begins or has been removed from court due to disruptive behavior. The amendment expands this provision so that it is not limited to trial but rather applies to any proceeding.

Rule 54.1. Appeals from magistrate court to district court. The purpose of the amendment to this rule is to clarify that an order granting or denying a motion to set aside the forfeiture of bail or to exonerate bail may be appealed.

Idaho Rules of Evidence

The Evidence Rules Advisory Committee is chaired by Judge Karen Lansing.

Rule 101. Title and Scope. The amendment is a new subsection (d)(7). The purpose of the amendment is to clarify that the rules of evidence do apply to restitution hearings subject to the exception set out in I.C. § 19-5304(6) that provides “the court may consider such hearsay as may be contained in the presentence report, victim impact statement or otherwise provided to the court.”

Rule 507. Mediator Privilege. I.R.E. 507(5)(b) creates a balancing test to determine whether mediation communications are admissible in felony or misdemeanor proceedings. As written, the rule is inconsistent with the express language in the criminal mediation rules, I.C.R 18.1 and I.J.R. 12.1, that “except as provided in I.C. § 16-1605, mediation proceedings shall in all respects be confidential and not reported or recorded.” The amendment makes I.R.E. 507 consistent with I.C.R. 18.1 and I.J.R. 12.1.

Idaho Infraction Rules

The Misdemeanor / Infraction Rules Advisory Committee is chaired by Judge Michael Oths.

Changes have been made to the infraction schedule to reflect the statutory amendment raising POST fees by \$5.00. Every infraction that includes a POST fee has been raised by \$5.00.

One new infraction was added to the schedule and that is texting while driving. The fixed penalty is \$25.00 and, with court costs, the total penalty will be \$81.50.

Idaho Juvenile Rules

The Child Protection Committee is chaired by Judge Bryan Murray.

Rule 12.1. Criminal Mediation. This rule mirrors Criminal Rule 18.1 and the same amendments were made.

Rules 35 and 36. Guardian Ad Litem Programs. (CPA). The court has amended Rules 35 and 36 to clarify that the information and records maintained by a Guardian ad litem and the Guardian Ad Litem Program in a Child Protection Act case are confidential and such information remains confidential after a case has been dismissed or the GAL resigns or is removed.

Rule 39. Shelter Care Hearing (CPA). Part (4) under subsection (l) on the burden of proof at a shelter care hearing has been amended to delete subsection (4) as it creates confusion regarding the relevant burden of proof and could be interpreted as inconsistent with the standard provided under I.C. § 16-1615, which requires a “reasonable cause to believe”.

Rule 40. Notice of Proceedings (CPA). Subsection (b) now clarifies that when a youth over eight seeks to participate in a proceeding by way of a writing, the writing shall be filed with and considered by the court and copies provided to the Department of Health and Welfare, whether or not a party, and all parties to the case.

Idaho Misdemeanor Rules

By statute, there is a \$5.00 increase in POST fees for misdemeanors. In addition, the legislature added a new \$10.00 fee to misdemeanors for VINE, the Victims Information and Notification

System. Thus, all payable misdemeanors were raised by \$15.00. A few other misdemeanors were raised in a similar fashion so that they would not become payable.

Idaho Court Administrative Rules

Rule 32. Records of the Judicial Department. Rule 32 addresses access to court records, including records that are exempt from disclosure. Guardianships and conservatorships have been added to the list of proceedings that are exempt from disclosure except as to certain interested persons specified in the rule. While the majority of the record is exempt from disclosure, the rule does provide that certain records are still open. The public may access the register of actions, letters of guardianship or conservatorship, any order of the court regarding a bond by a conservator and the bond, as well as any order, decree or judgment dismissing, concluding or otherwise disposing of the case.

In addition, subsection (j), request for records, has been amended to provide that the custodian of the record may request contact information as provided in I.C. § 9-338(4) and that a request for public records and delivery of the public records may be made by electronic mail.

Rule 32 has also been amended to add records in cases involving child custody, child support and paternity to the list of records that are exempt from disclosure. The purpose of the amendment is to exempt from automatic disclosure the intimate information regarding children that is frequently present in the records filed in these cases. Such information can include the types of reports and allegations that are often seen in Child Protective Act and parental termination cases, in which the records are exempt from disclosure under the current provisions of I.C.A.R. 32. The register of actions (ROA) is still available to the public, as is any order, decree or judgment, though the order is subject to the redaction requirements of I.R.C.P. 3(c)(4), as far as certain personal identifying information. Parties to the cases and their attorneys would of course still have access to the records in these cases under I.C.A.R. 32(c), and the rule specifies that it does not apply to officers and employees of the Department of Health and Welfare examining and copying these records in the exercise of their official duties. Other persons with a legitimate interest in the information contained in these files may still file motions seeking access to the records under I.C.A.R. 32(i).

Rule 43A. Administrative Conference. This new rule addresses the membership and role of the Administrative Conference. The members of the Administrative Conference include the Chief Justice of the Supreme Court, the Chief Judge of the Court of Appeals, the Administrative District Judge of each judicial district, the Trial Court Administrators of each judicial district, the President of the District Judges' Association, the current president, immediate past president, and President-Elect of the Magistrate Judges' Association, the Administrative Director of the Courts and various designated court personnel. The Conference meets four times a year and its responsibilities include formulating policies for the judiciary and developing standards for the trial court to improve court operations, among others. The rule was effective April 1, 2012.