REPORT OF THE

IDAHO STATE BAR

EVIDENCE COMMITTEE

Merlyn W. Clark, Chairman

December 16, 1983

Revised 6/1/85

REPORT

OF THE

IDAHO STATE BAR EVIDENCE COMMITTEE

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1. Supplemented August 20, 1984, with Revisions dated 5/18/84
2. Supplemented December 7, 1984, with Revisions dated 12/7/84
3. Supplemented December 31, 1984, with Revisions dated 12/31/84
4. Supplemented June 1, 1985, with Revisions dated 6/1/85

Revised 6/1/85

REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE

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PREFACE

In late 1979 the Board of Commissioners of the Idaho State Bar appointed the Idaho Evidence Committee. The Committee was instructed to review the Idaho law of evidence and rules of evidence from other jurisdictions and, if necessary, to draft rules of evidence for the consideration of the Idaho Bar. The Report of the Idaho Evidence Committee that follows was prepared in compliance with that charge.

The Committee began its deliberations on February 29, 1980. Since then many individuals have voluntarily contributed their time, intellect and energy to the preparation of this Report. The initial research was performed by law students at the University of Idaho College of Law under the able and expert leadership of Professor Craig Lewis. The research materials prepared by Professor Lewis and the students were of tremendous value to the Committee and they deserve much credit for this Report.

The membership of the Committee has changed during the four years that have elapsed since it was formed. Some members found it necessary to withdraw from the work of the Committee. Other individuals participated in deliberations at various times when members were unable to attend. For their valuable contributions to the deliberations of the Committee during the time they were able to serve or participate, those persons deserve recognition. Thus, special thanks go to

Samuel Eismann, Esq.
Thomas C. Frost, Esq.
Mary Stiles Hobson, Esq.
Charles F. McDevitt, Esq.

The Report is the product of the Committee whose members were selected from the Bench and Bar of Idaho with due consideration being given to factors such as years of judicial experience or practice, whether public or private, civil or criminal, prosecution or defense oriented, and geographical location. The result was effective. Certainly not every vote of the Committee was unanimous, but all points of view were well represented in the deliberations.

Many hours of study, discussion and debate were enthusiastically contributed by the members of the Committee. They are

Thomas A. Banducci, Esq., Boise
Bruce S. Bistline, Esq., Boise
Eugene L. Bush, Esq., Idaho Falls
Warren Derbidge, Assistant U.S. Attorney for Idaho, Boise
Honorable J. Ray Durtschi, District Judge, Boise
Blaine F. Evans, Esq., Boise
William D. Faler, Esq., Idaho Falls
Donald J. Farley, Esq., Boise
Alfred C. Hagan, Esq., Boise
James C. Harris, Esq., Boise
William R. Hollifield, Esq., Twin Falls
Ronald D. Howen, Assistant U.S. Attorney for Idaho, Boise
Dennis L. Johnson, Deputy Prosecuting Attorney for Ada County, Boise
Patrick J. Kole, Deputy Attorney General, Boise
David Leroy, Esq., Lieutenant Governor of Idaho, Boise
Professor Craig Lewis, University of Idaho College of Law, Moscow
James J. May, Esq., Twin Falls
Thomas A. Mitchell, Esq., Coeur d'Alene
Honorable Robert M. Rowett, District Judge, Mountain Home
Lloyd J. Webb, Esq., Twin Falls
Honorable Darla Williamson, Magistrate, Cascade
Honorable Donald K. Worden, Jr., Magistrate, Lewiston

Finally, inestimable thanks go to the word processing staff of Hawley Troxell Ennis & Hawley and to the staff of the Idaho State Bar. Without their patience and effort the Report would not have been accomplished.

Merlyn W. Clark, Esq.
Hawley Troxell Ennis & Hawley
Chairman, Idaho State Bar
Evidence Committee

December 16, 1983

INTRODUCTION AND SUMMARY

The Idaho State Bar Evidence Committee submits this Report for the consideration of the Bench and Bar and all citizens of Idaho. Constructive comment on the Report is solicited. The Committee intends that the Report be treated by the Bench, the Bar and the citizens of Idaho as a vehicle for promoting a constructive dialogue from which Rules of Evidence for Idaho can emerge.

The Report was prepared by the Idaho State Bar Evidence Committee in compliance with Idaho State Bar Resolution No. 79-9. That Resolution provides in part "that the Board of Commissioners of the Idaho State Bar appoint a committee to review the statutes of this State relating to evidentiary matters; . . . to review and consider various uniform rules of evidence, and if necessary to draft the same for the Idaho Bar to review for possible implementation."

Consistent with that charge the Idaho Committee included within its study the evidentiary constitutional provisions, statutes, and rules of Idaho, and the apposite decisions of the Idaho courts. Also included in the study for comparison purposes were the Uniform Rules of Evidence (1974), 13 U.L.A. 209-363 (Supp. 1983); Federal Rules of Evidence, 28 U.S.C.A. (Supp. 1983); California Evidence Code; and in some instances the Colorado Rules of Evidence and specific rules of other states.

The procedure followed by the Committee in its deliberations involved an individual examination of each of the Uniform Rules of Evidence, an analysis of the relevant Idaho law where it exists and a comparison of that law to the Federal, California and in some instances the Colorado counterpart. The study process also included a search for Idaho law that does not have a Uniform Rule counterpart, particularly in the area of testimonial privileges. When the initial examination of individual rules was completed and Committee preferences were established, the Committee re-examined each rule and each Article as a group and drafted commentary to each rule in accordance with its findings.

In drafting the Rules certain criteria were established. The Committee concluded that the numbering system of the Federal Rules should be followed for ease of reference and research. It was also determined that when only minor grammatical differences existed between the Federal Rule and the Uniform Rules, the language and punctuation of the Federal Rule was followed to facilitate the use of the decisions of the federal courts and those state courts which have adopted Federal Rules verbatim. The Committee also had in mind the desire of the Idaho practitioners for one set of rules applicable in both the state and

federal courts, but that concern did not outweigh other concerns when variances were deemed justified to accomodate Idaho practice.

The proposed Rules of Evidence are identical or substantially identical to the Federal Rules of Evidence with few exceptions in the areas other than testimonial privileges. Congress did not adopt rules of privilege for the federal courts, relying instead upon those provided at common law. In contrast, the Idaho Committee has attempted to present a complete codification of testimonial privileges for Idaho and has included proposed rules of privilege recognizing those testimonial privileges which are now provided by statute or rule in Idaho.

The majority of the proposed Idaho Rules would have little or no effect on the evidentiary law of Idaho as it now exists. Certainly some individual rules that are proposed will effect a change in the Idaho law, but in those instances the change is deemed to constitute an improvement of that law.

The Committee had several goals in mind when drafting the Comments to the proposed Idaho Rules. One goal is to explain the purpose of the rule and how it accomplishes that purpose. In this respect the Comments to the Idaho Rules may in some instances be more descriptive of the mechanics of applying the rule rather than the policy considerations underlying the rule. The Federal Advisory Committee Notes to each of the Federal Rules address those policy considerations and where the Idaho Rules are comparable, reference may be made to those Notes. The Idaho Committee saw no need to extensively repeat those Notes in the Comments to the Idaho Rules.

Caution must be exercised when referring to the Federal Advisory Committee Notes. Congress modified some of the rules that were proposed by the Federal Advisory Committee rendering the Notes to those particular rules of little value and in some instances even misleading. See, e.g., Federal Rules 301 and 611. Moreover, a few Federal Rules have been amended since their adoption in 1974 and the Federal Advisory Committee Notes to those rules must likewise be read and used with caution. See, e.g., Rules 410 and 801.

The Idaho Committee believes that many Idaho practitioners and members of the Idaho judiciary have had no reason to study the Federal Rules or the Uniform Rules and consequently are not fully acquainted with them. Thus, in addition to providing an explanation of each rule, the Committee has attempted to explain or describe issues that have developed under specific rules as applied by the courts. In this respect the Committee has borrowed extensively from treatises on the subject and in particular from J. Weinstein & M. Berger, Weinstein's Evidence (Supp. 1983). In the final drafting stages the Committee also

drew heavily from Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig. (1983).

Following the explanation of the rule or subsection thereof and its application in the courts, the commentary describes and compares the Idaho law as it was found to exist by the Idaho Committee. The commentary further attempts to identify areas of conflict and point out the effect adoption of the rule would have on existing Idaho law where it is perceived that change in the Idaho law would result.

The Idaho Committee further intends that the commentary to the Idaho Rules of Evidence serve as a compilation of the evidentiary law of Idaho and that it be used for study and research regardless of whether the proposed Idaho Rules of Evidence are adopted for Idaho.

Should the Rules proposed by the Committee be adopted for Idaho, it is intended that the Comments serve as guidelines for the application of the rules by the Idaho courts and practitioners and that they be considered and applied, not in vacuo, but rather in the context of the particular case and the sound judicial discretion of the court.

Finally, it must be noted that the admission or exclusion of evidence is a matter of state policy except in areas involving constitutional rights. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Additionally, the Idaho Supreme Court has pointed out that "[w]hile courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy - itself a serious evil - without giving any additional safeguard to the interests of justice." American Bonding Co. v. Regents of University, 11 Idaho 163, 193, 81 P. 604, 614 (1905). The Idaho Committee believes that the Idaho Rules of Evidence contained in this Report are consistent with the principles set forth above and would serve Idaho "to the end that the truth may be ascertained and proceedings justly determined" (I.R.E. 102) in our judicial system.

The Idaho Evidence Committee recommends that the Idaho Rules of Evidence as proposed in this Report be adopted by the Idaho Supreme Court for application in the Idaho judicial system.

INSTRUCTIONS FOR USING REPORT

1. **HOW TO CITE TO THIS REPORT:**

An example is:

> M. Clark, Report of the Idaho State Bar Evidence Committee, C 612, p. 1 (4th Supp. 1985).

2. **HOW TO USE THIS REPORT:**

This Report of the Idaho State Bar Evidence Committee was prepared by the members of the Committee and contains the official Comments of the Committee to the Idaho Rules of Evidence, which rules were adopted by the Idaho Supreme Court by Order entered January 8, 1985 effective commencing July 1, 1985. Also included are the amended Rules 509 and 802 which were adopted March 26, 1985 effective commencing July 1, 1985. The Comments of the Committee were not adopted by the Idaho Supreme Court and although they may be cited for persuasive effect, the comments are not binding on the courts of Idaho. The comments are intended by the Committee to serve as a source of reference by judges and parties for guidance in the application of the Idaho Rules of Evidence. The comments state the Committee's understanding of the rules and its intent with respect to the application of many of the rules.

The Idaho Rules of Evidence track the numbering system of the Federal Rules of Evidence and the Uniform Rules of Evidence. The numbering of the Idaho Rules differs from the Federal Rules as follows:

> Idaho Rule 101 combines title, scope and applicability into that rule. The Federal Rules treat of title and applicability in F.R.E. 1101 and 1102.
>
> Idaho Rules 303 and 413 have no Federal counterpart.
>
> Idaho Rules 502-520, which provide for testimonial privileges, have no Federal counterpart.
>
> Idaho Rules 1101-1103 have no Federal counterpart.

The numbering of the Idaho Rules differs from the Uniform Rules of Evidence as follows:

Idaho Rule 101 combines title, scope and applicability into that rule. The Uniform Rules treat of title and applicability in Uniform Rules 1101 and 1102.

Idaho Rule 413 has no Uniform Rules counterpart.

Idaho Rules 502-520 provide for testimonial privileges. The Uniform Rules provide for testimonial privileges in Uniform Rules 502-509 but have no counterpart to Idaho Rules 510-520.

Idaho Rules 1101-1103 have no Uniform Rules counterpart.

To locate subject matter in the Comments to the Rules the user should identify the applicable rule or rules and refer to the commentary to that rule or rules. The comments are organized by subsections matching the subsections of the rule. To identify the applicable rule, use the Table of Contents. One may also use the Uniform Rules index or an index to the Federal Rules to identify the applicable rule except as to those rules that have no Federal or Uniform Rules counterpart as noted above.

3. **PAGINATION:**

The pages of this report are numbered in the lower right corner of each page by reference to rule or comment. "R 612" indicates that is Rule 612, a one page rule. "C 612 p. 1" indicates that is the first of more than one page of the Comment to Rule 612.

4. **REVISIONS OF REPORT:**

The report was originally issued dated December 16, 1983. Since then the Committee has issued four supplemental reports containing revised pages for substitution and insertion in the original report. The revised pages are marked in the lower left corner of each page "Revised 5/18/84," "Revised 12/7/84," "Revised 12/31/84," or "Revised 6/1/85." The revisions dated 12/31/84 contain all revisions to Rules and Comments necessary to reflect the Idaho Rules of Evidence in the form adopted by the Supreme Court on January 8, 1985. The revisions dated 6/1/85 accomodate the amendments to Rules 509 and 802 made March 26, 1985. The signal "(typo.)" following a revision date indicates that the revision consisted only of correcting a typographical error.

5. **CUT-OFF DATE:**

Legal editing on the Report dated December 16, 1983 was completed on November 30, 1983. Case, statute and rule citations were checked to that date. Although some additional material has been added by the supplemental reports, the authorities cited in this Report and the supplements to the Report should not be regarded as complete beyond November 30, 1983.

Research was performed by the Committee for the purposes of its deliberations and the commentary. Accordingly, the Report may not include all related authority.

FINAL REPORT

AND

SUPPLEMENT

TO

REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE

Merlyn W. Clark, Chairman

August 20, 1984

FINAL REPORT AND SUPPLEMENT

On December 16, 1983 the Idaho State Bar Evidence Committee submitted its report of Proposed Rules of Evidence with commentary to the Commissioners of the Idaho State Bar for consideration of the Bench and Bar and all citizens of Idaho.

In January, 1984 the Idaho State Bar distributed copies of the report to the following persons and organizations:

1. The Justices of the Supreme Court of Idaho.
2. The Justices of the Court of Appeals of Idaho.
3. The Administrative District Judge of each Judicial District of Idaho.
4. The Chief Judge of the United States District Court for Idaho and the other District Judges.
5. Governor John V. Evans.
6. Attorney General Jim Jones.
7. The President pro tem of the Senate.
8. The Speaker of the House.
9. The Chairman of the Senate Judiciary and Rules Committee.
10. The Chairman of the House Judiciary, Rules & Administration Committee.
11. The Chairman of the Idaho Industrial Commission.
12. The Director of the Idaho Department of Law Enforcement.

13. The District Bar President of each Judicial District.

14. The Idaho Supreme Court Law Library.

15. The University of Idaho College of Law Library.

16. The Idaho Prosecuting Attorneys' Association.

17. The Idaho Trial Lawyers' Association.

18. The Idaho Association of Defense Counsel.

19. The Idaho Sheriffs' Association.

20. The Idaho Education Association.

21. The Idaho Medical Association.

22. The Idaho Hospital Association.

23. The Idaho Society of Certified Public Accountants.

24. The Idaho Chief's of Police Association.

25. The Idaho School Administrators' Association.

26. The Idaho Social Workers' Licensing Board.

27. The Idaho Professional Counselors' Licensing Board.

28. The Idaho District Judges' Association.

29. The Idaho Magistrates' Association.

30. The Idaho Association of Psychologists.

Additionally, copies of the Report were made available at a nominal cost to other members of the Bench and Bar and other interested persons from the Office of the Idaho State Bar and that fact was publicized in "The Advocate."

Each recipient of the Report was requested to submit comments to the Chairman of the Committee not later than April 30, 1984. The comments received are summarized as follows:

1. The Rules in general received one comment. The President of the Idaho Chief's of Police Association stated, "I believe these Rules chart a positive direction for court proceedings from a law enforcement perspective. I would be more than happy to support these Rules . . . ."

2. Rule 408. Compromise and Offers to Compromise received one comment which appeared to misinterpret references to prior law and the recommendation of the Committee.

3. Rule 519. Hospital, In-Hospital Medical Staff Committee and Medical Society Privilege received not less than 16 comments opposing the proposed Rule and one comment in support of the proposed Rule.

The Evidence Committee met on May 18, 1984 to consider the comments then received, legislation and court decisions enacted or rendered subsequent to the Report of the Committee and to meet with several members of the medical community to further discuss proposed Rule 519. Mr. Richard Fields was most helpful in organizing the presentation by the representatives of the medical community. Several physicians and hospital administrators expressed their concern with proposed Rule 519 and the adverse effect it would have on voluntary participation by physicians and staff in health care review proceedings. In essence, they convinced the Committee members present that meaningful review procedures would be most difficult to obtain if the physicians and other medical personnel participating in those review proceedings are not allowed to freely and frankly express

their opinions during the review process without subsequent disclosure.

The Committee took the following action on May 18, 1984 with respect to the proposed Rules.

1. Rule 408: Determined that the author of the one comment misinterpreted the proposed Rule and Comment to the Rule and that no further action is required.

2. Rule 519: Determined to revise Rule 519(a)(1) to define "hospital" in the language of Idaho Code § 39-1392(a), as amended by the Forty-Seventh Legislature effective March 30, 1984.

3. Rule 519: Determined to revise Rule 519 to propose a rule of privilege that protects statements of opinion or conclusion. A copy of Revised Rule 519 and Revised Comment to Rule 519 is attached to this Report as a separate document to facilitate the substitution of pages in the original Report.

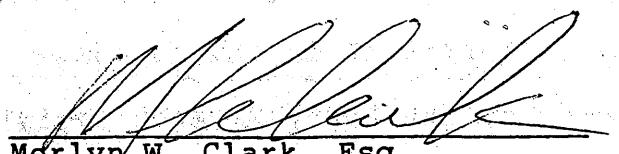
4. Determined to amend the Comment to Rule 803(22), page 34, to insert a reference to Idaho Code § 18-8004(7) enacted by the Forty-Seventh Legislature effective March 1, 1984. A copy of the revised page 34 and subsequent pages 35 through 40 of the Comment to Rule 803 are attached as a separate document to facilitate the substitution of pages in the original Report.

5. Determined to amend the Introductory Comment to Article V, page 6, to reflect the revision of Rule 519. A copy of the revised Introductory Comment to Article V is attached to

this Report as a separate document to facilitate the substitution of pages in the original Report.

A minority report was submitted to the Committee. It was determined that it should be submitted to the Idaho State Bar and the Idaho Supreme Court with this Final Report.

The Idaho Committee believes that this Final Report and Supplement completes the work of the Evidence Committee at this time.



Merlyn W. Clark, Esq.
HAWLEY TROXELL ENNIS & HAWLEY
Chairman
Idaho State Bar Evidence Committee

DATE: August 20, 1984

SECOND SUPPLEMENTAL REPORT

TO

REPORT OF THE IDAHO STATE BAR
EVIDENCE COMMITTEE

Merlyn W. Clark, Chairman

December 7, 1984

SECOND SUPPLEMENTAL REPORT

On December 16, 1983, the Idaho State Bar Evidence Committee submitted its report of proposed Idaho Rules of Evidence with commentary to the Commissioners of the Idaho State Bar for consideration of the Bench and Bar and all citizens of Idaho. On August 20, 1984, the Committee submitted its Final Report and Supplement recommending revisions in certain proposed Rules and Comments to Rules which reflected views expressed in written and verbal comments to the Committee and a change in the law which occurred after the December 16, 1984 Report.

On October 25, 1984, Committee members Craig Lewis, Jim May and Merlyn Clark met with four Justices of the Supreme Court to review the proposed Rules. As a result of that meeting, the Committee met on December 7, 1984 to consider questions raised by the Justices and their staff attorney, Lon Davis.

The Committee took action on December 7, 1984 with respect to the proposed Rules which is summarized as follows:

Rule 101: Revised the introductory language in Rule 101(e) to read "These Rules apply in the following proceedings subject to the enumerated exceptions." The revision was made to eliminate a perceived double negative and ambiguity. Reversed the order of appearance of subsections (d) "Rules inapplicable" and (e) "Rules inapplicable in part," to improve the organization of the Rule, thus making subsection (d) "Rules inapplicable in part" and (e) "Rules inapplicable." Added Idaho Code

§ 16-1614(d) to what is now Rule 101(d)(2) to make clear that the evidentiary provisions of the Idaho Juvenile Rules and § 16-1614(d) govern in Child Protective Act proceedings. The Comment to Rule 101 was revised to reflect these changes in the Rule.

Rule 402: Deleted the words "statute or by" which in effect created a conflict with the proposed Rules of Evidence and abrogated certain of the proposed Idaho Rules of Evidence contrary to the intent of the Committee and the purpose of the proposed Rules. By deleting the general statutory exception, the Committee intends that the admissibility of evidence in judicial proceedings be governed by the Idaho Rules of Evidence or other rules applicable in the courts of Idaho. Only in those instances where the proposed Rules of Evidence or other rules give recognition and effect to a statute will the statute govern the question of admissibility. The Comment to Rule 402 was revised to reflect this change in the Rule.

Rule 413: Adopted a new proposed rule to recognize and give effect to the evidentiary provisions of Idaho Code § 6-1001 which make evidence of medical malpractice proceedings inadmissible in civil actions. The statute was overlooked in prior deliberations of the Committee. Because Section 6-1001 provides for an exclusionary rule based on the legislative intent to foster prelitigation settlement of medical malpractice claims and a rule of privilege from disclosure to permit the parties to present their claim to the panel in an open and frank manner, the

Committee concluded that both an exclusionary rule (proposed Rule 413) and a rule of privilege (proposed Rule 520) are required. The Comment to Rule 413 was adopted by the Committee.

Rule 501: Added language to the general exception in the introductory language following the word "statute" to read "statute not in conflict with these Rules . . . ." The revision is deemed necessary to remove a conflict between those statutory privileges which are addressed in the proposed Rules and the rules of privilege in Article V of the proposed Idaho Rules of Evidence. The exception "statutes not in conflict with these Rules" is intended by the Committee to give recognition and effect to the statutory privilege against self-incrimination codified at Idaho Code §§ 9-1302, 19-108 and 19-3003 and any other statutory privilege that is not addressed in Article V of the proposed Rules. The Committee intends that all statutes creating testimonial privileges against disclosure that are addressed in Article V of the proposed Rules will have no further force or effect in judicial proceedings. The Comment to Rule 501 was revised to reflect the change made in Rule 501.

Rule 520: Adopted a new proposed rule to give recognition and effect to the medical malpractice screening panel privilege in civil actions as is now provided in Idaho Code § 6-1001. The Comment to Rule 520 was adopted by the Committee.

Rule 612: Added to subsection (b) the language "or protected from disclosure under I.R.C.P. 26 or I.C.R. 16" to make clear that under subsection (b) work product is protected from

disclosure when used for refreshment of memory prior to testifying.

Rule 614: Revised the Rule to allow the trial court to call or interrogate witnesses only when the court is the trier of fact. The Committee concluded that the danger of unfair prejudicial influence resulting from the calling of a witness or the interrogation of a witness by the court is too great to allow the practice in jury cases except for the purpose of ruling on objections or preliminary questions such as qualifications of a witness which may be done outside the hearing of the jury if there is danger of unfair prejudice to a party. The Comment to Rule 614 was revised to reflect the changes in the Rule.

Rule 802: Deleted the word "law" and substituted "statute or other rules of the Supreme Court of Idaho" in the introductory language to make clear that case law is not included in the exception. The Committee expressed concern that the language "by law" is overly broad and may be interpreted to mean any case law as well as statutes or rules. The Comment to Rule 802 was revised to reflect the change in the Rule.

Rule 1001: Added to the subsection (2) definition of "photographs," the language "and similar products of processes which produce recorded images of objects" to include within that definition other forms of new technology such as CT scans, thermograms and infra-red photographs. The Comment to Rule 1001 was revised to reflect the change in the Rule.

Rule 1102: Deleted the word "Prior" from the title and the words "previously existing" and "further" from the body of the Rule. The intended effect is to preclude amendment of the Idaho Rules of Evidence by subsequent legislation that is in conflict with the Rules. The Committee intends that evidentiary matters be governed by the Idaho Rules of Evidence. When a Rule of Evidence recognizes and gives effect to a statute or other rule of the Supreme Court in a given situation or proceeding, only then will that statute or rule be the governing authority to resolve the evidentiary question. If a statute or other rule is "in conflict with" an Idaho Rule of Evidence, the Rule of Evidence will govern the result. "In conflict with" is intended by the Committee to apply when the result of the evidentiary question would be different under the Idaho Rules of Evidence from that under the statute or other rule.

Comment to Rule 502: Added a paragraph to the commentary under subsection (d)(1) to express the intent of the Committee as to the showing that should be required before the court invokes the "contemplated crime or fraud" exception to the lawyer-client privilege. There is a split of authority whether the party propounding disclosure of a confidential communication between lawyer and client is required to make a prima facie showing that the communication related to a contemplated crime or fraud or whether it is sufficient that he merely make an allegation of that fact to obtain disclosure. The Committee concluded that a rule cannot be formulated to resolve the issue

for all cases because it is a problem of application of the rule which will vary with the circumstances of each case. The Committee determined to add the commentary that the court should require a substantial evidentiary showing that the communication with the attorney dealt with contemplated criminal acts or contemplated perpetration of fraud prior to invoking the exception. The Committee expressly rejected the requirement that a prima facie showing be made and rejected the rationale of the Federal Advisory Committee Notes and those decisions which hold that only an allegation is sufficient to require disclosure. The Committee concluded that some showing must be required, but that it must depend on the circumstances which can only be developed on a case-to-case basis.

ADDITIONAL REVISIONS

The Committee further authorized the Chairman to conform the Table of Contents and Comments to the Rules as revised. The Chairman is also authorized to correct typographical errors in the proposed Rules and Comments when they appear. Conforming revisions and typographical corrections have been made as follows:

Table of Contents: Added Rules 413 and 520; deleted word "Prior" from title of rule 1102; and corrected typographical error at Rule 517.

Introductory Comment to Article IV: Added description of Rules 413 and 520.

Comment to Rule 407: Changed references to Rule 101(e) in last paragraph of "Comment" at page 3 to read Rule 101(d).

Comment to Rule 410: Corrected typographical error at page 3 to substitute word "authority" for "attorney" in line sixth from bottom.

Introductory Comment to Article V: Added language "not in conflict with these Rules" at page 5, paragraph 3, and page 6, paragraph last, and added description of Rule 520 at page 6.

Rule 503: Corrected typographical error in title.

Rule 514: Corrected typographical error in subsection (b).

Rule 518: Corrected typographical error in subsection (a)(2).

Introductory Comment to Article VI: Added reference to Rule 612 at page 1, paragraph 2; added reference to "calling of witnesses by the court" at page 1, paragraph 3; and added words "or otherwise protected from disclosure" and a description of Rule 614 at page 1, paragraph 4.

Rule 801: Corrected typographical error in subsection (d)(2).

Rule 803: Corrected typographical error in subsection (22), page 4, to substitute word "of" for "or."

Introductory Comment to Article X: Added reference to Rule 1001(2) at page 1, paragraph 5.

Introductory Comment to Article XI: Deleted language "that were previously enacted or adopted" from second paragraph.

ATTACHED REVISIONS

Attached to this report are the revisions and additions for substitution and insertion in the original Committee Report dated December 16, 1984, with instructions for doing so. Included among the revisions and additions are additional inserts which have the effect of dividing each Article of the Rules and Comments into separate chapters, i.e., rather than having the Introductory Comment of Article II appear on the reverse side of the last page of the Comment to Rule 106 (marked C106 p.2), the Introductory Comment to Article II will be on a separate page. This is done to facilitate the insertion of index dividers between Articles for those who wish to do so.

Also attached is a description of the revisions and additions that were included in the "Final Report and Supplement" that was made August 20, 1984. It is included so that those who wish to do so can be certain that their copy of the Committee Report correctly contains all revisions and additions since December 16, 1983.

Merlyn W. Clark, Esq.
Hawley Troxell Ennis & Hawley
Chairman
Idaho State Bar Evidence Committee

DATE: December 7, 1984

THIRD SUPPLEMENTAL REPORT

TO

REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE

Merlyn W. Clark, Chairman
December 31, 1984

THIRD SUPPLEMENTAL REPORT

On December 16, 1983, the Idaho State Bar Evidence Committee submitted its report of proposed Idaho Rules of Evidence to the Commissioners of the Idaho State Bar.

On August 20, 1984, following the receipt of comments upon the proposed rules, the Committee submitted its first supplemental report labeled Final Report and Supplement in which the Committee recommended revisions in certain proposed rules and revised the Committee commentary to those rules.

On December 7, 1984, following a meeting of members of the Committee and four Justices of the Idaho Supreme Court, the Committee met to consider questions raised by the Justices and their staff attorney. The Committee then issued its Second Supplemental Report in which the Committee recommended additional revisions in the proposed rules and revised the comments to those rules.

On December 28, 1984, the chairman of the Committee and the staff counsel for the Supreme Court drafted changes and corrections in the rules which were made by the Supreme Court during its deliberations of the proposed rules. Thereafter, the Committee endorsed the changes by the Court and revised the commentary to those rules to reflect the changes.

The changes made in the rules by the Court and the resulting revisions in the comments made by the Committee as of December 31, 1984, are summarized as follows:

Rule 101: The Court deleted former subsection (d)(2) which made the rules inapplicable in part in Child Protective Act proceedings and added a subsection (e)(6) making the rules, except the rules of privileges, inapplicable in Temporary Shelter Care Hearings held under Idaho Code § 16-1614. The effect of the change is to make the Rules of Evidence applicable in all Child Protective Act proceedings, except for Temporary Shelter Care Hearings which often require the court to act on short notice, by telephone or under other urgent circumstances. The Comment to Rule 101 was revised to reflect the change.

Rule 409: The wording of the rule was rearranged to more clearly state the rule. No substantive change in the rule was made. The Comment was revised to reflect the change.

Rule 410: The format of the rule was changed to facilitate reference to subparts of the rule and to make it more easily readable. The rule of inadmissibility was made a captioned subsection (a), and the exceptions were made a captioned subsection (b) with numbered subparagraphs for each exception. No substantive change in the rule was made. The Comment was revised to reflect the new format.

Rule 501: The Court substituted the language "statute implementing a constitutional right" for the language "statute not in conflict with these Rules" which the Committee had recommended in its Second Supplemental Report of December 7, 1984. The Court, in its deliberations of the proposed rule, determined that the Committee version was overly broad because it

would give effect to statutorily created testimonial privileges that are not covered in the rules and those that may be created in the future. The Court expressed an intent that, except for constitutional privileges and statutes implementing constitutional privileges, all testimonial privileges be governed by the Idaho Rules of Evidence. The Committee endorses this change for the certainty its creates with respect to testimonial privileges. The Comment was revised to reflect the change.

Rule 502: The Court inserted the language "which were made" in subsection (b) to make clear that the rule of privilege applies to confidential communications "which were made" between the enumerated persons. No substantive change in the rule was made. The Comment was revised to reflect the change.

Rule 504: The wording of subparts (A), (B) and (C) of subsection (d)(2) was revised to add the word "spouse" in subparts (A) and (B), and to substitute the language "the other spouse or a person residing in the household of either spouse" for "either of them" in subpart (C). The changes do not effect any substantive change in the rule but, rather, more clearly identify the persons to whom the exception applies. The Comment was revised to reflect the additional language.

Rule 509: The various forms of relief which the court may grant under subsection (c)(2), when the public entity elects not to disclose the identity of the informer, were assigned alphabetical designations (A) through (E) solely for ease of reference. Additionally, the word "or" immediately preceding

"dismissing charges" in that provision of subsection (c)(2) was substituted for the word "and" to eliminate the possibility that the forms of relief now denominated (A) through (D) be interpreted as necessarily conjunctive with (E) which is "dismissing charges." The change in the rule is intended to more clearly state that the court may grant "one or more" of the forms of relief as provided in the rule. The changes effect no substantive change in the rule. The Comment was revised to reflect the changes.

Rule 514: The wording of subsections (d)(1) and (d)(2) were revised by adding the phrase "of the parties to the confidential communication" to more clearly identify the persons included within the scope of those exceptions. The changes effect no substantive change in the rule. The Comment was revised to reflect the new language.

Rule 515: The language "which were made" was inserted in subsection (b) as was done in Rule 502 for the same reasons. No substantive change in the rule results. The Comment was revised to reflect the additional language.

Rule 516: The wording of subsection (d)(1) was revised by adding the phrase "of the parties to the confidential communication" to more clearly identify the persons included within the scope of that exception. No substantive change in the rule results from the change. The Comment was revised to reflect the additional language.

Rule 517: The wording of subsection (d)(1) was revised by adding the phrase "of the parties to the confidential communication" to more clearly identify the persons within the scope of that exception. No substantive change in the rule results. The Comment was revised to reflect the additional language.

Rule 518: The wording of subsection (d)(3) was revised by adding the phrase "of the parties to the confidential communicaton" to more clearly identify the persons within the scope of that exception. No substantive change in the rule results. The Comment was revised to reflect the additional language.

Rule 519: Subsection (a)(1) which provides the definition of "Hospital" under the rule was revised to include nonresident hospitals. The Comment was revised to reflect the change.

Rule 520: The wording of subsection (c) was revised to delete reference to "representative of the medical malpractice screening panel" because no person or entity is known to be such a "representative." As revised, "[t]he privilege may be claimed by any holder of the privilege or for him through his lawyer." The revision effects no known substantive change in the rule. The Comment was revised to reflect the change.

Rule 608: The format of the rule was changed to the extent of making the last sentence a captioned subsection solely

for ease of reference. No substantive change in the rule results. The Comment was revised to reflect the change.

Rule 609: The Court inserted a comma in the second sentence after the word "conviction" for grammatical reasons. No substantive change in the rule results and no change in the Comment was required.

Rule 612: The reference to materials "not privileged or protected from disclosure under I.R.C.P. 26 or I.C.R. 16" was revised to eliminate the possibility that it be interpreted to mean "not privileged . . . under I.R.C.P. 26 or I.C.R. 16." As revised, that provision reads "not privileged under these rules or not protected from disclosure under Rule 26 of the Idaho Rules of Civil Procedure or Rule 16 of the Idaho Criminal Rules . . . ." The revision more clearly identifies the excepted material and effects no substantive change in the rule. The Comment was revised to reflect the revised language.

Rule 614: The language "when the court is the trier of fact" was stricken from subsection (b). The effect is to allow the court to interrogate witnesses in jury cases. The Supreme Court in its deliberations observed that there may be occassions when the trial court may find a need to ask questions of the witness. An example given is when the judge cannot discern whether the witness responded "yes" or "no." Subsection (c) which provides for the making of objections to interrogation by the court was added as necessary since the court may interrogate

witnesses in jury cases. The Comment was revised to reflect the changes.

Rule 706: The penultimate sentence was revised to substitute the language "by any party or by the court pursuant to Rule 614(a)" in place of "by the court or any party." The change is necessary for consistency with Rule 614(a) which restricts the court from calling witnesses unless the court is the finder of fact. That change required deletion of former subsection (c) which permitted the court to disclose to the jury that a witness was the court's witness because it is unncessary under Rules 614(a) and 706(a) which restrict the authority of the court to call witnesses before a jury and it may have been construed as permitting the court to call expert witnesses in jury cases. The Comment was revised to reflect the changes.

Rule 1101: Subsections (a) and (b) were retained without change. Subsection (c) subtitled "Application" was removed from Rule 1101 and made Rule 1103 without a change in text. The change was made solely to present a more orderly format of the rules and effects no substantive change in those rules. The Comment to Rule 1101 was revised to reflect the change, and the Comment to Rule 1103 was transferred from the Comment to Rule 1101(c).

ADDITIONAL REVISIONS BY COMMITTEE

The Committee has further revised some Comments to the rules which are summarized as follows:

Comment to Rule 502: Since the Comment was published in the Report of December 16, 1983, the Idaho Supreme Court has ruled that the attorney-client privilege extends to communications made with a view toward employing an attorney by a potential client, whether or not actual employment results. State v. Iwakiri, 106 Idaho 618, 682 P.2d 571 (1984). The Comment to Rule 502 was revised to reflect that decision.

Comment to Rule 601: During its deliberations of the proposed Rules, the Court expressed concern that the rules established for hypnotically induced or enhanced testimony in State v. Iwakiri, 106 Idaho 618, 682 P.2d 571 (1984), would survive the adoption of Rule 601. Unlike Federal Rule 601, the Idaho version of the rule, as recommended by the Committee and adopted by the Court, expressly provides a mechanism for testing the qualifications of a witness in the manner established in the Iwakiri decision. It is the intent of the Committee that the rule established in Iwakiri does survive the adoption of Rule 601 and that the guidelines for testing the qualifications of a witness with respect to hypnotically induced or enhanced testimony are applicable under Rule 601. The Comment to Rule 601 has been revised as requested by the Court to make clear that the rule established in Iwakiri is not abrogated by the adoption of Rule 601.

Comment to Rule 612. Since the Comment was published in the Report of December 16, 1983, the Idaho Court of Appeals has ruled that a witness may, while testifying, refresh memory by

using a report prepared by another person. State v. Gallatin, 106 Idaho 564, 682 P.2d 105 (Ct. App. 1984). The Comment to Rule 612 has been revised to reflect that decision.

ADDITIONAL REVISIONS

The Committee further authorized the Chairman to conform the Table of Contents and the Introductory Comments to the rules as revised and to correct typographical errors in the rules and comments when they appear. Conforming revisions and typographical corrections have been made as follows:

Table of Contents: Corrected caption of Rule 410 and typographical errors in caption to Rule 512; revised caption to Rule 1101 and added caption for Rule 1103.

Rule 104: Corrected typographical error in subsection (e).

Comment 104 p. 4: Corrected typographical error.

Comment 201 p. 4: Corrected typographical errors.

Comment 401 pp. 1 & 2: Corrected typographical errors.

Comment 403 p. 1: Corrected typographical error.

Comment 413: Corrected typographical error and moved third paragraph of comment to page 2 to follow discussion of Idaho statute. Added phrase "of medical malpractice screening panels" in first paragraph of Comment.

Introductory Comment to Article V: Revised pages 5 and 6 to reflect changes made by the Court in Rule 501.

Comment 507 p. 2: Deleted "Legislature or the" from last paragraph to conform it to Rule 501.

Introductory Comment to Article VI: The fourth paragraph was revised to indicate that the last sentence of Rule 608 is a separate subsection in the Idaho rule.

Comment 604 p. 1: Corrected typographical error.

Comment 607 p. 4: Corrected typographical error.

Comment 609 pp. 9 & 11: Corrected typographical errors.

Comment 611 p. 8: Corrected typographical error.

Introductory Comment to Article VII: Revised paragraph seven to state that Rule 706 is conformed to Rule 614(a) and omits subsection (c) of the Federal Rule.

Rule 802: Corrected typographical error.

Comment 802 p. 1: Corrected typographical error.

Comment to Rule 803: The second paragraph at page 29 was revised to add reference to Martineau v. Walker, 97 Idaho 246 (1975), regarding the use of treatises on cross-examination and to correct the statement that "only one Idaho decision had been located" on the subject by deleting it.

Comment 803 pp. 34 & 39: Corrected typographical and grammatical errors.

Comment 804 pp. 3, 14, 16 & 17: Corrected typographical errors.

Introductory Comment to Article X: Corrected typographical error at page 1.

Rule 901 p. 2: Corrected typographical error.

Comment 902 pp. 5 & 6: Corrected typographical errors.

Comment 1001 p. 2: Corrected typographical error.

ATTACHED REVISIONS

Attached to this report are the third supplemental revisions and additions for substitution and insertion in the Committee Report dated December 16, 1983, with instructions for doing so.

Merlyn W. Clark
Hawley Troxell Ennis & Hawley
Chairman
Idaho State Bar Evidence Committee

DATE: December 31, 1984

FOURTH SUPPLEMENTAL REPORT

TO

REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE

Merlyn W. Clark, Chairman
June 1, 1985

FOURTH SUPPLEMENTAL REPORT

The Report of the Idaho State Bar Evidence Committee issued December 16, 1983 has been previously supplemented with revisions dated 5/18/84, 12/2/84 and 12/31/84 to accomodate changes made in the rules prior to January 8, 1985 when the Order of the Supreme Court was entered adopting the rules for Idaho.

On March 26, 1985, Rules 509 and 802 were amended by Order of the Supreme Court, effective commencing July 1, 1985. This Fourth Supplemental Report is issued to accomodate those amendments and to revise the commentary to those rules. Additional revisions have been made where necessary to correct errors of substance and typographical errors. Finally, the Comment to Rule 704 has been revised to reflect the amendment of Fed. R. Evid. 704 made October 12, 1984.

No attempt has been made to incorporate the decisions of the Idaho appellate courts entered since November 30, 1983 or to reflect the amendments to the Idaho Rules of Civil Procedure, Idaho Criminal Rules and Idaho Juvenile Rules which were made to accomodate the Idaho Rules of Evidence by Orders entered March 20, 1985, effective commencing July 1, 1985.

The revisions are summarized as follows:

COVER: Revised to reflect the addition of the Fourth Supplemental Report.

CONTENTS, p.1: Revised to reflect the addition of the Fourth Supplemental Report.

INSTRUCTIONS, p.1: Revised to correct omission of Rule 303 as one of the Idaho Rules for which there is no Federal Rule counterpart.

INSTRUCTIONS, p.2: Revised paragraph 4 to reflect the revisions dated 6/1/85.

Rule 101, p.1: Corrected a typographical error in the subtitle of subsection (d).

C 401, p.1: Corrected a typographical error.

C 404, p.2: Corrected a typographical error.

C 406, p.3: Added a sentence to reflect the opinion of the Committee that the Rules of Evidence will supersede the notice requirement provided in Idaho Code § 28-1-205(6) as a condition precedent for admission of such evidence.

C 502, p.1: Corrected a typographical error.

C 502, p.7: The first two paragraphs of the commentary to Rule 502(c) have been revised to more clearly state the purpose of that provision and to remove language from the second paragraph which was incorrect, i.e. the statement that "[t]he second provision is included because the privilege does not apply to a communication involving the lawyer's

representative ..." The privilege does apply to a communication involving the lawyer's representative as well as the lawyer. The example given in the commentary is omitted in the revision as unnecessary.

C 503, p.6: The first full paragraph is revised to reflect that Rule 503, when read in conjunction with Rules 501 and 1102, renders the statutory provisions of Idaho Code § 18-215 inapplicable.

C 503, p.7: Corrected a typographical error in the statute cited in the commentary to subsection (d)(1).

C 504, p.10: Corrected a typographical error in the statute cited in the commentary to subsection (d)(3).

R 509: Revised subsection (c) to conform to the language of Rule 509(c) as amended by Order of the Supreme Court entered March 26, 1985. The rule, as recommended by the Evidence Committee and initially adopted by the Supreme Court on January 8, 1985, provided that disclosure of the identity of the informer would be mandatory if the informer testifies. The Evidence Committee also recommended repeal of Idaho Criminal Rule 16(f)(2), which makes disclosure discretionary if the informer testifies. The intent of the Evidence Committee was to abolish the reported practice of some courts allowing the informer to testify using an assumed name. The Evidence Committee has concerns that the practice may deny an accused the constitutional right to "meaningful" cross-examination required by the Confrontation Clause. The

Supreme Court Criminal Rules Advisory Committee objected to the repeal of Criminal Rule 16(f)(2) and refused to recommend repeal of that rule to the Court. Rather than repeal the Criminal Rule or leave both inconsistent rules in place, the Supreme Court determined to amend Evidence Rule 509(c) to make disclosure of the identity of the informer witness discretionary, consistent with Criminal Rule 16(f)(2). The amendments to Rule 509(c) consist of the deletion of the language "or if the informer appears as a witness for the public entity" from subsection (c)(1); the addition of a new subsection (c)(2) providing for the informer as a witness; and the redesignation of the provision for testimony on relevant issue as subsection (c)(3). During its deliberations of the amendments to Rule 509, one justice commented that the Rule, as amended, would be presented to the Court for reconsideration if it appears that public entities are refusing to disclose the identity of an informer witness only for the purpose of allowing the informer to continue making cases, rather than the intended purpose to protect the informer witness and others from harm.

C 509: Revised to accomodate the amendments to Rule 509(c).

C 601, p.3: Added a comment for subsection (c) which had inadvertently been omitted from the comment to Rule 601.

Rule 612(b): Corrected a typographical error.

C 615, p.4: Corrected a typographical error.

Intro. VII, p.1: Revised the penultimate paragraph to reflect the difference between Idaho Rule 704 and the Federal Rule as amended October 12, 1984, which added subsection (b) prohibiting expert testimony on certain ultimate issues with respect to the mental state or condition of a defendant in a criminal case in the federal courts.

C 704, p.1: Revised the commentary to reflect the amendment of Fed. R. Evid. 704 by Congress effective October 12, 1984. The amendment adds subsection (b) which, in effect, precludes an expert witness from rendering an opinion on the ultimate issue whether the accused in a criminal case had or has the mental state or condition constituting an element of the crime charged or of a defense thereto, leaving such ultimate issues to the trier of fact alone. The amendment is part of the Comprehensive Crime Control Act of 1984, Ch. IV, Insanity Defense Reform Act of 1984, § 404. Because it was not generally published or known by the Idaho Committee until December, 1984, adoption of the amendment for Idaho has not been considered by the Idaho Committee or the Idaho Supreme Court.

Intro. VIII, p.2: Revised to reflect that Idaho Rule 802 differs from Fed. R. Evid. 802 to the extent the Idaho Rule omits exceptions prescribed by statute.

Rule 802: Revised to conform to the language of Rule 802 as amended by Order of the Idaho Supreme

Court entered March 26, 1985, effective commencing July 1, 1985. The rule, as recommended by the Evidence Committee and initially adopted by the Court on January 8, 1985, provided that "[h]earsay is not admissible except as provided by statute or these rules or other rules promulgated by the Supreme Court of Idaho." The Committee had intended to give effect to specific statutes prescribing exceptions to the rule against hearsay for writings such as the minutes of various Idaho state commissions and others described in the Comment to Rule 802. However, the general provision for statutory exceptions in Rule 802 also gave effect to the statutory exceptions allowing unlimited use of hearsay in Child Protective Act proceedings and Termination of Parent and Child Relationship proceedings, contrary to the intent of the Committee and the Supreme Court as provided in Rule 101 and stated in the Comment to Rule 101 at pp. 5-8. When the oversight was discovered, an analysis was made of the specific statutory exceptions described in the Comment to Rule 802 for the purpose of determining whether they would be excepted under Rules 803 and 804. It was determined that they would be excepted, that the general provision for statutory exceptions was unnecessary to accomplish the intent of the Committee with respect to those exceptions and that deletion of the general statutory provision would accord with the intent of the Committee and the Supreme Court to exclude hearsay in Child Protective Act proceedings and Termination of Parent and Child Relationship proceedings unless permitted under these rules or other Supreme Court rules. Thus,

upon request of the Committee Chairman, the Supreme Court amended Rule 802 by deleting the words "statute or" from the rule. As amended only those exceptions provided by these rules or other rules of the Supreme Court will be given effect.

C 802: Revised to accomodate the amendment of Rule 802.

C 803, p.10: Revised the last sentence of the paragraph to correct the statement to read that "[a]lthough not rendered inadmissible under ~~the hearsay rule~~ Rule 803(5), police accident reports would still be inadmissible under ~~Idaho Code § 49-1511~~ Rule 803(8)." The statement was incorrect to the extent it stated that "the hearsay rule" does not render police accident reports inadmissible because it ignored the effect of Rule 803(8). It was further rendered incorrect to the extent it gave effect to Idaho Code § 49-1511 in light of Rule 802, as amended on March 26, 1985, which renders statutory exceptions ineffective.

C 803, p.21: Corrected a typographical error in the third paragraph.

ADDITIONAL COMMENTS

Two additional matters of concern to the Evidence Committee deserve comment.

The Idaho Rules of Evidence are designed to apply in civil and criminal proceedings. They provide for and are

intended to be the governing authority for the admissibility of evidence and the competency and privileges of witnesses. To that end Rules 402, 501 and 802, subject to constitutional law, make the Rules of Evidence and other rules of the Supreme Court the governing authority for questions of relevancy, privileges and hearsay to the exclusion of statutory law, common law and contrary case law. In addition, Rule 1102 expressly provides that "[s]tatutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect."

An analysis was made of the Idaho Rules of Civil Procedure, Idaho Criminal Rules and Idaho Juvenile Rules to determine the amendments of those rules that would be necessary to accomodate the Idaho Rules of Evidence and appropriate recommendations for change were made to the Supreme Court. By Orders entered March 20, 1985 the necessary amendments were adopted effective commencing July 1, 1985, with one exception. The Criminal Rules Advisory Committee determined to amend the second sentence of Idaho Criminal Rule 26 rather than rescind it and the amendment was adopted by the Court. As amended, that sentence provides that "[t]he admissibility of evidence and the competency and privileges of witnesses shall be governed by the Idaho Rules of Evidence or by law."

The Evidence Committee is concerned that the last three words of the rule, as amended, will be misconstrued to give

effect in criminal proceedings to the statutory law, common law and case law that is intended to be abrogated by the Idaho Rules of Evidence. The Evidence Committee is informed that the Criminal Rules Advisory Committee intended to give effect to the decisions of the Idaho appellate courts interpreting the Idaho Rules of Evidence and questions not covered by the rules, and did not intend to give effect to law that contradicts the Rules of Evidence.

It is the opinion of the Evidence Committee that the words "or by law" in Criminal Rule 26 are inappropriate and unnecessary, and the effect of those words in criminal proceedings should be construed in light of Evidence Rule 1102.

Finally, it should be noted that Rules 503(d)(1), 504(d)(3), 516(d)(2), 517(d)(2), and 518(d)(4) provide an exception to those respective privilege rules for communications relevant to an issue in proceedings to hospitalize the holder of the privilege for mental illness pursuant to Idaho Code § 66-329. The Evidence Committee inadvertently failed to consider or provide an exception for communications relevant to an issue in proceedings to appoint a guardian for a person deemed mentally ill. The Committee recommends that at some future time the scope of the exception for hospitalization be expanded to include proceedings for appointment of a guardian under Idaho Code § 66-322.

ATTACHED REVISIONS

Attached to this report are the fourth supplemental revisions and additions for substitution and insertion in the Committee Report dated December 16, 1983, with instructions for doing so.

CONCLUSION

This will be the last supplement to the Report to be issued by the Idaho State Bar Evidence Committee. It is anticipated that after the rules become effective on July 1, 1985, the Idaho Supreme Court will appoint an advisory committee for the Rules of Evidence as it has with the other procedural rules and that the Evidence Committee will be disbanded on July 1, 1985.

Merlyn W. Clark
Hawley Troxell Ennis & Hawley
Chairman
Idaho State Bar Evidence Committee

DATE: June 1, 1985

INTRODUCTORY COMMENT TO ARTICLE I

GENERAL PROVISIONS

Article I contains general provisions of the Rules. They do not set forth evidentiary principles of admission and exclusion. Rather, they identify the courts, actions and stages of proceedings in which the rules are applicable, and provide guidelines for the judge to follow when making decisions on evidentiary issues.

Rule 101 states the title, scope, proceedings and stages of proceedings to which the rules apply in whole or in part. Rule 102 sets forth the general purposes of the Rules. Rule 103 provides procedures for raising and disposing of evidence questions. Rule 104 allocates functions between judge and jury. Rule 105 sets forth the doctrine of limited admissibility. Rule 106 is a rule of completeness covering writings and recordings.

Idaho Article I is identical to Federal Article I except that Idaho Rule 101 combines scope with the provisions for applicability and title which are dealt with in Federal Rules 1101 and 1103; Rule 103(b) includes a provision for making a record in court trials; and Rule 104 mandates that hearings on the admissibility of confessions in criminal cases be heard away from the jury.

The application of the comparable Federal Rules has created few difficulties in the federal system. Rule 102 has apparently been applied by some courts to achieve results they perceive to be preferable to those dictated by other rules. Rule 106 fails to specifically state that evidence offered under the rule must itself be admissible, a point made by the federal decisions and covered by the Idaho Committee in comment. See generally Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig. 10-31 (1983).

IDAHO RULES OF EVIDENCE

Article I.

GENERAL PROVISIONS

Rule 101. Title and Scope

(a) **Title.** These rules shall be known and cited as the Idaho Rules of Evidence, or abbreviated I.R.E.

(b) **Scope.** These rules govern all actions, cases and proceedings in the courts of the State of Idaho and all actions, cases and proceedings to which rules of evidence are applicable, except as hereinafter provided.

(c) **Rules of privilege.** The rules with respect to privileges apply at all stages of all actions, cases and proceedings.

(d) **Rules inapplicable in part.** These rules apply in the following proceedings subject to the enumerated exceptions.

(1) **Preliminary hearings.** Preliminary hearings except as modified by Rule 5.1(b) of the Idaho Criminal Rules.

(2) **Youth Rehabilitation Act.** Proceedings under the Youth Rehabilitation Act except as modified by the Idaho Juvenile Rules.

(3) **Masters proceedings.** Masters proceedings unless the appointing court directs otherwise in the order of appointment pursuant to Rule 53 of the Idaho Rules of Civil Procedure.

(4) **Uniform Post-Conviction Act.** Proceedings under the Uniform Post-Conviction Procedure Act except as modified by Idaho Code § 19-4907.

(5) **Driver's License Suspension.** Proceedings for suspension of driver's license for failure to take an evidentiary test for alcohol concentration except as modified by Rule 9.2(b) of the Idaho Misdemeanor Criminal Rules.

(e) **Rules inapplicable.** These rules, other than those with respect to privileges, do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Special Inquiry Judge. Special Inquiry Judge proceedings.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt proceedings. Contempt proceedings in which the court may act summarily.

(5) Small claims. Proceedings in the small claims department of the district court.

(6) Shelter Care Proceedings. Temporary Shelter Care Hearings held under Idaho Code § 16-1614.

COMMENT TO RULE 101

Prior Idaho Statutes or Rules: Idaho Code § 19-2110; I.R.C.P. 43(a); I.C.R. 26.

Comparable Federal Rule: Similar in purpose to F.R.E. 101, 1101 and 1103 combined.

Comment: Rule 101 provides the title of the rules and specifies the courts and proceedings to which the rules are applicable, applicable in part or inapplicable. The Committee preferred to combine the rules pertaining to title, scope and applicability into a single rule at the beginning rather than follow the format of the Federal Rules which provide the title and applicability at the end of the rules.

Subsection (a) states the title and permits abbreviation of the rules when cited, as do other Idaho rules. See I.R.C.P. 85; I.C.R. 2(b); I.A.R. 1.

Subsection (b) provides that the rules govern all actions, cases and proceedings in the courts of Idaho, except when specifically made inapplicable. Rule 101(b) is consistent with Idaho Code § 19-2110 ("The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in the criminal code."), I.R.C.P. 43(a) ("All evidence shall be admitted which is admissible under the statutes of, or under the rules of evidence applied in the courts of this state."), and I.C.R. 26 ("The admissibility of evidence and the competency and privileges of witnesses shall be governed by rules of evidence in civil actions, except as where otherwise provided by law or by these rules.").

The Committee considered the applicability of the rules to other quasi-judicial, administrative or commission hearings. The Committee concluded that, pursuant to Idaho Code § 1-212 and § 1-213, the Supreme Court has the power to adopt rules of evidence as they apply to court proceedings. See State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980). The Committee further concluded this power could not extend to legislatively created boards or commissions. See Skelly v. Sunshine Mining Co., 62 Idaho 192, 109 P.2d 622 (1941). The rule is intended to defer to legislative action for a determination of the extent to which the rules of evidence will apply to actions, cases, and proceedings outside the courts. See, e.g., Idaho Code § 67-5210 (Administrative Procedure).

Subsection (c) preserves the testimonial privileges of witnesses at all stages of all proceedings even though the remaining rules may be inapplicable. This is consistent with the policy of Idaho Code § 9-203 (confidential relations and communications), other statutes which confer testimonial privileges, I.R.C.P. 26(b)(1) (scope of discovery in general), I.R.C.P. 43(a) (evidence--form and admissibility) and I.R.C.P. 43(b)(4) (cross-examination of adverse party).

Subsection (d) specifies the situations, other than those with respect to privileges, where the rules are made inapplicable in part. To the extent that a statute or rule governing an enumerated proceeding provides a specific evidentiary principle that may conflict with these rules, the rules of evidence defer to that specific statutory or rule provision.

Subsection (d)(1) recognizes the special evidentiary provisions in I.C.R. 5.1(b) (preliminary hearing--probable cause hearing--procedure). See also State v. Williams, 103 Idaho 635, 651 P.2d 569 (Ct.App. 1982).

Subsection (d)(2) recognizes the special evidentiary provisions in Youth Rehabilitation Act proceedings under Title 16, Chapter 18, Idaho Code and the Idaho Juvenile Rules which govern the procedure in all actions and proceedings under the Y.R.A. See I.J.R. 1 (Rules 1 through 4 and 16 through 27 govern procedure in Y.R.A. proceedings; all rules shall be liberally construed to provide a simple judicial procedure).

I.J.R. 17 empowers the court to issue an order that the child be taken into custody as provided in Section 16-1811, Idaho Code, when the court has "reason to believe" or "reasonable grounds to believe" specified facts exist.

I.J.R. 20 authorizes a "preliminary inquiry" and "investigation through county and state agencies" by the court and empowers the court to dismiss the petition, set it for hearing, or make an informal adjustment based on the reports obtained.

If an evidentiary hearing or trial is held upon denial of the allegations of the petition, I.J.R. 22(a) mandates that "[t]he rules of evidence and discovery in a Y.R.A. trial are the same as the rules of evidence in a criminal proceeding, and the child has the same constitutional protections as a defendant in a criminal action."

The disposition hearing is governed by I.J.R. 24, which "shall be an informal hearing in which the court may hear any relevant evidence. . ."

I.J.R. 19 authorizes "[w]aiver of Y.R.A. jurisdiction and prosecution of the child as an adult may be done in the manner and under the conditions set forth in Section 1806 [§ 16-1806], Idaho Code." The Idaho Supreme Court has held that the determination of the existence of probable cause to justify transfer to adult court may be based on hearsay and need not be tested by cross-examination and confrontation. Wolf v. State, 99 Idaho 476, 583 P.2d 1011 (1978). See also State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979)(testimony of prior misdemeanor offenses and dismissed felony charges is admissible), (hearings on transfer are to be informal in nature and no error found in admitting inculpatory statements allegedly improperly obtained).

Subsection (d)(3) renders the Rules of Evidence applicable to proceedings before "masters" appointed pursuant to I.R.C.P. 53 unless the appointing court directs otherwise. I.R.C.P. 53(c) empowers the District Court to establish the powers, duties and functions of the master. The Committee believes that it is appropriate to defer to the appointing court for the determination of the extent to which the master must proceed in accordance with the Rules of Evidence.

Subsection (d)(4) recognizes the special evidentiary provisions in Idaho Code § 19-4907, Uniform Post-Conviction Procedure Act, to the extent it permits the court to receive proof by affidavits or depositions. Section 19-4907 provides that "the court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing."

Subsection (d)(5) recognizes the special evidentiary provisions in Misdemeanor Criminal Rule 9.2(b) (1983) to the extent that it requires the court to "make the determination of whether there has been a prima facie showing that the respondent has refused to submit to an evidentiary test for alcohol concentration after having been properly requested by a peace officer to submit to such examination," based solely upon the affidavit of the officer. All other proceedings under M.C.R. 9.2 are governed by these rules.

Subsection (e) specifies the situations other than those with respect to privileges where the rules are made inapplicable.

Subsection (e)(1) restates, for convenience, the provisions of the second sentence of Rule 104(a). See Comment to Rule 104.

Subsection (e)(2) renders the rules inapplicable to Special Inquiry Judge proceedings. This rule appears to be consistent with Idaho Code §§ 19-1116 through 19-1123, in that they are silent as to whether rules of evidence apply, except for the privilege against self-incrimination which is preserved under Idaho Code § 19-1121. The special inquiry judge proceeding is not an adversary proceeding. Nor is it an evidentiary hearing for the purpose of determining or adjudicating a question of fact or law. It is more in the nature of a discovery proceeding and no valid purpose would be served by making the rules applicable in such proceedings. Conversely, to impose the rules of evidence on these proceedings would render the proceedings ineffective.

Idaho Code § 19-1123(2) provides that, "[t]he prosecuting attorney shall have access to all special inquiry judge evidence and may introduce such evidence before any grand jury or judical proceeding in which the same may be relevant." The Committee concluded that the term "introduce," as used in the statute, is intended to mean that such evidence may be "offered in evidence," and that evidence obtained from a special inquiry judge proceeding is not automatically admissible in an action, case or proceeding by virtue of this provision.

Subsection (e)(3) renders the rules of evidence inapplicable in certain stages of criminal proceedings.

Excepting proceedings for extradition or rendition, including fugitive from justice proceedings, is consistent with Title 19, Chapter 45, Idaho Code and I.C.R. 1. See also Struve v. Wilcox, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S.Ct. 1037, 57 L.Ed.2d 84 (1979). Traditionally the rules of evidence have not been applied in these proceedings. 1 Wigmore § 4(6).

Excepting proceedings for sentencing, including motions to vacate, set aside or correct a sentence, for commutation of sentence and suspending or withholding judgment, and for proceedings granting or revoking probation, including motions to modify probation, is consistent with Title 19, Chapter 25, Idaho Code, I.C.R. 32 and 33, and M.C.R. 10. See also State v. Coutts, 101 Idaho 110, 609 P.2d 642 (1980); State v. Moore, 93 Idaho 14, 454 P.2d 51 (1969).

Excepting proceedings for issuance of warrants for arrest and criminal summonses, including proceedings to determine probable cause before or after arrest, is consistent with I.C.R. 4 and 5, and M.C.R. 3 and 11.

Excepting proceedings for issuance of a warrant for search and seizure is consistent with I.C.R. 41(c) and Idaho Code § 19-4403. See also State v. Oropeza, 97 Idaho 387, 545 P.2d 475 (1976); State v. Arregui, 44 Idaho 43, 254 P. 788 (1927).

Excepting proceedings with respect to release on bail or otherwise, including forfeiture and enforcement of bail bond and bail for witnesses, is consistent with I.C.R. 46 and 46.1, and M.C.R. 13.

Subsection (e)(4) renders the rules inapplicable in contempt proceedings in which the court may act summarily. The rule is consistent with Idaho Code § 7-603 and I.C.R. 42(a) (contempts in actual presence of the court).

Subsection (e)(5) renders the rules inapplicable in the proceedings in the small claims department of the district court. The rule is consistent with the policy expressed in I.R.C.P. 1(a) (small claims proceedings are exempt from I.R.C.P. except as provided by Rule 81), I.R.C.P. 81(a) (a small claims default judgment requires only "evidence satisfactory to the court") and I.R.C.P. 81(g) (no record of the proceeding is required).

The Committee believes that the nature and purpose of small claim proceedings warranted the action taken in making the rules inapplicable to small claims proceedings. The presiding magistrate is best able to determine the proper balance between rules which unduly frustrate the purpose of a "layman's court" and rules which are reasonably necessary to insure the integrity of evidence which is offered.

Subsection (e)(6) renders the rules inapplicable in temporary shelter care hearings held under Idaho Code § 16-1614. Consequently, except for privilege questions, evidentiary matters in temporary shelter care hearings are governed by Idaho Code § 16-1614 ("any evidence may be considered by the court which is of the type which reasonable people may rely upon") and I.J.R. 8 (the court shall hold a shelter care hearing in accordance with Idaho Code § 16-1614.

General Comment: The final draft of Rule 101 which was submitted in the Report dated December 16, 1983 contained a provision rendering the Rules of Evidence inapplicable in part in Child Protective Act proceedings under Title 16, Chapter 16, Idaho Code, and the Idaho Juvenile Rules. That provision in the Rules of Evidence would have made those statutory and juvenile rules provisions the governing authority as to evidentiary

matters in all Child Protective Act proceedings. See I.J.R. 1 (Rules 1 through 4 and 5 through 15 govern procedure in C.P.A. proceedings; all rules shall be liberally construed to provide a simple judicial procedure). I.J.R. 6 empowers the court to issue an ex parte warrant for the taking of the child into custody upon the affidavit of any person or the testimony of any person, at the option of the court. With respect to adjudicatory hearings see Idaho Code § 16-1608(b)("hearing shall be conducted in an informal manner") and I.J.R. 10 ("As the hearing upon the petition is not before a jury, and is not a criminal proceeding, the strict rules of evidence and procedure do not have to be followed. . . . The hearing shall be conducted in an informal manner . . ."), ("only the attorney-client privilege applies in the proceeding . . . there is no husband-wife or parent-child privilege, nor is there any professional privilege such as physician-patient, counselor-client, or clinic, day care center or school privilege recognized in the proceeding.").

The Supreme Court in its deliberation of the proposed rules, determined that evidentiary matters in Child Protective Act proceedings, except for temporary shelter care hearings which often require the court to act on short notice, by telephone or under other urgent circumstances, should be governed by the Idaho Rules of Evidence. Thus the Supreme Court struck the provision that made the rules inapplicable in part in Child Protective Act proceedings and added the provision at subsection (e)(6) making the rules inapplicable in temporary shelter care proceedings.

The Committee believes that the change made by the court in the Rule with respect to temporary shelter care hearings still gives effect to the intent of the Committee that those proceedings be governed by Idaho Code § 16-1614 and I.J.R. 8.

With respect to adjudicatory proceedings it is the opinion of the Committee that all evidentiary matters in those proceedings are governed by the Idaho Rules of Evidence. Consequently, the evidentiary provisions in Idaho Code § 16-1608(b) and I.J.R. 10 are of no further force or effect. See I.R.E. 1102. In practice the result in the adjudicatory proceedings should not materially change. Due process requires that judicial decisions, including those made in Child Protective Act proceedings, be based upon reliable evidence. The Rules of Evidence provide guidelines to the court and the parties for determining whether evidence is deemed sufficiently reliable that it may be admitted and form the basis for findings of fact. The provision in I.J.R. 10 that made rules of evidence and procedure inapplicable in adjudicatory hearings provided no guidance.

The exceptions provided in the rules of privilege in Article V adequately address the provisions in I.J.R. 10 which render testimonial privileges inapplicable in adjudicatory proceedings. Consequently, abrogation of those evidentiary

provisions in I.J.R. 10 will effect no material change in the law.

The Committee considered excluding grand jury proceedings from the Idaho Rules of Evidence as do the Federal Rules. However, because Idaho Code § 19-1105 and I.C.R. 6(f) both provide that, "the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay and secondary evidence," the Idaho Committee concluded that the rules of evidence are applicable in grand jury proceedings and that there is no reason to change the existing law.

The Committee considered adding Termination of Parent and Child Relationship proceedings to subsection (d) in light of Idaho Code § 16-2009 which provides that the hearing may be conducted in an informal manner and further provides that:

> The court's finding with respect to grounds for termination shall be based upon clear and convincing evidence under rules applicable to the trial of civil causes, provided that relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value. When information contained in a report, study or examination is admitted in evidence, the person making such report, study or examination shall be subject to both direct and cross-examination. . . .

The Committee concluded that Termination of Parent and Child Relationship proceedings should not be excepted from the Rules of Evidence and that the termination of the parent and child relationship should not be based on hearsay evidence. The right of the parent and child to that relationship is considered by the Committee to be a right of the highest value, and worthy of the procedural protection afforded by rules of evidence.

In State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979), the Idaho Supreme Court was called upon to determine whether certain evidence was admissible in a "transfer" proceeding under the Y.R.A. The Court specifically referred to the provision in the Y.R.A. which similarly provides that the hearings upon which the determination is made are to be "informal in nature," in support of its decision that rules of evidence do not apply in that proceeding. It must be noted, however, that the Supreme Court also observed that a "transfer" hearing is not a final adjudication and that under Rule 22 of the Idaho Juvenile Rules, at the adjudicatory hearing the rules of evidence are applicable and the juvenile is entitled to all rights afforded

the accused in a criminal trial. The Committee concluded that the parents and the child are entitled to no less "due process" in a termination proceeding with regard to the rules of evidence.

The Committee is not persuaded that merely making the author of the report, study or examination which is admissible in evidence, "subject to both direct and cross-examination," renders the evidence reliable for the reason that the report, study or examination may contain hearsay statements or opinions of the author based on hearsay. In such cases, examination or cross-examination of the author would not reveal the truthfulness or untruthfulness of the statements made by the declarent. The Committee is of the opinion that the declarent must be the person examined or cross-examined; only then will the truthfulness or the untruthfulness of the evidence be determined. Cf. Owen v. Burcham, 100 Idaho 441, 599 P.2d 1012 (1979)(the Idaho Supreme Court noted several reasons for excluding investigating police officers reports in motor vehicle negligence actions--that they may contain extensive hearsay, conclusions and speculations of the officer, criminal charges made, and other materials otherwise inadmissible).

Denial of the right to confront and cross-examine the declarant may constitute a denial of the constitutional right to due process under the ruling in Santosky v. Kramer, 445 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982). In Santosky the United States Supreme Court held that under the Fourteenth Amendment, process is constitutionally due a natural parent at a state's parental rights termination proceeding, such a proceeding interfering with a fundamental liberty interest of natural parents in the care, custody, and management of their child; that the minimum requirements of procedural due process are not diminished by the fact that a state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action, such requirements being a matter of federal law; and, that before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence.

The Committee considered whether to except from the rules the proceedings for forfeiture of property for violation of a statute of the State of Idaho, e.g., Idaho Code § 37-2744 (forfeitures in connection with controlled substances), Idaho Code § 18-3804 (relating to gambling devices); habeas corpus proceedings under Idaho Code § 19-4212; and, proceedings in quo warranto under Idaho Code § 6-601, et seq., and determined that these proceedings should not be excepted from the Rules of Evidence.

The Committee also considered expressly excepting from the rules the proceedings of coroners under Title 19, Chapter 43,

Idaho Code, as do the Idaho Criminal Rules, but concluded that no express exception is required because the coroner's inquest is not a judicial proceeding and the rules of evidence are not applicable to these proceedings in the first instance. See In re Sly, 9 Idaho 779, 76 P. 766 (1904)(the coroner is not a judicial officer and coroner's proceedings are not regarded as being in a court of record).

The Committee examined whether an additional partial exception should be made to allow for the effect of the evidentiary provisions of the Idaho Products Liability Act, Idaho Code § 6-1406. The Committee concluded that Rules 402 and 407 adequately cover the concerns underlying Idaho Code § 6-1406. See Comments to Rules 402 and 407.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 16-2009 as follows: first, delete the second sentence of the first paragraph and substitute the language "The hearing shall be conducted in accordance with the Idaho Rules of Civil Procedure."; second, in the third paragraph of section 16-2009, delete the language," provided that relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value. When information contained in a report, study or examination is admitted in evidence, the person making such report, study or examination shall be subject to direct and cross-examination."

Amend Idaho Code § 16-1609(c) by deleting the language: "not be admitted into evidence at the adjudicatory hearing and shall."

Amend Idaho Code § 16-1620 by deleting the language: "Any privilege between husband and wife, or between any professional person except the lawyer-client privilege, including but not limited to physicians, ministers, counselors, hospitals, clinics, day care centers and schools and their clients shall not be grounds for excluding evidence at any proceedings regarding the abuse, abandonment or neglect of the child or the cause thereof."

Amend Rule 10 of the Idaho Juvenile Rules to delete the language: "As the hearing upon the petition is not before a jury, and is not a criminal proceeding, the strict rules of evidence and procedure do not have to be followed." "In the hearing of a petition, only the attorney-client privilege applies in the proceedings. In proving the allegations of the petition there is no husband-wife or parent-child privilege, nor is there any professional privilege such as physician-patient, minister-confessor, hospital-patient, counselor-client, or clinic, day care center or school privilege recognized in the proceeding."

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.

COMMENT TO RULE 102

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 102.

Comment: Rule 102 states a general rule of purpose for guidance in the interpretation and application of the rules. It is intended to provide flexibility in the application of the rules to avoid an unreasonable or intolerable result that may occur from technicalities and to provide guidance in the resolution of close questions and unforeseen circumstances.

Rule 102 has apparently been applied by some courts to achieve results they perceive to be preferable to those dictated by other rules. See, e.g., United States v. Batts, 558 F.2d 513 (9th Cir.), opinion withdrawn, 573 F.2d 599 (1978), cert. denied, 439 U.S. 859 (1978). This application of the rule is not condoned because there is a potential for uneven treatment of litigants. See, e.g., United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977).

It is not intended that Rule 102 be construed to permit the clear language of other rules to be ignored. The introductory language of Rule 102 emphasizes that the rule is a guide to construction. By bearing in mind that rules like 403, 611(a), 803(24) and 804(5) leave room for the sound exercise of judgment and discretion, the courts will find that they can interpret other, specific rules to promote the goals articulated in Rule 102.

To the extent that this rule requires that the Idaho Rules of Evidence be construed to secure "promotion of growth and development of the law of evidence," it is intended to abrogate the rule of strict construction with reference to these rules in the same manner as does Idaho Code § 73-102(1) with reference to statutes which are in derogation of the common law.

For examples of the application of the rule, see United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977); United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977); United States v. King, 73 F.R.D. 103 (E.D.N.Y. 1976).

Action Recommended on Idaho Statutes or Rules: None required.

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The Court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Errors affecting substantial rights. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

COMMENT TO RULE 103

Prior Idaho Statutes or Rules: Idaho Code § 19-3702; I.R.C.P. 43(c) and 61; I.C.R. 52.

Comparable Federal Rule: Subsections (a), (c) and (d) are identical to F.R.E. 103(a), (c) and (d). Subsection (b) includes the language of F.R.E. 103(b) and adds language from I.R.C.P. 43(c).

Comment: Rule 103 continues the doctrine of harmless error and imposes certain obligations on litigants to make a record on evidence questions before error affecting a substantial right may, in the absence of plain error, be made the subject of appellate review. The rule further confers certain authority on the trial court with respect to the making of the record, provides procedures, and preserves the right of the appellate court to take notice of plain errors affecting substantial rights.

One of the developments in modern litigation is the increasing use of motions in limine to obtain evidentiary rulings before trial or before a certain point in a trial. Nothing in Rule 103 requires a judge to make in limine rulings or inhibits him from doing so.

The Idaho trial courts have allowed the use of motions in limine. In one instance the Idaho Court of Appeals has ruled that the trial court should make a ruling before trial and may allow an offer of proof to avoid ruling in a pre-trial vacuum. Johnson v. Emerson, 103 Idaho 350, 647 P.2d 806 (Ct. App. 1982).

Subsection (a) provides that error may not be predicated upon an erroneous evidentiary ruling unless a substantial right of a party is affected and then only if the affected party has made the required record. To make the necessary record, the rule requires that the parties timely inform the trial court of any objections to the admission or exclusion of evidence in order that the trial court be provided the information and opportunity to avoid or correct error during the proceeding.

The rule does not attempt to define what constitutes an error affecting a "substantial right," leaving this to precedent and determination on a case-by-case basis.

The rule incorporates existing Idaho law regarding harmless error. See Idaho Code § 19-3702; I.R.C.P. 61; and I.C.R. 52. See also State v. Campbell, 104 Idaho 705, 662 P.2d 1149 (Ct.App. 1983); State v. Wells, 103 Idaho 137, 139, 645 P.2d 371 (Ct.App. 1982); Gayhart v. Schwabe, 80 Idaho 354, 330 P.2d 327 (1958); Morford v. Brown, 85 Idaho 480, 381 P.2d 45 (1963).

The rule is also consistent with Idaho law to the extent that the determination of a "substantial right" is to be made on a case-by-case basis. See, e.g., State v. LePage, 102 Idaho 387, 630 P.2d 674 (1981).

Subsection (a)(1) requires that, if the ruling is one admitting evidence, a timely objection or motion to strike be made, stating the specific ground, unless the specific ground is apparent from the context. The language "if the specific ground was not apparent from the context" was included in the federal rule in recognition of the truism that, "[A] court may not rely on irrelevant evidence to support a verdict despite the fact it was received without objection, since, by definition, such evidence cannot prove or disprove a consequential fact." 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 103[02](Supp. 1983). "Failure to object may make incompetent evidence competent, but it cannot make irrelevant evidence relevant." Hirsch v. Immigration and Naturalization Service, 308 F.2d 562, 567 (9th Cir. 1962).

The rule would continue Idaho case law requiring timely and proper objections, see, e.g., Stewart v. Idaho Falls, 61 Idaho 471, 103 P.2d 697 (1940), but would extend existing Idaho case law by allowing appellate review of a ruling when an objection is not specifically stated if the ground for the objection is apparent from the record.

In State v. Chaffin, 92 Idaho 629, 448 P.2d 243 (1968), the Court ruled even though the ground for the objection was apparent from the record, that the specific ground was not stated and the evidentiary ruling could not be raised on appeal. The Committee believes this approach places too great a premium on "buzzwords" and encourages counsel to state every imaginable ground when making an objection. Its effect is to reward the party proffering inadmissible evidence and to punish the party represented by counsel who fails to use the requisite precise terminology, either because of the pressures of trial or the lack of knowledge or experience. In neither event is truth determined or justice served. Requiring the parties to inform the trial court of objections or proffers to provide the trial court the opportunity to avoid or correct error and requiring that an adequate record be made for appellate review serve a valid purpose in the truth finding process. Denying review because an objection is not made in precise terminology, even though the

ground for objection is apparent from the context of the record, does not serve this purpose. It then becomes nothing more than a technicality that frustrates the purpose of the rules as provided in Rule 102. The Committee suggests that the rule, as proposed, creates adequate safeguards against a claim being raised for the first time on appeal and thus satisfies the principal concern in Chaffin, if not the express language.

The rule would be consistent with Idaho case law that evidence introduced without objection stands as evidence in the case for all purposes and may support a finding "if sufficiently probative." In re Bowen. 95 Idaho 334, 508 P. 2d 1240 (1973); Hamby v. Simplot, 94 Idaho 794, 498 P. 2d 1267 (1972).

Subsection (a)(2) requires that, if the ruling is one excluding evidence, an offer of proof of the substance of the evidence must be made, unless the substance of the evidence was apparent from the context within which the questions were asked. The rule requires no specific form for an offer of proof other than as may be required by the court. However, if not in question and answer form, it must state specifically what the offerer seeks to establish and must show clearly that the evidence proffered is competent and otherwise admissible.

The rule is consistent with I.R.C.P. 43(c) which permits offers of proof and is in accord with Idaho case law regarding the necessity for employing offers of proof. See Koser v. Hornback, 75 Idaho 24, 265 P.2d 988 (1954); McKee v. Chase, 73 Idaho 491, 253 P.2d 787 (1953). Where the question shows its own purpose and makes apparent the answer, no offer of proof is necessary under existing Idaho authority. State v. White, 97 Idaho 708, 712 n. 5, 551 P.2d 1344 (1976), cert. denied, 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976).

With respect to the form of an offer of proof, the rule is consistent with Idaho law. See In re South, 91 Idaho 786, 430 P.2d 677 (1967).

Subsection (b) authorizes the trial court to augment the record to show the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The rule authorizes the court to require that the offer be made in question and answer form. It also provides that the same procedure may be followed in court trials unless a party requests a record in question and answer form, in which case it must be so made unless the evidence is clearly inadmissible.

The rule incorporates the third and fourth sentences of I.R.C.P. 43(c) virtually verbatim with the additional provision allowing the court to direct that the offer of proof be made in question and answer form.

Although not specifically required in existing I.R.C.P. 43(c), nor in proposed Rule 103(b), it should be noted that the Idaho Court has ruled that the record of excluded evidence should be made contemporaneously with the court's ruling. Openshaw v. Adams, 92 Idaho 488, 444 P.2d 409 (1968).

Subsection (c) requires that proceedings be conducted, to the extent practicable, out of the hearing of the jury. It is intended to eliminate any doubt that a question on which an offer of proof is based should not be asked in the presence of the jury.

The rule is consistent with I.R.C.P. 43(c) to the extent Rule 43(c) provides that the court may require that the offer be made out of the hearing of the jury.

Subsection (d) preserves the authority of the appellate court to review plain error affecting a substantial right of a party even when no adequate objection was interposed at trial. Rule 103(d) imposes no duty to do so.

The Federal Advisory Committee Notes indicate the word "plain" was added in keeping with the "plain error" language of Federal Rule of Criminal Procedure 52(b).

The terminology of Idaho case law indicates that "fundamental error" will justify review in the absence of a proper objection if it deprives defendant of due process. See, e.g., State v. Campbell, 104 Idaho 705, 662 P.2d 1149 (Ct.App. 1983); State v. Williams, 103 Idaho 635, 651 P.2d 569 (Ct.App. 1982); State v. Baker, 103 Idaho 43, 644 P.2d 365 (Ct.App. 1982), State v. Garcia, 100 Idaho 108, 594 P.2d 146 (1979); State v. White, 97 Idaho 708, 551 P.2d 1344 (1976) cert. denied, 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976); State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971).

"Fundamental error," as used by the Idaho Appellate Courts, is deemed to encompass Rule 103(d) language of "plain errors affecting substantial rights."

Action Recommended on Idaho Statutes and Rules: Repeal I.R.C.P. 43(c) except the first two sentences which are procedural in nature.

Rule 104. Preliminary Questions

(a) **Questions of admissibility generally.** Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy conditioned on fact.** Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) **Hearing of jury.** Hearings on the admissibility of confessions in criminal cases shall be conducted out of the hearing of a jury. Hearings on other preliminary matters in all cases shall be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness, if he so requests.

(d) **Testimony by accused.** The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) **Weight and credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

COMMENT TO RULE 104

Prior Idaho Statutes or Rules: Idaho Code § 9-102.

Comparable Federal Rule: Subsections (a), (b), (d) and (e) are identical to F.R.E. 104(a), (b), (d) and (e). Subsection (c) is similar to F.R.E. 104(c) except that F.R.E. 104(c) does not mandate that hearings on the admissibility of confessions in criminal cases be heard away from the jury.

Comment: Rule 104 is intended to establish who determines preliminary questions and how the determination is to be done.

Subsection (a) states the general rule that preliminary questions as to qualifications of witnesses, privileges or admissibility of evidence are to be decided by the court. Simply stated, the trial judge is expected to apply rules of evidence to the evidence offered at trial, but he is not to usurp the fact-finding function of the jury. Thus, the trial judge decides judicial notice issues under Article II, presumption issues under Article III, most issues that arise under Article IV, privilege questions under Article V, expert witness questions under Article VII, hearsay questions under Article VIII, and most best evidence questions under Article X (subject to those factual questions reserved to the jury under Rule 1008). Moreover, the judge decides what evidence is relevant according to the definition in Rule 401.

In making its determination the court is not bound by the rules of evidence except as to privileges. The court is often required to act as a trier of fact in determining whether or not certain conditions have occurred which make the proffered evidence admissible. If the question is factual in nature, the court should be empowered to hear any relevant reliable evidence. The rule allows the court, while making determinations on preliminary questions, to disregard all evidentiary rules except these dealing with privileges and to hear all evidence deemed relevant and reliable regardless of whether that evidence would be admissible at trial.

The proposition finds support in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), wherein the Supreme Court stated:

> There is much to be said for the proposition that in proceedings where the judge himself is considering the admissibility

> of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel. However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings.

Id. at 175, 94 S.Ct. at 995, 39 L.Ed.2d at 252. On the other hand, it is not intended as an open invitation for the court to ignore all rules of evidence.

The rule is consistent with existing Idaho law. See Idaho Code § 9-102. See also Howes v. Curtis, 104 Idaho 563, 661 P.2d 729, 734 (1983)("[T]he competence of a witness is first determined by the trial court."); Clark v. Gneiting, 95 Idaho 10, 501 P.2d 278 (1972)(it is the court's function to determine the qualifications and competency of witnesses as a matter of law); State v. Holm, 93 Idaho 904, 478 P.2d 284 (1970); State v. Elsen, 68 Idaho 50, 187 P.2d 967 (1948); State v. Cosler, 39 Idaho 519, 228 P. 277 (1924); State v. Riley, 83 Idaho 346, 362 P.2d 1075 (1961)(questions of the existence of a privilege are to be heard in the absence of the jury and determined by the trial court); State v. Hall, 88 Idaho 117, 397 P.2d 161 (1964)(the determination of questions preliminary to the admission of evidence is to be made by the trial court); Hard v. Spokane International Ry. Co., 41 Idaho 285, 283 P.2d 891 (1925).

To the extent subsection (a) provides that the court is not bound by the rules of evidence in determining preliminary questions, it is unclear whether this would affect existing Idaho law. Idaho Code § 9-102 is silent on the point and no Idaho case law has been found. Section 9-102 treats such preliminary questions as "questions of law . . . to be decided by the court when submitted and before the trial begins." I.R.C.P. 43(e) permits motions to be heard on affidavits, subject to the court's authority to direct that the matter be heard wholly or partly on oral testimony or deposition. However, I.R.C.P. 43(a) provides that in all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by the rules or by statutes and that the competency of witnesses shall be determined in like manner. This apparent conflict as to the competency of a witness and the ambiguity as to other preliminary questions would be resolved by adoption of Rule 104.

Subsection (b) creates a distinction between the court's role in determining preliminary questions of fact, involving the competency of evidence or witnesses, from its role in the determination of preliminary questions involving relevancy of

evidence that is conditional upon other evidence which has not already been offered.

In essence, subsection (b) reflects what remains for the jury: once the judge decides that evidence, if credited, is relevant and is not excluded under some other rule, it is for the jury to decide whether to credit that evidence. And, if one piece of evidence is helpful only if another piece is also believed, the judge leaves to the jury the decision whether to believe them both, after initially determining that the jury properly could do so and that neither piece is excluded by some other rule of evidence.

Idaho Code § 9-102 does not make this distinction. The rule is in accord with the practice of our courts and is not inconsistent with the language of Idaho Code § 9-102. See Ace Supply, Inc. v. Rocky-Mountain Machinery Co., 96 Idaho 183, 525 P.2d 965 (1974); Nottingham v. McCormick, 95 Idaho 188, 505 P.2d 1260 (1973). Adoption of the rule would further manifest the distinction between conditional admission which is approved and the practice of trial courts in reserving rulings on objections to evidence which is condemned. See Fidelity Acceptance Corporation v. Erickson, 62 Idaho 152, 108 P.2d 1031 (1941); Seeley v. Security Nat. Bank of Fairfield, 40 Idaho 574, 235 P. 976 (1925).

Subsection (c) mandates that hearings on the admissibility of confessions in criminal cases be conducted out of the hearing of the jury. Other preliminary matters are to be similarly heard out of the hearing of the jury when justice requires or when requested by an accused if he is a witness.

The rule is consistent with existing Idaho law. See Idaho Code § 9-102; State v. Hall, 88 Idaho 117, 397 P.2d 261 (1964).

Subsection (d) is designed to encourage participation by the accused in the resolution of preliminary questions. The rule permits the defendant to strictly limit his testimony on direct and thus on cross examination to those matters relevant to the preliminary question. The rule eliminates the possibility that a defendant who takes the stand to testify solely with respect to the preliminary question can be subjected to cross-examination as to other issues in the case.

The rule does not resolve the question whether the testimony of a criminal accused given on preliminary matters may be used at trial on the issue of guilt or for impeachment purposes. In this regard attention is directed to Simmons v. U.S., 390 U.S. 377 (1968); Harris v. New York, 401 U.S. 222

(1971); Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed.2d 503 (1954); United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980); Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971).

No similar Idaho statute, rule or decision relating specifically to preliminary matters has been found. See commentary to Rule 611(b) for discussion of Idaho decisions relevant to the scope of cross-examination in general where the accused takes the stand.

Subsection (e) explicitly adds that once evidence is admitted, a party who had opposed its admission can offer evidence suggesting that the jury should give it little weight.

The rule is useful to make clear the fact that the judge's decision on admissibility does not preclude further evidence relevant to the weight or credibility of the admitted evidence.

The Committee found no Idaho statute, rule or decision bearing on the matters controlled by this subsection.

Action Recommended on Idaho Statutes and Rules: Repeal Idaho Code § 9-102.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

COMMENT TO RULE 105

Prior Idaho Statutes or Rules: I.R.C.P. 51.

Comparable Federal Rule: Identical to F.R.E. 105.

Comment: Rule 105 recognizes the practice of admitting evidence as to one party, but not another, or for a limited purpose. The rule places further emphasis on the limitation by requiring an appropriate instruction, but only if requested.

Rule 105 must be read in conjunction with Rule 403, which requires the exclusion of evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Where a limiting instruction will not be adequate to prevent unfair prejudice, evidence may have to be excluded. See, e.g., Bruton v. United States, 391 U.S 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The rule places the burden of requesting this instruction on the affected party. In the absence of such a request, the trial judge's failure to give such a limiting instruction may be examined only for "plain error." See, e.g., United States v. Bridwell, 583 F.2d 1135, 1140 (10th Cir. 1978); United States v. Barnes, 586 F.2d 1052, 1058 (5th Cir. 1978). However, if the failure to give the limiting instruction affects a substantial right the court may be required to raise the point sua sponte if it determines that "plain error" would otherwise result. See Rule 103(d).

Although it has been recognized in Idaho that evidence introduced for a certain purpose should be restricted to that purpose, Advance-Rumeley Thresher Co. v. Jacobs, 51 Idaho 160, 4 P.2d 657 (1931), no Idaho statute governs a request for a limiting instruction. I.R.C.P. 51 provides a similar procedure for requesting instructions on the law.

IDJI 127 provides an appropriate form of instruction regarding the limited admission of evidence. Failure to request a limiting instruction may preclude raising the issue on appeal. See, e.g., McDowell v. Geokan, 73 Idaho 430, 252 P.2d 1056 (1953).

Action Recommended on Idaho Statutes or Rules: None required.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

COMMENT TO RULE 106

Prior Idaho Statutes or Rules: I.R.C.P. 32(a)(4).

Comparable Federal Rule: Identical to F.R.E. 106.

Comment: Rule 106 provides guidance when presented with the situation where evidence is being taken out of context from a writing or recorded statement. It is intended to avoid the creation of misleading impressions which may be difficult or impossible to erase at a later time. It does so by affording an adverse party the right to demand the simultaneous admission of any other part of the offered evidence or any other related writing or recorded statement. The trial judge decides the extent to which an entire writing or recorded statement, or related evidence, should be admitted in order to put the offered evidence in context and to promote its fair consideration.

Any evidence offered under this rule must itself be admissible. Rule 106 affects only the time at which evidence may be admitted; it does not modify the rules of admissibility. See, e.g., United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir. 1981).

If the other evidence needed to supply the context is not available or is inadmissible, it is open to the trial judge to rely on Rule 403 and exclude the originally proffered evidence on the ground that, taken out of context, it would mislead or confuse the jury.

The rule is consistent with I.R.C.P. 32(a)(4) which provides that if only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. It is also consistent with I.C.R. 15(e)(4).

The rule may modify Rosenberg v. Toetly, 94 Idaho 413, 489 P.2d 446 (1971) where the Court indicates that if one party is allowed to introduce only part of a writing the other party may prove the balance of the contents. The Court in Rosenberg did not specifically consider the question of when the balance of the report should be admitted. The procedure affirmed in Rosenberg appears to have involved the admission of the full report at some point subsequent to the testimony as to portions of its contents. Thus, this rule may extend the Court's ruling in Rosenberg, but the Committee believes this extension does not contradict or overrule Rosenberg.

To the extent this rule may modify Rosenberg the Committee believes that the better approach is that taken by F.R.E. 106 and I.R.C.P. 32(a)(4). The Committee believes that fairness requires that a party should not be subjected to the risk that the selective, biased and out of context tender of portions of a writing or recorded statement may create a mistaken impression in the minds of the trier of fact. The rule would afford the prejudiced party an opportunity to avoid this risk by forcing a full disclosure of the contents at the outset. The Committee believes that these justifications are in accord with the Court's reasoning in Rosenberg.

The rule is limited in application to writings and recorded statements. The Committee believes this limitation is appropriate. The completeness of the disclosure can be easily verified in these instances and there is no risk of having the trial sidetracked into an attempt to verify the completeness of the disclosure, as would be the case if the rule applied to unrecorded conversations.

Action Recommended on Idaho Statutes and Rules: None required.

INTRODUCTORY COMMENT TO ARTICLE II

JUDICIAL NOTICE

Article II consists of a single rule which deals with judicial notice of adjudicative facts. It is the only evidence rule concerning judicial notice.

Adjudicative facts constitute only a portion of those facts and matters of which a court may take notice. There are, for example, nonadjudicative, or legislative facts, or the law of a sister state or a foreign country which may be the object of judicial notice pursuant to statute, rule or the common law. These are not governed by Rule 201, being deemed more procedural than evidentiary in nature.

In most respects, the rule applies uniformly to civil and criminal cases. Subdivision (g), however, provides that a jury in a criminal case need not accept as conclusive those facts judicially noticed while a jury in a civil case is instructed that it has no such discretion.

Idaho Rule 201 is identical to Federal Rule 201.

Rule 201 has generated few, if any, problems for the federal courts, primarily because it is a codification of the common law. A potential problem concerns the interaction between the Sixth Amendment right to a jury trial recognized to an extent in Rule 201(g), and Rule 201(f) which permits judicial notice of adjudicative facts to be taken after trial or on appeal. The issues are addressed in the commentary to Rule 201. See generally Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig. 32-41 (1983).

Article II.

JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

COMMENT TO RULE 201

Prior Idaho Statutes or Rules: Idaho Code § 9-101; I.R.C.P. 44(d).

Comparable Federal Rule: Identical to F.R.E. 201.

Comment: Rule 201 is intended to make clear the application or use of judicial notice of facts and provide direction to the courts regarding judicial notice of adjudicative facts.

It is intended to encompass the provisions for judicial notice of adjudicative facts in Idaho Code § 9-101 and allow the court to take judicial notice of other adjudicative facts within the definition in Rule 201 when the requirements of the rule have been satisfied.

Subsection (a) makes clear that Rule 201 is intended to provide guidance only with respect to judicial notice of adjudicative facts, i.e., those facts necessary to resolve issues that relate only to the particular case. For example, if relevant, the court may take judicial notice of the adjudicative fact that the City of Boise, Idaho is in Ada County. Shaw v. Martin, 20 Idaho 168, 117 P. 858 (1911). See also, e.g., W. L. Scott, Inc. v. Madras Aerotech, Inc., 103 Idaho 736, 653 P.2d 791 (1982)(appropriate discount rate to determine damages); Cather v. Kelso, 103 Idaho 684, 652 P.2d 188 (1982)(county offices are closed Saturdays); Justice v. Government Emp. Ins. Co., 100 Idaho 293, 597 P.2d 16 (1979)(camper units are very common in the west).

Authority for the Idaho courts to take judicial notice of adjudicative facts is provided in Idaho Code § 9-101 and I.R.C.P. 44(d). Although Idaho Code § 9-101 appears quite limiting on its face, it has been held that it is not exclusive. See City of Lewiston v. Frary, 91 Idaho 322, 420 P.2d 805 (1966).

The rule does not cover judicial notice of law (foreign, sister state, and domestic) which is considered to be a question of law and is governed by I.R.C.P. 44(d) and Idaho Code § 9-101.

The rule does not cover "legislative facts," i.e., those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court, or in the enactment of a legislative body, and that have legal significance beyond the particular case. An example would be notice of the fact proposition that "spouses will communicate less if they are not granted a

privilege covering their confidences." See Federal Advisory Committee Notes to F.R.E. 201. Other examples may include notice of journals of legislative bodies to determine the legislative intent, Knight v. Employment Security Agency, 88 Idaho 262, 398 P.2d 643 (1965); the social and economic setting in which a piece of legislation came into being, Loomis v. Gray, 60 Idaho 193, 90 P.2d 529 (1939) overruled on other grounds, William v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1977); and, the general decline in the purchasing power of the dollar, Fuller v. Fuller, 101 Idaho 40, 607 P.2d 1314 (1980).

Further the rule does not cover "non-evidence facts," i.e., those used to give meaning to evidence. An example would be notice of the fact that a vehicle traveling at a higher rate of speed takes longer to stop than one traveling at a lower speed. See Federal Advisory Committee Notes to F.R.E. 201. Other examples may include notice of the fact that the eye is most sensitive, and serious injury thereto causes intense pain, Pierstorff v. Gray's Auto Shop, 58 Idaho 438, 74 P.2d 171 (1937); that water seeks its level, Larsen v. Callahan Canning Co., 53 Idaho 746, 27 P.2d 967 (1933); and, that soil is less compact and less cohesive after it has been excavated than before it was disturbed, Yellowstone Pipe Line Co. v. Kuczynski, 283 F.2d 415 (9th Cir. 1960).

The fact that Rule 201 does not cover or provide guidance with respect to judicial notice of law, legislative facts or non-evidence facts does not mean that the court cannot take judicial notice of those matters. Rather, it means that those matters are governed by applicable statutes, rules of procedure or controlling common law and that judicial notice of those matters can be taken when permitted by that authority.

Subsection (b) maintains the traditional limitation on the kind of adjudicative fact that may be noticed; one not subject to reasonable dispute. Requiring that the fact be generally known within the territorial jurisdiction of the trial court or be capable of accurate and ready determination by resort to sources of reference is consistent with Idaho Code § 9-101(8). See also City of Lewiston v. Frary, 91 Idaho 322; Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952); Fawcett v. Irby, 92 Idaho 48, 436 P.2d 714 (1968).

Subsection (c) permits the court to take judicial notice regardless of whether it is requested by a party. This is consistent with existing Idaho law. See Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949).

Subsection (d) mandates that the court take judicial notice of a fact if requested by a party and supplied with the necessary information. The rule would change Idaho law to the extent that the court would be required to take judicial notice if requested and if the necessary information is provided.

Subsection (e) requires that the court, upon timely request, afford a party an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. The request may be made after notice has been taken if the objecting party had no prior notification. The rule would create new law, there being no prior Idaho law. It is based on the belief that the opportunity to be heard is fundamental to our judicial system.

Subsection (f) permits judicial notice to be "taken at any stage of the proceeding." This provision contemplates the taking of judicial notice after trial by the trial court on post-trial motions or by an appellate court on appeal. See, e.g., United States v. Jones, 580 F.2d 219 (6th Cir. 1978)(appellate court noticed status of telephone company as common carrier of interstate communications).

The court should exercise caution before taking judicial notice of facts on post-trial motions or on appeal in criminal proceedings in view of Rule 201(g), which contemplates that a jury in a criminal case should be permitted to determine all the facts in a proceeding. Judicial notice at this stage would recognize a fact as true without a jury determination. More importantly, judicial notice of an adjudicative fact on appeal or otherwise after trial, precluding the jury from determining the fact sought to be noticed, could be viewed as violating the Sixth Amendment right to trial by jury. See, e.g., United States v. Dior, 671 F.2d 351, 358 n.11 (9th Cir. 1982). If the fact to be noticed is deemed legislative, not adjudicative, in nature, a requirement that it be determined by the jury may not apply. See, e.g., United States v. Bowers, 660 F.2d 527 (5th Cir. 1981) (a fact that does not change from case to case but, instead, remains fixed was deemed legislative in nature).

To the extent that the rule permits a district court, on trial de novo on appeal, to take judicial notice of facts judicially noticed in the court below, it is consistent with Idaho law. City of Lewiston v. Frary, 91 Idaho at 328. To the extent the rule permits judicial notice after trial or on appeal on the record, it probably creates new law for Idaho. No Idaho decision on this aspect of the rule has been found. Idaho Code § 9-101 provides that "[c]ourts" take judicial notice of facts enumerated in the statute. It does not restrict the power to trial courts,

nor does it expressly include appellate courts. The rule would remove any question in this regard.

Subsection (g) recognizes that a jury in a criminal case should be permitted to determine all the facts in the proceeding. To allow otherwise may deprive the accused of the Sixth Amendment right to trial by jury. The rule thus provides that in a civil case the jury shall be instructed to accept the noticed fact as conclusive but, in a criminal proceeding, the court must instruct the jury "that it may, but is not required to, accept as conclusive any fact judicially noticed."

The federal courts have recognized a distinction between adjudicative facts and the legal significance of those facts. Thus, the jury in a criminal case may be instructed that if it finds that the defendant traveled from Idaho to Washington, then the defendant traveled in interstate commerce. Similarly, in prosecutions for the sale of controlled substances, proof that a substance is, for example, cocaine hydrochloride has been found sufficient to sustain an instruction that the substance is a Schedule II controlled substance. See, e.g., United States v. Coffman, 638 F.2d 192 (10th Cir. 1980), cert. denied, 451 U.S. 917 (1981). See also United States v. Bowers, 660 F.2d 527 (5th Cir. 1981).

The rule is consistent with Idaho Code § 9-102 as applied to civil cases and is consistent with recent Idaho case law as applied to criminal cases. See State v. Williams, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982). The Committee is of the opinion that because a verdict cannot be directed against the accused in a criminal case, the court should not be allowed to direct the jury to accept a fact as conclusive on the basis of judicial notice.

The Committee is of the opinion that Rule 201 would have little impact on existing Idaho law with the exception that judicial notice of adjudicative facts would be mandatory if requested and properly submitted under Rule 201, whereas it has been left to judicial discretion with the suggestion that it be used when possible. See City of Twin Falls ex rel. Cannon v. Koehler, 63 Idaho 562, 123 P.2d 715 (1942); City of Lewiston v. Frary, 91 Idaho 322. Adoption of the rule may also be an expansion of the Idaho law to the extent that it permits judicial notice to be taken after trial or on appeal.

Adoption of Rule 201 would not affect judicial notice as provided under specific statutes such as Idaho Code § 50-104 (authorizing judicial notice of proof of corporation existence of municipality), and § 61-209 (authorizing judicial notice of P.U.C. seal).

Action Recommended on Idaho Statutes and Rules: Amend I.R.C.P. 44(d) to delete the words "of facts" from the phrase "judicial notice of facts" in line two of the rule, and add after the words "as provided by law" the language "or the Idaho Rules of Evidence."

INTRODUCTORY COMMENT TO ARTICLE III

PRESUMPTIONS

Article III covers what at common law were known as rebuttable presumptions, presumptions which invite rebuttal evidence and are not conclusive in the face of the rebuttal evidence. Idaho Article III, unlike the Federal Article III as adopted by Congress, covers both civil and criminal cases.

Article III contains three rules. Rule 301 governs in civil cases and provides the basic framework for treatment of rebuttable presumptions where state law defines the rights, duties and defenses of the parties. Rule 302 defers to federal law where that law defines the rights, duties and defenses of the parties. Rule 303 governs in criminal cases and, based on constitutional standards, provides for the treatment of inferences directed against an accused.

The Federal Advisory Committee and the Supreme Court approved the Morgan-McCormick approach to presumptions - the presumption shifts the burden to the party opposing it to disprove the fact. Congress, as did the Idaho Committee, preferred the Thayer view - the burden of persuasion does not shift because of the operation of a presumption, unless a specific statute or another rule provides for a shift in the persuasion burden. Consequently, as to Rule 301 the Federal Advisory Committee's notes are of little value beyond explaining the differences in the two approaches. Congress rejected a proposed Rule 303 covering presumptions in criminal cases only because the subject was being considered in proposals to revise the criminal code. No action has yet been taken.

The Article does not cover "conclusive presumptions," which are deemed to be rules of law created by statute.

Rules 301 and 302 have caused no significant problems in the judicial handling of presumption problems in civil cases in the federal courts, perhaps because Rule 301 tracks the traditional Thayer ("bursting bubble") approach rather closely. See generally Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig. 42-49 (1983).

Article III.

PRESUMPTIONS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

COMMENT TO RULE 301

Prior Idaho Statutes or Rules: Idaho Code § 28-1-201(31).

Comparable Federal Rule: Identical to F.R.E. 301 except to substitute the word "statute" for "Act of Congress."

Comment: Rule 301 is intended to treat all presumptions, not specifically excepted by statute, as shifting only the burden of producing evidence on the issue to the party opposing the presumption. The presumption does not shift the burden of persuasion (burden of proof) to the opponent, nor does the presumption itself have the weight of evidence, although the underlying facts giving rise to the presumption may have their own evidentiary weight for whatever inferences may be drawn from them. This method of treating rebuttable presumptions has been referred to as the Thayer or "bursting bubble" theory. See Speck v. Sarver, 128 P.2d 16, 19 (Cal. 1942) (dissent, Traynor, J. wherein he reviews in depth the various theories regarding the treatment of rebuttable presumptions).

Rule 301 imposes on the opponent of a presumed fact the burden to go forward and produce evidence sufficient to permit a jury to find the nonexistence of the fact. If he does not do so, then the presumption operates to establish the existence of the fact.

However, if the opponent produces such evidence the presumption "disappears," and the jury must weigh the evidence proving the nonexistence of the fact against any evidence offered to prove it's existence, which may include inferences from the evidence which gave rise to the presumption.

The rule does not attempt to further define how much rebuttal evidence is required to make the presumption disappear or, if the presumption disappears, when a directed verdict or summary judgment for one party might be proper in light of the evidence actually presented by both sides. These questions must be left to the determination of the court on a case-by-case basis.

The quantum of evidence required to find the fact rebutted is intended to be enough evidence to permit the trier of fact to find the nonexistence of the fact, applying the burden of proof as it may be assigned on the issue. There is no increased measure of persuasion required to rebut the existence of the fact even though the proponent of the presumption may have a higher burden of proof than a mere "preponderance." See, e.g., Breeden

v. Weinberger, 493 F.2d 1002, (4th Cir. 1974). See also 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 301[02](Supp. 1983).

The question must be submitted to the jury unless the court believes that reasonable minds could not come to a different conclusion as to the existence or nonexistence of the basic or presumed fact. This is the same standard that the Idaho courts generally apply in determining whether a verdict may be directed pursuant to I.R.C.P. 50. See, e.g., Smith v. Great Basin Grain Co., 98 Idaho 266, 561 P.2d 1299 (1977).

When the evidence against the presumption is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved the court should instruct the jury, as it would regarding inferences, that the nonexistence of the fact presumed has been established as a matter of law. On the other hand, if the opponent of the presumption fails to produce sufficient evidence to meet the presumption, the jury should be instructed that the presumed fact has been established as a matter of law.

Although Rule 301 is silent with respect to how a jury is to be instructed when a presumption has been invoked, the presumption should not be mentioned to the jury.

Failure to object to an improper instruction, i.e., one that shifts the burden of producing evidence and the burden of persuasion, waives the issue and it may not be considered on appeal. See Sharp v. Coopers & Lybrand, 649 F.2d 175 (3rd Cir. 1981), cert. denied, 455 U.S. 938, 102 S. Ct. 1427, 71 L.Ed. 2d 648 (1982).

For examples of the application of Rule 301, see Presbyterian/St. Luke's Medical Center v. NLRB, 653 F.2d 450 (10th Cir.) 455 U.S. 987, 102 S.Ct. 1608, 71 L.Ed.2d 846 (1981); N.L.R.B. v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921, 99 S.Ct. 2847 (1979).

Rule 301 would be consistent with the definition of presumptions incorporated in the Idaho Uniform Commercial Code. Section 28-1-201(31), Idaho Code, provides that "[p]resumption or presumed means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." This is the "bursting bubble" type of presumption. The same is true under § 28-41-301(31) of the Idaho Credit Code (1983).

The Idaho Committee agrees that a presumption is not actual evidence but, rather, is a procedural device to aid the party with the burden of proof to establish the existence of a fact as a matter of law in the absence of credible evidence to

the contrary and to apportion the burden of going forward with the introduction of such evidence. See Speck v. Sarver, 128 P.2d at 20-21.

Rebuttable presumptions arise in Idaho in a number of ways: as common law presumptions, e.g., the presumption against death by suicide; by statutory creation of a presumption, e.g., the presumption of legitimacy provided in Idaho Code § 7-1119; or by statutory assignment of "prima facie" weight to certain types of evidence, e.g., the certificate of an acknowledgment as prima facie proof of execution of a writing under Idaho Code § 9-409.

Where the statute creating the presumption expressly provides the force that the presumption shall carry, e.g., to shift the burden of proof, or provides the weight of evidence required to rebut the presumption, it is intended that the statute shall govern. See, e.g., Idaho Code § 7-1119.

Rule 301 would change the rule stated in those Idaho decisions which have treated a rebuttable presumption as shifting the burden of persuasion as well as production of evidence, or as having evidentiary value of its own. See, e.g., Haman v. Prudential Ins. Co. of America, 91 Idaho 19, 415 P.2d. 305 (1966). See also Freiburghaus v. Freiburghaus, 103 Idaho 679, 651 P.2d 944 (Ct.App. 1982)(dicta - proof of prima facie case shifts burden to overcome presumption of marriage by "clear and positive proof" to the contrary).

The rule is inconsistent with IDJI 126 (1982), which would instruct a jury to weigh a presumption as a form of evidence. Instructing a jury to weigh a presumption as a form of evidence is perceived to be prejudicial because it enables the jury to attribute more weight to the presumption than to the evidence against it, no matter how extensive or persuasive.

The Committee believes that it is unreasonable to expect a jury to "weigh" a presumption in any meaningful way but that a jury is capable of evaluating the factual inferences underlying a presumption; that the allocation of the burden of proof or persuasion on an issue should be made based on consideration of the policies involved in the particular issue before the court, rather than by any automatic operation of the presumption; and that the primary function of a presumption should be to relieve the party who has the benefit of the presumption from presenting further proof of the presumed fact until the opposing party has presented substantial evidence of the non-existence of the fact.

An inference of fact is defined in IDJI 123 to be one which may logically and reasonably be drawn from another fact or group of facts established by the evidence. As distinguished from a presumption, the Idaho Court of Appeals has said: "The fundamental difference between an inference and a presumption is

that an inference is permissive; a trier of fact may choose whether or not to draw it. A presumption, on the other hand, attaches definite probative value to certain facts. If the presumption is conclusive, it mandates a particular conclusion. If it is rebuttable, it mandates the conclusion in the absence of contradictory evidence." State v. Williams, 103 Idaho 635, 639, 651 P.2d 569, 573 (Ct.App. 1982).

Rule 301 would have no effect upon conclusive presumptions, which are really nothing more than disguised rules of law created by statute. See, e.g., Idaho Code § 30-1-56, providing that the certificate of incorporation shall be conclusive evidence that all conditions precedent required of the incorporators have been met and that the corporation has been incorporated.

Action Recommended on Idaho Statutes or Rules: Revise IDJI 126 (1982) to conform to Rule 301.

Rule 302. Applicability of Federal Law in Civil Cases

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which Federal law supplies the rule of decision is determined in accordance with Federal law.

COMMENT TO RULE 302

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Same as F.R.E. 302, only conversely it applies state law.

Comment: Rule 302 recognizes that parallel jurisdiction in state and federal courts exists in many instances. The rule provides that when a federally created right is litigated in an Idaho court, any prescribed federal presumption shall be applied.

The rule is intended to apply only to those situations in which the presumption operates on a substantive element of a claim or defense. The rule would not apply to federal law when the presumption operates upon a lesser aspect of the case, concerning an issue which is not a substantive element of the case.

The Committee believes that the rule is desirable for the certainty and consistency it provides. The alternative to this rule would be to have no rule on this issue, thus leaving the question open to a case-by-case determination. No Idaho statutory or case law has been found.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 303. Presumptions in Criminal Cases

(a) Scope. Except as otherwise provided by statute, in criminal cases presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) Submission to jury. The court shall not direct the jury to find a presumed fact against the accused. The court may submit the question of guilt or of the existence of the 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 the presumed fact beyond a reasonable doubt.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the court in instructing the jury shall not charge in terms of a presumption. The charge shall include an instruction to the effect that the jurors have a right to draw reasonable inferences from facts proved beyond a reasonable doubt and may convict the accused in reliance upon an inference of fact if they conclude that such inference is valid and if the inference convinces them of guilt beyond a reasonable doubt and not otherwise.

COMMENT TO RULE 303

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: None. A similar proposed Federal Rule 303, which referred only to presumptions, was rejected by Congress in 1974 since the subject of presumptions in criminal cases was being dealt with in proposals to revise the criminal code. No code has been adopted as of December 1, 1983.

Comment: Rule 303 applies to presumptions directed against a defendant in a criminal case. Under Rule 303, "a presumption is a rule of procedure which provides that when proof establishes a basic fact, an inference may, not must, be drawn that another consequential, material, fact termed the presumed fact, also exists unless and until a specified condition is met." 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 303[02](Supp. 1983). Compare to the rule in a civil case where the conclusion must, not may, be drawn, if no evidence is offered to rebut the existence of the presumed fact.

Rule 303 is based on constitutional standards that have evolved from decisions of the United States Supreme Court. See, e.g., Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965); United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Subsection (a) states the scope of the rule. It makes clear that Idaho statutes using the phrase "prima facie evidence" or "prima facie proof" will be regarded as creating presumptions within the meaning of this rule.

The exception in Rule 303(a), "as otherwise provided by statute," recognizes those statutes that require the accused to assert and prove affirmative defenses or shift the burden of proof to defendant to explain. See, e.g., Idaho Code § 37-2745 imposing the burden of production and the burden of proof on the defendant to rebut the statutory presumption that a person does

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not have a valid prescription to possess a controlled substance. The Committee expresses no opinion whether statutes such as the example given will survive the constitutional standards discussed in the cases cited above. No cases have been found that relate to this particular statute.

Subsection (b) recognizes that presumptions in criminal prosecutions pose problems not involved in civil cases. The rule mandates that the court shall not direct the jury in a criminal proceeding to find a presumed fact against the accused. Since a verdict of guilty can never be directed, it follows that the court cannot direct the jury to find a presumed fact against the accused as to any element of the offense. The use of a presumption cannot take away from the jury any evidentiary issue, and the court can submit the existence of the presumed fact to the jury only if the jury could find guilt or the presumed or inferred fact beyond a reasonable doubt based on the evidence as a whole.

The rule contemplates that, as with presumptions, the jury cannot be directed to find the existence of an inferred fact against the accused.

Subsection (c) permits the court to instruct the jury of the existence of a presumed fact in terms that are permissive, but not mandatory, and prohibits charging in terms of a presumption.

In recognition that the jury may be instructed in terms of permissive inferences, the rule requires that the jury be informed that the fact from which an inference may be drawn must be proved beyond a reasonable doubt.

Rule 303 is consistent with Idaho case law to the extent it prohibits the court from shifting the burden of proof to an accused on any essential element of the offense charged and to the extent it prohibits the court from directing a jury to find a presumed or inferred fact. See State v. Trowbridge, 97 Idaho 93, 540 P.2d 278 (1975); State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978); and State v. Fuchs, 100 Idaho 341, 597 P.2d 227 (1979).

Rule 303 is consistent with State v. Williams, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), holding that the jury may be instructed only in terms of permissive inferences and not by reference to presumptions.

Action Recommended on Idaho Statutes or Rules: None required.

INTRODUCTORY COMMENT TO ARTICLE IV

RELEVANCY AND ITS LIMITS

Article IV treats the subject of relevancy and the limitations imposed on the admissibility of relevant evidence by various policy considerations inherited from the common law, embodied in statutes or other rules, or articulated definitively in the Rules themselves.

Rule 401 sets forth a broad definition of "relevant evidence" which subsumes the common law concept of materiality. Rule 402 states the general rule that relevant evidence is admissible and irrelevant evidence is inadmissible. Rule 403 articulates the fundamental balancing test under which relevant evidence may properly be excluded if its probative value is substantially outweighed by any of several considerations, including prejudice, confusion or delay.

Rule 404 and 405 deal, respectively, with the admissibility of character evidence for substantive purposes and the proper methods of proving it. They should be read in conjunction with Rule 608 which prescribes the parameters of using character evidence for attacking or rehabilitating credibility. Rule 406 covers the related question of the admissibility of evidence of habit or routine practice.

Rules 407 through 412 deal with specific recurring relevancy problems. Rule 407 addresses the admissibility of evidence of subsequent remedial measures. Rule 408 concerns proof of compromise and offers to compromise. Rule 409 precludes evidence that a party paid, or offered to pay, any other party's medical expenses and expenses relating to death or property loss. Rule 410 deals with the general inadmissibility of guilty or nolo contendere pleas and related statements with an exception to permit limited use of statements for impeachment purposes. Rule 411 covers evidence of liability insurance. Rule 412 addresses the admissibility in rape and sexual assault cases of evidence of the past sexual behavior of the victim. Finally, Rule 413 addresses the admissibility of evidence of the proceedings of medical malpractice screening panels.

The proposed Idaho Article IV is identical to the existing Federal Article IV with the following exceptions: Rule 402 makes relevancy a question for determination under these Rules or other rules promulgated by the Idaho Supreme Court and fails to give recognition or effect to statutes which exclude evidence that is relevant and otherwise admissible; Idaho Rule 409 is expanded to encompass expenses relating to death or property loss; Rule 410 permits limited use of statements for

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impeachment purposes; Rule 412 modifies notice requirements; and, Rule 413 provides that evidence of proceedings of medical malpractice screening panels is inadmissible in civil actions.

The application of Federal Article IV Rules has caused few problems in those courts. Questions have been raised under Rule 403 concerning the necessity for making a record of the ruling, how to treat conflicts between substantive law evidentiary provisions and the rule, and whether the rule applies in trials by court. Under Rule 404 issues have been raised regarding the quantum of proof required to establish another crime as fact and whether evidence of another crime is admissible before the permissible issue, e.g., intent, is placed in dispute. These are problems of application that vary from case to case and cannot be resolved by rule.

Rule 407 has been the subject of a significant dispute as to whether it applies in strict liability cases. There is some division among the federal courts. For reasons stated in the Comment to Rule 407, the Idaho Committee determined that the law for Idaho on this issue should be left for development on a case-to-case basis.

Under Rule 410, questions have been raised whether it applies to agents of the prosecutor or to non-lawyer statements made in performance of the plea bargain or to statements by the government. Concerns under Rule 411 have involved attempts to "smuggle" evidence of insurance before the jury despite the policy underlying the rule and establishment of standards for admission of such evidence. Again, these are matters relating to application of the rules in the varying circumstances of each case and are best resolved on a case-to-case basis.

Rule 412 is the Privacy Protection for Rape Victims Act of 1978. Although some commentators have expressed concerns, no significant problems have been reported, perhaps because the rule has been in effect only since 1979. See generally Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig. 52-91 (1983).

Article IV.

RELEVANCY AND ITS LIMITS

Rule 401. Definition of Relevant Evidence

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

COMMENT TO RULE 401

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 401.

Comment: Rule 401 defines the kind of evidence that Rule 402 makes admissible, subject to the numerous exceptions provided in Article IV and other statutes and rules.

It is a general rule intended to provide guidance to the court when exercising its broad discretion in determining whether to admit or exclude proffered evidence. It is only one of several rules the court must apply in the process of ruling on evidentiary questions. Other considerations include whether the probative force of the evidence outweighs its prejudicial effect under Rule 403, whether other requirements of admissibility have been satisfied such as authenticity under Article IX, or whether the evidence is nevertheless excludible by reason of constitutional grounds, statutory restrictions, procedural rules, or by these rules. Specific recurring relevancy problems are treated in Rules 404 through 412.

"Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Federal Advisory Committee Note to Rule 401. In this context, Rule 401 provides two standards for determining whether evidence is relevant: (1) does it tend to prove a fact that is "of consequence to the determination of the action;" and (2) does it have any tendency to make the evidence of that fact "more probable or less probable than it would be without the evidence."

The first standard is traditionally referred to as requiring that proferred evidence be "material" to the issues in the case. The term "material" was rejected by the Federal Advisory Committee as being "loosely used and ambiguous" in favor of language adopted from the California Evidence Code. The Idaho Committee agrees with this view.

Whether the evidence tends to prove a fact that is "of consequence to the determination of the action" should not be narrowly construed to mean only evidence that directly tends to prove a fact bearing on the issues as framed by the pleadings or issues that may be framed by the pleadings if amended within the discretion of the court under I.R.C.P. 15(b). The Idaho Committee agrees with the broad interpretation of the rule by the federal courts. Evidence may be indirectly consequential when

offered to attack or support the credibility of a witness, to explain or aid the factfinder in understanding other consequential evidence, or to lay foundation for testimony or the admission of other consequential evidence. See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979), cert. denied 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980); Travis v. United States, 269 F.2d 928 (10th Cir. 1959); United States v. Iaconetti, 406 F. Supp. 554 (E.D. N.Y.) aff'd 540 F.2d 574 (2nd Cir. 1976), cert. denied, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977); United States v. Giese, 597 F.2d 1170 (9th Cir. 1979), cert. denied, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979).

Rule 401 requires only that the proffered evidence have "any tendency" to make the existence of the fact more or less probable. Each item of evidence need not alone have probative value if the cumulative effect is probative. See, e.g., United States v. Harris, 661 F.2d 138 (10th Cir. 1981); Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2nd Cir. 1981); Bowden v. McKenna, 600 F.2d 282 (1st Cir.), cert. denied, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979).

Remoteness of the proffered evidence from the issue being proved may be considered in determining probative value under Rule 401. See, e.g., Kaufman v. United States, 268 F. Supp. 484 (E.D. Miss. 1967), United States v. Ives, 609 F.2d 930 (9th Cir.), cert. denied, 445 U.S. 919, 100 S.Ct. 1283, 63 L.Ed.2d 605 (1980).

There is no statutory definition of "relevant evidence" in Idaho; however, Rule 401 would be consistent with existing Idaho case law. See State v. Farris, 48 Idaho 439, 466, 282 P.489 (1929), ("[t]he rule no doubt is that any legal evidence which logically tends to prove or disprove a material fact in issue is relevant and therefore admissible, provided it is not too remote or speculative or otherwise of such slight probative value as to justify the court in excluding it on the ground of immateriality.").

In State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972), the Idaho Supreme Court stated: "[r]elevancy, as defined in the Idaho cases, encompasses two main aspects. The first, traditionally denominated 'materiality,' requires that the issue for which the specific evidence is offered to prove be a material issue in the case. The second aspect of relevancy concerns the probative value of the offered evidence. Evidence offered to prove a material issue in the case is not relevant unless it logically tends to prove or disprove that issue." 94 Idaho at 809. See also Williams v. Idaho Potato Starch Co., 73 Idaho 13, 22, 245 P.2d 1045, 1050 (1952), ("[i]t is fundamental that evidence, to be admissible, must relate to and be confined to the matter in issue."); Briscoe v. Nishitani, 105 Idaho 175, 667 P.2d

278 (1983); State v. Williams, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982); State v. Crawford, 99 Idaho 87, 577 P.2d 1135 (1978); Smith v. Smith, 95 Idaho 477, 511 P.2d 194 (1973); State v. Beason, 95 Idaho 267, 506 P.2d 1340 (1973); Mountain States Telephone & Telegraph Co. v. Jones, 76 Idaho 241, 280 P.2d 1067 (1955); Allen Steel Supply Co. v. Bradley, 89 Idaho 29, 403 P.2d 859 (1965).

Although the Idaho Court has held that remoteness is grounds for exclusion, Nobach v. Scott, 20 Idaho 558, 119 P. 295 (1911), more recent decisions indicate remoteness affects the weight of the evidence rather than its admissibility. See Blankenship v. Brookshier, 91 Idaho 317, 322, 420 P.2d 800 (1966)("The determination of the question whether evidence is or is not too remote is for the determination of the trial court, and it is clothed with wide discretion in this regard."). See also In re Goan's Estate, 83 Idaho 568, 366 P.2d 831 (1961); Koch v. Elkins, 71 Idaho 50, 225 P.2d 457 (1950); Hooton v. City of Burley, 70 Idaho 369, 219 P.2d 615 (1950).

"In a court trial, the judge has greater latitude to admit evidence and to evaluate its weight, than in a jury trial." Erhardt v. Leonard, 104 Idaho 197, 202, 657 P.2d 494, 499 (Ct.App. 1983)(court refused to superimpose its judgment upon that of the trial court regarding the relevancy of the evidence in question). See also Guillard v. Department of Employment, 100 Idaho 647, 603 P.2d 981 (1979); State v. Alvord, 47 Idaho 162, 272 P. 1010, (1928).

The law of Idaho specifically allows evidence to challenge credibility. See Comment to Rules 608 and 609. The Idaho Committee agrees that evidence to challenge credibility is admissible under Rule 401 ("evidence of credibility is always relevant") and that there is no need to expressly so provide as did Montana.

It has been held that it is prejudicial error to exclude irrelevant evidence that is offered to explain irrelevant and incompetent evidence introduced by the opposition over objection. Murphy v. Mut. Life Ins. Co., 62 Idaho 362, 112 P.2d 993 (1941); King v. Hahn, 40 Idaho 555, 234 P.2d 937 (1925). See also State v. Carter, 103 Idaho 917, 922, 655 P.2d 434 (1982)("An opponent may reply with similar evidence if it is needed to eradicate an unfair prejudice which might ensue from the original [immaterial] evidence."); State v. Breyer, 40 Idaho 324, 232 P. 560 (1925).

Under Idaho case law, preliminary questions to a witness which are not relevant at the time asked but which lay a foundation for later relevant testimony are permissible. G. Bell, Handbook of Evidence for the Idaho Lawyer, 29 (2d ed. 1972); Shepperd Investment Co. v. Roscoe, 48 Idaho 405, 283 P.

519 (1929); McKee v. Chase, 73 Idaho 491, 253 P.2d 787 (1953); State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953).

Although Idaho case law has used the language "material" and "prove or disprove," the Committee believes use of the language "of consequence" and "more probable or less probable" found in Rule 401 does not substantially change existing Idaho law and is more clear and meaningful. Use of the language "more probable or less probable" would also be consistent with IDJI 112 (1982).

Action Recommended on Idaho Statutes or Rules: None required.

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Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

COMMENT TO RULE 402

Prior Idaho Statutes or Rules: I.R.C.P. 43(a).

Comparable Federal Rule: Substantially the same as F.R.E. 402; the language is altered to conform to state practice and reference to statutory restrictions on admissibility of evidence that is relevant and otherwise admissible is deleted.

Comment: Rule 402 states what has otherwise been the rule by implication and case law. Under Rule 402 relevance, as defined in Rule 401, is the threshold criterion of admissibility. Rule 402 proceeds to enumerate the sources of exceptions to the general principle that relevant evidence is admissible and expressly provides that irrelevant evidence is inadmissible.

Although not specifically stated in Rule 402, it is implicit that evidence obtained in violation of the constitutionally protected rights of a party would be inadmissible under "the rules applicable in the courts of this state."

As applied in the federal courts, it has been held that there is a presumption of admissibility of evidence that is relevant under Rule 402, and there is a burden on one wishing to exclude such evidence to advance a convincing reason for doing so. See, e.g., United States v. Dupee, 569 F.2d 1061 (9th Cir. 1978).

The Commitee believes that Rule 402 is consistent with existing Idaho case law. See, e.g., State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972); Williams v. Idaho Potato Starch Co., 73 Idaho 13, 245 P.2d 1045 (1952); State v. Farris, 48 Idaho 439, 282 P. 489 (1929).

To the extent that Rule 402 recognizes the power of the Idaho Supreme Court to adopt rules relating to the admissibility of evidence, it is consistent with I.R.C.P. 43(a) which provides, inter alia, that "[a]ll evidence shall be admitted which is admissible under the statutes of, or under the rules of evidence applied in the courts of this state." By omitting reference to statutory restrictions on admissibility of evidence that is relevant and otherwise admissible, it is the intent of the Committee that those statutory restrictions be abrogated and that the admissibility of such evidence be governed by these Rules.

The Idaho Court has upheld statutory restrictions on the admissibility of mandatory reports. See Owen v. Burcham, 100

Idaho 441, 599 P.2d 1012 (1979), overruling Bell v. O'Connor Transport Limited, 94 Idaho 406, 489 P.2d 439 (1971)(Court applied Idaho Code 49-1013 which prohibits use of accident reports as evidence). Adoption of Rule 402 would have the effect of changing the governing authority for excluding accident reports from admission when they are relevant. The statutory authority would no longer be the governing authority. These rules would be the governing authority and the reports may still be inadmissible under other rules of evidence, e.g., Article VIII (hearsay) or Rule 403 (prejudice outweighs probative value).

The Idaho Rules of Civil Procedure include several provisions restricting or imposing conditions on the admissibility of evidence. E.g., Rule 32(a)(use of depositions); Rule 37(b)(2)(B)(authorizes court to prohibit introduction of designated matters in evidence as a sanction for disobedience).

Action Recommended on Idaho Statutes or Rules: Amend I.R.C.P. 43(a) to delete the words "under the statutes of, or."

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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COMMENT TO RULE 403

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 403.

Comment: Rule 403 authorizes the trial court to exclude relevant evidence that it finds, in essence, will do more harm than good to the truth-finding process or the efficiency of the judicial process. The rule recognizes existing case law granting the court broad discretion in the conduct of the trial. It applies to all forms of evidence. For examples of its application, see generally United States v. DeLillo, 620 F.2d 939 (2d Cir.), cert. denied, 449 U.S. 835, 101 S.Ct. 107, 66 L.Ed.2d 41 (1980); United States v. Juarez, 549 F.2d 1113 (7th Cir. 1977); United States v. Hearst, 412 F. Supp. 880 (N.D. Calif. 1976); United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975).

It is suggested that the ruling on Rule 403 objections be made in detail on the record for appellate review purposes. See, e.g., United States v. Long, 574 F.2d 761 (3d Cir. 1978). See also, e.g., United States v. Dwyer, 539 F.2d 924 (2d Cir. 1976)(where counsel had requested an explanation of a Rule 403 exclusion ruling, the failure of the trial court to set forth its explanation on the record led to reversal).

Rule 403 omits "unfair surprise" as a ground for exclusion on the premise that a continuance is a more appropriate remedy.

Rule 403 provides that the evidence "may" be excluded; it is not intended to affect situations where exclusion may be required by other rules or substantive law. See, e.g., Sheehy v. Southern Pacific Transporation Co., 631 F.2d 649, 652 (9th Cir. 1980)(discretion granted by the rule is subject to balancing established by other law; Rule 403 authorizes discretion only in the absence of governing rules or statutes and the policies they reflect). See also United States v. Foskey, 636 F.2d 517 (D.C. Cir. 1980) and United States v. Harvey, 547 F.2d 720 (2d. Cir. 1976)(both dealing with Constitutional fair criminal trial considerations' impact on Rule 403).

Obviously a confession or admission is highly prejudicial because of its probative value, but it would not be inadmissible under Rule 403 or existing Idaho law. See State v. Boothe, 103 Idaho 187, 646 P.2d 429 (Ct.App. 1982). Unless the prejudice is unfair, it affords no basis to exclude the evidence. State v. Fenley, 103 Idaho 199, 646 P.2d 441 (Ct.App. 1982).

Rule 403 is consistent with Idaho case law. See State v. Abel, 104 Idaho 865, 870, 664 P.2d 772, 777 (1983)("The trial court is vested with discretion to determine whether the probative value of evidence outweighs any prejudicial effect."); Pline v. Asgrow Seed Co., 102 Idaho 827, 831, 642 P.2d 64, 68 (Ct.App. 1982)("A trial court has broad discretion in the admission of evidence at trial and its judgment will only be overruled where there has been clear abuse of discretion."); State v. Terry, 98 Idaho 285, 561 P.2d 1318 (1977); State v. Thomas, 94 Idaho 430, 489 P.2d 1310 (1971); Cardoza v. Cardoza, 76 Idaho 347, 282 P.2d 475 (1955); State v. Alvord, 47 Idaho 162, 272 P. 1010 (1928)(the Supreme Court refused to superimpose its judgment as to the probative value determined by the trial court). See also State v. Beason, 95 Idaho 267, 278, 506 P.2d 1340, 1351 (1973)("In the exercise of its discretion, the trial court must first determine the relevancy of the offered exhibit. After an affirmative determination of the issue of relevancy has been made, then the trial court has to make the determination whether the probative value of the offered evidence is outweighed by the inflammatory effect. . ."); Lopez v. Allen, 96 Idaho 866, 538 P.2d 1170 (1975); State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972); Williams v. Idaho Potato Starch Co., 73 Idaho 13, 245 P.2d 1045 (1952); State v. Farris, 48 Idaho 439, 282 P. 489 (1929).

The Idaho Court of Appeals has specifically adopted the "dangers" language of relative weights ascribed to the process. See State v. Greensweig, 102 Idaho 794, 798, 641 P.2d 340, 345 (Ct.App. 1982)("Where the probative value of evidence is substantially outweighed by the danger of unfair prejudice to the defendant, this evidence should be excluded."). See also State v. Goodrich, 97 Idaho 472, 477, 546 P.2d 1180 (1976).

The Idaho Supreme Court has recognized each of the factors enumerated in Rule 403. See, e.g., Cogswell v. C.C. Anderson Stores Co., 68 Idaho 205, 216, 192 P.2d 383 (1948)(regarding evidence of prior accidents, "[w]here substantial identity in the circumstances appears, and the danger of unfairness, confusion or undue expenditure of time in the trial of collateral issues reasonably seems small to the trial judge, he has generally been left free to admit such evidence in his discretion."); Lopez v. Allen, 96 Idaho at 871, 538 P.2d at 1175 (experimental evidence is admissible in the discretion of the trial court if conditions are sufficiently similar so the evidence will assist and not mislead the jury); Rowett v. Kelly Canyon Ski Hill, Inc., 102 Idaho 708, 639 P.2d 6 (1981)(exclusion of photographs as being cumulative, prejudicial, irrelevant and immaterial, or misleading will not be reversed in absence of abuse of discretion by the trial court); State v. Allen, 23 Idaho 772, 780, 131 P. 1112 (1913)(there was no error when the trial court told counsel, "[T]oo much time is being consumed in the

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examinations, as the same questions are being repeatedly asked many times and much needless repetition being indulged in, and that perhaps nine out of ten questions which have been asked are irrelevant and immaterial because of this continued and useless repetition." (emphasis omitted)).

Action Recommended on Idaho Statutes or Rules. None required.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

COMMENT TO RULE 404

Prior Idaho Statutes and Rules: Idaho Code § 18-6105; I.R.C.P. 43(b)(9).

Comparable Federal Rule: Identical to F.R.E. 404.

General Comment: Rule 404 is one of the several rules dealing with character evidence,

Under Rule 402, all relevant evidence is admissible unless otherwise excludible. Rule 403 permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, etc. The admissibility of character evidence, although relevant and sufficiently probative, is further dependent upon the method of proof or form of evidence offered: (1) testimony as to reputation, (2) opinion testimony regarding character, or (3) evidence of specific instances which are probative of character. It is also dependent upon the purpose for which offered: (1) to establish an essential element of a claim, defense or charge, (2) to show that a person acted in conformity with his character, (3) to prove a fact of independent significance such as motive, identity, plan or scheme, or (4) to impeach a witness.

Rule 405 restricts the method or form of character evidence that may be used. Rule 412 restricts the use of evidence of prior conduct of the victim in rape and sexual assault cases. Rule 608 restricts the use of evidence of the character or conduct of a witness to impeach. Rule 609 limits the use of evidence of a prior conviction to impeach a witness.

Rules 404 and 405 are applicable whenever character evidence is offered. If the character evidence is offered to attack or support the credibility of a witness, Rule 608 must also be considered. If the evidence consists of a prior conviction, further consideration must be given Rule 609. If evidence of prior conduct is offered to impeach a victim of rape or sexual assault, Rule 412 must be considered.

It should also be noted that evidence of character which may reflect a person's disposition to perform an act is distinguished from evidence of habit which may be offered to show a person's regular response to a repeated specific situation. Evidence of habit is governed by Rule 406.

Comment: Rule 404 is the basic rule governing the use of character evidence. It is applicable in both civil and criminal proceedings. Like the common law, it recognizes some basic rules concerning the admissibility of character evicence and establishes that evidence of specific acts offered for a purpose other than to prove a character trait is not affected by these general rules.

Subsection (a) sets forth the general approach. It deals with character evidence offered for the purpose of showing a disposition to perform the conduct in issue. It requires the exclusion of character evidence only if offered for the purpose of showing conforming conduct, subject to three stated exceptions. Rule 404(a) does not exclude character evidence offered for the purpose of proving an element of a claim, defense or charge, or a fact of independent significance, or to impeach a witness. Evidence offered for these purposes may, however, be restricted by other rules as noted above.

Under Rule 404(a) evidence of character to prove conforming conduct is inadmissible in both civil and criminal actions, except as specifically provided in the three listed exceptions.

Idaho law is substantially the same as Rule 404(a). With respect to civil actions, see, e.g. Denbeigh v. Oregon-Washington, Etc. Co., 23 Idaho 663, 132 P. 112 (1913)(evidence of reputation for being prudent or negligent is irrelevant in an action for negligence). See also Johnson v. Richards, 50 Idaho 150, 294 P. 507 (1930).

Idaho case law does not exclude evidence of character to prove an essential element of a claim, defense or charge in a civil case. See Kralick v. Shuttleworth, 49 Idaho 424, 289 P. 74 91930)(general bad character for chastity was admitted as mitigating damages in an action for seduction); Moske v. Klee, 38 Idaho 314, 221 P. 152 (1923)(good reputation of a person charged with the crime was admitted in an action for malicious prosecution).

Rule 404(a) would not change Idaho law under I.R.C.P. 43(b)(9), which excludes evidence of the good character of a party in any civil action until the character of such party has been impeached or unless the issue involves his character.

Idaho case law generally excludes character evidence to show conforming conduct in a criminal action. See, e.g., State v. Henry, 66 Idaho 60, 154 P.2d 184 (1944)(excluded evidence of the accused's bad associates and professional gambling occupation

offered to prove a disposition for larceny). See also, e.g., State v. Haynes, 66 Idaho 291, 158 P.2d 742 (1945)(excluding evidence of prior convictions offered to prove conforming conduct).

However, in the absence of a timely objection at trial, admission of evidence of other unrelated criminal activity of the accused will not be considered on appeal, unless it is so fundamental or plain as to constitute a deprivation of due process. State v. Campbell, 104 Idaho 705, 662 P.2d 1149 (Ct.App. 1983). See also State v. Wells, 103 Idaho 137, 645 P.2d 371, (Ct.App. 1982); State v. Garcia, 100 Idaho 108, 594 P.2d 146 (1979).

Subsection (a)(1) permits evidence of character of the accused to prove conforming conduct in a criminal case only if offered by the accused or by the prosecution to rebut the accused's evidence.

Idaho law is substantially the same. See State v. Dobbins, 102 Idaho 706, 639 P.2d 4 (1981); State v. Allen, 23 Idaho 772, 131 P. 1112 (1913); State v. McGreevey, 17 Idaho 453, 105 P. 1047 (1909)(when offered by the accused). See also State v. Rodriquez, 93 Idaho 286, 460 P.2d 711 (1969); State v. Henry, 66 Idaho 60, 154 P.2d 184 (1944)(when offered by the prosecution to rebut defendant's evidence). I.R.C.P. 43(b)(9) likewise permits such evidence in a criminal case.

Subsection (a)(2) permits evidence of the character of the victim in a criminal case to show conforming conduct if offered by the accused (except as limited by Rule 412 in rape and sexual assault cases) or by the prosecution to rebut the accused's evidence. Rule 404(a)(2) also permits the prosecution to put in evidence of the victim's character of peacefulness in a homicide case to rebut evidence that the victim was the first aggressor. Idaho case law is substantially similar. See State v. Ward, 51 Idaho 68, 1 P.2d 620 (1931). The use of such evidence in rape cases is limited by Idaho Code § 18-6105. See Comment to Rule 412 regarding rape and sexual assault cases.

Subsection (a)(3) permits evidence of character to impeach a witness as provided in Rules 607, 608 and 609. See comments to those rules.

Subsection (b) prohibits the use of evidence of other crimes, wrongs, or acts to prove character only if it is offered for the purpose of showing conforming conduct. Although it may

be argued that subsection (b) is unnecessary because subsection (a) already excludes evidence of character to prove conforming conduct, Rule 404(b) makes clear that evidence of specific conduct, as well as opinion or reputation evidence, is intended to be excluded if offered for the purpose of showing a disposition to act in conformity with the conduct in issue.

The second provision of subsection (b) recognizes that evidence of specific conduct is traditionally admissible for purposes other than to prove conforming conduct even though it may reflect on a person's character and makes clear that such evidence remains admissible. It provides examples of the purposes for which such evidence may be admitted. The examples are not exclusive.

Subsection (b) does not automatically admit evidence of other crimes, wrongs or acts when offered for a permitted purpose. The court must determine whether there is sufficent evidence to establish the other crime or wrong as fact, see, e.g., United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)(en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979) and cf. United States v. O'Brien, 618 F.2d 1234, 1239 (7th Cir. 1980). The court must also determine whether the fact of another crime or wrong, if established, would be relevant, such as where offered to prove intent if intent is not disputed or if offered during the prosecution's case in chief before intent is disputed. See, e.g., United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980)(held it is preferable for the other crime or act evidence to be reserved for rebuttal and be offered only if intent becomes an issue). Moreover, the court is still obliged to weigh the probative value of the proffered evidence against the danger of unfair prejudice and the other factors as provided in Rule 403. Each of these considerations of admissibility must be determined on a case-by-case basis.

Rule 404(b) would not change existing Idaho law. The Idaho Court has specifically stated:

> "As a general rule, evidence that a defendant has committed other crimes is inadmissible to show criminal propensity on the part of the accused. See State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979). However, evidence of other crimes is admissible when relevant to prove: (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, (5) the identity of the person charged

with the commission of the crime on trial, and (6) other similar issues. State v. Wrenn, 99 Idaho 506, 510, 584 P.2d 1231 (1978)."

State v. Boothe, 103 Idaho 187, 189, 646 P.2d 429, 431 (Ct.App. 1982). See also State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971).

The Idaho Court has "recognized that the admission of such evidence of other crimes requires a balancing, see State v. Sharp, 101 Idaho 498, 501-02, 616 P.2d 1034, 1037-38 (1980), and that the admissibility of such evidence is within the discretion of the trial judge, State v. Thomas, 94 Idaho 430, 489 P.2d 1310 (1971)." State v. Abel, 104 Idaho 865, 664 P.2d 772, 776 (1983).

The Idaho Court has allowed evidence of recent imprisonment to prove identity, State v. McCormick, 100 Idaho 111, 594 P.2d 149 (1979); other crimes to prove identity if they disclose a distinctive modus operandi, State v. Morris, 97 Idaho 420, 546 P.2d 375 (1976); and uncharged prior crimes to prove identity, State v. Hatton, 95 Idaho 856, 522 P.2d 64 (1974). Evidence of a prior assault on the victim by the defendant was allowed to prove motive or intent in State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979).

When the specific criminal conduct is "inseparably connected" to the crime charged it is admissible, even though it may not fit neatly into one of the specific exceptions. State v. Sharp, 101 Idaho 498, 616 P.2d 1034 (1980); State v. Crawford, 99 Idaho 87, 577 P.2d 1135 (1978); State v. Ilett, 96 Idaho 667, 534 P.2d 1107 (1975). But cf. State v. Wrenn, 99 Idaho 506, 510, 584 P.2d 1231 (1978)(rejected evidence of other unrelated criminal activity, stating it did not fit under any of the six exceptions mentioned above, and was irrelevant and prejudicial).

Under Idaho case law, evidence of bad acts is not rendered inadmissible merely because they occurred subsequent to the crime being prosecuted. The question to be determined, as with prior bad acts, is whether the evidence is relevant and whether the probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Greensweig, 102 Idaho 794, 641 P.2d 340 (Ct.App. 1982).

Evidence of prior criminal activity has also been allowed by the Idaho Court for corroboration of the victim's testimony in sex crime cases. E.g., State v. Boothe, 103 Idaho 187, 646 P.2d 429 (Ct.App. 1982); State v. Elsen, 68 Idaho 50, 187 P.2d 976 (1947); State v. Hirsch, 64 Idaho 20, 127 P.2d 764 (1942)(also to show the relation and familiarity of the parties);

State v. Dowell, 47 Idaho 457, 276 P. 39 (1929)(to show conduct, purpose and disposition toward the victim); State v. Greensweig, 102 Idaho 794, 641 P.2d 340 (Ct.App. 1982)(to show intent).

In two early decisions the Idaho Supreme Court allowed evidence of prior criminal activity reasoning that it corroborated the victim's testimony in sex crime cases; however, the stated purpose of admitting the evidence in each case appears to contravene the general rule excluding such evidence to show disposition to perform the conduct in issue. See State v. Shelton, 46 Idaho 423, 267 P. 950 (1928)(to show intimacy and "adulterous inclination" of defendant); State v. Hammock, 18 Idaho 424, 110 P. 169 (1910)(to show common criminal design and habit to gratify lust).

The Committee draws special attention to the concurring opinion of Burnett, J. in State v. Boothe, 103 Idaho at 193, 646 P.2d at 435, pointing out that the Idaho Supreme Court's decision in State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981) abolished the requirement of corroboration in sex offense cases thereby removing the justification that evidence of other sexual misconduct is admissible on the ground that it is relevant to a required showing of corroboration. Judge Burnett observes that such evidence can be highly prejudicial and states:

> "A trial court must weigh, in each case, the probative value of the evidence against its likely prejudicial impact."
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> "Idaho trial courts now should take a fresh look at the balance between probative value and prejudicial impact. We have noted in our decision that evidence of other crimes generally is not admissible to prove the offense charged. A person who committed other crimes might have been more likely to commit the crime in question; but the probative value of such evidence usually is outweighed by the unfair prejudice to the defendant. We have outlined the principal exceptions to this general rule. These exceptions are grounded in specific elements of proof of the crime charged. Evidence admissible under the exceptions must serve a genuine purpose other than suggesting that the defendant probably committed the crime charged because he committed other crimes." 103 Idaho at 193, 646 P.2d at 435.

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Under Idaho law, weighing the probative value against the danger of unfair prejudice is a matter for the sound discretion of the trial court. State v. Sharp, 101 Idaho 498, 616 P.2d 1034 (1980); State v. Thomas, 94 Idaho 430, 489 P.2d 1310 (1971). See also State v. Fenley, 103 Idaho 199, 203, 646 P.2d 441, 445 (Ct.App. 1982)("Probative evidence is always prejudicial to someone. Unless the prejudice is unfair, it affords no basis to exclude the evidence.").

Action Recommended on Statutes or Rules: Repeal I.R.C.P. 43(b)(9). See Comment to Rule 412 regarding Idaho Code § 18-6105.

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

COMMENT TO RULE 405

Prior Idaho Statutes or Rules: I.R.C.P. 43(b)(6).

Comparable Federal Rule: Identical to F.R.E. 405.

Comment: Rule 405 deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered by Rule 404. See General Comment to Rule 404.

Rule 405 approves three methods of showing character when evidence of character is admissible: (1) by testimony as to reputation, (2) by testimony in the form of an opinion of a witness, and (3) by evidence of specific instances of conduct. The purpose for which the evidence is offered determines which method or methods will be allowed. If offered to prove conforming conduct, only evidence of reputation or opinion may be used. If offered to prove an essential element of a claim, defense or charge, all three methods are allowed. If offered to prove a fact of independent significance, e.g., motive, there is no limitation on the method used. If offered to attack credibility of a witness, Rules 608 and 609 govern.

Subsection (a) permits the use of testimony as to reputation and opinion testimony in all cases in which character evidence is admissible. Under the federal decisions, reputation evidence has been limited to the person's reputation in the community. See, e.g., Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); U.S. v. McLister, 608 F.2d 785 (9th Cir. 1979).

Under the federal decisions, the reputation witness "must be able to demonstrate that he is familiar with the defendant's reputation, and competent to speak for the community. The testimony must relate to a time contemporaneous with the acts charged and to the character traits relevant to the offense in question." 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 405[02] at 16-18 (Supp. 1983). See also, e.g., Whiting v. United States, 296 F.2d 512 (1st Cir. 1961)(no showing witness had knowledge sufficient to qualify); Awkard v. United States, 352 F.2d 641 (D.C. Cir. 1965)(earlier period and different community); United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973)(reputation after charge publicized is inadmissible).

Opinion evidence was not generally allowed under federal case law prior to Rule 405 or in most other jurisdictions. The Federal Advisory Committee adopted the recommendations of

Wigmore, see 7 Wigmore § 1986, and followed the rule allowing opinion evidence established in the California Evidence Code. Most states adopting the Federal Rules of Evidence have also adopted the provision in Rule 405 allowing opinion evidence as to character. It is based on the argument that reputation testimony is largely the disguised opinion of the witness and that a presentation based on personal knowledge and belief is more reliable and provides the jury a truer perspective of the probative value of the evidence. The Idaho Committee agrees with this approach.

Allowing opinion testimony should not create additional problems for Idaho courts in terms of numbers of witnesses since reputation witnesses are usually easily found and are already allowed. This has posed no apparent problem in the federal courts because the courts have the power to limit the number of character witnesses. See, e.g., United States v. Gray, 507 F.2d 1013 (5th Cir.), cert. denied, 423 U.S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975); United States v. Henry, 560 F.2d 963 (9th Cir. 1977). The results should be similar in Idaho courts under Rule 403 which empowers the court to restrict cumulative evidence and Rule 611 which vests broad discretion in the court to control the presentation of evidence. Cf. State v. Calico, 55 Idaho 96, 38 P.2d 1002 (1934)(court may, in its discretion, limit the number of witnesses who may be called to testify to the prior inconsistent statement, but allowing only two of four persons to testify was unduly restrictive).

Although not allowed on direct testimony, inquiry into relevant specific instances of conduct is allowed on cross-examination under Rule 405. The inquiry generally takes the form of questions whether the witness "has heard about" or "knows about" specific acts committed by the defendant. Extrinsic proof of the specific acts is not allowed unless character is in issue. See, e.g., Hendrix v. United States, 430 U.S. 937, 97 S.Ct. 1566, 51 L.Ed.2d 784 (1977). See also Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948) which is still considered the leading case under the Federal Rules of Evidence. If there is doubt concerning the validity of the specific acts or facts, the court may, and perhaps should, conduct a voir dire examination out of the hearing of the jury to determine whether the specific facts are true or whether the examination would constitute unfair prejudice to the defendant, before permitting the cross-examination. See, e.g., United States v. Reese, 568 F.2d 1246 (6th Cir. 1977); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976).

Idaho case law permits use of testimony as to general reputation in the community but does not permit use of opinion testimony. See, e.g., Kralick v. Shuttleworth, 49 Idaho 424, 289 P. 74 (1930); Monske v. Klee, 38 Idaho 314, 221 P. 152 (1923)(to prove an essential element of the claim, charge or defense); State v. McGreevey, 17 Idaho 453, 105 P. 1047 (1909)(as to

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character evidence offered by the accused in a criminal case); State v. Rodriguez, 93 Idaho 286, 460 P.2d 711 (1969); State v. Henry, 66 Idaho 60, 154 P.2d 184 (1944)(character evidence offered by the prosecution in a criminal case in rebuttal); State v. Ward, 51 Idaho 68, 1 P.2d 620 (1931)(character of the victim for peacefulness).

I.R.C.P. 43(b)(6) permits use of testimony as to general reputation for truth, honesty, or integrity, but not opinion testimony when offered for impeachment of a witness. Under existing Idaho law only testimony as to reputation is allowed and it must be restricted to the "general reputation in the community." See, e.g., State v. Dobbins, 102 Idaho 706, 707, 639 P.2d 4 (1981) (quoting rule in Michelson v. United States, 335 U.S. at 477, that witness may not testify about specific acts or course of conduct or a particular disposition or moral traits, nor personal opinion), ("The rationale for limiting character evidence to general reputation is grounded in expediency and policy."), (the witness cannot name persons from whom witness learned of general reputation because, by inference it would then become testimony as to defendant's reputation among the named individuals). See also State v. Branch, 66 Idaho 528, 164 P.2d 182 (1945), overruled on other grounds, State v. Owen, 73 Idaho 408, 253 P.2d 203 (1953). Allowable reputation evidence may not be too remote from the time of trial. See, e.g., State v. May, 93 Idaho 343, 461 P.2d 126 (1969) (reputation which was three years old was admissible); State v. Goodrich, 33 Idaho 654, 196 P. 1043 (1921).

Under existing Idaho law, inquiry into specific instances of conduct is allowed on cross-examination, as it would be under the second provision of Rule 405(b). See I.R.C.P. 43(b)(6). See also State v. Ward, 51 Idaho 68, 1 P.2d 620 (1931).

Subsection (b) makes clear that evidence of specific instances of conduct as a method of proving character is permissible when character is an essential element of a charge, claim or defense. Unlike Rule 405(a) which permits inquiry into relevant specific instances of conduct on cross-examination to test the credibility of the witness, but does not permit extrinsic proof of the specific conduct, Rule 405(b) does permit extrinsic proof of specific conduct in addition to evidence of reputation or opinion, when character is in issue or when the specific conduct is independently relevant to a material proposition. See, e.g., United States v. Brown, 547 F.2d 438 (8th Cir.), cert. denied, 430 U.S. 937, 97 S.Ct. 1566 (1977).

Idaho case law is in accord. See Comment to Rule 404(b).

Action Recommended on Idaho Statutes or Rules: Repeal I.R.C.P. 43(b)(6).

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Rule 406. Habit; Routine Practice

Evidence of a habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

COMMENT TO RULE 406

Prior Idaho Statutes or Rules: None

Comparable Federal Rule: Identical to F.R.E. 406.

Comment: Rule 406 permits introduction of habit evidence used to show that conduct on a particular occasion was in conformity therewith. The rule does away with what has been termed the "eyewitness rule," which, as a general proposition, stated that evidence of habit was admissible only if there was no direct evidence of the act in question. The "eyewitness rule" had been rejected by some courts prior to enactment of F.R.E. 406. See, e.g., Cereste v. New York, New Haven & Hartford R. Co., 231 F.2d 50, 53 (2d Cir.), cert. denied 351 U.S. 951, 76 S.Ct. 848, 100 L.Ed. 1475 (1956)(The eyewitness exception "lacks reason; for, if the evidence is highly prejudicial, it is no less so when eyewitnesses are unavailable.").

"Habit," which is generally defined to describe one's regular response to a repeated situation, is distinguished from "character" which describes one's propensity or disposition in respect to a general trait. See McCormick § 162, p. 340. See also Reyes v. Missouri Pacific R.R. Co., 589 F.2d 791 (5th Cir. 1979) (intoxication convictions held inadmissible as character evidence to show propensity and did not constitute habit evidence because behavior did not rise to sufficient level of consistency). Evidence of character, offered to show conforming conduct, is governed by Rule 404 and related rules. See General Comment to Rule 404.

The rule does not attempt to provide a definition of "habit" for the reason that precise standards cannot be formulated. Rather, the determination whether the evidence constitutes proof of "habit," and whether it is admissible, is left to the discretion of the trial court on a case-by-case basis.

Rule 406 further makes clear that evidence of the routine practice of an organization is relevant to prove conforming conduct, whether corroborated or not. See, e.g., United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981). As with "habit," no attempt is made to define "routine practice." The requirement of corroboration as a condition precedent to admission, as imposed in some jurisdictions, is rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility.

Congress rejected a proposed subdivision (b) which had provided that the method of proof of habit or routine practice could be "in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine." It was rejected on the belief that the method of proof should be left to the courts to deal with on a case-by-case basis. It was not intended that the omission of subdivision (b) be construed as sanctioning a general authorization of opinion evidence in this area. The Idaho Committee agrees with this view.

Rule 406 is intended to do nothing more than clarify that neither the absence of an eyewitness nor corroboration are required as a condition precedent to the admission of such evidence. It is not intended to make such evidence automatically admissible. Other rules of evidence, e.g., Rule 402 (relevancy of the habit or practice to the conduct in issue) and Rule 403 (probative value), are still applicable to the question of admissibility.

Under existing Idaho case law, evidence of habit is admissible as proof that a person acted in conformity therewith. Petricevich v. Salmon River Canal Co., 92 Idaho 865, 869, 452 P.2d 362 (1969)("evidence of a habit is generally admissible, at least in the absence of eyewitnesses, to prove that a person acted in accordance with that habit on a particular occasion."), ("The habit itself can be proved by specific instances of its occurrence."). Whether the absence of an eyewitness is required and whether proof of habit may be made by opinion testimony have not been decided in Idaho. The rule resolves these issues.

Evidence of routine practice is also admissible under Idaho case law, although the one decision located on the subject indicates that opinion evidence may not be admissible. See Commercial Insurance Co. v. Hartwell Excavation Co., 89 Idaho 531, 537, 407 P.2d 312, 314 (1965)("Evidence of a habit of doing a thing in the course of business is, if clearly shown as a definite course of action, admissible as indicating that, on a particular occasion, the thing was done as usual."), (quoted with approval: "'We have held that custom or usage is a matter of fact and not of opinion. . . . but, that proof of the fact may be established either by testimony or specific uses, . . . or by evidence of general practice . . .'").

No general statutory law for Idaho has been located. If the case involves a question under the Idaho Uniform Commercial Code, reference should be made to Idaho Code § 28-1-201(28) (defines "organization" to include "a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, or any other legal or commercial entity.") and § 28-1-205 (defines "course of dealing" and "usage

of trade," provides for legal effect of same and requires notice of intent to use such evidence). The Rules of Evidence will supersede the notice requirement provided in Idaho Code § 28-1-205(6) as a condition precedent for admission of such evidence. If the case involves a question under the Idaho Credit Code (1983), reference should be made to Idaho Code § 28-41-301(26)(defines "organization" to mean "a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.").

<u>Action Recommended on Idaho Statutes or Rules</u>: None required.

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Rule 407. Subsequent Remedial Measures

Whenever, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

COMMENT TO RULE 407

Prior Idaho Statutes or Rules: Idaho Code § 6-1406.

Comparable Federal Rule: Identical to F.R.E. 407.

Comment: Rule 407 follows the conventional doctrine that evidence of subsequent remedial measures is not admissible as proof of an admission of negligence or culpable conduct.

The use of the phrase "remedial measures" rather than the common law phrase "subsequent repairs" is designed to bring within the scope of the rule any post-accident change, repair or precaution. See, e.g., Ford v. Schmidt, 577 F.2d 408 (7th Cir. 1978)(excluded proof of a new regulation issued after the event which would have avoided the event in issue). The exclusion of such evidence is based on the public policy that people should be encouraged to take subsequent remedial measures. See 2 Wigmore, Evidence, § 283 at 151 (3d Ed. 1940).

The second provision of the rule follows established doctrine in providing that the rule is not applicable if the evidence is offered for "another purpose." The admissibility of evidence of subsequent remedial measures for "another purpose" is governed by Rules 401 to 403. See, e.g., Robbins v. Farmers Union Grain Terminal Ass'n., 552 F.2d 788 (8th Cir. 1977).

The language "if controverted" was inserted in the Federal Rule to avoid proof of subsequent remedial measures under the guise that it is for "another purpose" when there is no real issue requiring proof and it is offered only to circumvent the exclusionary rule.

The exclusionary purposes of the rule apply to evidence used to prove "culpable conduct" as well as negligence.

Rule 407 is silent as to whether it bars evidence of remedial measures in a strict liability case.

The Idaho Committee considered the position taken in Ault v. International Harvester Co., 13 Cal.3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (on rehearing) (1975), which held that the policies behind the exclusionary rule did not apply in strict liability actions. Although that doctrine has been followed in at least one federal circuit applying F.R.E. 407, Robbins v. Farmers Union Grain Terminal Ass'n., 552 F.2d 788 (8th Cir. 1977), the greater number of circuits have found the exclusionary purposes equally applicable to strict liability cases. See Cann

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v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981); Oberst v. International Harvester Co., Inc, 640 F.2d 863 (7th Cir. 1980); Werner v. Upjohn Co., Inc., 628 F.2d 848 (4th Cir. 1980); Knight v. Otis Elevator Co., 596 F.2d 84 (3d Cir. 1979); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230 (6th Cir. 1980); Chammers v. G.D. Searle & Co., 441 F.Supp. 377 (D.Md. 1975), Aff'd., 567 F.2d 269 (4th Cir. 1977). See also Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F.Supp. 598 (D. Idaho 1976).

"It is easy to fashion an argument in favor of modifying the rule to state plainly how it affects products liability actions. However, that argument may be too quick. Recent cases indicate that not all products liability cases involve similar theories of liability. Whether or not the exclusionary provision of Rule 407 should be applied in a particular liability case may depend on precisely how liability is gauged under the applicable law. Additional cases may clarify the state of the law. See, e.g., DeLuryea v. Winthrop Laboratories, Etc., 697 F.2d 222 (8th Cir. 1983)." Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig. 75-76 (1983). The Idaho Committee determined that the law for Idaho on this issue should be left for development on a case-to-case basis.

The exclusionary provisions of the rule do not apply when the evidence of subsequent measures is offered on an issue other than proof of negligence or culpable conduct. Again, this is substantially consistent with the provisions of Idaho Code § 6-1406, which allows such evidence when offered for other purposes if the court finds that its probative value "substantially outweighs its prejudicial effect and that there is no other proof available." However, the rule would not impose any greater showing of relevance, or of necessity, than that normally applied to the introduction of evidence under Rule 403.

Idaho follows the general rule that, while evidence of repairs made following an accident is inadmissible on the question of prior negligence, such evidence may come in as proof of a collateral matter where in issue. Alsup v. Saratoga Hotel, 71 Idaho 229, 229 P.2d 985 (1951); Carter Packing Co. v. Pioneer Irrigation District, 91 Idaho 701, 429 P.2d 433 (1967).

Idaho permits an exception where the evidence is offered as proof of control or possession. Otts v. Brough, 90 Idaho 124, 409 P.2d 95 (1965). Idaho has no case law dealing with admissibility of subsequent repairs when offered on other collateral matters such as proof of feasibility of repair.

The Committee concluded that adoption of Rule 407 would not change existing Idaho case law.

Rule 407 would be inconsistent with the evidentiary provisions of Section 6-1406 of the Idaho Product Liability Reform Act in several respects because Rule 407 deals only with remedial measures whereas the statute covers additional matters. Section 6-1406 provides that "evidence of changes in (a) a product's design, (b) warnings or instructions concerning the product, (c) technological feasibility, (d) "state of the art," or (e) the custom of the product seller's industry or business, occurring after the product was manufactured and delivered, is not admissible for the purpose of proving that the product was defective in design or that a warning or instruction should have accompanied the product at the time of manufacture. Such evidence may be admitted for other relevant purposes such as proof of ownership or control, or for impeachment, but only if the court first determines that the probative value of such evidence substantially outweighs its prejudicial effect and that there is no other proof available."

Adoption of Rule 407 will create a conflict with Idaho Code § 6-1406. As provided in Rule 1102, the Committee does not intend that the Rules be inapplicable in every situation where there is a statute covering the admissibility of evidence in judicial proceedings just because the statute exists. The rules are intended to be inapplicable only in those specific statutory proceedings listed in Rule 101. The Idaho Product Liability Reform Act is not included in those exceptions. Inclusion of the Idaho Product Liability Reform Act in Rule 101(d) would remove the conflict. The Committee is of the opinion that such evidence should not be treated as a matter of specific statutory exclusion, but rather should be treated as matter of relevancy on a case-to-case basis and so has not recommended including the Act in the Rule 101(d) exceptions.

<u>Action Recommended on Idaho Statutes or Rules</u>: Amend Idaho Code § 6-1406 to delete the evidentiary provisions.

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

COMMENT TO RULE 408

Prior Idaho Statutes or Rules: I.R.C.P. 68.

Comparable Federal Rule: Identical to F.R.E. 408.

Comment: Rule 408 excludes evidence of certain conduct and statements made in compromise negotiations or settlement if offered "to prove liability for, invalidity of, or amount of the claim or any other claim."

The rule applies in both civil and criminal matters whether or not litigation has been commenced. It is intended to preclude admission of statements made in compromise negotiations, in addition to the offer itself, to foster a strong public policy favoring out-of-court settlement of disputes. The particularized treatment accorded by the common law to factual admissions made hypothetically or without prejudice is considered an unjustifiable restraint upon truly effectuating the purpose of the rule and is believed to constitute an unwarranted preference for the sophisticated and correspondingly a trap for the unwary. The rule applies to completed compromises when offered against a compromisor, as well as those attempted.

The rule requires that there be a dispute as to either the validity or the amount of the claim. Efforts to obtain a reduction in the amount admittedly due are not protected. A dispute as to matters other than the validity or the amount of the claim, e.g., time of payment, are likewise not protected. See, e.g., Perzinski v. Chevron Chemical Co., 503 F.2d 654, 658 (7th Cir. 1974).

The rule is not intended to render evidence, otherwise discoverable, inadmissible solely because it was presented during the settlement negotiations. To deny discovery or allow exclusion on this ground would conflict with the liberal rules of discovery and would permit a party to immunize evidence by revealing it during negotiations.

Rule 408 does not preclude admission of such evidence if offered for "another purpose" such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The examples provided in the rule are not exclusive.

The application of the exception to show bias or prejudice of a witness requires the court to weigh the announced policy of encouraging settlements against the value of the

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evidence to the truth-finding process (see Rule 403) on a case-to-case basis. The few federal decisions note but do not purport to resolve the tension between these two concerns. Compare Estate of Spinosa v. International Harvester Co., 621 F.2d 1154 (1st Cir. 1980)(excluding proffer of settlement between plaintiff and another defendant) with John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632 (3d Cir. 1977)(admitting same). See also Reichenbach v. Smith, 528 F.2d 1072 (5th Cir. 1976).

The federal courts have held that such evidence is admissible to prove a consequential, material fact in issue other than the validity or invalidity of the claim or its amount. See, e.g., B & B Investment Club v. Kleinert's, Inc., 472 F.Supp. 787 (E.D. Pa. 1979)(where after main issues were settled, question remained whether party was successful and entitled to attorney fees, evidence of settlement was admitted); Iberian Tankers Co. v. Gates Construction Corp., 388 F.Supp. 1190 (S.D.N.Y. 1975)(evidence of settlement negotiations was allowed on question whether prejudgment interest should be awarded). Similarly, an offer of judgment made under Rule 68 of either the Federal or Idaho Rules of Civil Procedure would not be excludible in a proceeding to determine costs.

The Idaho Supreme Court has judicially adopted the policy of F.R.E. 408 in regard to statements or conduct made in the course of compromise negotiations. Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944 (1980), overruling dictum in Whitney v. Cleveland, 13 Idaho 558, 91 P. 176 (1907)(which suggested that statements of fact, as opposed to statements of opinion, were protected only when phrased hypothetically or prefaced with the disclaimer).

Rule 408 is consistent with the policy of I.R.C.P. 68, which precludes evidence of offers of judgment which are rejected or withdrawn except in a proceeding to determine costs.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, funeral, or similar expenses occasioned by an injury or death, or damage to or loss of property of another is not admissible to prove liability for the injury, death or damage.

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COMMENT TO RULE 409

Prior Idaho Statutes or Rules: Idaho Code § 41-1840.

Comparable Federal Rule: Similar to F.R.E. 409. The Idaho rule contains additional language for expenses occasioned by death, or damage to or loss of property of another.

Comment: Rule 409 is based upon the social policy that payment or offers of payment of medical, hospital, funeral or similar expenses occasioned by an injury or death, or damage to or loss of property of another should be encouraged for humanitarian purposes. Thus, evidence of payment, or offers or promises of payment of such expenses is inadmissible to prove liability for the injury, death or damage. The rule does not preclude the evidence if offered for another purpose, e.g., ownership or control, subject to the discretion of the court to exclude it on other grounds, e.g., Rule 403.

Rule 409 does not apply to conduct or admissions of liability made in connection with the offer or promise of payment that are not a part of the act of offering, promising or paying such expenses. As stated in the North Dakota Procedure Committee Notes on Rule 409: "It is likely that admissions will at times be so intertwined with an offer to furnish medical expenses that the two cannot be severed. Whenever this occurs, a choice must be made between admitting the evidence, totally, or excluding it. Balance must be made of the social policy behind this rule and the need for such evidence."

Idaho Code § 41-1840, subsection (1), provides, that no payment made by any person, or by his insurer, "on account of bodily injury or death or damage to or loss of property of another," shall constitute an admission of liability or waiver of defense or be admissible in evidence in any action brought against the insured person or his insurer unless pleaded as a defense to the action. Subsection (2) provides that payments shall be credited upon any settlement or judgment.

The Idaho Supreme Court has held that § 41-1840 barred evidence of defendant's letters assuming the obligation to pay medical expenses, as well as the actual payment thereof. Further, the Court held the statute equally applicable to private persons as well as insurers. Tommerup v. Albertson's, Inc., 101 Idaho 1, 607 P.2d 1055 (1980).

Idaho law is unclear on the extent to which conduct or statements of the defendant in assuming the obligation to pay, which are not part of the act of payment or offering to pay, will be protected.

Idaho law is also unclear whether or not evidence would be admissible on collateral matters other than the issue of liability. Idaho Code § 41-1840 is phrased as an absolute ban on receipt of such evidence unless pleaded as a defense to the action. In contrast, Rule 409 limits the exclusion to the issue of liability.

The Committee determined that payment of "expenses relating to death or damage to or loss of property of another" as is now provided in Idaho Code § 41-1840 should also be encouraged and accordingly expanded the scope of the rule beyond medical, hospital or similar expenses.

The use of the term "furnishing," instead of "payment," is intended to encompass payments made by an insurer or others on behalf of a party.

<u>Action Recommended on Idaho Statutes or Rules</u>: Delete from Idaho Code § 41-1840(1), the language ", or be admissible in evidence" and the language "unless pleaded as a defense to the action."

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Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

(a) **Inadmissibility.** Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Idaho Rules of Criminal Procedure or comparable Federal or state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

(b) **Exceptions.** Notwithstanding the foregoing, such a statement is admissible:

(1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or

(2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel; or

(3) under subsection (a)(3) above, in the same criminal action or proceeding for impeachment purposes.

COMMENT TO RULE 410

Prior Idaho Statutes or Rules: I.C.R. 11(b).

Comparable Federal Rule: Substantially the same as F.R.E. 410 and Fed.R.Crml.P. 11(e)(6) as amended effective December 1, 1980, except to allow limited impeachment by use of statements made under subsection (a)(3) of the rule.

Comment: Rule 410 makes certain evidence relating to pleas and plea bargain discussions in criminal proceedings inadmissible in both civil and criminal cases.

The rule has as its purpose the promotion of disposition of criminal cases by compromise. As noted by the Federal Advisory Committee quoting McCormick § 251, p. 543, "[e]ffective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises." The same would be true in Idaho.

Prior to the 1980 amendment, F.R.E. 410 did not expressly limit the Rule's plea discussion coverage to discussions involving an attorney for the prosecuting authority. According to the Notes of the Federal Advisory Committee the major objective of the 1980 amendment is to describe more precisely consistent with the original purpose of the provision, what evidence relating to pleas and plea discussions is inadmissible. The language of the former version of the rules was susceptible to interpretation which made it applicable to a wide variety of statements not intended to be protected. See, e.g., United States v. Herman, 544 F.2d 791 (5th Cir. 1977)(defendant in custody of two postal inspectors instigated conversation and said he would plead guilty to armed robbery if murder charge was dropped; one inspector stated they were not "in a position" to make any deals; held, defendant's statement inadmissible because the defendant made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea); United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976)(defendant telephoned postal inspector and offered to plead guilty if he got a two-year maximum; statement inadmissible).

As amended, the Federal Rule makes inadmissible statements made in the course of any proceedings under the rules regarding a plea of guilty later withdrawn or a plea of nolo contendere and also statements made in the course of plea discussions with an attorney for the prosecutor which do not result in a plea of guilty or which result in a plea of guilty

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later withdrawn. The rule is not limited to statements made by the defendant himself, and thus covers statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process, which is to be encouraged, without attempting to deal with confrontations between suspects and law enforcement officers, which involve problems of quite different dimensions, e.g., the desireability of obtaining confessions and applicable constitutional standards.

Subsection (a) states the rule of inadmissibility in the language of the Federal Rule.

Although the rule explicitly limits only the government's use of settlement evidence and does not provide for exclusion of statements made by a prosecutor, the policy of promoting settlements that gives rise to the rule has led to decisions rejecting evidence offered by a defendant to the effect that the government was willing to make a deal. See, e.g., United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976).

If there has been a plea of guilty later withdrawn or a plea of nolo contendere the rule makes inadmissible statements made in the course of any such proceedings with limited exceptions.

Although Idaho does not at this time recognize the plea of nolo contendere under existing statutes or the Idaho Criminal Rules, the plea of nolo contendere is recognized in the federal courts and in some sister states. Consequently, the rule provides that a plea of nolo contendere, as with a plea of guilty which was later withdrawn in another jurisdiction, would be inadmissible.

Subsection (b) states the exceptions to the rule of inadmissibility. Suparts (1) and (2) are in the language of the Federal Rule. Subpart (3) states an exception not in the Federal Rule to allow limited impeachment by use of statements made under subsection (a)(3).

With regard to the exception stated in subpart (1), the Federal Advisory Committee Notes state:

> The last sentence of Rule 11(e)(6) [F.R.E. 410] is amended to provide a second exception to the general rule of nonadmissibility of the described statements. Under the amendment, such a statement is also admissible "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." This change is

necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language of the amendment follows closely that in Fed. R. Evid. 106, as the considerations involved are very similar.

Idaho Criminal Rule 11(b), with one exception, is substantially the same, as were Fed. R. Evid. 410 and Fed. Crm. R. 11(e)(6) prior to the 1979 amendments. I.C.R. 11(b) provides:

> (b) Inadmissibility of pleas, offers of pleas, and related statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or an offer to plead guilty to the crime charged or any other crime, is admissible as impeachment in the same action, or in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Adoption of the proposed I.R.E. 410 would remove ambiguity in I.C.R. 11(b) to the extent that offers to plead guilty or other statements made to obtain concessions will be inadmissible only if made to "an attorney for the prosecuting authority." It will change Idaho law under the present I.C.R. 11(b) in one respect. It will render statements made in the course of plea discussions admissible "when another statement made in the course of the same plea or plea discussion has been

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introduced and the statement ought in fairness be considered contemporaneously with it."

Unlike the federal rules, the existing Idaho Criminal Rule 11(b) and the proposed Idaho Rule 410 permit the admission of statements made in connection with a plea of guilty later withdrawn "as impeachment in the same action." Congress first considered the question in connection with Fed. R. Evid. 410: the House disapproved of admissibility for any purpose; the Senate favored admissibility for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions to preclude the defendant from contradicting his previous statements and lying with impunity; and, the Conference Committee adopted the House version until the matter could be further considered in deliberations relating to Fed. Crm. R. 11(e)(6). In 1975 both federal rules were amended to allow admissibility in criminal proceedings for perjury or false statement, but not for impeachment.

The Fed. Crm. R. Advisory Committee's Notes point out that:

> "The Committee's exception permits the use of such evidence in a perjury or false statement prosecution where the plea, offer, or related statement was made by the defendant on the record, under oath and in the presence of counsel. The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness.

Notes of Committee on the Judiciary, House Report No. 94-247.

The Idaho Committee considered the desirability of retaining the provision now found in the Idaho Crm. Rule 11(b) rendering statements admissible for purposes of impeachment. The Idaho Committee, as did the Federal Advisory Committee and Congress, concluded that making the plea later withdrawn and statements made in plea discussions admissible for impeachment would thwart the purpose of the rule which is to encourage pleas and candid plea discussions. Given the broad scope of impeachment, almost any testimony on any issue by the defendant would be subject to impeachment with such evidence. This would likely have the effect of restricting candid plea discussions or restricting the defendant from taking the stand.

Notwithstanding these policy considerations, the Idaho Committee concluded that statements made under oath as defined in subsection (a)(3) should be admissible for impeachment in the same action or proceeding only. The Idaho Committee is not convinced that the threat of subsequent perjury or false statement charges alone would deter an accused from testifying falsely, particularly when charged with a crime more serious than perjury.

Action Recommended on Idaho Statutes or Rules: Amend I.C.R. 11(b) to conform to I.R.E. 410 and retain the rule in both the Idaho Rules of Evidence and Idaho Criminal Rules as is done in the Federal Rules.

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Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

COMMENT TO RULE 411

Prior Idaho Statutes or Rules: I.R.C.P. 26(b)(2).

Comparable Federal Rule: Identical to F.R.E. 411.

Comment: Rule 411 is based on the premise that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. It is designed to exclude such evidence on issues of plaintiff's contributory fault as well as the fault of defendant.

The examples provided in the rule where evidence of liability insurance is admissible are illustrative only. The rule does not preclude evidence of insurance where the question of possession of liability insurance is itself an element of the action or where the existence or nonexistence of an insurance contract is an essential element of the claim or defense. The rule is not intended to cover voir dire of prospective jurors as to possible interest in connection with any insurance carrier, since it is felt that the issue does not involve a rule of evidence.

In applying the rule, some federal courts have addressed the problem where parties attempt to smuggle insurance evidence into the case on theories or pretexts that undercut the policy forbidding such evidence, by requiring that the trial court find the presence of a validating purpose and then weigh relative prejudice to proponent and opponent. See, e.g., Hunziker v. Scheidemantle, 543 F.2d 489 (3d Cir. 1976); Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749 (6th Cir. 1980). However, the mere presence of such a purpose does not suffice for admission. Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977). Moreover, direct evidence on the subject of insurance does not necessarily open the topic to cross-examination of the scope afforded other evidence. Hannah v. Haskins, 612 F.2d 373 (8th Cir. 1980).

Rule 411 is consistent with I.R.C.P. 26(b)(2) which permits discovery of insurance agreements and provides that, "information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial."

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Consistent with Rule 411, the general rule in Idaho is that evidence of insurance is inadmissible at trial to prove negligence. Brown v. Jerry's Welding and Construction Co., 104 Idaho 893, 665 P.2d 657 (1983). See also, Crossler v. Safeway Stores, Inc., 51 Idaho 413, 6 P.2d 151 (1931). However, as is permitted under Rule 411, evidence of insurance has been admitted where relevant to other issues. Brown v. Jerry's Welding and Construction Co., 104 Idaho at 896, 665 P.2d at 660 (insurance certificate relevant to loaned employee issue); Tucker v. Union Oil Co. of California, 100 Idaho 590, 603 P.2d 156 (1979) (evidence of insurance relevant to other material issues); Openshaw v. Adams, 92 Idaho 488, 445 P.2d 663 (1968)(fact an insurance adjuster took a written statement that was used to impeach a witness); Burns v. Getty, 53 Idaho 347, 24 P.2d 31 (1933)(ownership); Curtis v. Ficken, 52 Idaho 426, 16 P.2d 977 (1932) and Steve v. Bonners Ferry Lumber Co., 13 Idaho 392, 92 P. 363 (1907)(both to show interest or bias of a witness).

As is required under the Idaho Rules of Evidence (Rule 403), the Court in Brown v. Jerry's Construction Co., 104 Idaho at 896, 665 P.2d at 660, indicated that the trial court must weigh the probative value of the proffered evidence against its potential prejudicial impact and implied that a limiting instruction should be given that such evidence cannot be considered for any other purpose.

Inquiry on voir dire as to employment or ownership of stock in an insurance company is permitted. See Cochran v. Gritman, 34 Idaho 654, 203 P. 289 (1921); Bressan v. Herrick, 35 Idaho 217, 205 P. 555 (1922); Shaddy v. Daley, 58 Idaho 536, 76 P.2d 279 (1938). See also Gorton v. Doty, 57 Idaho 792, 69 P.2d 136 (1937)(invited error); Barry v. Arrow Transportation Co., 83 Idaho 41, 358 P.2d 1041 (1960)(refusal to declare a mistrial when such evidence was inadvertently put before the jury).

The rule is not intended to have any effect on discovery of insurance agreements under I.R.C.P. 26(b)(2).

Action Recommended on Idaho Statutes or Rules: None required.

Rule 412. Rape Cases; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is--

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of--

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than five days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence

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described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

COMMENT TO RULE 412

Prior Idaho Statutes or Rules: Idaho Code § 18-6105.

Comparable Federal Rule: Identical to F.R.E. 412 (Adopted October 28, 1978) with two exceptions in subsection (c)(1): first, motion and notice of intent to use the evidence may be made and given at any time up to five days before trial rather than fifteen days as required in the Federal Rule; second, notice need not be served on the victim as is required under the Federal Rule.

Comment: Rule 412, applicable only in criminal cases, spells out when, and under what circumstances, evidence of the rape or sexual assault victim's prior sexual behavior can be admitted. The rationale of the rule is to prevent the victim, rather than the defendant, from being put on trial. It recognizes that evidence of the victim's unchastity is ordinarily of no probative value on the issue of whether a rape or assault to commit rape occurred. In the same instance the rule is designed to protect the constitutional rights of the defendant to a fair trial.

Subsection (a) explicitly provides that reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. No exceptions are provided.

Subsection (b) provides that evidence of the victim's past sexual behavior "other than reputation or opinion evidence," i.e., specific instances of conduct, is likewise inadmissible, except under three specific circumstances: (1) where the defendant's constitutional rights mandate admission; (2) where the defendant raises the issue of consent and the evidence is of sexual behavior with the defendant, provided the court first finds that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice; (3) where the evidence is of behavior with someone other than the defendant and is offered by the defendant on the issue of whether or not he was the source of semen or injury, provided that the court finds that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice.

Subsection (c) requires that before evidence is admitted under any of the three exceptions, the accused must timely make and serve a written motion to offer such evidence accompanied by a written offer of proof. If the court determines from the written offer of proof the existence of one of the three circumstances in subsection (b), there must be a hearing in chambers out of the presence of the jury and the general public, and a determination by the court that the evidence is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice. The order granting the motion must further specifically identify the evidence that may be offered and describe the areas with respect to which the alleged victim may be examined or cross-examined. This procedure is designed to afford the prosecution and the victim maximum notice of the questioning that may occur.

Idaho Code § 18-6105 precludes evidence of the past sexual conduct of the "prosecuting witness" unless the defendant has made a special application to the court whereupon admissibility is discretionary. There are no Idaho decisions under Idaho Code § 18-6105.

Rule 412 differs from Idaho Code § 18-6105 in several respects: (1) the statute is limited to the crime of rape; (2) the statute permits the defendant to apply to the court for admission of the evidence at any time before or during trial without limitation; (3) the evidence is not limited under the statute to specific instances nor by a limited definition of relevancy; (4) there is no limitation under the statute on the right to use evidence of a prior felony conviction to impeach; and, (5) the court is not directed to weigh probative value against unfair prejudice under the statute. The Idaho statute requires the court only to determine "the relevancy of such evidence."

The Committee is of the opinion that adoption of Rule 412 would be an improvement of Idaho law. The rule fairly balances the interests involved--the rape victim's interest in protecting the right of privacy, the accused's right to a fair trial, and the right of society to have the case decided without unduly prejudicial or inflammatory evidence beclouding the issues before the jury.

The Committee believes the five day filing and notice requirement is adequate; that service of notice on the prosecutor is sufficient; and, that it is unreasonable to impose on the defendant the duty to locate and serve notice on the alleged victim.

The Committee intends that Rule 412 have no effect on the rules of discovery.

Action Recommended on Idaho Statutes and Rules: Repeal Idaho Code § 18-6105.

Rule 413. Proceedings of Medical Malpractice Screening Panels

Evidence of the proceedings or of conduct or statements made in proceedings before a hearing panel for prelitigation consideration of medical malpractice claims, or the results, findings or determinations thereof is inadmissible in a civil action or proceeding by, against or between the parties thereto or any witness therein.

COMMENT TO RULE 413

Prior Idaho Statutes or Rules: Idaho Code § 6-1001.

Comparable Federal Rule: None.

Comment: Rule 413 excludes evidence of proceedings of medical malpractice screening panels conducted or maintained under the authority of Idaho Code §§ 6-1001 to 6-1011 and all conduct or statements made in such proceedings and all results, findings or determinations thereof.

The rule applies only in civil actions or proceedings "by, against or between the parties thereto or any witness thereof."

The rule is intended to bar the use of such evidence for any purpose.

The Committee recognizes that medical malpractice screening panel proceedings are intended in the public interest to foster settlement of medical malpractice claims. See Section 1 of S.L. 1976, ch. 278. For reasons similar to those which preclude evidence of compromises and offers to compromise under Rule 408, the Committee concluded that the rule is necessary to encourage participants in such proceedings to make a full and frank presentation before the screening panel.

The rule is not intended to render evidence, otherwise discoverable, inadmissible solely because it was presented during the panel proceedings. To deny discovery or allow exclusion on this ground would conflict with the liberal rules of discovery and would permit a party to immunize evidence by revealing it during the panel proceedings contrary to the intent of the statute and this rule.

Idaho Code § 6-1001 provides:

> 6-1001. Hearing panel for prelitigation consideration of medical malpractice claims--Procedure.--The Idaho state board of medicine, in alleged malpractice cases involving claims for damages against physicians and surgeons practicing in the state of Idaho or against licensed acute care general hospitals operating in the state of Idaho, is directed to cooperate in providing a hearing panel in the nature of a special civil

> grand jury and procedure for prelitigation consideration of personal injury and wrongful death claims for damages arising out of the provision of or alleged failure to provide hospital or medical care in the state of Idaho, which proceedings shall be informal and nonbinding, but nonetheless compulsory as a condition precedent to litigation. Proceedings conducted or maintained under the authority of this act shall at all times be confidential, privileged and immune from civil process and evidence of them or results, findings or determinations thereof shall be inadmissible in any civil or other action or proceeding by, against or between the parties thereto or any witness therein. Formal rules of evidence shall not apply and all such proceedings shall be expeditious and informal.

No Idaho decisions interpreting Idaho Code § 6-1001 have been found.

The rule omits reference to "other" proceedings for the reason that the language "other" in the statute is in reference to administrative or peer review proceedings of medical committees which are nonjudicial.

Section 6-1001 contains two evidentiary principles. It creates a rule of privilege that precludes discovery of such evidence and, perhaps for the reason that a privilege against disclosure can be waived, the statute further provides that such evidence is inadmissible in the enumerated situations. Rule 520 provides for the rule of privilege against disclosure of such evidence.

<u>Action Recommended on Idaho Statutes or Rules</u>: None required.

INTRODUCTORY COMMENT TO ARTICLE V

PRIVILEGES

The Committee has taken a different approach with Article V, Privileges, than is used with other articles contained in the Idaho Rules of Evidence. In other articles the Committee has attempted to draft Idaho Rules that are substantially similar to the Federal Rules (and the Uniform Rules of Evidence (1974), 13 U.L.A. 215-363 (Supp. 1983) which are taken from them) as far as possible so that procedure in state and federal courts will be consistent. This is not possible in Article V because Congress did not enact the proposed rules on privileges, preferring to enact a rule that applies the common law of privileges in federal civil and criminal cases and the state law of privileges in civil actions in which state law supplies the rule of decision. The Uniform Rules (1974) Article V adopted the federal draft which Congress rejected. See 56 F.R.D. 183, 230-234 (1973).

Adoption of Article V will have the effect of modifying privileges currently recognized in Idaho. The Committee has borrowed from the Uniform Rules of Evidence (1974) Article V when it suited our purpose. However, many provisions of our statutes providing privileges are not covered by the Uniform Rules (1974) and original text was required.

The Committee deliberated at length whether to attempt to provide rules for testimonial privileges. Some members expressed the view that we should leave the subject to the Constitution, statutes and the principles of the common law as did Congress. The majority prevailed with the view that perhaps we could clarify ambiguities, rectify areas of abuse, and resolve apparent conflicts in our existing statutes and rules.

Thus, the Committee undertook the task of examining our law relating to privileges and attempted to formulate rules within certain guidelines. We determined to recognize and provide for all privileges now specifically provided by statute or rule in Idaho, making changes where deemed necessary to remove ambiguities, curb abuses, resolve conflicts, and in some instances, recognize current decisions. The Committee determined to refrain from creating any new privileges in the absence of express statutory provisions or rules as did the Idaho Supreme Court in Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1977), cert. denied., 434 U.S. 930, 98 S.Ct. 418, 54 L.Ed.2d 291 (1977). See also Marks v. Vehlow, 105 Idaho 560, 671 P.2d 473 (1983).

The question may be raised whether the Idaho Supreme Court has authority to adopt rules governing testimonial

privileges. The Committee believes the question has been resolved in State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980), in which the Court relied upon Idaho Code § 1-212 recognizing and confirming the inherent power of the Supreme Court to make rules governing procedure in the courts of Idaho, and Idaho Code § 1-213 imposing a duty on the Supreme Court to prescribe rules of practice and procedure for our courts.

The Committee is aware that, notwithstanding the decision of the Supreme Court in State v. Knee, 101 Idaho 484, some may view changes in rules of privilege as affecting substantive rights and therefore more properly the subject of change by the Legislature rather than the Supreme Court. See, e.g., State v. Knee, 101 Idaho at 487 (Bistline, J. dissenting). The Committee disagrees with this view.

The Committee recognizes that every person has a substantive constitutional right to due process of law which includes the right to a fair and impartial trial, U. S. Const. amend. XIV, § 1; Idaho Const. art. V, § 13; and that improper conduct of the trial can deprive one of this substantial right. See, e.g., State v. Ramirez, 33 Idaho 803, 199 P. 376 (1921). See also Schwartzmiller v. Winters, 99 Idaho 18, 576 P.2d 1052 (1978).

The conduct of the trial, however, including the manner of producing witnesses and the admission or exclusion of evidence is a matter of procedure and not substantive law. See Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 Reh. denied, 434 U.S. 882, 98 S.Ct. 246 (1977)("Even though it may work to the disadvantage of a defendant a procedural change is not ex post facto."); Salsburg v. Maryland, 346 U.S. 545, 74 S. Ct. 280, 98 L.Ed. 281 (1953)(Rules of evidence, being procedural in their nature, are peculiarly discretionary with the law making authority); Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed 204 (1898)(change in law after first trial which made evidence admissible in second trial did not violate Ex Post Facto Clause); Hopt v. Utah, 110 U.S. 574, 589, 4 S.Ct. 202, 28 L.Ed. 262 (1884)(change in law after crime and before trial which rendered witness qualified to testify against defendant was not ex post facto "because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict."); State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980)(Idaho Court has authority to adopt I.R.C.P. 43(b)(6)); Taylor v. State, 640 P.2d 554 (Okla. Cr. 1982)(defendant has no "accrued right" under evidence code in effect when crime committed that would preclude wife from testifying against him; change in evidence code prior to trial resulting in wife testifying against defendant was "clearly procedural," citing Dobbert, Hopt and Thompson). See also State v. Griffith, 97 Idaho 52, 58, 539 P.2d 604 (1975).

The proposal that rules of privilege be adopted by the Supreme Court to govern procedure in our state courts is not intended to deny the authority of our Legislature to enact laws providing privileges, nor the necessity that the Legislature provide for testimonial privileges in proceedings other than judicial proceedings. The Idaho Rules of Evidence, as with the Idaho Rules of Procedure, are applicable only in court actions and proceedings. The rules and the privileges provided in the rules are not applicable in administrative proceedings or any other nonjudicial proceeding where testimony can be compelled by law unless specifically made applicable by statute. See Skelly v. Sunshine Mining Co., 62 Idaho 192, 109 P.2d 622 (1941). Consequently, to avoid the conflict and confusion that may result from having one set of privileges in administrative proceedings and another in judicial proceedings if Article V is adopted by our Court, it is strongly recommended by the Committee that our Legislature be requested to amend the appropriate statutes to conform the privileges provided by statute to these rules.

Judicial proceedings should be and are intended to be conducted in a manner that elicits truth. Testimonial privileges permit one to suppress or secrete truth and thwart this judicial purpose in recognition of a higher social policy designed to protect certain relationships and foster open and truthful communications in such relationships. The Committee has concluded that the mere existence of a relationship is not alone sufficient reason to suppress the determination of truth in a judicial proceeding. Continuing the policy that permits a party to disqualify a witness from testifying merely because a relationship exists with that party only serves to recognize and enforce the erroneous belief, found in the medieval canons, that a witness cannot be truthful if the witness has an interest in the proceeding. It has resulted in abuses evidenced by the instances in which a criminal defendant has married the state's witness solely to suppress adverse testimony. Moreover, it has resulted in many needless exceptions and distinctions in application, as evidenced by the decisions discussed in the comments that follow each of the various rules of privilege.

In recognition of the desirable and necessary social policy that open and truthful confidential communications in certain relationships deserve and require protection, the Committee is recommending that only confidential communications be privileged as provided in the rules of privilege that follow.

The Committee is of the belief that testimonial privileges are the source of much confusion in Idaho law and are often misunderstood or overlooked, partly because they are scattered in various statutes. The Committee is also of the belief that often there is a failure to recognize a distinction between information and communications that may be confidential by statute but are not privileged. Examples include health reports required under

Idaho Code § 66-348 and other mandatory reports that must be filed with state agencies. Such reports may be confidential in that they are not available to the public. The declarant, however, is not privileged to refuse to testify as to the contents of the report unless otherwise privileged by statute or rule. See also, e.g., Idaho Code § 41-272 regarding information received by the state fire marshal and others within the purview of the Idaho Arson and Fraud Reporting-Immunity Act; Idaho Code § 66-348 as to records and reports relating to hospitalization of the mentally ill; Idaho Code § 67-5410 with respect to any individual applying for or receiving services to the blind; Idaho Code § 72-1342 with respect to information obtained under the Employment Security Act; Idaho Code § 1-2103 with respect to proceedings before the Idaho Judicial Council.

Similarly, certain provisions of the Idaho professions, vocations and businesses licensing statutes impose a duty on certain licensees to maintain the confidentiality of their records. Examples include Idaho Code § 54-1814(13) making it a ground for discipline if a physician fails to safeguard the confidentiality of medical records "pertaining to identifiable patients, except as required or authorized by law." See also Idaho Code § 54-712(7) imposing the same duty on chiropractors and Idaho Code § 39-1310 imposing a similar duty on the hospital licensing agency.

Two other sections of the licensing statutes deserve comment. Section 54-1735, Idaho Code, requires manufacturers and wholesalers to maintain records regarding legend drugs and to make them available to law enforcement agencies. It further provides: "Evidence obtained under this section may not be used in a criminal prosecution of the person from whom obtained." The Committee does not consider this to be a rule of testimonial privilege, but rather a rule of exclusion based on the constitutional right against self-incrimination.

Section 33-1211, Idaho Code, provides that any publication or communication made by any member of the state board of education, or its hearing officer or certification officer in the proper discharge of any official duty imposed under Sections 33-1208, 33-1209, or 33-1210 (§ 33-1210 has been repealed) "shall be privileged." Although the statute uses the word "privileged," the Committee is of the opinion that the intent of the legislature was not to confer a testimonial privilege but, rather, to provide immunity from liability. The Committee can find no reason or justification for a testimonial privilege applicable to such publications or communications and do not include one in the recommended rules of privilege that follow. See also, e.g., Idaho Code § 41-4113 as to immunity from liability for statements made by the association, the director or others within the purview of the Medical Malpractice Insurance Act; Idaho Code

§ 1-2103 with respect to testimony before the Idaho Judicial Council.

Finally, one other provision of our statutes deserves comment. Idaho Code § 9-1302 provides that a witness need not "give an answer which will have a direct tendency to degrade his character, unless it be the very fact in issue, or to a fact from which the fact in issue would be presumed." The rules of privilege provided in Article V omit this provision. Since Rule 403 is designed to give the court broad discretion in admitting or excluding testimony, Rule 404 is designed to protect against certain embarrassing disclosures and Rule 608 bars any inquiry into prior bad acts not the subject of a criminal conviction used for impeachment purposes, no privilege is necessary under these rules. Were it not for these three rules, it might be necessary to add a privilege to make it clear that the court is to balance the impact of questioning on a witness against the need of a party for evidence, as well as to balance the prejudicial effect of certain evidence on one party against the beneficial effect on another party.

For ease of reference to the Uniform Rules (1974) and the decisions of the states that have adopted those rules, the Idaho privilege Rules 501-512 are similarly organized and numbered. Rule 501 abolishes any claim of a common law privilege and preserves only those provided by constitution, statute implementing a constitutional right, or by these or other rules promulgated by the Idaho Supreme Court. Rule 502 provides for the traditional lawyer-client privilege. Rule 503 provides for a physician and psychotherapist-patient privilege which deals with communications with a physician, psychiatrist and psychologist and removes some of the distinctions in the treatment of communications with physicians and psychologists that existed under prior Idaho law.

Rule 504 provides for the husband-wife privilege but, departs from the disqualification rule under prior Idaho law and restricts the privilege to confidential marital communications. Rule 505 provides for the traditional religious communication privilege and Rule 506 provides for the common law privilege against disclosing one's political vote.

Rule 507 is "reserved." The Idaho Committee determined that Idaho has no trade secrets privilege per se and declined to recommend one for Idaho. Rule 508 provides for a governmental communications privilege which recognizes only those now expressly provided by statute to the exclusion of matters that are merely "confidential." Rule 509 provides for the confidential informant privilege now recognized in the Idaho Criminal Rules.

Rules 510 through 513 are general rules which govern the application of the rules of privilege. Rule 510 provides that the right to claim a privilege may be waived by voluntary disclosure. Rule 511 protects and preserves the privilege notwithstanding an involuntary disclosure. Rule 512 forbids comment upon the exercise of a claim of privilege. Rule 513 provides that the claim of privilege may be exercised by the lawyer for the client vested with such right.

Rules 514 through 520 recognize those privileges now provided by statute in Idaho which were not the subject of the Federal or Uniform Rules. Rule 514 provides for the parent-child privilege as to communications from the child to the parent. Rule 515 provides for the accountant-client privilege which is made identical to the lawyer-client privilege. Rule 516 provides for the school counselor-student privilege, Rule 517 provides for the licensed counselor-client privilege, and Rule 518 provides for the licensed social worker-client privilege, all of which include exceptions not previously provided in the respective statutes. Rule 519 provides for the hospital, in-hospital medical staff committee and medical society privilege, the scope of which has been restricted essentially to statements of opinion or conclusion. Rule 520 provides a privilege for the proceedings of medical malpractice screening panels.

The Committee believes that protections afforded by rules of privilege should be predictable and is hopeful that one compilation of the rules regarding testimonial privileges will eliminate much of the confusion and many of the ambiguities, abuses, and conflicts deemed to exist under Idaho law. Article V is intended to bring all testimonial privileges into one compilation, except the constitutionally protected right against self-incrimination. Thus, Rule 501 provides that no testimonial privilege exists except those provided by Constitution, or statute implementing a constitutional right, or by these or other rules promulgated by the Idaho Supreme Court.

Article V.

PRIVILEGES

Rule 501. Privileges Recognized Only as Provided

Except as otherwise provided by constitution, or by statute implementing a constitutional right, or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

COMMENT TO RULE 501

Prior Idaho Statutes or Rules: Idaho Code §§ 1-1603, 9-1301, 9-1302; I.R.C.P. 43(a).

Comparable Federal Rule: F.R.E. 501 provides that testimonial privileges, except as otherwise required by the Constitution, statutes, or in rules prescribed by the Supreme Court pursuant to statutory authority, shall be governed by "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with the State law."

Idaho Rule 501 is substantially the same as Uniform Rule of Evidence 501 (1974), 13 U.L.A. 248-249 (Supp. 1983) and is substantively the same as proposed Federal Rule 501 that was rejected by Congress. See 56 F.R.D. 183, 230-234 (1973).

Comment: Rule 501 is intended to eliminate in Idaho any claim of a common law privilege that is not expressly provided by constitution, statute implementing a constitutional right, rule of procedure, or included in these rules.

The language "statute implementing a constitutional right" recognizes and gives effect to the constitutional right against self-incrimination which is codified in Idaho Code §§ 9-1302, 19-108 and 19-3003, and to a varying extent in other statutory provisions, e.g., Idaho Code §§ 48-117 and 74-1340. The Committee in its Second Supplemental Report recommended the language "statute not in conflict with these Rules" with the intent that statutory privileges not addressed by the rules be given effect. That would have included the statutes which codify the right against self-incrimination and any statute creating a testimonial privilege from disclosure that the Committee may have missed during its deliberations. The Committee intended that all statutes creating testimonial privileges against disclosure which are addressed in these rules would have no further force or effect in judicial proceedings and rulings on those privilege questions would be governed by these rules.

In its deliberations of the proposed rules, the Supreme Court concluded that testimonial privileges in judicial proceedings, except a privilege created by constitution, should

be governed exclusively by the Idaho Rules of Evidence. The language "[e]xcept as otherwise provided by constitution, or by statute implementing a constitutional right . . ." is intended to effect that result. As a consequence any statutorily created testimonial privilege from disclosure that does not implement a constitutional right to refuse disclosure is of no force or effect in judicial proceedings. The Committee endorses this change in the rule for the certainty it provides. With the exception for a constitutional right to refuse disclosure, the courts and parties need look only to Article V of these rules for guidance with respect to testimonial privileges.

To the extent that Rule 501 provides that no person has a privilege to refuse to be a witness, or disclose any matter, or refuse to produce any object or writing, except as provided, it expresses existing Idaho law. See Idaho Code §§ 1-1603, 9-1301, 9-1302, 19-3003, 19-3004, et seq.; I.R.C.P. 43(a).

The phrase "or other rules promulgated by the Supreme Court of this State" is intended to encompass the "work-product" immunity rules and the interpretations of I.R.C.P. 26(b)(3) and I.C.R. 16(f)(1) and (g), which remain unaffected by Rule 501. Although technically not a testimonial privilege, but rather a rule restricting or prohibiting discovery, the "work-product" immunity rule does permit a person to refuse disclosure or production as provided in I.R.C.P. 26 or I.C.R. 16. Thus, the exception in Rule 501 for such "other rules" is necessary. Similarly, other Idaho procedural rules which operate to restrict or prohibit discovery, or bar the admission of evidence, are within the scope of the "other rules" exception of Rule 501.

Action Recommended on Idaho Statutes or Rules: None required. See comments to specific rules that follow.

Rule 502. Lawyer-Client Privilege

(a) **Definitions.** As used in this rule:

(1) **Client.** A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) **Representative of the client.** A "representative of the client" is one having authority to obtain professional legal services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the attorney of the client.

(3) **Lawyer.** A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) **Representative of the lawyer.** A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal service.

(5) **Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer, representing another concerning a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) **Who may claim the privilege.** The privilege may be claimed by the client or for the client through his lawyer, his guardian or conservator, or by the personal represen-

tative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

(6) Shareholder actions. As to a communication between a corporation and its lawyer or a representative of the lawyer, which was not made for the purpose of facilitating the rendition of professional legal services to the corporation during the litigation and concerning the litigation in which the privilege is asserted: (A) in an action by a shareholder against the corporation which is based on a breach of fiduciary duty; or (B) in a derivative action by a shareholder on behalf of the corporation, provided that disclosure of privileged communications under either subpart (A) or (B) of this exception shall be required only if the party asserting the right to disclosure shows good cause for the disclosure and provided further that the court

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may use in camera inspection or oral examination and may grant protective orders to prevent unnecessary or unwarranted disclosure.

COMMENT TO RULE 502

Prior Idaho Statutes or Rules: Idaho Code § 9-203(2); I.R.C.P. 26(b)(4); DR 4-101 Idaho Code of Professional Responsibility.

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 503) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Idaho Rule 502 is substantially the same as Uniform Rule of Evidence 502 (1974), 13 U.L.A. 249-251 (Supp. 1983). Subsection (a)(2) of the Idaho Rule has been changed to define the representative of the client consistent with Upjohn Co. v. U.S., 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); subsection (c) is re-worded to expressly authorize the lawyer for the client to exercise the claim of privilege and to provide for the presumption of authority; the exception for communication between a public officer or agency and its lawyer found in the Uniform Rule is omitted from the Idaho Rule; and, an exception for shareholder actions is added in the Idaho Rule.

Idaho Rule 502 is also very similar to proposed Federal Rule 503 which Congress rejected and which did not include the definition of a representative of the client or an exception for shareholder actions. See 56 F.R.D. 183, 236 (1973).

Comment: Rule 502 recognizes and provides for the attorney-client privilege now provided in Idaho Code § 9-203(2):

> 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. The word client used herein shall be deemed to include a person, a corporation or an association.

The attorney-client privilege "is intended to promote justice and protect persons who are obliged to disclose their private business affairs to an attorney in order to be advised of their legal rights and duties. It is defensive and not offensive. It is intended as a shield and not a sword." In re Niday, 15 Idaho 559, 556, 98 P. 845 (1908).

The Committee recommends the adoption of a rule for the attorney-client privilege rather than retention of the existing Idaho statutory law (Idaho Code § 9-203(2)) and case law for the reasons that (1) the statute, read literally, seems to provide a privilege only for the attorney's testimony about communications with the client, and not for the client's testimony about the same matter - a distinction for which the Committee can find no justification; and (2) the statute and case law in Idaho fail to clearly address a number of issues relating to this privilege which are resolved by the rule, including questions of the extent to which the privilege includes an attorney's assistants, communications overheard by "eavesdroppers", communications by various agents of corporations, and communications made during joint meetings among multiple parties. The Idaho Committee believes that the desirable policy on these issues is clear and that the development of Idaho law will be served by a clear expression of that policy.

Subsection (a) provides the definitions which govern the application of Rule 502.

Subsection (a)(1) defines "client" to include a public officer or government entity. This is consistent with the policy of Idaho Code § 9-203(5). The definition includes private corporations or other entities which is consistent with Idaho Code § 9-203(2). The definition of "client" is limited to one who is rendered professional legal services which is consistent with the rule expressed in McFee v. U.S., 206 F.2d 872 (9th Cir. 1953); Later v. Haywood, 12 Idaho 78, 85 P. 494 (1906); and In re Niday, 15 Idaho at 566, or one who consults a lawyer with a view to obtaining professional legal services from him even though actual employment does not result. Idaho law is in accord. State v. Iwakiri, 106 Idaho 671, 682 P.2d 571 (1984).

Subsection (a)(2) defining a "representative of the client" is most significant in relation to corporations and other organizations which can only be represented through communications with their agents. There is no Idaho law on this point.

The definition in Rule 502(a)(2) rejects the "control group test" previously followed by the federal courts in favor of the more liberal view adopted by the U.S. Supreme Court in Upjohn

Co. v. U.S., 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). That decision recognizes that middle and lower level corporate employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and would have relevant information needed by the corporate attorney in order to adequately advise the client. Accordingly, communications between such employees and the lawyer concerning such information are included within the privilege.

Neither the Supreme Court in Upjohn nor the Idaho Committee were willing to extend the privilege to post-employment communications concerning activities occurring while employed. The Idaho Committee further determined that "employees of the client" should not be expanded to include independent agents. The fact that employees are included within the privilege does not preclude discovery of facts or testimony regarding the facts known by the employee. The rule of privilege applies only to confidential communications and only prohibits inquiry as to such confidential communications.

Subsection (a)(3) defines lawyer to include those authorized to practice and those "reasonably believed by the client to be so authorized." Idaho has ruled that the privilege extends only to communications with a lawyer. Later v. Haywood, 12 Idaho at 82. The Idaho Committee believes the extension of the privilege to further protect the "client" who reasonably believed he was consulting a lawyer authorized to practice and who otherwise satisfies the requirement of the rule will prevent deception to obtain admissions and further promote the intent of the privilege.

There is no requirement that the lawyer be authorized to practice in Idaho nor any requirement that the licensing authority recognize the attorney-client privilege, thus avoiding excursions into conflict of laws questions.

Subsection (a)(4) is intended to clarify any question that the privilege extends to persons employed by the attorney to assist him in the rendition of legal services to the client.

I.R.C.P. 26(b)(4) permits discovery of the expert employed to assist in preparation of a case although he will not be called as a witness if the proponent of discovery cannot obtain facts or opinions by other means. Rule 503 may limit the scope of such discovery in that the client could preclude inquiry as to any confidential communications among the lawyer, client and expert. This would not preclude discovery of the facts or opinions however; only the confidential communications would be privileged. There is no Idaho authority on this point.

Subsection (a)(5) defines a confidential communication in terms of intent. Unless intent to disclose is apparent, the attorney-client communication is confidential. This requirement of intent that the communication be confidential is consistent with existing Idaho authority. See In re Niday, 15 Idaho at 566; Compton v. Compton, 101 Idaho 328, 612 P.2d 1175 (1980). In Compton, the Court held that the privilege extends only to communications which are intended to be confidential and excludes general statements by the attorney as to contacts by the client, contacts by the attorney with third persons, communications with the wife in the presence of the agent for the adverse party, and communications by the client to the attorney when the same had been expressed by the client to other persons on other occasions.

The rule adopts as policy a protection against invasion of the privilege by eavesdroppers, upon the rationale that the evolution of more sophisticated techniques of eavesdropping and interception or intrusion calls for abandonment of the position allowing testimony to overheard privileged conversations. Cf. State v. Perry, 4 Idaho 224, 38 P. 655 (1894)(a third party who overheard an attorney-client conversation could be ordered to testify in the absence of any conspiracy between the state and the third party to violate the defendant's right to counsel).

The policy of the State of Idaho in regard to "eavesdropping" is clearly expressed in Title 18, chapter 67, Idaho Code. In essence, any person intercepting any wire or oral communication through the use of any electronic, mechanical, or other device or who willfully uses or discloses the contents of a wire or oral communication thus intercepted is guilty of a felony, unless the interception, use or disclosure is authorized as therein provided. Idaho Code § 18-6702.

Similar to the definition of a "confidential communication" in Rule 502, in terms of intent that it not be disclosed to others, Section 18-6701(2) defines an "oral communication" to mean "any oral communication uttered by a person under circumstances justifying an expectation that said communication is not subject to interception." "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . if the disclosure of that information would be in violation of this chapter." Idaho Code § 18-6705. Even when interception is authorized, [n]o otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." Idaho Code § 18-6707(4).

The Committee can discern no justifiable reason to distinguish between confidential communications intercepted by

the eavesdropper "through the use of any electronic, mechanical, or other device," and those intercepted by other means when the communication is otherwise confidential and privileged.

In the decision of State v. Hoisington, 104 Idaho 153, 657 P.2d 17 (1983), the Idaho Supreme Court held that the admission of testimony by a court reporter regarding conversations between defendant and his attorney during a preliminary hearing, which the reporter overheard, was harmless error. The Court did not decide whether it violated defendant's constitutional right to counsel or was otherwise inadmissible. In support of the decision, the Idaho Court cites Weatherford v. Bursey, 429 U.S. 545 (1977)(a defendant's right to counsel had not been violated due to the presence of an undercover agent during an attorney-client meeting, noting a distinction between the government's use of electronic eavesdropping as opposed to interception by undercover agents and observing that intrusion by agents may be avoided by excluding third parties from such meetings). The Idaho Court further discussed distinctions between attorney-client conversations held when they are aware of the presence of third persons in the vicinity and when such presence is unknown. The Court stated that the requirement that the attorney and client converse in whispers to avoid being overheard "is certainly a reasonable one." 104 Idaho at 160, 657 P.2d at 24.

The Idaho Evidence Committee disagrees with this view. It imposes too fine a distinction and encourages effort to intrude into the confidential communications between attorney and client. Thus, the Committee recommends that such testimony by eavesdroppers be inadmissible by rule. It should be noted that under Rule 502, the attorney-client conversation in Weatherford would probably not have been privileged because it would not have been a "confidential" communication as defined in subsection (a)(5), unless the disclosures to the undercover agent were made "in the furtherance of the rendition of professional legal services to the client" or unless his presence was "reasonably necessary for the transmission of the communication."

Lawyers must be cautious when admitting third persons into the attorney-client conference if confidential communications are intended. The rule is intended to include the attorney's employees or legal assistants. It also includes, in the view of the Committee, an interpreter or a friend or family member of the client if disclosures are made in the presence of such persons in furtherance of the rendition of professional legal services or if their presence is "reasonably necessary for the transmission of the communication." A record of third persons present and the reasons for their presence would be advisable.

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Subsection (b) states the rule of privilege. It confers the privilege only on the client, although it may be exercised for the client by his attorney or other representative. The rule is intended to provide the privilege to all communications between the attorney and client, and to others necessary to the communication process or the rendition of professional legal services to the client.

Subsection (b)(1) is intended to make clear that confidential communications between the client or his employees and the attorney or his assistants are within the privilege.

Subsection (b)(2) is intended to make clear that confidential communications between the lawyer and his assistants are within the privilege.

Subsection (b)(3) includes communications relating to matters of common interest in the "joint defense" or "pooled information situations," where different lawyers are representing clients who share a common interest. In these situations each client is granted the privilege as to his own statements made at a joint conference and he may waive that privilege as to his own statements. The rule does not apply to situations where there is no common interest to be promoted by a joint consultation and the parties meet on an adversary basis. The application of subsection (b)(3) is not limited to a pending action. There is no Idaho authority on this point.

Subsection (b)(4) is intended to make clear that confidential communications between or among the client and the client's employees are within the privilege.

Subsection (b)(5) extends the privilege to communications among lawyers and their representatives representing the same client. This is consistent with Idaho case law. See In re Felton, 60 Idaho 540, 94 P.2d 166 (1939).

The rule as stated in subsection (b) extends the privilege only to confidential communications. It does not apply to articles of evidence and does not permit a client to bury evidence by delivering it to his lawyer. Idaho case law is in accord. See State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971). In Dillon, the Court stated "[t]he privilege against self incrimination refers only to communicative and not 'real' evidence. The same is true of the attorney-client privilege. An attorney may not act as a depository for criminal evidence and he

may not suppress such evidence." 93 Idaho at 710. But cf. In re Niday, 15 Idaho 566. (dicta: "There can be no doubt under our statute, but what these communications (letters from client to third party deposited with lawyer by third party) would be privileged if they were received by the attorney in the course of his legal employment by the client, and for the purpose of giving him legal advice thereon, or using the same in connection with his legal engagement with the client.").

The Idaho Evidence Committee is of the opinion that third party correspondence deposited with the attorney would not be privileged under existing law or Rule 502 because the requirement of confidentiality would not be satisfied. The holding in Compton, 101 Idaho at 337, seems to support this view. It is the intent of the Committee that letters or other documents evidencing communications between the client and nonprivileged third parties be treated as "real" evidence and outside the scope of the privilege under Rule 502.

Subsection (c) deals with who holds the privilege and states who may claim it. The privilege belongs to the client, whether or not he is a party to the proceeding in which the privileged communication is sought. It survives the death of an individual and the dissolution of a corporation.

The client may claim the privilege on his own behalf and if he is incompetent his guardian or conservator may assert it on his behalf. The lawyer currently representing the client may also invoke the privilege on his client's behalf even though he was not counsel at the time the communication was made. Also, the rule expressly provides that the person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. Unlike the federal rule provision that was proposed to Congress, the Idaho rule further provides that the person who was the lawyer's representative at the time of the communication may assert the privilege on behalf of the client to cover the situations when the lawyer's representative may be called to testify in the absence of the client or his lawyer.

The burden of proving the right to claim the privilege is on the client which is consistent with Idaho case law. See In re Niday, 15 Idaho at 564. If exercised by the client's attorney, a representative or other person authorized to do so, a presumption exists that he has authority to exercise the claim of privilege on behalf of the client, but the presumption disappears if evidence to the contrary is introduced. The presumption is to be treated the same as are other presumptions under Article III.

The presumption applies only to the issue of authority of the attorney or other enumerated representative to exercise

the claim of privilege on behalf of the client. The presumption does not apply to the issue of whether the client has the right to claim the privilege. As under existing Idaho authority, the person claiming the privilege must first show the relation that existed between the attorney and the client at the time of the communication, the circumstances under which the attorney came into possession of the communication or information, and that the same was obtained by him while acting as attorney for the client and in connection with his professional engagement. See In re Niday, 15 Idaho at 564.

Subsection (d) states the exceptions to the rule. Although not expressly provided in Idaho Code § 9-203(2), the exceptions are well established in the law.

Subsection (d)(1) is consistent with DR 4-101, Idaho Code of Professional Responsibility. The privilege does not extend to advice in aid of future wrong doing. 8 Wigmore § 2298 (McNaughton Rev. 1961). The wrongdoing need not be that of the client. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised that a proposed action is within the law.

The Committee recommends that the court require a substantial evidentiary showing that the communication related to a contemplated crime or fraud prior to requiring disclosure. The Committee rejected the requirement that a prima facie showing be made and rejected the rationale of those decisions which hold that only an allegation is sufficient to require disclosure. The Committee concluded that some showing must be required, but that it must depend on the circumstances which can only be developed on a case-by-case basis.

Subsection (d)(2) recognizes that normally the privilege survives the death of the client and may be asserted by his representative. When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The exception makes clear that neither side may assert the privilege.

Subsection (d)(3) is required by considerations of fairness and policy when questions arise out of dealings between attorney and client. It is consistent with DR 4-101, Idaho Code of Professional Responsibility.

Subsection (d)(4) is based on the premise that when the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communication is a proper result.

Subsection (d)(5) makes clear that when two or more clients retain the same attorney, communications by one of the clients to the attorney are not privileged as to the other clients in an action between or among the clients. This is the rule at common law. This provision does not apply when the clients with a common interest have retained different lawyers.

Subsection (d)(6) attempts to resolve the question whether a corporation can raise the attorney-client privilege to bar disclosure in a suit brought against it by a shareholder.

"Theoretically, a derivative suit is for the benefit of the corporation so that there should be no objection to divulging information to its representative, the minority shareholder. But the facts of corporate life are that 'antagonism between the derivative plaintiff and those who really run (i.e. are) the corporation is a common phenomenon.'" 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503(b)[06] at 56.13 to 56.14 (Supp. 1983)(citing Heilbrunn v. Hanover Equities Corp., 259 F.Supp. 936, 939 (S.D.N.Y. 1966)). "[A]llowing management to claim an absolute privilege would indiscriminately bar all evidence of communications between counsel and corporation, thereby immunizing management actions from stockholder inquiry." Id. at ¶ 56.14.

The design of the exception stated in subsection (d)(6) is based on the ruling of the court in Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2 323 (1971).

> In Garner v. Wolfinbarger, the Fifth Circuit, on the appeal from a district court opinion holding that the privilege is not available in derivative suits, considered the competing policies in issue:
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> > It is urged that disclosure is injurious to both the corporation and the attorney. Corporate management must manage. It has the duty to do so and requires the tools to do so. Part of the managerial task is to seek legal counsel when desirable, and, obviously management

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> prefers that it confer with counsel without the risk of having the communications revealed at the instance of one or more dissatisfied stockholders. The managerial preference is a rational one, because it is difficult to envision the management of any sizeable corporation pleasing all of its stockholders all of the time, and management desires protection from those who might second-guess or even harass in matters purely of judgment.
>
> But in assessing management assertions of injury to the corporation it must be borne in mind that management does not manage for itself and that the beneficiaries of its actions are the stockholders . . . [M]anagement judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised.

In remanding to the District Court to determine whether or not under the circumstances "good cause" had been shown, the Court of Appeals suggested the following guidelines:

> [T]he number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the stockholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confiden-

> tiality the corporation has an interest for independent reasons.
>
> The appellate court also suggested that in a case of this nature the trial court
>
> > can freely use in camera inspection or oral examination and freely avail itself of protective orders, a familiar device to preserve confidentiality in trade secret and other cases where the impact of revelation may be as great as in revealing a communication with a client.

2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503(b)[05] at 56.14-57 (Supp. 1983).

Attention is also directed to Valente v. Pepsico, Inc., 68 F.R.D. 361 (D. Del. 1975) in which the Garner principle of disclosure was extended considerably, where minority stockholders were suing the defendant corporation for alleged violations in connection with the securities offering which had led to their corporation being acquired by defendant. The court held the attorney-client privilege did not apply to (1) communications between defendant's general counsel and defendant since counsel also sat on the board of the acquired corporation so that his fiduciary duty to the stockholders of the acquired corporation outweighed his duties to his client; (2) communications between defendant and outside counsel because a general partner in the law firm sat on the acquired corporation's board so that fiduciary obligation was owed the shareholders of the acquired corporation; (3) documents prepared by counsel for defendant corporation with regard to matters concerning the interests of the minority shareholders since the defendant was at the time controlling stockholder in the corporation to be acquired and as such could not use its position to the undue advantage of the minority.

The Idaho Committee agrees that "[t]he Garner v. Wolfinbarger balancing approach is sound. Officers and directors should not be permitted unrestricted use of the privilege of the corporation to block off inquiry into possible breaches of their fiduciary duty to the corporation's owners." 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 503(b)[05] at 58. At the same time minority shareholders should not be allowed unbridled access to the corporate confidences to the detriment or damage of the corporation.

The scope of this exception is limited with respect to the kind of communication that is subject to disclosure. The language "which was not made for the purpose of facilitating the

rendition of professional legal services to the corporation during the litigation and concerning the litigation in which the privilege is asserted" was added to the exception by the Idaho Committee with the intent that these communications are exempt from the exception and are not subject to disclosure unless otherwise excepted under subsections (b)(1)-(5), or unless waived by prior voluntary disclosure as under Rule 510.

The Idaho Committee recognizes a distinction between communication with corporate counsel relating to conduct which gave rise to the action for breach of fiduciary duty or a derivative action as opposed to communications with litigation counsel made during and concerning the litigation itself. The Committee determined that the "litigation" communications should remain privileged unless otherwise excepted or waived. Otherwise the corporation would be deprived of effective legal representation to which it is entitled during the litigation.

The Idaho Committee considered and rejected an exception to Rule 502 which is found in the proposed Federal Rule and the Uniform Rule of Evidence 502 (1974), that would except a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest. The Idaho Committee cannot justify a distinction between application of the privilege to private clients and to public clients, and therefore rejected the exception.

<u>Action Recommended on Idaho Statutes or Rules</u>: Amend Idaho Code 9-203(2) to conform the language of the statute to Rule 502 for application in non-judicial proceedings.

Rule 503. Physician and Psychotherapist-Patient Privilege

(a) Definitions. As used in this rule:

(1) Patient. A "patient" is the person who consults or is examined or interviewed by a physician or psychotherapist for the purpose of obtaining diagnosis or treatment of a physical, mental or emotional condition, including alcohol or drug addiction.

(2) Physician. A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) Psychotherapist. A "psychotherapist" is (A) a physician while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) Confidential communication. A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General rules of privilege.

(1) Civil action. A patient has a privilege in a civil action to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(2) Criminal action. A patient has a privilege in a criminal action to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his mental or emotional condition, including alcohol or drug addiction, among himself, his psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the

psychotherapist, including members of the patient's family.

(c) **Who may claim the privilege.** The privilege may be claimed by the patient or for the patient through his lawyer, guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication may claim the privilege but only on behalf of the patient. His authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.**

(1) **Proceedings for hospitalization.** There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) **Examination by order of court.** If the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) **Condition an element of claim or defense.** There is no privilege under this rule as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

(4) **Child related communications.** There is no privilege under this rule in a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

COMMENT TO RULE 503

Prior Idaho Statutes or Rules: Idaho Code §§ 9-203(4), 9-203(6), 16-1620, 18-215, 54-2314, 66-322(h); I.R.C.P. 43(b)(4).

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 504) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Idaho Rule 503 is based on Uniform Rule of Evidence 503 (1974), 13 U.L.A. 253-255 (Supp. 1983). Subsection (a)(1) has been changed to more specifically define a "patient" and (a)(3) has been changed to avoid duplicity in the definition. Subsection (b) adopts the language of the Uniform Rule in stating the rule of privilege, but creates a distinction between civil and criminal actions. Subsection (c) is changed to expressly provide for the presumption of authority and (d) adds an exception for child related communications.

Idaho Rule 503 is also similar in many respects to proposed Federal Rule 504 which applied only to communications with psychotherapists made for the purpose of diagnosis or treatment of a mental or emotional condition, including drug addiction and omitted the exception for child related communications. See 56 F.R.D. 183, 240-242 (1973).

Comment: Rule 503 recognizes and provides for the physician-patient privilege now provided in Idaho Code § 9-203(4):

> 4. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient, provided, however, that:
>
> (A) Nothing herein contained shall be deemed to preclude physicians from reporting of and testifying at all cases

of physical injury to children, where it appears the injury has been caused as a result of physical abuse or neglect by a parent, guardian or legal custodian of the child.

(B) After the death of a patient, in any action involving the validity of any will or other instrument executed, or claimed to have been executed, by him, conveying or transferring any real or personal property or incurring any financial obligation, such physician or surgeon may testify to the mental or physical condition of such patient and in so testifying may disclose information acquired by him concerning such patient which was necessary to enable him to prescribe or act for such deceased.

(C) That where any person or his heirs or representatives brings an action to recover damages for personal injuries or death, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said injured or deceased person and whose testimony is material in the action may testify.

(D) That if the patient be dead and during his lifetime had not given such consent, the bringing of an action by a beneficiary, assignee or payee or by the legal representative of the insured, to recover on any life, health or accident insurance policy, shall constitute a consent by such beneficiary, assignee, payee or legal representative to the testimony of any physician who attended the deceased.

and the psychologist-client privilege now provided in Idaho Code § 54-2314:

> A person licensed as a psychologist under the provisions of this act cannot, without the written consent of his client, be examined in a civil or criminal action as to any information acquired in the course of his professional services in behalf of the client. The confidential relations and communications between a psychologist and his client are on the same basis as those provided by law

between an attorney and client, and nothing in this article shall be construed to require any such communication to be disclosed.

The Idaho Evidence Committee is recommending adoption of Rule 503 rather than retention of Idaho Code § 9-203(4) and § 54-2314 for several reasons. The Committee can find no valid reason to differentiate between the psychiatrist who is diagnosing and treating a mental condition, whose patient is granted a limited privilege in civil cases under Idaho Code § 9-203(4), from a psychologist performing a similar service whose patient is granted an almost unlimited privilege in both civil and criminal actions under Idaho Code § 54-2314.

The privilege granted physicians and psychiatrists under Idaho Code § 9-203(4) contains exceptions for situations involving physical injury to children, competency of a decedent to execute a will or other documents, actions for damages for personal injuries or death by a person or his heirs, and actions against insurers, none of which are provided in Idaho Code § 54-2314. However, other than the exceptions provided in Idaho Code § 16-1620 and I.J.R. 10 relating to Child Protective Act proceedings, no exceptions are applicable to psychologists under existing law. Moreover, there is no express provision in existing Idaho law for assistants of physicians or psychologists, nor for others necessarily involved in the treatment or communication process. Other conflicts and ambiguities in existing Idaho law are noted below.

<u>Subsection (a)</u> provides the definitions which govern the application of Rule 503.

<u>Subsection (a)(1)</u> defines "patient" in terms that restrict it to the person who consults or is examined or interviewed by a physician or psychotherapist for the purpose of obtaining diagnosis or treatment of a physical, mental or emotional condition, including alcohol or drug addiction.

<u>Subsection (a)(2)</u> defines "physician" to include a person authorized in any state or nation to practice medicine. It further defines "physician" to include a person "reasonably believed by the patient" to be so authorized. This expands the application of the privilege beyond Idaho Code § 9-203(4) which is limited to physicians.

Subsection (a)(3) defines "psychotherapist" to include a physician, if treating a mental or emotional condition, in recognition of the fact that general practitioners are often engaged in the diagnosis or treatment of such conditions, including alcohol or drug addiction, and to avoid the making of needless distinctions concerning what is or is not the practice of psychiatry.

The requirement that the psychologist be in fact licensed or certified in any state or nation, and not merely be believed to be so, is deemed justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories. Providing for psychologists to be licensed or certified in any state or nation may be an expansion of Idaho Code § 54-2314 which limits the definition to "a person licensed as a psychologist under the provisions of this act. . ."

The clarification of mental or emotional condition as including drug addiction is consistent with current approaches to drug abuse problems.

Subsection (a)(4) defines a "confidential" communication based on the intent that it not be disclosed to third persons with certain exceptions to include within the privilege those persons deemed necessary to the diagnosis, treatment or communication process.

This provision appears to be at variance with Idaho Code § 9-203(4) and § 54-2314 which provide a privilege as to "any information acquired" and has been held to include all observations made or used for diagnosis or treatment. See Gardner v. Hobbs, 69 Idaho 288, 206 P.2d 539 (1949); Fritcher v. Kelley, 34 Idaho 471, 201 P. 1037 (1921). It has also been held to include the condition of tissue removed from the patient. Jones v. City of Caldwell, 23 Idaho 467, 130 P. 995 (1913). Subsection (a)(4) limits the privilege to communications and does not include observations of the patient, his actions or the condition of tissue removed.

The Idaho Court has held that the privilege under Idaho Code § 9-203(4) includes communications between one physician and the patient's family doctor, Shaw v. City of Nampa, 31 Idaho 347, 171 P. 1132 (1918), but the question whether nurses or other assistants of physicians or psychologists are included within the privilege has not been decided in Idaho. In State v. Bounds, 74 Idaho 136, 258 P.2d 751 (1953), the Court allowed testimony of attending nurses as to defendnt's statements to his attending physician on the grounds that § 9-203(4) does not apply in criminal actions and refused to rule whether nurses are within the scope of the privilege.

Although not specifically provided in § 9-203(4), legislative intent to include nurses and other medical assistants within the scope of the privilege may be found in Idaho Code § 39-1312. It requires the hospital licensing agency to receive and maintain confidential certain medical records and further provides that nothing in the statute shall be construed "as to impair, restrict or alter the confidentiality and privilege afforded the physician and patient communications, including without limitation, documentation thereof in hospital records, or communications to and with nurses or other assisting persons or entities, nor shall this act be construed to amend by implication such physician-patient communication privilege as provided elsewhere in this code, including without limitation, § 9-203(4), Idaho Code, which shall remain inviolate."

Idaho Code § 9-203(4) and § 54-2314 appear to be limited only to the physician or psychologist. Subsection (a)(4) would remove the ambiguity in Idaho law and explicitly include confidential communications to third persons deemed necessary to the diagnosis, treatment or communication process, as defined therein.

Subsection (b) states the rules of privilege. It grants the privilege to the patient only and makes a distinction in the application of the rule between a civil action as opposed to a criminal action based upon the services being rendered and not by whom rendered. In a civil action, the privilege extends to and includes confidential communications made for the purpose of diagnosis or treatment of a physical, mental or emotional condition as provided in subsection (b)(1). However, in a criminal action under subsection (b)(2), the privilege is limited in that it does not include confidential communications made for the purpose of diagnosis or treatment of a physical condition. No other distinction is made. This distinction is consistent with existing Idaho law which grants the privilege to physicians in civil cases only, but confers the privilege upon psychologists in both civil and criminal actions.

Idaho Code § 9-203(4), relating to physicians and psychiatrists, and § 54-2314, relating to psychologists, create a distinction between a psychiatrist and a psychologist that cannot be justified by the Idaho Committee. Under § 9-203(4), a confidential communication made to a psychiatrist is not privileged in a criminal action, see State v. Bounds, 74 Idaho 136, 258 P.2d 751 (1953); Barker v. Barker, 92 Idaho 204, 440 P.2d 137 (1968); State v. Coburn, 82 Idaho 437, 354 P.2d 751 (1960) but, is privileged under § 54-2314 when made to a psychologist by a patient and even under Idaho Code § 9-203(6) when made to a school counselor by a student.

Rule 503(b) changes Idaho law to the extent that it grants the privilege in criminal actions to a patient receiving

mental or emotional treatment from a physician or psychiatrist. The Committee believes that since the Idaho Legislature saw fit to extend the privilege to psychologists in criminal proceedings, it would have extended the privilege to psychiatrists if the question had been put before it.

Adoption of Rules 501 and 503(b) resolves an apparent conflict between Idaho Code § 9-203(4) and Idaho Code § 18-215. Section 18-215 appears to apply equally to "psychiatric or psychological examination or treatment" and inferentially to psychiatrists and psychologists when a person is subjected to examination by order of the court in criminal proceedings. The provisions of Idaho Code § 18-215 relating to the scope of the privilege are rendered inapplicable by Rule 503 when read in conjunction with Rule 501 which makes the privileges provided in these rules the governing authority "except as otherwise provided by constitution, or by statute implementing a constitutional right . . ." and Rule 1102, which renders statutory provisions in conflict with the rules of no force or effect.

The Committee intends that the grant of privilege applies irrespective of whom employs the physician or psychotherapist or pays for the services, as is the rule under existing Idaho authority. See Brayman v. Russell & Pugh Lumber Co., 31 Idaho 140, 169 P. 932 (1917).

The Committee intends that the grant of privilege in this rule and the other privilege rules apply only to judicial cases, actions and proceedings as provided in Rule 101 and Rule 501, and does not apply in administrative matters or hearings unless made applicable by statute. See, e.g., Skelly v. Sunshine Mining Co., 62 Idaho 192, 109 P.2d 622 (1941).

I.R.C.P. 26(b)(4) permits discovery of facts known or opinions held by an expert who has been retained and who is not expected to be called as a witness, except as provided in Rule 35(b) or upon a showing that the information cannot be obtained by other means. I.R.C.P. 35(b) provides for obtaining the report of the examining physician and deposing the examining physician in civil matters and provides that the party examined who requests or obtains a report of an examination ordered pursuant to I.R.C.P. 35(a), waives any privilege he may have in that action or any other involving the same controversy.

The Idaho Committee intends that Rule 503 not have any effect on the provisions of I.R.C.P. 26(b)(4) except to the extent that the expert can be prevented from testifying as to privileged communications as provided in Rule 503. The Committee further intends that Rule 503 have no effect on discovery under I.R.C.P. 35 and that the privilege granted by Rule 503 would be waived as provided in I.R.C.P. 35(b)(2).

Subsection (c) states who may claim the privilege. It permits the lawyer for the patient, or his guardian, conservator or the personal representative of his estate to exercise his claim of privilege in his behalf. It further permits the physician or psychotherapist at the time of the confidential communication to exercise the claim of privilege in the patient's behalf. The authority to exercise the claim of privilege for the patient is presumed until evidence to the contrary is produced. When such contrary evidence is produced, the presumption disappears as with other presumptions under Article III. The presumption does not apply to the validity of the privilege.

Subsection (d) states the exceptions to the rule. The exceptions differ substantially from those of the attorney-client privilege, as a result of basic differences in the relationship. The exceptions permitting disclosure are based on the belief that the need for disclosure is sufficiently great to justify the risk of possible impairment of the relationship.

Subsection (d)(1) makes an exception for proceedings to hospitalize the mentally ill patient. The Committee believes that an exception should be made in a proceeding to hospitalize the patient for mental illness, as is now provided in Idaho Code § 66-329, which is applicable to both physicians and psychologists. The interests of both patient and the public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the psychotherapist determines that hospitalization is necessary, control over disclosure is placed in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely.

Subsection (d)(2) precludes a claim of privilege as to communications made during the course of an examination if the examination of a patient's physical, mental or emotional condition was performed pursuant to an order of the court, "unless the court orders otherwise." This exception is broader than the waiver under I.R.C.P. 35(b) in that it would apply regardless of whether or not the party examined requests a copy of the examiner's report or deposes the examiner, "unless the court orders otherwise."

In a court ordered examination, the relationship is likely to be an arm's length one, though not necessarily so. In any event, an exception is necessary for the effective utilization of this important and growing procedure. The exception, it will be observed, deals with a court ordered examination rather than with a court appointed psychotherapist. Also, the exception is effective only with respect to the

particular purpose for which the examination is ordered. The rule thus conforms with the provisions of Idaho Code § 18-215 which limits the use of statements made by a defendant in a criminal action during an examination ordered by the court pursuant to Idaho Code §§ 18-211, 18-212 or 19-2522 in any criminal proceedings against him on any issue other than the defendant's ability to assist counsel at trial or to form any specific intent which is an element of the crime charged, except that such statements to a psychiatrist or psychologist as are relevant for impeachment purposes may be received subject to the usual rules of evidence.

Subsection (d)(3) precludes a claim of privilege in any proceeding in which the patient relies upon the condition as an element of his claim or defense. It further excepts the claim of privilege whenever any party relies upon the condition as an element of his claim or defense in any proceeding after the death of the patient. The Idaho Committee believes that a person should not be allowed to assert a claim or defense based on a medical or mental condition and then prevent discovery or proof of the facts relating to the condition by asserting the privilege.

The Committee believes that the exception in existing Idaho law at Idaho Code § 9-203(4)(C), which is limited to an action to recover damages for personal injuries or death and is limited to physicians, should be broadened to include all actions and proceedings where the condition is made an element of the claim or defense by the patient. By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses in all cases. Similar considerations prevail after the patient's death.

This exception is intended by the Committee to also cover an action involving custody of children where the physical or emotional fitness of a parent to have custody is in issue. The Committee believes that the patient should not be permitted to preclude testimony as to potential injury to a child or testimony that the patient possesses character traits that would endanger a child in the future should the patient be awarded custody. This result under Rule 503 would be contra to the holding in Barker v. Barker, 92 Idaho 204, 440 P.2d 137 (1968) wherein the Court precluded psychiatric testimony as to fitness to have custody on the ground it was privileged under Idaho Code § 9-203(4).

The second provision of subsection (d)(3) also covers the exception now provided in Idaho Code § 9-203(4)(B) and expands the exception beyond competency to execute a will or document. It also provides an exception applicable to patients of psychologists not now provided in Idaho Code § 54-2314.

The second provision of subsection (d)(3) also covers the exception now provided in Idaho Code § 9-203(4)(D) relating to actions by heirs or beneficiaries against insurers after the death of the insured.

Subsection (d)(4) excepts any communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child or the welfare of a child.

It is the intent of the Committee that the rule contain a broad exception for communications affecting children. The reference to "abuse, abandonment or neglect of a child" is intended to include, without lmitation, the conduct or circumstances included within such terms as defined in Idaho Code § 16-1602.

The Idaho Committee considered the exception provided in Idaho Code § 9-203(4)(A) which is limited to "physical injury to children where it appears the injury has been caused as a result of physical abuse or neglect by a parent, guardian or legal custodian of the child." The Committee strongly feels that the exception for physicians in Idaho Code § 9-203(4)(A) is far too narrow. The Committee is aware of the fact that mental and emotional injuries to children are often more devastating and lasting than physical injuries and believes that mental and emotional injuries should be covered by the rule. The Committee is also aware of the many published accounts of torture and death inflicted on children by a friend of the parent and have consequently deleted from the rule any limitation with respect to the persons causing the injury or their relationship to the child.

The privilege conferred on psychologists under Idaho Code § 54-2314 makes no exception for any injury to a child. It provides that the privilege granted patients of psychologists is based on the attorney-client privilege which contains no exception for injuries to children. Idaho Code § 9-203(6) which applies to school psychologists in civil and criminal actions likewise makes no exception whatever. Idaho Code § 16-1620 and I.J.R. 10 are applicable to psychologists but provide an exception only in Child Protective Act proceedings.

Subsection (d)(4) is consistent with Idaho Code § 16-1620 which excludes all privileges except the lawyer-client privilege, as grounds for excluding evidence "at any proceeding regarding the abuse of a child or the cause thereof." See also I.J.R. 10 (in a Child Protective Act adjudicatory hearing of a petition, "only the attorney-client privilege applies in the proceeding. In proving the allegations of the petition there is no husband-wife or parent-child privilege, nor is there any

professional privilege such as physician-patient, minister-confessor, hospital-patient, counselor-client, or clinic, day care center or school privilege recognized in the proceeding."). The interests of the public and the need to protect children far outweigh any damage that may result to the patient-physician or psychotherapist relationship from disclosure. Thus, the exception is designed to encompass both the physician and psychotherapist patient privilege.

I.R.C.P. 43(b)(4) provides, inter alia, that "[n]othing contained in this rule shall be construed in such manner as to compel the husband or wife to testify against the other, nor to compel a witness to disclose information or communications which are privileged by law, except that physicians and parents may testify in all cases of physical injury to children without regard to whether the testimony violates what would otherwise constitute a privileged communication." Adoption of Rule 503 may create an apparent conflict with I.R.C.P. 43(b)(4) to the extent that Rule 503 contains an exception for testimony as to a physical, mental or emotional injury to a child and would be applicable to psychologists as well as physicians. Actually, Rule 43(b)(4) confers no privilege, but merely recognizes those provided by law. Nonetheless, deletion of the language following "privileged by law" would remove the apparent conflict.

<u>Action Recommended on Idaho Statutes or Rules</u>: Amend Idaho Code § 9-203(4) and § 54-2314 to conform the language of the statutes to Rule 503 for application in nonjudicial proceedings.

Amend I.R.C.P. 43(b)(4) to delete the language ", except that physicians and parents may testify in all cases of physical injury to children without regard to whether the testimony violates what would otherwise constitute a privileged communication."

Rule 504. Husband-Wife Privilege

(a) **Definition.** A communication is "confidential" if it is made during marriage privately by any person to his or her spouse, and is not intended for disclosure to any other person.

(b) General rule of privilege. A party in an action or proceeding has a privilege to prevent testimony as to any confidential communication between the party and his or her spouse made during the marriage.

(c) **Who may claim the privilege.** The privilege may be claimed by the party or by the spouse on behalf of the party, or by the lawyer for the party on behalf of the party. The authority of the spouse or the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

(2) **Criminal action.** In a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a person residing in the household of either spouse, or (C) a third person committed in the course of committing a crime against the other spouse or a person residing in the household of either spouse.

(3) **Special proceeding.** In proceedings (A) under the Reciprocal Enforcement of Support Act, or (B) concerning desertion or non-support of a spouse, or (C) for commitment of mentally ill or deficient persons.

(4) **Civil action.** In a civil action or proceeding by one spouse against the other involving the person or property of the other.

COMMENT TO RULE 504

Prior Idaho Statutes or Rules: Idaho Code §§ 9-203(1), 19-3002, 7-1069, 16-1620; I.C.R. 26; I.R.C.P. 43(a), 43(b)(4).

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 505) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state or political subdivision thereof, shall be determined in accordance with state law."

Idaho Rule 504 is in many respects similar to Uniform Rule of Evidence 504 (1974), 13 U.L.A. at 258 (Supp. 1983), the major difference being that the Idaho rule is made applicable in civil, as well as criminal actions. Subsection (a) defining a confidential communication is changed to explicitly provide that the communication must be made "during marriage; (b) is changed to make the privilege applicable in both civil and criminal actions and to reiterate that the privilege applies only to communications made during marriage; (c) is changed to include a party in a civil as well as a criminal action; and, (d) adds exceptions for child related communications, special proceedings and civil actions between spouses.

Idaho Rule 504 is unlike proposed Federal Rule 505 which provided for a spousal disqualification in criminal actions only. See 56 F.R.D. 183, 244 (1973).

Comment: Rule 504 recognizes and provides for the husband-wife privilege now provided in Idaho Code § 9-203(1):

> 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other

nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, nor does this exception apply to any case of physical injury to a child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, nor does this exception apply to any case of lewd and lascivious conduct or attempted lewd and lascivious conduct where either party would otherwise be protected by this privilege.

and in Idaho Code § 19-3002;

Neither husband nor wife are competent witnesses for or against each other in a criminal action or proceeding to which one or both are parties, except:

1. With the consent of both, or
2. In cases of criminal violence upon one by the other; or acts of physical injury upon a child of either the husband or the wife where the injury has been caused as a result of physical abuse or neglect by one or both of the parents; or to acts or attempted acts of lewd conduct with a minor child; or
3. In cases of desertion or nonsupport of wife or child by the husband.

The Idaho Evidence Committee is recommending adoption of Rule 504 rather than retention of Idaho Code § 9-203(1) and § 19-3002 for several reasons. The Committee can find no valid reason to continue the practice of permitting an accused to marry the state's witness solely to prevent adverse spousal testimony. The Committee has found existing Idaho law to be confusing and ambiguous, particularly with respect to the statutory exceptions which are noted below. The Committee believes that current public policy justifies only the protection of confidential communications between spouses.

The marital privilege originated as a spousal disqualification rule that a spouse could not be produced as a witness either for or against the other spouse. The disqualification of a spouse as a witness was founded on two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one.

The rule of spousal disqualification remained intact in most common-law jurisdictions until well into the 19th century.

In the 1933 decision of Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 93 A.L.R. 1136, 78 L.Ed. 369, the Supreme Court held that rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to the law of the state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience, and abolished the testimonial disqualification in the federal courts, so as to permit the spouse of a defendant to testify in the defendant's behalf. Funk, however, left undisturbed the rule that either spouse could prevent the other from giving testimony. The rule thus evolved into one of privilege rather than one of absolute disqualification. See Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

Following Funk the federal courts recognized two rules of marital privilege: first, the rule that one spouse could not testify against another without the consent of both; second, the rule that a person could refuse to testify and could prevent others from testifying as to confidential communications between spouses. See Wolfle v. United States, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed. 617 (1934).

In Wolfle the Supreme Court stated that the privilege with respect to communications applies even though the different privilege, excluding the testimony of one against the other, is not involved. The Supreme Court in Wolfle also stated that communications between the spouses privately made are generally assumed to have been intended to be confidential, and hence they are privileged.

The privilege as to confidential communications between spouses was again the subject of the Court's ruling in Blau v. United States, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306 (1951), holding that the witness spouse has the privilege in a grand jury proceeding to refuse to disclose a confidential communication from his wife as to her whereabouts.

Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), involved the rule barring adverse spousal testimony. In Hawkins, the court rejected the government's request that the rule forbidding one spouse to testify against the other unless both consent, be modified to permit a spouse to voluntarily do so. The court reasoned that public policy to preserve marital harmony justified preservation of the rule barring adverse spousal testimony. The Court noted, however, "this decision does not foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'"

In 1974 Congress rejected a proposed rule that would have abandoned the marital privilege as to confidential communications and would have retained only a rule prohibiting

adverse spousal testimony in a criminal proceeding unless both consent. As previously noted, Congress enacted F.R.E. 501 instead of the proposed specific rules.

In 1980, the Supreme Court again had the question before it whether to modify the rule forbidding adverse spousal testimony unless both consent in a criminal case where the trial court had allowed the wife to testify to nonconfidential communications by her husband and about his conduct. In Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980), the Supreme Court modified the rule of Hawkins v. United States, 358 U.S. 74, holding that the privilege against adverse spousal testimony vests in the witness spouse alone and that the witness may be neither compelled to testify nor foreclosed from testifying as to nonconfidential communications and conduct in a criminal proceeding.

In Trammel the Supreme Court reviewed the history of the marital privilege and observed that the modern justification for this privilege is its perceived role in fostering the harmony and sanctity of the marriage relationship. The Court further observed that nonetheless, because it is an obstruction to the determination of truth, it has been severely criticized. The Court stated that Wigmore and others suggested a privilege protecting only private marital communications, modeled on the privilege between priest and penitent, attorney and client, and physician and patient.

In Trammel the Court observed that testimonial exclusionary rules and privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence." "As such they must be strictly construed." 445 U.S. at 48, 100 S.Ct. at 912. The Court further observed that the ancient foundations for permitting an accused to prevent adverse spousal testimony have long since disappeared. A woman is no longer regarded as a chattel and when a spouse is willing to testify against the other their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony to preserve. The Court concluded that:

> Our consideration of the foundation for the privilege and its history satisfy us that "reason and experience" no longer justify so sweeping a rule as that found acceptable by the court in Hawkins. Accordingly, we conclude that the existing rule should be modified so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification - vesting the privilege in the witness spouse - furthers the important public

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> interest in marital harmony without unduly burdening legitimate law enforcement needs.

445 U.S. at 53, 100 S.Ct. at 914.

The Supreme Court in Trammel specifically noted that its holding related only to non-confidential communications and conduct, and that the privilege as to confidential marital communications would still be governed by Wolfle and Blau.

The Idaho statutes provide for spousal incompetency unless both consent and provide a privilege as to marital communications. Although Idaho long ago abolished the concept that a person with an interest in the outcome of an action is excluded as a witness, Idaho Code § 9-201, the Idaho spousal incompetency privilege appears to retain the concept that husband and wife are one to the extent that a spouse is incompetent to be a witness unless both consent.

Idaho Code § 9-203(1) provides for spousal incompetency and a marital communication privilege that neither spouse can be examined during the marriage or afterwards, as to any communication made by one to the other during the marriage. Idaho Code § 19-3002 provides only for spousal incompetency in a criminal action or proceeding. Both sections provide for exceptions to the respective rules.

Other statutes provide for additional exceptions applicable in specific proceedings. Idaho Code § 7-1069 provides that the marital privilege is inapplicable in cases under the Uniform Reciprocal Enforcement of Support Act. Section 16-1620 of the Child Protective Act and I.J.R. 10 both provide that the privilege between husband and wife shall not be grounds for excluding evidence at any proceeding regarding the abuse of a child or the cause thereof. Although couched in terms seemingly broad enough to exclude the privilege in "any proceeding regarding the abuse of a child", the Idaho Supreme Court refused to apply it in a criminal prosecution for lewd conduct. See State v. McGonigal, 89 Idaho 177, 403 P.2d 745 (1965).

The existing Idaho statutory scheme seems confusing and ambiguous. Section 9-203(1) encompasses two privileges: first, the incompetency of a spouse to testify unless both consent; second, the marital communication privilege. See State v. Fowler, 101 Idaho 546, 617 P.2d 850 (1980); State v. McKenney, 101 Idaho 149, 609 P.2d 1140 (1980). Section 19-3002 provides only for the incompetency of a spouse to testify unless both consent in a criminal proceeding. Where the two statutes are in conflict, § 19-3002 governs in a criminal proceeding. See State v. McGonigal, 89 Idaho at 180.

The Idaho decisions indicate that any question of spousal incompetency in a civil proceeding must be resolved under section 9-203(1). In a criminal proceeding, the question of spousal incompetency is governed by section 19-3002. See State v. Riley, 83 Idaho 346, 362 P.2d 1075 (1961); State v. McGonigal, 89 Idaho at 180; State v. Cliett, 96 Idaho 646, 534 P.2d 476 (1975); State v. McKenney, 101 Idaho at 151; State v. Fowler, 101 Idaho at 550.

A question whether evidence of a marital communication is admissible is apparently governed by section 9-203(1) in both a civil and criminal proceeding. See Mabbett v. Mabbett, 34 Idaho 611, 202 P. 1057 (1921); Hess v. Hess, 41 Idaho 359, 239 P. 956 (1925); State v. Cliett, 96 Idaho at 647; State v. Anspaugh, 97 Idaho 519, 547 P.2d 1124 (1976); State v. Fowler, 101 Idaho at 549.

The Idaho Supreme Court has ruled that the marital privilege is applicable to a common law marriage. See State v. Riley, 83 Idaho at 348. Divorce, annulment or death of a spouse terminate the marriage and remove the disqualification, leaving only a privilege as to marital communications. See State v. Fowler, 101 Idaho at 550; State v. Anspaugh, 97 Idaho at 520. See also Hess v. Hess, 41 Idaho at 365; State v. Cliett, 96 Idaho at 647.

Questions whether the exceptions found in sections 9-203(1) and 19-3002 are applicable and the extent to which they remove a disqualification or allow testimony of marital communications have been the subject of several decisions. Enactment of statutes regarding marital privileges abolished the common law principles applicable to marital privileges in Idaho and there are no exceptions to the spousal incompetency provisions or the marital communications privilege unless specifically provided by statute. Moreover, those provided will be strictly construed. See Watkins v. Lord, 31 Idaho 352, 171 P. 1133 (1918); Hess v. Hess, 41 Idaho at 365; State v. Riley, 83 Idaho at 350; State v. McKenney, 101 Idaho at 151.

Until 1963 there was no exception for cases involving lewd conduct in either section 9-203(1) or section 19-3002. In State v. Riley, 83 Idaho at 350, the Court held that if a common law marriage existed, the wife was disqualified from testifying against the husband who was charged with lewd conduct. In 1963, section 9-203(1) was amended to except cases involving physical injury to a child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents. Section 19-3002 was not similarly amended. In State v. McGonigal, 89 Idaho at 180, the Court rejected the argument that the amendment to § 9-203(1) amended § 19-3002 by implication, determined that § 19-3002 governed the qualifications of the witness spouse in

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criminal actions, and barred testimony by the wife against the husband who was charged with lewd conduct.

In State v. McKenney, 101 Idaho at 149, another lewd conduct case, trial was held before section 19-3002 was amended in 1979 to specifically except cases involving lewd conduct. The Court held that the annulment of the marriage, following the commission of the crime but prior to trial, removed the disqualification of the wife to testify against her former husband. The inclusion of the exception for cases involving lewd conduct in both sections 9-203(1) and 19-3002 as amended in 1979 may have laid that issue to rest. Other issues, however, remain unresolved.

In State v. Ansbaugh, 97 Idaho at 519, the Court refused to decide whether the former wife's testimony regarding conduct of her former husband and nonconfidential statements to the victim by the husband was admissible. However, in State v. Fowler, 101 Idaho at 550, the Court allowed testimony by the former wife as to the husband's possessions and their location.

The Idaho Supreme Court has not been required to determine the definition of a "marital communication" under § 9-203(1). In dicta, in State v. Fowler, 101 Idaho at 550, the Court stated that non-verbal acts, communicative in nature such as shaking or nodding the head, are within the privilege. Whether the "marital communication" must be confidential has not been expressly decided. Other unresolved issues and ambiguities are noted below.

Rule 504 confers a marital privilege in both civil and criminal actions, but limits the privilege to testimony of confidential communications made during marriage; vests the privilege in the spouse or former spouse who is a party in an action, but permits either spouse or former spouse to exercise the claim of privilege as to such confidential communication; and, provides for certain exceptions in criminal cases, in civil cases and in other specific statutory proceedings. The distinctions between the application of the privilege in criminal as opposed to civil actions are found only in the exceptions provided in the rule.

Subsection (a) defines a confidential communication in terms of the intent that it be made privately and not for disclosure to any other person. It must be made during marriage. The Idaho Committee is aware of occasions in Idaho when an accused has married the state's witness solely to preclude testimony against the accused. The Committee considers this an abuse of the public policy underlying the privilege. Subsection (a) is intended to end that abuse.

The definition in subsection (a), being phrased in terms of the intent that it not be disclosed to any other person, is intended to preclude testimony of confidential communications by an eavesdropper. It is consistent with the ruling of the Court in State v. Breyer, 40 Idaho 324, 232 P. 560 (1925). In Breyer the Court held that testimony by a third person as to the contents of statements made by the wife at the time her husband murdered the victim, which were overheard by the third person, are not rendered incompetent by Idaho Code § 19-3002, because her statements were not made privately with the intent that they not be disclosed to any third persons. Those statements would not be "confidential communications" under Rule 504.

Rule 504(a) renders the privilege more restrictive than that allowed under the ruling in Trammel v. United States, 445 U.S. 40, because there is no privilege under Rule 504 as to nonconfidential communications or actions.

The rule is consistent with Idaho Code § 9-203(1) as applied in a civil action when the witness is the former spouse, see Hess v. Hess, 41 Idaho 359, 239 P. 956 (1925); State v. Cliett, 96 Idaho 646, 534 P.2d 476 (1975); State v. McKenney, 101 Idaho 149, 609 P.2d 1140 (1980); State v. Fowler, 101 Idaho 546, 617 P.2d 850 (1980), but would change Idaho law to the extent that a present spouse could be compelled to be a witness as to premarital communications, and to nonconfidential communications or conduct of the other spouse.

The rule is consistent with Idaho Code § 19-3002 as applied in a criminal action, to the extent that a witness spouse could not be compelled to testify as to confidential communications, but would change existing law to the extent that the spouse could be compelled to testify to pre-marital communications, non-confidential communications and conduct of the accused spouse. It would also change existing law to the extent that a former spouse could not be compelled in a criminal action to testify as to confidential communications made during the marriage.

Subsection (b) states the rule of privilege. It confers the privilege on the spouse who is a party in an action or proceeding to refuse to testify and to prevent others from testifying as to privileged communications. This will permit the spouse to preclude testimony by the eavesdropper.

Rule 504(b) is consistent with the ruling of the Idaho Supreme Court in McClellan v. State, 100 Idaho 682, 603 P.2d 1016 (1979), to the extent that the Court held that Idaho Code § 19-3002 creates only a testimonial privilege.

Recognizing that marriage requires open and truthful communication between spouses and to protect and promote such communication, the intent and the thrust of the privilege conferred in subsection (b) is to protect the confidential communications of a marriage regardless of whether the marriage still exists. This is a change in the policy that the spousal testimony should be prohibited solely because the marital relationship exists. Conferring the privilege to protect the confidential communications of a relationship is consistent with the policy underlying the other recognized privileges.

Subsection (c) states who may claim the privilege. It permits the witness spouse to exercise the privilege on behalf of the party spouse in recognition of the fact that the party spouse may be absent from the proceeding and unable to assert the privilege, e.g., grand jury proceedings.

The presumption of authority to exercise the privilege on behalf of the party spouse disappears upon the introduction of evidence to the contrary as occurs with other presumptions under Article III. The presumption applies only to the issue of the authority of the spouse, attorney or other enumerated person to exercise the claim of privilege for the party. It does not apply to the issue of the right of the party to claim the privilege.

As occurs under existing Idaho authority, the party claiming the privilege must first prove the existence of the marital relationship, State v. Riley, 83 Idaho 346, 362 P.2d 1075 (1961), and then show the circumstances of the communication and the intent that it not be disclosed to third parties to qualify it as privileged.

Subsection (d) states the exceptions to the rule. As to communications which affect children, it creates distinctions between the application of the privilege in criminal actions as opposed to civil actions and excepts the application of the rule in certain statutory proceedings previously excepted.

Subsection (d)(1) incorporates and expands the scope of the exception now provided in the statutes and rules for matters involving children. The Committee intends a broad exception for communications affecting children.

The reference to "abuse, abandonment or neglect of a child" is intended to include, without limitation, the conduct or circumstances included within said terms as defined in Idaho Code § 16-1602.

Because this exception is drafted in very broad terms, the Committee believes that it is not necessary to provide an

exception explicitly for actions involving lewd and lascivious conduct as do Idaho Code §§ 9-203(1) and 19-3002, nor for actions involving desertion or nonsupport of a child as does Idaho Code § 19-3002, nor to specific types of proceedings such as Child Protective Act proceedings which are expressly excepted in Idaho Code § 16-1620 and I.J.R. 10. All of these exceptions are within the scope of the exception stated in subsection (d)(1). The Committee determined not to expressly provide for such conduct, circumstances and proceedings for fear that they would be construed as limitations on the scope of the exception intended.

Subsection (d)(2) incorporates the exception now provided in Idaho Code § 19-3002 in criminal actions and § 9-203(1). It extends the exception to cases involving a crime by one spouse against the other to include a crime committed against a person in the household of either spouse, or a third person if committed in the course of committing a crime against the other spouse or a person residing in the household of either spouse. The exception in Idaho Code § 19-3002 is based on the policy that protection of the marital relationship is not required when the case involves a crime by one spouse against the other. The Committee believes the same policy or reasoning is applicable and justifies denial of the privilege for the protection of other persons in the household.

Subsection (d)(3) incorporates exceptions already provided under existing statutes: (A) Reciprocal Enforcement of Support Act, Idaho Code § 7-1069; (B) desertion or nonsupport actions, Idaho Code § 9-203(1); and, provides an additional exception at (C) for the hospitalization of the mentally ill under Idaho Code § 66-329. The Committee believes that the need to protect mentally ill persons outweighs the need to protect marital communications in such cases.

Subsection (d)(4) is applicable only in civil actions and excepts application of the privilege when the action involves the person or property of the other. It is consistent with Idaho Code § 9-203(1) and existing authority. See Mabbett v. Mabbett, 34 Idaho 611, 202 P. 1057 (1921).

Rule 504 does not attempt to define "spouse." It is the intent of the Committee that the rule is applicable to a common law marriage as under existing Idaho law. See State v. Riley, 83 Idaho 346, 362 P.2d 1075 (1961).

Adoption of Rule 504 would not create a conflict with I.C.R. 26 which provides, in part, that privileges of witnesses "shall be governed by rules of evidence in civil actions, except as where otherwise provided by law or by these rules."

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Adoption of Rule 504 would not create a conflict with I.R.C.P. 43(a) pertaining to the form and admissibility of evidence. However, Rule 504 may create an apparent conflict with I.R.C.P. 43(b)(4) permitting cross-examination of an adverse party. Rule 43(b)(4) provides in part that "[n]othing contained in this rule shall be construed in such manner as to compel the husband or wife to testify against the other, nor to compel a witness to disclose information or communications which are privileged by law except that physicians and parents may testify in all cases of physical injury to children without regard to whether the testimony violates what would otherwise constitute a privileged communication." Under Rule 504, the spousal disqualification is abolished and only a privilege as to confidential marital communications remains. Moreover, to the extent that Rule 504 contains an exception for testimony as to a physical, mental or emotional injury to a child there may be an apparent conflict with Rule 43(b)(4). Actually Rule 43(b)(4) confers no privilege, but merely recognizes those provided by law. Nonetheless, amendment of Rule 43(b)(4) to delete the language "compel the husband or wife to testify against the other, nor to" and the language following the words "privileged by law" would resolve this ambiguity, yet maintain the purpose of Rule 43(b)(4).

<u>Action Recommended on Idaho Statutes or Rules</u>: Amend Idaho Code § 9-203(1) and § 19-3002 to conform the language of the statutes to Rule 504 for application in nonjudicial proceedings.

Amend I.R.C.P. 43(b)(4) to delete the words "compel the husband or wife to testify against the other, nor to" and the language ", except that physicians and parents may testify in all cases of physical injury to children without regard to whether the testimony violates what would otherwise constitute a privileged communication."

Rule 505. Religious Privilege

(a) Definitions. As used in this rule:

(1) Clergyman. A "Clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) Confidential communication. A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, or for the person by his lawyer, his guardian or conservator, or by his personal representative if he is deceased. The clergyman at the time of the communication may claim the privilege but only on behalf of the person. His authority to do so is presumed in the absence of evidence to the contrary.

COMMENT TO RULE 505

Prior Idaho Statutes or Rules: Idaho Code § 9-203(3).

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 506) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Idaho Rule 505 is identical to Uniform Rule of Evidence 505 (1974), 13 U.L.A. at 259-260 (Supp. 1983) except that subsection (c) is changed to add "or for the person by his lawyer," and to expressly provide for the presumption of authority. The Idaho Rule is also identical to proposed Federal Rule 506 except for the language "or for the person by his lawyer." See 56 F.R.D. 183, 247 (1973).

Comment: Rule 505 recognizes and provides for the religious privilege now provided at Idaho Code § 9-203(3):

> 3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of dicipline enjoined by the church to which he belongs.

The rationale for the religious privilege was well stated in Mullen v. United States, 263 F.2d 275 (D.C.Cir.1958) (concurring opinion, Fahy J.):

> Sound policy--reason and experience--concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent. Knowledge so acquired in the performance of a spiritual function as indicated in this case is not to be transformed into

> evidence to be given to the whole world. As Wigmore points out, such a confidential communication meets all the requirements that have rendered communications between husband and wife and attorney and client privileged and incompetent. The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the tranquility of the home, the integrity of the professional relationship, and the spiritual rehabilitation of a penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment. Id. at 280.

See also Trammel v. United States, 445 U.S. 40, 50, 100 S.Ct. 906, 913, 63 L.Ed.2d 186, 195 (1980)("The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.").

Subsection (a) states the definitions which govern the application of the rule.

Subsection (a)(1) defines "clergyman" to include those who perform functions similar to those of traditionally recognized priests, ministers, and rabbis, if performed in that capacity for a religious organization. The definition is not broad enough to include self-ordained "ministers." As stated in the Federal Advisory Committee's Note to the comparable proposed Federal Rule, "[a] fair construction of the language requires that the person to whom the status is sought to be attached, be regularly engaged in activities conforming at least in a general way with those of a Catholic Priest, Jewish Rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis." As with the lawyer-client and psychotherapist-patient rules, the "reasonable belief" provision is included in Rule 505.

Subsection (a)(2) defines a confidential communication in terms of intent that it not be disclosed as do the other rules of privilege. It is intended to include all confidential communications and is not restricted to a confession of culpable conduct. The language "except to other persons present in furtherance of the purpose of the communication" is included to make clear that the privilege covers situations such as where a husband and wife jointly consult a clergyman, as, for instance,

when they seek marital counseling. It is also intended to include persons who are assisting the clergyman in carrying out the spiritual duties.

The definition of a confidential communication renders the privilege conferred by Rule 505 potentially broader in scope than that conferred by Idaho Code § 9-203(3). The statute protects only "confessions" made in the course of discipline enjoined by the church to which the clergyman belongs. See Angleton v. Angleton, 84 Idaho 184, 370 P.2d 788 (1962). In addition, it does not appear to confer the privilege to the person making the confession, but only to the clergyman and is unclear as to whether the privilege would extend to prevent testimony by third persons who may have overheard the confession.

Rule 505 extends the privilege to all communications made confidentially to the clergyman in his professional character as spiritual adviser, whether or not the communication is in the nature of a "confession." The Committee proposes this coverage in recognition of the broad roles assumed by modern clergymen, who frequently serve as psychological and marriage counselors as well as recipients of "confessions." The same considerations which support the psychotherapist-patient privilege support a broader privilege for communications of this kind.

Subsection (b) states the rule of privilege. It permits the communicating person to prevent disclosure not only by himself, but also by the clergyman and by eavesdroppers.

Subsection (c) states who may claim the privilege. It permits the clergyman and others designated to assert the claim of privilege on behalf of the person vested with the privilege in recognition of the fact that circumstances may arise when the person with the privilege may not be present, e.g., a grand jury proceeding.

Rule 505(c) further recognizes that the clergyman-communicant relationship may have ended prior to the time he is called to testify in a proceeding. Consistent with the view that the desirable public policy is to protect confidential communications made during the relationship, and not merely the existence of the relationship, the clergyman at the time of the communication is granted the right to assert the privilege on behalf of the communicant even after the relationship has ended.

The effect of the presumption is the same as in the other rules of privilege. It does not apply to the issue of the right of the person vested with the privilege to claim it, but

only to the right of those enumerated to exercise it in his behalf in the absence of evidence to the contrary.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 9-203(3) to conform the language of the statute to Rule 505 for application to nonjudicial proceedings.

Rule 506. Political Vote

(a) General rule of privilege. Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot.

(b) Exceptions. This privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the election laws of the State of Idaho.

COMMENT TO RULE 506

Prior Idaho Statutes or Rules: Idaho Const., art. VI, § 1; Idaho Code §§ 34-1108, 34-1110, 34-2017, 34-2410, 34-2428.

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 507) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Idaho Rule 506 is identical to Uniform Rule of Evidence 506 (1974), 13 U.L.A. at 260 (Supp. 1983) except to add the words "of Idaho." It is also substantially identical to proposed Federal Rule 507. See 56 F.R.D. 183, 249 (1973).

Comment: Rule 506 recognizes and provides for the political vote privilege. The Committee can find no existing Idaho statute directly conferring this privilege. However, the scheme of our Constitution and laws pertaining to elections and the expressed intent to protect and maintain the absolute secrecy of one's ballot clearly indicates that the privilege is recognized in Idaho. See Idaho Const., art. VI, § 1; Idaho Code §§ 34-1108, 34-1110, 34-2410, and 34-2428.

The privilege to refuse to disclose how one voted has been recognized as inherent in the democratic form of government since Johnston v. Charleston, 1 Bay 441 (S.C. 1795). Although only the voter can assert the privilege, it is recognized that society has an interest in protecting the secrecy of the voting process and the integrity of elections.

Subsection (a) states the rule of privilege. It confers the privilege only to the voter at a political election conducted by secret ballot. Although not expressly stated, it is intended to preclude the person who assisted another in voting from disclosing the tenor of that vote.

The Idaho Supreme Court has implied that a voter is entitled to maintain the secrecy of his ballot. McGrane v. County of Nez Perce, 18 Idaho 714, 112 P. 312 (1910) involved a challenge to an election in which the election official had numbered the ballot stubs and the ballots, in violation of the law which prohibited any identifying marks on the ballots. In its decision upholding the validity of the election, the Court discussed the reason for prohibiting any identifying marks on a ballot stating, ". . . it intends to guard the individual elector from intimidation and undue influence and greater temptation than he is able to withstand. It leaves the voter so that he does not run the risk of losing a position, being thrown out of employment, or subjected to various annoyances on account of having cast his vote in a given way or having failed to vote as he had promised to do." 18 Idaho at 729.

Subsection (b) states the exceptions to the rule. It excepts illegally cast votes from protection of the privilege. It is based on society's interest in maintaining honest and fair elections.

The exception for illegally cast votes is one generally recognized under statutory and case law. 8 Wigmore § 2214. The exception is expressly provided for in Idaho Code § 34-2017, in an election contest proceeding.

The Idaho Committee believes that it is not creating a privilege, but merely recognizing an existing privilege. Concern was expressed that perhaps, by omitting the privilege from the rules, some would construe that to mean it does not exist in Idaho. Inclusion of the rule is believed to be consistent with the Committee's effort to include in these rules all privileges previously recognized in Idaho, except the constitutional right against self-incrimination and the "work-product" immunity privilege.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 507. (Reserved)

COMMENT TO RESERVED RULE 507

Prior Idaho Statutes or Rules: Idaho Code § 48-804; I.R.C.P. 26(c).

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 508) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

Comment: Idaho has no statute, rule or case law conferring a testimonial privilege as to trade secrets. Section 48-804 of the Idaho Trade Secrets Act enacted in 1981, provides that in an action under the Act, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

I.R.C.P. 26(c) permits a party to obtain protective orders limiting discovery including an order; "(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. . ." No Idaho case law has been found.

The Idaho Committee recommends that a trade secret privilege not be created for several reasons: (1) it is not considered to be a true privilege, (2) there are dangers in the recognition of such a privilege, (3) it is not recognized as a true privilege under existing Idaho law, and (4) the Committee believes the subject matter is adequately covered by Idaho Code § 48-804, I.R.C.P. 26(c) and by these rules as they relate to relevancy.

As noted above, there are dangers in the recognition of such a privilege. Copyright and patent laws provide adequate protection for many of the matters that might otherwise be classified as trade secrets. Recognizing the privilege as to such information would serve only to hinder the courts in determining the truth without providing the owner of the secret any needed protection. Again, disclosure of the matters protected by the privilege may be essential to disclose unfair competition or fraud or to reveal the improper use of dangerous

materials by the party asserting the privilege. Recognizing the privilege in such cases would amount to a legally sanctioned license to commit the wrongs complained of, for the wrongdoer would be privileged to withhold his wrongful conduct from legal scrutiny.

The Committee has reserved Rule 507 in order that it may be used for such a rule should the Supreme Court determine to create a "trade secrets" privilege now or at some future date.

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Rule 508. Secrets of State and Other Official Information; Governmental Privileges

(a) Federal. If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) State. No other governmental privilege is recognized except as created by the Constitution or statutes of this State.

(c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

COMMENT TO RULE 508

Prior Idaho Statutes and Rules: Idaho Code § 9-203(5).

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Federal Rule 509) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

The second provision of F.R.E. 501, making privileges provided by state law applicable in federal civil cases where "State law supplies the rule of decision" does not apply to a privilege for government information. See 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 509 at 3-5 (Supp. 1983)(suggests that Congress, already sensitized by Watergate and claims of executive privilege by the Nixon Administration feared access to government records would be even more difficult if a rule conferring this privilege was enacted).

Idaho Rule 508 is identical to Uniform Rule of Evidence 508 (1974), 13 U.L.A. 261 (Supp. 1983).

Comment: Rule 508 rejects all claims of governmental privileges except those that the State must recognize as required by federal law and those specifically provided by statutes of the State of Idaho. In refusing to recognize an official information privilege, the Idaho Committee intends that internal government documents be disclosed when relevant to litigation, unless specifically protected by statute. Protective orders under the discovery rules are available to adequately protect against any disclosure that may harm the public interest.

Nothing in these rules speaks to the various constitutional issues that may arise when a privilege is claimed. For example, these rules do not attempt to provide whether the doctrine of separation of powers implies a constitutionally based executive privilege. See generally United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). See also 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶509[11] at 71-78 (Supp. 1983). Nor do these rules address constitutionally based claims of legislative privilege. See generally Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972), reh. denied 409 U.S. 902, 93 S.Ct. 98, 34 L.Ed.2d 165.

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Subsection (a) makes clear that Idaho State courts will recognize federal governmental privileges, but restricts them to include only those that "this State must recognize under the Constitution of the United States."

Rule 508 is a codification of the rationale of Penn Mutual Life Ins. Co. v. Ireton, 57 Idaho 466, 65 P.2d 1032 (1937), in which the Idaho Supreme Court recognized that the government of the United States could create valid evidentiary privileges, which are applicable in state court.

Subsection (b) recognizes the authority of the Idaho Legislature to create governmental privileges.

Idaho does not have a general statute imposing a privilege as to all "secrets of state" or "official information" similar to that contained in proposed Federal Rule 509 that was rejected by Congress. 56 F.R.D. 183, 251 (1973). The Idaho Committee considered proposed Federal Rule 509 and rejected it for the reasons previously noted.

Idaho Code § 9-203(5) provides that "a public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by disclosure." No Idaho case law has been found.

Idaho also has various statutes requiring that specific reports be made to the State, some of which are privileged by the statute requiring the report. See, e.g., Idaho Code § 49-1012 (requires repair shops to report information regarding every vehicle showing evidence of involvement in an accident or having been struck by a bullet) and § 49-1013 (prohibits use of repair shop reports as evidence in any trial arising out of an accident). See also, e.g., Idaho Code § 49-1015 (municipalities may require accident reports which may not be used as evidence in trial); § 49-1016 (requires morticians to obtain blood samples for Dept. of Health and Welfare for statistical purposes and makes unauthorized disclosure of information subject to misdemeanor penalties).

Subsection (c) requires that when the privilege is asserted and sustained, the court must determine the consequences of nondisclosure to the litigant and is empowered to enter appropriate orders that the "interests of justice require." The examples provided are not exclusive. Because of the great variety of situations that may arise and because the impact of non-disclosure will vary greatly, no specific rule can be formulated and the trial court must be given broad discretion to fashion a remedy. The remedy may include sanctions for failure to obey an order of disclosure in the same manner as is

authorized under I.R.C.P. 37 or I.C.R. 16 for failure to comply with discovery orders.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 9-203(5) to conform the language of the statute to Rule 508 for application to nonjudicial proceedings.

Rule 509. Identity of Informer

(a) **Rule of privilege.** The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) **Who may claim.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) **Exceptions:**

(1) **Voluntary disclosure.** No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action.

(2) **Informer as a witness.** If an informer appears as a witness for the public entity, disclosure of his identity shall be required unless the court finds, in its discretion, that the witness or others may be subjected to economic, physical or other harm or coercion by such disclosure.

(3) **Testimony on relevant issue.** If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: (A) requiring the prosecuting attorney to comply, (B) granting the defendant additional time or a continuance, (C) relieving the defendant from making disclosures otherwise required of him, (D) prohibiting the prosecuting attorney from introducing specified

evidence, or (E) dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present. (Amended 3/26/85).

COMMENT TO RULE 509

Prior Idaho Statutes or Rules: I.C.R. 16(f)(2).

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 510) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The language of subsections (a), (b) and (c)(3) of Idaho Rule 509 is taken from Uniform Rule of Evidence 509 (1974), 13 U.L.A. 262-263 (Supp. 1983). The language of subsection (c)(1) is changed to omit reference to the informer as a witness and (c)(2) is added to provide for discretionary disclosure when the informer is a witness. The Uniform Rule is patterned after the Supreme Court Standard (proposed Federal Rule 510) which Congress rejected along with all rules of privilege. See 56 F.R.D. 183, 255-256 (1973). Changes have been made to conform the rule to state practice, and an additional significant change was made in Idaho subsection (c)(3) which broadens the Supreme Court Standard exception regarding testimony on the issue of guilt or innocence in a criminal case to "any issue" in a criminal case. As a consequence of this latter change in the rule, the third exception provided in the Supreme Court Standard for testimony at a suppression of evidence hearing is unnecessary and is omitted from the Uniform Rule and the Idaho Rule.

Comment: Rule 509 recognizes and provides for the confidential informant privilege now provided in Idaho Criminal Rule 16(f)(2):

> Disclosure shall not be required of an informant's identity unless such informant is to be produced as a witness at a hearing or trial, subject to any protective order under Rule 16(k) or a disclosure order under Rule 16(b)(8).

The rule at common law that a privilege exists for the identity of persons providing information concerning possible

violations of the law is based on the policy that communications of this kind are valuable to law enforcement and should be encouraged, and that protection of the informer is necessary to accomplish this result. In the same instance, the courts recognize that the accused has a constitutionally protected right to prepare and present his defense. Thus, the privilege is qualified. See Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

The privilege belongs to the government or public entity, not the informer. It extends only to the identity of the informer and not to the communication, unless his identity would be revealed by disclosure of the communication. See, e.g., Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972).

Rule 509 is designed to provide a solution to the extreme alternatives of disclosure vs. nondisclosure by authorizing a disclosure in camera. The trial court is then able to make an informed decision and is empowered to enter orders that are appropriate to effect the competing policies - that the informant be protected and that the defendant's constitutionally protected rights be provided. The requirement that a record be made and sealed preserves the process for appellate review.

Although situations requiring application of the rule will most likely arise in criminal proceedings, the rule is also applicable to civil cases. See, e.g., Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa. 1962)(government's claim of privilege upheld in suit for libel by Jersey Joe Walcott's manager against Saturday Evening Post).

Subsection (a) states the rule of privilege. It confers the privilege on the public entity to refuse to disclose the identity of an informant, i.e., "a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation."

The rule confers the privilege only on the public entity. The Idaho Committee considered and rejected a proposal that it be also extended to the informant. Restricting the privilege to the public entity is deemed to be consistent with I.C.R. 16(f)(2) and with the view that the public interest in law enforcement requires that the privilege be vested in the public entity rather than the informant.

Only facts that would disclose identity are privileged. Communications are not included within the privilege except to the extent that disclosure of the communication would result in

disclosure of identity. Idaho Criminal Rule 16(f)(2) is to the same effect.

The phrase "relating to or assisting in an investigation of a possible violation of law" is deemed to be sufficiently broad to cover activities such as furnishing of general intelligence information, the solicitation of other informers and assistance in the apprehension of wanted persons. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 510[03] (Supp. 1983). See also, e.g., Black v. Sheraton Corp. of America, 564 F.2d 550 (D.C. Cir. 1977)(informers assisting with installation and operation of electronic listening device were within scope of privilege).

The phrase "a law enforcement officer" is not restricted to only those who qualify as a "peace officer" as defined in Idaho Code § 19-5101(d) or M.C.R. 2(g)(1983). It is intended to include all persons, whether federal, state or local authority who are involved in the law enforcement process as that term is defined in Idaho Code § 19-5101, to-wit: "'Law enforcement' means any and all activities pertaining to crime prevention or reduction and law enforcement, including police, courts, prosecution, corrections, rehabilitation, and juvenile delinquency."

Subsection (b) states who may claim the privilege. It permits the appropriate representative of the public entity to claim the privilege, to the exclusion of the informant. Although contrary to the common law which permitted the informant to exercise the privilege, this limitation is consistent with I.C.R. 16(f)(2).

Rule 509(b) does not define who would be an "appropriate representative of the government" for the purpose of claiming the privilege. It is assumed that ordinarily the attorney for the public entity will be the one to exercise the claim of privilege, but some other representative may be appropriate, such as the "law enforcement officer" while testifying when the inquiry as to identity of an informant is made.

Subsection (c) states the exceptions and provides for limitations upon the exercise of the claim of privilege by the public entity.

Subsection (c)(1) provides for waiver or loss of the privilege when "the identity of the informer or his interest in the subject matter of his communication" has been disclosed "to those who would have cause to resent the communication," "by a holder of the privilege or by the informer's own action.

Although the public entity holds the privilege, it may be waived or lost when the informer's identity is revealed by the informer as well as by the public entity simply because there is then no further reason to apply the privilege.

An informer may disclose "his interest in the subject matter of his communication" and thereby move without the protection of the privilege by instituting an action and subjecting himself to civil discovery in that action. See, e.g., Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F.2d 762, 770 (D.C. Cir. 1965)("No policy is furthered by permitting the Government to suppress information which the plaintiff would have had to disclose.").

The phrase which limits disclosure "to those who would have cause to resent the communication" means that disclosure to another public entity, law enforcement officer, or to a judge pursuant to the rule will not defeat the privilege.

The public entity can waive the privilege by disclosure of the informer's identity to those who would have reason to resent the informer's communication.

Subsection (c)(2) provides for disclosure of identity of the informer if the informer is called as a witness for the public entity. The rule continues the policy of Idaho Criminal Rule 16(f)(2) to the extent it makes disclosure discretionary if the court finds that the witness or others may be subjected to economic, physical or other harm or coercion by such disclosure.

The form of the rule originally adopted by the Supreme Court on January 8, 1985 mandated disclosure if the informer appears as a witness. The intent of the Evidence Committee was to abolish the reported practice of some local courts to allow the informer to testify using an assumed name. The Evidence Committee has concerns that the practice may deny an accused the constitutional right to "meaningful" cross-examination required by the confrontation clause. The policy of the evidence rule was questioned by the Criminal Rules Advisory Committee which recommended the retention of I.C.R. 16(f)(2) to the Supreme Court. Rather than rescind Criminal Rule 16(f)(2) or leave the two conflicting rules in place, the Court amended Rule 509 by deleting the language from subsection (c)(1) which made the giving of testimony a waiver of the privilege and adding a new subsection (c)(2) providing for discretionary disclosure if the informer appears as a witness.

The Evidence Committee remains convinced that when called as a witness by the public entity the informer's status should be disclosed because his relationship with the public entity is relevant to his credibility and he must be subject to full cross-examination. Informants are known to be motivated at

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times by pecuniary rewards, reduced sentences or revenge. If these underlying factors are not exposed, the trier of fact will be hampered in ascertaining the truth. See, e.g., Harris v. United States, 371 F.2d 365 (9th Cir. 1967). See generally 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 510[05] (Supp. - 1983).

The question whether the public entity is obligated to produce the informer if the defense is unable to, and to what extent, is not covered by Rule 509. See, e.g., Velarde-Villarreal v. United States, 354 F.2d 9, 12 (9th Cir. 1965)("If it were made to appear that the Government, through reasonable effort, could have produced [the informer] and yet failed to do so when defendant demanded such production, there should be a new trial. On the other hand, if the Government was actually unable by reasonable effort to produce him, we cannot hold that such inability would require a dismissal of the case, unless of course, the Government itself purposely saw to it that [the informer] disappeared . . . We know of no rule that the Government is under any general obligation to produce an informer."), (Court remanded for further hearing whether government "was genuinely unable through reasonable efforts to produce [the informer] and also, if such be the case, that the Government did not take steps to see to it that [the informer] would be or become unavailable as a witness.").

Subsection (c)(3) governs those situations when the informer may be able to give testimony, his identity is demanded, and the public entity claims the privilege. A distinction is made in the rule between criminal and civil cases as to the standard to be met. In a criminal case the accused is required to show that the informer may be able to give testimony "relevant to any issue," whereas in a civil case the party demanding identity of the informer is required to show that he may be able to give testimony "relevant to a fair determination of a material issue on the merits." A further distinction between criminal and civil cases is made in the options or powers granted the court if the court finds there is a reasonable probability the informer can give testimony and the public entity refuses to comply.

Allowing the accused to seek the identity of the informant who may be able to give testimony "on any issue" is intended to apply at all stages of the proceedings, including the preliminary hearing and pre-trial motions. As previously noted this is broader than was the proposed Federal Rule which was restricted to "the issue of guilt or innocence," i.e., at trial or to pre-trial proceedings to determine the legality of evidence obtained by the government, i.e., suppression hearings. The proposed Federal Rule was based squarely on the Supreme Court's decision in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

In a civil action the language of the rule that the party demanding disclosure must show that the informer may be able to give testimony "relevant to a fair determination of a material issue on the merits" is identical to that of the proposed Federal Rule. It is in accord with the practice in the federal courts. See generally 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 510[05] (Supp. 1983). See also Annot., "Application in federal civil action of governmental privilege of nondisclosure of identity of informer." 8 A.L.R.Fed. 6 (1971).

When the public entity invokes the privilege, the court must give the public entity an opportunity to show in camera facts relevant to the question whether the informer can, in fact, supply that testimony. The showing will usually be in the form of affidavits but the court can order that testimony be taken if it cannot be resolved by affidavit.

If the court orders disclosure and the public entity refuses, the court can enter appropriate relief dependent upon whether it is a criminal or civil action. In a criminal case the relief may include one or more of the following: (A) requiring the prosecuting attorney to comply, (B) granting a continuance, (C) relieve the defendant of the obligation to disclose, (D) bar specified evidence, or (E) dismiss charges. Similar powers exist in respect to discovery under I.R.C.P. 37 and I.C.R. 16(j). In a civil case, upon noncompliance, the court is empowered to make any order "the interests of justice require."

No parties or counsel are permitted to attend the showing in camera and all evidence is to be sealed and preserved for appellate review.

No Idaho case law has been found. The Committee is informed that it is the practice of some Idaho trial courts to require the disclosure of the identity of an informer under I.C.R. 16 only if the informer will be used at trial, on the ground that Rule 16 does not require the disclosure of the identity of an informant who may not be called at trial. The history and design of I.C.R. 16 supports this view.

The genesis of I.C.R. 16 is Idaho Code § 19-1302. It requires that the prosecuting attorney endorse on the information "the names of the witnesses known to him at the time of filing the same" and any others subsequently learned, except rebuttal witnesses. The purpose of the statute is to inform the defendant of the names of witnesses who are to testify against him so that he may have the opportunity to meet and controvert their evidence. State v. Stewart, 46 Idaho 646, 270 P. 140 (1928); State v. Mundell, 66 Idaho 297, 158 P.2d 818 (1945). The statute is not mandatory, however, and the defendant must make a showing that he was surprised, unprepared to cross-examine or prejudiced

when a witness is allowed to testify whose name was tardily endorsed on the information, State v. Stewart, 46 Idaho at 650; State v. Mundell, 66 Idaho at 304, or not endorsed at all, State v. Fedder, 76 Idaho 535, 285 P.2d 802 (1955). See also State v. Smoot, 99 Idaho 855, 590 P.2d 1001 (1978)(delayed disclosure is not per se reversible error); State v. Hoaglund, 39 Idaho 405, 228 P. 314 (1924)(test is whether or not defendant was surprised or prejudiced by endorsement of name of witness during trial); State v. Olsen, 103 Idaho 278, 647 P.2d 734 (1982)(Idaho Code § 19-1302 expressly excludes rebuttal witnesses from the endorsement requirement).

Following Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."), Idaho granted a limited right of discovery to the accused. Enacted in 1969, Idaho Code § 19-1309 provides that the court "may" order the prosecuting attorney to provide certain evidence to the defendant. The statute was in large measure copied verbatim from Rule 16 of the Federal Rules of Criminal Procedure, which is still the law in the federal courts.

The Idaho statute does not provide for discovery of the names and addresses of state's witnesses and it expressly provides that internal investigative reports are not discoverable. Permissible discovery under Section 19-1309 was made expressly subject to protective orders under subparagraph (5):

> (5) Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the state, the court may permit the state to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the state's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

The Idaho statute futher permits the imposition of sanctions for noncompliance with its orders in subparagraph (7):

> (7) . . . If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed

> to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

The Idaho Criminal Rules were first adopted in 1972. The original I.C.R. 16 granted expanded discovery rights to the accused and, unlike the Federal Rule, included a provision at subparagraph 16(1)(vi) that, upon request, the prosecutor "shall furnish to the defendant a written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial . . ." It further provided, however, that "[n]ames and addresses of the prosecution witnesses shall not be subject to disclosure if the prosecuting attorney certifies that to do so may subject the witness or others to physical or substantial economic harm or coercion."

Rule 16(f) further provided for protective orders in language taken verbatim from Idaho Code § 19-1309(5). The Commentary of the Advisory Committee that drafted Rule 16 (1972) states in part:

> The present Idaho law provides that the court upon motion for discovery may issue the order. The proposed rule is changed to "shall" to make clear that the judge must order discovery if the conditions specified in the rule exist. The reason for such a change is based upon several federal court decisions which have construed the current language of the Idaho law as giving the court a discretion as to whether [to] grant discovery [or deny] discovery because the party did not demonstrate that his request for discovery was warranted. Further, courts have held that there must be a showing of actual need before the discovery would be granted. The proposed rule makes disclosure mandatory under the circumstances described in the rule and resolves any ambiguity as may currently exist in the direction of more liberal discussion.
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> The principle argument against disclosure of the identity of witnesses prior to trial

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> has been the danger to the witness, either his being subjected to physical harm or to threats desired to make the witness unavailable or to influence him to change his testimony. This rule however gives the state an alternative when it believes disclosure will create an undue risk of harm to the witness: it can certify that pretrial disclosure will "subject the witness or others to physical or substantial economic harm or coercion" in which case disclosure shall not be required.

Redford, Proposed Idaho Rules of Criminal Procedure, Advisory Committee to the Supreme Court on Rules of Criminal Practice and Procedure, 64-66 (1971).

As provided in I.C.R. 59, the Idaho Criminal Rules "govern all criminal proceedings . . ." Thus, the requirement under Idaho Code § 19-1302 that names and addresses of all witnesses for the prosecution be endorsed on the information has been abrogated and the accused must rely upon I.C.R. 16 for authority to obtain this discovery. See State v. Goodrick, 95 Idaho 773, 519 P.2d 958 (1974)(I.C.R. 16 is controlling),(it was not error under I.C.R. 16 to allow witness to testify even though his name was not endorsed on the information, in the absence of a request for a continuance or showing of prejudice). See also State v. Nelson, 97 Idaho 718, 552 P.2d 226 (1976)(it was error to prohibit testimony of witness whose name was not endorsed on the information in absence of request for continuance or showing of prejudice), (I.C.R. 16(a)(1)(vi) [1972] "is essentially the purpose of the endorsement requirement of Idaho Code § 19-1302."); State v. Smoot, 99 Idaho 855, 859, 590 P.2d 1001 (1978)("[a] delayed disclosure by the prosecution is not per se reversible error."). But cf. State v. McCoy, 100 Idaho 753, 605 P.2d 517 (1980)(delayed disclosure of document so greatly prejudiced defendant's preparation or presentation of his defense that he was denied his constitutionally guaranteed fair trial).

The Idaho Criminal Rules were amended in 1980 and Rule 16 was substantially broadened. However, the provision requiring the state to provide the list of names and addresses of state's witnesses (I.C.R. 16(b)(6)) and the provision for protective orders (I.C.R. 16(k)) were left largely intact. Additional provisions were included to require production of statements made by state's witnesses (I.C.R. 16(b)(6)) and internal investigative reports (I.C.R. 16(b)(7)), to allow the defendant to make a special showing of need for discovery not already expressly provided by the rule (I.C.R. 16(b)(8)), and to expressly provide for nondisclosure of informants (I.C.R. 16(f)).

The present I.C.R. 16(b)(6) requires the prosecutor, upon request, to furnish the accused "a written list of the names

and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial" and the statements made by prosecution witnesses or prospective prosecution witnesses. Rule 16(b)(7) requires that the defendant also be furnished, upon request, copies of reports and memorandum made by the police officers or investigators in connection with the case. These reports often contain the names of informers and the information received from informers.

Under Rule 16(b)(8), the court has authority "in its discretion," to order that defendant be provided additional material or information upon a "showing he has substantial need in the preparation of his case for additional material or information not otherwise covered by Rule 16(b), and that he is unable without undue hardship to obtain the substantial equivalent by other means."

The ability of the accused to discover the identity of the informant under the existing I.C.R. 16(b)(6), (7) and (8) is, however, restricted by Rule 16(f) as set forth above.

The existing I.C.R. 16(k) further permits the court, upon a proper showing, to deny, restrict or defer discovery at any time, including "an order denying a request for disclosure of names and addresses of witnesses or others who may be subjected to economic, physical or other harm or coercion." The showing may be "in whole or in part, in the form of a written statement to be inspected by the judge alone." Only if the protective order is granted must the court seal and preserve the party's statement for appellate review.

The broad discretionary powers of the Idaho trial court to deny disclosure of the informant under Rule 16(f) and to enter protective orders under Rule 16(k) compels the conclusion that disclosure of the identity of the informant under existing Idaho law lies solely within the discretion of the court under Rule 16, regardless of whether the informant appears as a witness at a pre-trial hearing or at trial and regardless of whether he has testimony on the issues of guilt or innocence or any other issues, including the legality of evidence obtained by the state.

The Idaho Supreme Court has held that the trial court has broad discretion as to what sanction should be imposed and whether a sanction should be imposed at all for noncompliance with its discovery orders under I.C.R. 16. See State v. Buss, 98 Idaho 173, 560 P.2d 495 (1977)(Rule 16 does not dictate that evidence not disclosed be excluded from trial, but gives the trial court discretion as to sanctions and "the trial court's exercise of that discretion is beyond the purview of a reviewing court unless it has been clearly abused."); State v. Smoot, 99 Idaho 855, 590 P.2d 1001 (1978). But cf. State v. White, 98 Idaho 781, 572 P.2d 884 (1977)(per curiam),(it was error to

dismiss under I.C.R. 16(g) as a sanction for failure of the state to preserve defendant's truck in absence of a showing of prejudice).

I.C.R. 16 requires that defendant make a "specific request" for information required. A prosecutor's failure to disclose evidence which has been specifically requested, "is seldom, if ever, excusable." State v. Brown, 98 Idaho 209, 560 P.2d 880 (1977)(quoting from United States v. Agurs, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976)). If a specific request is made and refused by the prosecutor the Supreme Court, on review, will apply the test, "whether or not the failure to disclose has denied the defendant . . . evidence [which] might have affected the outcome of the trial." State v. Brown, 98 Idaho at 213, 560 P.2d at 884.

However, in the absence of a "specific request," the test is "whether a defendant has been prejudiced by a prosecutor's failure to volunteer evidence available to him." State v. Ward, 98 Idaho 571, 573, 569 P.2d 916, 918 (1977). See also State v. Totten, 99 Idaho 117, 577 P.2d 1165 (1978)(the prosecutor has no duty to volunteer information regarding the whereabouts of an informant whose testimony was allegedly crucial to defendant's defense of entrapment in the absence of a "specific request" or a showing of prejudice).

Adoption of Rule 509 would modify Idaho law under I.C.R. 16 to the extent that the privilege applies in both criminal and civil cases, that the privilege is waived if the identity of the informer is disclosed to "those who would have cause to resent the communication; and, that upon a finding that there is a reasonable probability that the informer can, in fact, supply "that testimony," the trial court does not have discretion whether to order disclosure as under I.C.R. 16, but does have discretion as to the form of relief to be granted if the public entity elects not to comply with the disclosure order. Rule 509 would additionally resolve many uncertainties now existing under I.C.R. 16(f)(2).

Action Recommended on Idaho Statutes or Rules: None required.

Rule 510. Waiver of Privilege by Voluntary Disclosure

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

COMMENT TO RULE 510

Prior Idaho Statutes or Rules: I.R.C.P. 35(b).

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 511) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Idaho Rule 510 is substantively identical to Uniform Rule of Evidence 510 (1974), 13 U.L.A. 265 (Supp. 1983). The Idaho Rule adds the language "of the confidential matter or communication" and changes the phrase "any significant part of the privileged matter" to read "any significant part of the matter or communication." The Idaho Rule is identical to the proposed Federal Rule 511. See 56 F.R.D. 183 (1973).

Comment: Rule 510 recognizes the rule at common law that the privilege of confidentiality terminates when the holder by his own act destroys that confidentiality. The rule must be read and applied with reference to what the privilege protects. For example, the attorney-client privilege protects only confidential communications. However, the underlying facts may still be discovered and testimony regarding the underlying facts does not waive the privilege as to the communications.

The rule makes clear that disclosure of a privileged communication, when the disclosure is itself privileged, does not constitute a waiver, e.g., telling one's psychologist the contents of a communication with one's lawyer.

Rule 510 requires only a voluntary disclosure. It need not be an intentional relinquishment of a known right. Once the communication has been voluntarily disclosed, it becomes irrelevant whether it was intended to constitute a waiver. See 8 Wigmore, Evidence § 2327 at 636 (McNaughton rev. 1961).

Use of the phrase "any significant part of the matter or communication" is intended to confer discretion on the court in

the application of the rule with reference to what the privilege protects.

The rule makes no attempt to define what constitutes a waiver when one of two or more joint holders of the privilege discloses the confidential communication, leaving resolution of these situations to the courts on a case-by-case basis with reference to the objectives of the particular privilege.

There is no Idaho statute providing in general for waiver of a privilege. I.R.C.P. 35(b) provides for waiver of the doctor-patient privilege in an action if a party examined pursuant to I.R.C.P. 35(a) obtains a copy of the examiner's report or deposes the examiner. No other rule regarding waiver of privilege has been found. Rule 510 is consistent with the provision for waiver in I.R.C.P. 35(b) and existing Idaho case law.

At common law and under existing Idaho decisions, a waiver of a privilege may be effected through a non-privileged disclosure by the party entitled to claim the privilege. See Skelton v. Spenser, 98 Idaho 417, 565 P.2d 1374 (1977), cert. denied, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 758 (1978). Although not couched in terms of waiver, making the same statements to third persons has been found persuasive that the client's communications to her attorney were not intended to be confidential, and therefore were not privileged. See Compton v. Compton, 101 Idaho 328, 612 P.2d 1175 (1980).

Under Idaho case law a person can waive the marital privilege by failing to object at trial. See, e.g., Hess v. Hess, 41 Idaho 359, 239 P. 956 (1925); State v. Anspaugh, 97 Idaho 519, 547 P.2d 1124 (1976), or by failing to clearly and precisely state the marital privilege objection. See State v. Chaffin, 92 Idaho at 629. The Idaho Court has also held that a party may claim the attorney-client privilege during discovery and later waive it at trial. In Re Merek's Estate, 94 Idaho 15, 480 P.2d 609 (1971).

However, merely testifying that one followed his doctor's advice in caring for an injury does not constitute a waiver. Brayman v. Russell & Pugh Lumber Co., 31 Idaho 140, 169 P. 932 (1917). Nor does one waive the physician-patient privilege by testifying that an accident was the cause of an injury where he did not testify that a physician had attended him. Federal Mining & Smelting Co. v. Dalo, 252 F. 356 (9th Cir. 1918). Testimony by the witness and a physician as to his injuries does not constitute a waiver as to other physicians who had attended him. Harrington v. Hadden, 69 Idaho 22, 202 P.2d 236 (1949); Jones v. City of Caldwell, 20 Idaho 5, 116 P. 110 (1911).

Any heir, beneficiary or personal representative of a decedent who was entitled to the privilege may waive the privilege. See, e.g., In Re Goan's Estate, 83 Idaho 568, 366 P.2d 831 (1961); In Re Merek's Estate, 94 Idaho at 15. A privilege may also be waived by entering into a contract that so provides. Murphy v. Mutual Life Ins. Co., 62 Idaho 362, 112 P.2d 993 (1941); Trull v. Modern Woodmen, 12 Idaho 318, 85 P. 1081 (1906).

Idaho law is unclear as to: (1) whether a disclosure which is itself privileged can constitute a waiver; (2) whether disclosure to third persons necessary to accomplish the purposes of the confidential relationship are protected (e.g., legal secretary, nurse, investigator, consultant); and (3) whether accidental disclosure to "eavesdroppers" can produce waiver. Under Rule 510 none of these circumstances would constitute waiver.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity To Claim Privilege

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

COMMENT TO RULE 511

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 512) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Idaho Rule 511 is substantively the same as Uniform Rule of Evidence 511 (1974), 13 U.L.A. at 266 (Supp. 1983). It is identical to proposed Federal Rule 512. See 56 F.R.D. 183 (1973).

Comment: Rule 511 attempts to provide a measure of repair by excluding evidence of a disclosed confidential communication or matter where the disclosure was compelled erroneously or without opportunity to claim the privilege.

Subpart (a) of the rule recognizes that not all persons will remain strong and refuse disclosure when ordered to do so by a court, even where compulsion would be erroneous. To expect this or to assume that a judicial remedy would be available is unrealistic. Moreover, requiring resistence in these circumstances only encourages disobedience of the lawful orders of our courts, however erroneous the orders may be.

Illustrative circumstances under subpart (b) are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication, by a family member participating in psychotherapy, or privileged data improperly made available from a computer bank.

No Idaho statute, rule or case law has been found that addresses the issue.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 512. Comment Upon or Inference From Claim of Privilege; Instruction

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

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COMMENT TO RULE 512

Prior Idaho Statutes or Rules: Idaho Code § 19-3003.

Comparable Federal Rule: None. Congress rejected a proposed rule (proposed Fed. Rule 513) and enacted F.R.E. 501 providing that privileges, except as otherwise provided by the Constitution, statutes, or rules of the Supreme Court adopted pursuant to statutory authority, shall be governed by "the principles of the common law as they shall be interpreted by the courts in the light of reason and experience."

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with State law."

Idaho Rule 512 is identical to Uniform Rule of Evidence 512 (1974), 13 U.L.A. at 266 (Supp. 1983) and proposed Federal Rule 513. See 56 F.R.D. 183 (1973).

Comment: Rule 512 is designed to protect a party from unfair prejudice. Where policy considerations justify the granting of a privilege it would be inconsistent to permit the destruction of the privilege by innuendo or negative inference. Accordingly this rule extends the treatment now afforded the privilege against self-incrimination to all other privileges.

The rule applies equally whether the privilege is claimed by a party or a witness, or by the holder or someone on his behalf, if an adverse inference against a party may result.

Subsection (a) forbids any comment upon or negative inference from the exercise of a privilege, in accord with the weight of authority. Courtney v. United States, 390 F.2d 521 (9th Cir. 1968). The rationale of the rule is drawn from the Supreme Court's decision in Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) in which the Supreme Court pointed out that allowing comment upon the claim of a privilege "cuts down on the privilege by making its assertion costly," and held that comment upon the election of the accused not to testify infringed upon his privilege against self-incrimination so substantially as to constitute a constitutional violation.

Subsection (b) further protects the privilege by requiring that in jury cases, effort be made to prevent the jury

from learning of the claim of privilege. The rule recognizes that calling a witness to the stand and requiring that he assert the privilege can be effective comment. So also can be calling the witness, having a sidebar discussion with the court and then excusing the witness. Both circumstances are forbidden when they can be avoided. Destruction of the privilege by innuendo can and should be avoided. Courtney v. United States, 390 F.2d 521 (9th Cir. 1968).

The Idaho Court has held that failure to exclude the jury when the witness asserted the privilege was not error in the absence of prosecutorial misconduct and prejudice to the defendant. The Court stated that the jury could not have drawn an unfavorable inference from the witness' fifth amendment claim, because he was not an accomplice and his connection with the case is itself unclear. See State v. Polson, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S.Ct. 2129, 23 L.Ed.2d 765 (1969). Adoption of Rule 512 would make clear that such tactics and the attendant inferences or innuendo against the defendant are to be avoided when practicable.

Subsection (c) is intended to leave the decision as to whether an instruction will be given to the discretion of counsel for the party against whom the adverse inference may be drawn. The instruction shall be given as a matter of right, if requested. See Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939).

There is no statute, rule or case law in Idaho dealing with the question whether a comment upon or inference from a claim of privilege may be made in a civil case, or in a criminal case, where a privilege other than that against self-incrimination is involved.

Idaho Code § 19-3003 provides that a defendant's refusal to testify cannot be used against him in a criminal action or proceeding. Under Idaho case law, it is reversible error for a prosecutor to comment upon the defendant's exercise of his privilege not to testify at trial. U. S. v. Kuntze, 2 Idaho 480, 21 P. 407 (1889); State v. Cosler, 39 Idaho 519, 228 P. 277 (1924).

The Idaho court has also held it is clearly erroneous to allow evidence of post arrest silence at trial for the purpose of raising an inference of guilt or for impeachment. State v. White, 97 Idaho 708, 714, 551 P.2d 1344 (1976), cert. denied 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976)("If a prosecutor is allowed to introduce evidence of silence, for any purpose, then the right to remain silent guaranteed in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 10 A.L.R.3d 974, 16 L.Ed.2d 694 (1966), becomes so diluted as to be rendered worthless."). See also

State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971); But cf. State v. Major, 105 Idaho 4, 665 P.2d 703 (1983); State v. Swenor, 96 Idaho 327, 528 P.2d 671 (1974).

Action Recommended on Idaho Statutes or Rules: None required.

Rule 513. Lawyer May Exercise Claim of Privilege

Whenever a person has a right to claim a privilege on behalf of himself or for another, it may be exercised by the lawyer for such person. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

COMMENT TO RULE 513

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: None. No similar rule was proposed.

Comment: Rule 513 recognizes and authorizes the practice followed in our courts whereby it is the attorney for the client who states the objection on behalf of the client. It extends the practice to include the attorney for others permitted to exercise the claim on behalf of the person vested with the privilege.

There is no Idaho statutory or case law conferring or denying this authority. It has been held, however, that counsel may waive the privilege for the client as a representative of the client. See Hartley v. Bohrer, 52 Idaho 72, 11 P.2d 616 (1932). If counsel can waive the privilege on behalf of the client, it seems reasonable to recognize counsel's authority to assert it on behalf of the client.

The authority of the attorney for the person vested with the privilege to exercise it on behalf of his client is included in each of the privilege rules. The purpose of this rule is to provide that the attorney for any other person entitled to assert the privilege on behalf of the person vested with the privilege may also do so. As with each of the specific rules, the presumption applies only to the authority to exercise the claim and not to the validity of the privilege. It is to be treated the same as other presumptions under Article III.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 514. Parent-Child; Guardian or Legal Custodian-Ward Privilege

(a) **Definition.** A communication is "confidential" if it is made by a minor child to his or her parent or a minor ward to his or her guardian or legal custodian, and is not intended for disclosure to any other person.

(b) **General rule of privilege.** A child or ward has a privilege in a civil or criminal action or proceeding to which he is a party to refuse to disclose and to prevent his parent, guardian or legal custodian from disclosing any confidential communication made by the child or ward to his parent, guardian or legal custodian.

(c) **Who may claim the privilege.** The privilege may be claimed by the child or ward, the lawyer for the child or ward, or by the parent, guardian or legal custodian on behalf of the child or ward. The authority of the lawyer, parent, guardian or ward to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Civil action.** In a civil action or proceeding by one of the parties to the confidential communication against the other.

(2) **Criminal action.** In a criminal action or proceeding for a crime committed by one of the parties to the confidential communication against the person or property of the other.

COMMENT TO RULE 514

Prior Idaho Statutes or Rules: Idaho Code § 9-203(7).

Comparable Federal Rule: None. No similar rule was proposed.

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Comment: Rule 514 recognizes and provides for the parent-child, guardian or legal custodian privilege now provided in Idaho Code § 9-203(7):

> Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matter [matters] in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected against disclosure; excepting, this section does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, nor does this section apply to any case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardian or legal custodian.

Subsection (a) defines a confidential communication in terms of intent that it not be disclosed as do the other rules of privilege. To this extent, the rule may reduce the scope of the statute which provides that "any communication shall be privileged and protected." The Committee believes the change is justified and is consistent with the policy underlying the special treatment granted privileged communications.

To the extent that only communications from the child to the parent and from the ward to the guardian or legal custodian are within the definition, the rule is consistent with the apparent intent of the statute as evidenced by the language that the parent, etc. shall not be forced to disclose "any

communication made by their minor child or ward to them . . ." The statute provides no privilege for communications from the parent to the child and the Idaho Committee does not desire to expand the scope of the privilege in this respect. The obvious purpose of the privilege is to encourage minors to reveal their problems and anti-social behavior to their parents, guardians or custodians so they can receive help without danger that the communications will be used against them in any civil or criminal proceeding. The statute does not express a policy to encourage parents and guardians to seek help from their minor children. The statute is also intended to protect the parents, guardians or custodians from being compelled to testify against their child or ward.

Subsection (b) states the rule of privilege. It confers the privilege to the child or ward, and consistent with the express policy of the statute, restricts the privilege only to communications from the child or ward and only to actions or proceedings to which he is a party. No protection is afforded the parent, guardian or legal custodian.

Subsection (c) states who may claim the privilege. It permits the child or ward, or the parent, guardian or legal custodian or the lawyer for the child or ward to exercise the claim of privilege on behalf of the child. As with the other rules of privilege, the presumption applies only to the authority of the designated person to exercise the claim for the child or ward and not to the validity of the privilege. The presumption is to be treated the same as other presumptions under Article III.

Subsection (d) states the exceptions to the rule. They encompass those exceptions now provided in the statute; however, subsection (d)(2) extends the exception for a criminal action to include a crime against the property of the other party to the confidential communication.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 9-203(7) to conform the language of the statute to Rule 514 for application in nonjudicial proceedings.

Rule 515. Accountant-Client Privilege

(a) Definitions. As used in this rule:

(1) Client. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional accounting services by an accountant, or who consults an accountant with a view to obtaining professional accounting services from him.

(2) Representative of the client. A "representative of the client" is one having authority to obtain professional accounting services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the accountant of the client.

(3) Accountant. An "accountant" is any licensed public accountant or certified public accountant authorized, or reasonably believed by the client to be authorized, to engage in the practice of accounting in any state or nation.

(4) Representative of the accountant. A "representative of the accountant" is one employed by the accountant to assist the accountant in the rendition of professional accounting service.

(5) Confidential communication. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional accounting services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional accounting services to the client which were made (1) between himself or his representative and his accountant or his accountant's representative, (2) between his accountant and the accountant's representative, or (3) by him or his representative or his accountant or a representative of the accountant to an accountant or a representative of an accountant representing another concerning a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among accountants and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client or for the client through his lawyer, accountant, guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the accountant or the accountant's representative at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by an accountant or client. As to a communication relevant to an issue of breach of duty by the accountant to his client or by the client to his accountant;

(4) Document attested by an accountant. As to a communication relevant to an issue concerning an attested document to which the accountant is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an accountant retained or consulted in common, when offered in an action between or among any of the clients.

(6) Shareholder actions. As to a communication between a corporation and its accountant or a representative of the accountant, which was not made for the purpose of facilitating the rendition of professional accounting services to the corporation during the litigation and concerning the litigation in which the privilege is asserted: (A) in an action by a shareholder against the corporation which is based on a breach of fiduciary duty; or (B) in a derivative action

by a shareholder on behalf of the corporation, provided that disclosure of privileged communications under either subpart (A) or (B) of this exception shall be required only if the party asserting the right to disclosure shows good cause for the disclosure and provided further that the court may use in camera inspection or oral examination and may grant protective orders to prevent unnecessary or unwarranted disclosure.

COMMENT TO RULE 515

Prior Idaho Statutes or Rules: Idaho Code § 9-203A.

Comparable Federal Rule: None. No similar rule was proposed.

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."

The accountant-client privilege is not recognized by either the common law or the federal courts, and no state-created privilege was recognized in federal cases prior to enactment of F.R.E. 501. See, e.g., Couch v. United States, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973). The limited recognition of state-created privileges afforded under F.R.E. 501 does not apply in federal tax cases or other federal regulatory matters because federal law, not state law, supplies the rule of decision in such cases. Communications to an accountant will be protected in federal court cases where F.R.E. 501 is inapplicable only if they can be brought within the scope of a privilege recognized in the federal system, e.g., the attorney-client privilege. See, e.g., United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

Comment: Rule 515 recognizes and provides for the accountant-client privilege now provided in Idaho Code § 9-203A:

> Any licensed public accountant, or certified public accountant, can not, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon in the course of professional employment. The word "client" used herein shall be deemed to include a person, a corporation or an association. The word "communication" as used herein shall be deemed to include but shall not be limited to, reports, financial statements, tax returns, or other documents relating to the client's personal and/or business financial status, whether or not said reports or documents were prepared by the client, the licensed public accountant or certified public accountant, or other person who prepared said documents at the direction

of and under the supervision of said accountants.

The wording of the accountant-client privilege in Idaho Code § 9-203A is identical to that of the attorney-client privilege in Section 9-203(2), with two exceptions: first, the reference to accountants rather than attorneys; second, the definition of "communication" provided in Section 9-203A is not found in Section 9-203(2).

Enacted in 1978, there are no Idaho decisions interpreting Section 9-203A. It seems reasonable to believe, however, that one may look to the Idaho decisions interpreting Section 9-203(2) for guidance in applying Section 9-203A, to the extent that the wording is identical.

For the reasons stated in the Comment to Rule 502, the Idaho Committee recommends the adoption of a rule for the accountant-client privilege rather than retention of the existing Idaho statute and case law.

In view of the fact that the Legislature evidenced its intent to confer a privilege upon accountants identical to the attorney-client privilege except for the definition of "communication," in recognition of the parallelism between this privilege and the attorney-client privilege, and in the interest of uniformity in the Rules of Evidence, the language of Rule 515 is made identical to Rule 502, with two exceptions: first, the reference to accountants and accounting services; second, the substitution of the language from the statute "any licensed public accountant or certified public accountant" in place of the word "person" in the definition of an accountant in subsection (a)(3).

Subsection (a) provides the definitions which govern the application of the rule.

Subsection (a)(1) encompasses the language of the statute in the definition of "client," but adds the public officer and public entity to make clear that the privilege is not limited to clients from the private sector. It also makes clear that one who consults an accountant with a view to obtaining his services is included within the definition, even though no contract of employment results.

Subsection (a)(2) defines "representative of the client," in language that rejects the "control group" test. The statute expressly provides that "client" includes "a corporation or an association," and by implication includes agents or

employees since a corporation or association can act only through its agents or employees. The statute, however, provides no guidelines to determine what agents or employees are within the scope of the privilege. The rule is intended to remove the ambiguity and provides the same guidelines as are applied to the attorney-client privilege.

Subsection (a)(3) restricts the definition of an accountant to include only a "licensed public accountant or certified public accountant" as is now provided in the statute.

The Idaho statute does not limit the privilege to an accountant licensed by Idaho. From the language "any licensed public accountant, or certified public accountant," it may be inferred that it is not intended to be limited to those licensed by Idaho. The rule removes any ambiguity in this regard by expressly including within the definition any licensed public accountant or certified public accountant "authorized to engage in the practice of accounting in any state or nation" as is done in the attorney-client privilege rule. Like Rule 502, the definition includes the accountant "reasonably believed by the client to be authorized" to engage in the practice of accounting.

Subsection (a)(4) recognizes that accountants, like lawyers, must utilize assistants in rendering services to the client.

Subsection (a)(5) defines the "confidential communication" in terms of intent that it not be disclosed as do the other rules of privilege. This may be a modification of the statutory privilege to the extent that the communication remains privileged even though overheard by the eavesdropper. The rule may further modify the statutory provision making the privilege applicable to "any communication" to the extent the rule requires intent that it not be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of the service or those reasonably necessary to the transmission of the communication.

The definition of a "confidential communication" in subsection (a)(5), omits the language of the statute incorporating reports, financial statements, tax returns, etc. within the definition. The Idaho Committee can find no justification for the provision that could be interpreted as permitting a client to deposit his records with his accountant and thereby immunize them from judicial process. It is not intended that the client be allowed to immunize his documents, records or other items constituting real evidence from judicial process by depositing them with his accountant. Those items of real evidence should be discoverable. There is no Idaho case law

interpreting Idaho Code § 9-203A and reference may be made to Idaho decisions interpreting the lawyer-client privilege where the statutory provisions are similar.

In State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971), the Idaho Court held that the attorney-client privilege under Idaho Code § 9-203(2) refers only to communicative and not "real" evidence and does not permit a client to bury physical evidence by delivering it to his lawyer. It was proper to require the lawyer to produce the items of evidence.

The working papers of the accountant have been recognized by the federal courts as belonging to the accountant and not the property of the client. See, e.g. Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). It seems reasonable to conclude that documents such as these, which are the product of confidential communications, would be protected by the privilege, based on the same policy considerations that protect the "work product" of the attorney. See I.R.C.P. 26(b)(3) and I.C.R. 16(f)(1).

Subsection (b) states the rule of privilege. It confers the privilege on the client and permits him to prevent others, including the eavesdropper, from disclosing the privileged communications. Like the attorney-client privilege, the rule expressly covers confidential communications among the representatives of the client and the accountant, in addition to those directly between accountant and client. In this regard the statutory provision protecting communications "made by the client to him and his advice given thereon" may be expanded, although the statute expressly includes reports, etc. prepared by assistants of the accountant and by implication would include the communications necessary to prepare the reports, etc.

Subsection (c) states who may claim the privilege. It permits the accountant and other designated persons to exercise the claim of privilege on behalf of the client. It further recognizes that the accountant or representative may no longer have that relationship with the client when the question arises and thus provides that the accountant or representative "at the time of the communication" may exercise the claim of privilege of behalf of the client. The statute is silent in this regard.

The presumption provided in the rule applies only to the authority of the designated person to exercise the claim on behalf of the client or former client and not to the validity of the privilege.

Subsection (d) states the exceptions to the rule. It adopts the exceptions provided in the lawyer-client privilege rule. No exceptions are provided in the statute, which not only seems unwise from the client's and the accountant's points of view, but also unjustifiable and against public interest. See Comment to Rule 502 for further discussion of the exceptions.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 9-203A to conform the language of the statute to Rule 515 for application in nonjudicial proceedings.

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Rule 516. School Counselor-Student Privilege

(a) Definitions. As used in this rule:

(1) Student. A "student" is a person regularly enrolled on a part-time or full-time basis in any public or private school located in the State of Idaho, who consults or is examined or interviewed by a school counselor.

(2) School counselor. A "school counselor" is any person duly appointed, regularly employed and designated for the purpose of counseling students by any public or private school located in the State of Idaho, or reasonably believed by the student so to be.

(3) Confidential communication. A communication is "confidential" if made to the school counselor while acting in his capacity as a school counselor or reasonably believed by the student to be so acting, and if not intended to be disclosed to third persons except persons present to further the interest of the student in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the rendition of counseling services to the student under the direction of the school counselor, including members of the student's family.

(b) General rule of privilege. A student has a privilege in any civil or criminal action to which the student is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of counseling services to the student, among himself, his school counselor, and persons who are participating in the counseling under the direction of the school counselor, including members of the student's family.

(c) Who may claim the privilege. The privilege may be claimed by the student, or for the student through his counselor, lawyer, parent, guardian or conservator, or the personal representative of a deceased student. The authority of the counselor, lawyer, parent, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Civil action. In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

(2) Proceedings for hospitalization. As to a communication relevant to an issue in proceedings to hospitalize the student for mental illness.

(3) Child related communications. In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

(4) Contemplation of crime or harmful act. If the communication reveals the contemplation of a crime or harmful act.

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COMMENT TO RULE 516

Prior Idaho Statutes or Rules: Idaho Code §§ 9-203(6), 54-2314, 16-1620, 66-322(h).

Comparable Federal Rule: None. No similar rule was proposed.

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Comment: Rule 516 recognizes and provides for the school counselor-student privilege now provided in Idaho Code § 9-203(6):

> Any certificated counselor, psychologist or psychological examiner, duly appointed, regularly employed and designated in such capacity by any public or private school in this state for the purpose of counseling students, shall be immune from disclosing, without the consent of the student, any communication made by any student so counseled or examined in any civil or criminal action to which such student is a party. Such matters so communicated shall be privileged and protected against disclosure.

Enacted in 1971, the Committee can find no case law interpreting this section of the statute.

For many of the same reasons stated in the Comment to Rule 503 relating to the psychotherapist-patient privilege, the Idaho Committee is recommending adoption of Rule 516 rather than retention of Idaho Code § 9-203(6).

Subsection (a) provides the definitions which govern the application of the rule.

Subsection (a)(1) defines student in terms to include those regularly enrolled full-time or part-time, in our primary, secondary and higher education schools, whether public or private, provided the school is located in Idaho. No distinction is made in regard to age of the "student."

Subsection (a)(2) defines a "school counselor" in language broader than that provided in the statute which appears to restrict the privilege to a "certified counselor, psychologist, psychological examiner." Rule 516 would expand the definition to include any person duly appointed, regularly employed and designated by any private or public school in Idaho for the purpose of counseling students or reasonably believed by the student to be so authorized. In other respects the definition is consistent with the statute.

The Idaho Committee is aware of the practice in our schools to use "resource officers" who are not certified counselors but who counsel students. The "resource officers" often serve in a dual role as counselor and as a law enforcement officer. To the extent that they serve as a counselor, the Committee believes that a confidential communication from a student while being counseled should be privileged.

Subsection (a)(3) defines a "confidential" communication in terms of intent that it not be disclosed to others except as provided therein, and that it be made to the counselor while acting in his capacity as a counselor or is reasonably believed by the student to be acting as a counselor. The requirement that the communication not be intended for disclosure is consistent with the definition provided in the other privilege rules. The requirement that it be made to the counselor while acting in his capacity as a counselor or he is reasonably believed by the student to be acting as a counselor is in recognition of the dual role performed by school resource officers.

The definition is in other respects consistent with the language of the statute in that it is restricted to communications.

Subsection (b) states the rule of privilege. It confers the privilege on the student in a civil or criminal action to which the student is a party. Like the psychotherapist-patient privilege in Rule 503, the privilege encompasses communictions made to or in the presence of others, if made in the furtherance of the rendition of the counseling services.

Subsection (c) states who may claim the privilege. It permits the counselor, lawyer, parent, guardian or conservator, or the personal representative of the student to exercise the privilege in his behalf. This is consistent with the provisions in the other privilege rules.

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Subsection (d) states the exceptions to the rule. It provides exceptions where none are now provided in the statute. The Committee believes there is no valid reason to confer an absolute privilege upon the counselor-student relationship and has provided exceptions consistent with the need to foster open and truthful communications in the relationship.

Subsection (d)(1) provides an exception for civil actions, cases or proceedings by one of the parties to the confidential communication against the other similar to that provided in the attorney-client and psychotherapist-patient privilege rules. See Comment to Rules 502 and 503.

Subsection (d)(2) provides an exception for proceedings to hospitalize the student for mental illness similar to that provided in the psychotherapist-patient privilege rule. See Comment to Rule 503.

Subsection (d)(3) provides an exception for child related communications similar to that provided in the psychotherapist-patient privilege rule. See Comment to Rule 503.

Subsection (d)(4) provides an exception for communications which reveal the contemplation of a crime or harmful act. The Committee cannot justify, as a matter of public policy, extending this privilege to immunize from judicial disclosure communications which reveal a plan or intent to commit a crime or harmful act.

The school counselor privilege contained in Section 9-203(6) refers to a psychologist or psychological examiner in addition to counselor and encompasses the situation where the student is being examined as well as being counseled. The Committee is of the opinion that Rule 516 should be limited to school counselors and the counseling situation because the psychologist or psychological examiner conducting an examination of a student is covered under Rule 503 relating to the physician and psychotherapist-patient privilege.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 9-203(6) to conform the language of the statute to Rule 516 for application in nonjudicial proceedings.

Rule 517. Licensed Counselor-Client Privilege

(a) **Definitions.** As used in this rule:

(1) **Client.** A "client" is a person who is rendered licensed counselor services.

(2) **Licensed counselor.** A "licensed counselor" is any person licensed to be a licensed professional counselor or a licensed counselor in the State of Idaho pursuant to Title 54, Chapter 34, Idaho Code, or reasonably believed by the client so to be.

(3) **Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons except persons present to further the interest of the client in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the rendition of counseling services to the client under the direction of the licensed counselor, including members of the client's family.

(b) **General rule of privilege.** A client has a privilege in any civil or criminal action to which the client is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of licensed counseling services to the client, among himself, his licensed counselor, and persons who are participating in the licensed counseling under the direction of the licensed counselor including members of the client's family.

(c) **Who may claim the privilege.** The privilege may be claimed by the client, or for the client through his licensed counselor, lawyer, guardian or conservator, or the personal representative of a deceased client. The authority of the licensed counselor, lawyer, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Civil action.** In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

(2) **Proceedings for hospitalization.** As to a communication relevant to an issue in proceedings to hospitalize the client for mental illness.

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(3) Child related communications. In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

(4) Licensing board proceedings. In an action, case or proceeding under Idaho Code § 54-3404.

(5) Contemplation of crime or harmful act. If the communication reveals the contemplation of a crime or harmful act.

COMMENT TO RULE 517

Prior Idaho Statutes or Rules: Idaho Code §§ 54-3404, 54-3410, 9-203(6).

Comparable Federal Rule: None. No similar rule was proposed. However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."

Comment: Rule 517 recognizes and provides for the licensed counselor-client privilege now provided in Idaho Code § 54-3410:

> Confidentiality of communication between licensed counselor and client shall be privileged from disclosure according to the provisions of subsection 1, paragraph 6, of section 9-203, Idaho Code, [certified counselor-student privilege] with the exception of the board in the review provided for in section 54-3404, Idaho Code.

Enacted in 1982, the Committee can find no cases interpreting this section.

Idaho Code § 54-3404(4) empowers the Idaho State Counselor Licensing Board to review the practice of licensed counselors who are charged with a violation of the Act. The review may include the notes of the counselor and other materials related to the practice. The review is to remain confidential unless the written consent of the client is received by the Board. The exception stated in Idaho Code § 54-3410 appears to be limited only to this review process and may not include proceedings to revoke, suspend or renew licenses under section 54-3404(6) or (7).

For many of the same reasons stated in the Comment to Rule 503 relating to the psychotherapist-patient privilege, the Idaho Committee is recommending adoption of Rule 517 rather than retention of Idaho Code § 54-3410.

Rule 517 confers a privilege as to confidential communications on the client of the licensed counselor the same as that conferred on the student under Rule 516. This is consistent with the apparent intent of Idaho Code § 54-3410.

Subsection (a) provides the definitions which govern the application of the rule.

Subsection (a)(1) defines "client" to be the person who is rendered licensed counselor services. It does not include those persons examined, tested or interviewed pursuant to court order or in the process of preparing a report for a court.

Subsection (a)(2) restricts the definition of a "licensed counselor" to a person licensed under Title 54, Chapter 34, Idaho Code to be consistent with the definition in Idaho Code § 54-3401 and as provided in Section 54-3410.

Subsection (a)(3) defines "confidential communication" in terms of intent that it not be disclosed as is done in the other privilege rules. This definition may expand the scope of the privilege beyond that provided in Idaho Code § 54-3410 which appears to be restricted to communications between counselor and client. The rule permits disclosure to third persons involved in the counseling process or necessary to the communication process as provided in the other privilege rules.

Subsection (b) states the rule of privilege. It confers the privilege on the client who is a party in any civil or criminal action which is consistent with Idaho Code § 54-3410 and § 9-203(6). To the extent that it encompasses communications with persons involved in the counseling or communication process, it may be an expansion of the scope of the privilege beyond that provided by the statute, but it is consistent with the other rules of privilege.

Subsection (c) states who may claim the privilege. It permits the counselor and other described persons to exercise the privilege for the client in recognition of the fact that the client may not be present to claim it. This is consistent with the same provision in the other rules of privilege.

Subsection (d) states the exceptions to the rule. It includes the same exceptions as are provided in Rule 516 and other rules (see Comment to Rules 516 and 503), with an additional exception for proceedings under Idaho Code § 54-3404 as is now provided in section 54-3410. To the extent that the exception in subsection (d)(4) includes any action, case or proceeding under § 54-3404, rather than "the board in review," it may be an expansion of the exception provided in the statute.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 54-3410 to conform the language to Rule 517 for application in nonjudicial proceedings.

Rule 518. Licensed Social Worker-Client Privilege

(a) **Definitions.** As used in this rule:

(1) **Client.** A "client" is the person who is rendered licensed social worker services.

(2) **Licensed social worker.** A "licensed social worker" is any person licensed to be a licensed certified social worker or a licensed social worker in the State of Idaho pursuant to Title 54, Chapter 32, Idaho Code.

(3) **Confidential communication.** A communication is "confidential" if not intended to be disclosed to third persons except persons present to further the interest of the client in the consultation or interview, or persons reasonably necessary to the transmission of the communication, or persons who are participating in the rendition of social services to the client under the direction of the licensed social worker, including members of the client's family.

(b) **General rule of privilege.** A client has a privilege in any civil or criminal action to which the client is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of licensed social services to the client, among himself, his licensed social worker, and persons who are participating in the licensed social work under the direction of the licensed social worker, including members of the client's family.

(c) **Who may claim the privilege.** The privilege may be claimed by the client, or for the client through his licensed social worker, lawyer, guardian or conservator, or the personal representative of a deceased client. The authority of the licensed social worker, lawyer, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** There is no privilege under this rule:

(1) **Contemplation or execution of crime or harmful act.** If the communication reveals the contemplation or execution of a crime or harmful act.

(2) **Charges against licensee.** When the client waives the privilege by bringing charges against the licensee.

COMMENT TO RULE 518

Prior Idaho Statutes or Rules: Idaho Code § 54-3213.

Comparable Federal Rule: None. No similar rule was proposed.

However, under F.R.E. 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Comment: Rule 518 recognizes and provides for the licensed social worker-client privilege now provided in Idaho Code § 54-3213:

> No person licensed under the provisions of this act shall disclose any information he may have acquired from persons consulting him in his professional capacity that was necessary to enable him to render services in his capacity to those persons, except:
>
> (1) With the written consent of that person or, in the case of death or disability, of his own personal representative, other person authorized to sue, or the beneficiary of an insurance policy on his life, health or physical condition;
>
> (2) That a person licensed under the provisions of this act shall not be required to treat as confidential communication that reveals the contemplation or execution of a crime or harmful act;
>
> (3) When the person is a minor under the laws of this state, and the information acquired by the licensee indicates that the minor was the victim or subject of a crime, the licensee may testify fully in relation thereto upon any examination, trial, or other proceeding in which the commission of such a crime is the subject of the inquiry;
>
> (4) When the person waives the privilege by bringing charges against the licensee.

Enacted in 1976, no decisions have been found which interpret this section.

(3) **Civil action.** In a civil action, case or proceeding by one of the parties to the confidential communication against the other.

(4) **Proceedings for hospitalization.** As to a communication relevant to an issue in proceedings to hospitalize the client for mental illness.

(5) **Child related communications.** In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.

For many of the same reasons stated in the Comment to Rule 503 relating to the psychotherapist-patient privilege, the Idaho Committee is recommending adoption of Rule 518 rather than retention of Idaho Code § 54-3213.

Rule 518 confers a privilege as to confidential communications upon the client of the licensed social worker similar to the psychotherapist-patient privilege (Rule 503), parent-child privilege (Rule 514), school counselor-student privilege (Rule 516), and licensed counselor-client privilege (Rule 517).

Subsection (a) provides the definitions which govern the application of the rule.

Subsection (a)(1) defines "client" to be the person who is rendered licensed social worker services. It does not include those persons examined, tested or interviewed pursuant to court order or in the process of preparing a report for a court.

Subsection (a)(2) restricts the definition of a "licensed social worker" to a person licensed under Title 54, Chapter 32, Idaho Code, as is now provided in Idaho Code § 54-3213.

Subsection (a)(3) defines "confidential communication" in terms of intent that it not be disclosed as is done in the other privilege rules. This definition extends the scope of the privilege beyond that provided in Idaho Code § 54-3213 which appears to be restricted to information obtained by the social worker only. It permits disclosure to third persons involved in the rendition of the social work service to the client or necessary to the communication process as is provided in the other privilege rules.

The statute uses the phrase "any information he may have acquired from persons consulting him." To the extent that the privilege is restricted to confidential communications, Rule 518 may be more restrictive in scope than the statute. See Comment to Rule 503 for case law applying the privilege in respect to "information" obtained in the physician-patient circumstance. The Committee believes the scope of the privilege under Rule 518 should be restricted to confidential communications as is recommended in the other rules of privilege.

Subsection (b) states the rule of privilege. It confers the privilege on the client who is a party in any civil or criminal action which is consistent with Idaho Code § 54-3213. To the extent that it encompasses communications with persons

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involved in the social work service or communication process, it is an expansion of the scope of the privilege beyond that provided by the statute, but it is consistent with the other rules of privilege.

Subsection (c) states who may claim the privilege. It permits the counselor and other described persons to exercise the privilege for the client in recognition of the fact that the client may not be present to claim it. This is consistent with the same provision in the other rules of privilege.

Subsection (d) states the exceptions to the rule. It incorporates the exceptions now provided in the statutes (subsections (d)(1), (2) and (5)), and adds exceptions which have been included in the other rules of privilege (subsections (d)(3) and (4). The contemplation or execution of crime exception stated at subsection (d)(1) varies in one respect from the similar exception found in Rules 516 and 517. This exception under Rule 518 includes, as does the existing statute, communications revealing the execution of a crime or wrongful act in addition to communications revealing the mere contemplation of such conduct. The Committee recognizes that the social worker serves a function different from that served by the school-counselor or the licensed counselor, including service as probation officers for the courts which justifies the difference in treatment. See Comment to Rules 503 and 516.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 54-3213 to conform the statute to the language of Rule 518 for application in nonjudicial proceedings.

Rule 519. Hospital, In-Hospital Medical Staff Committee and Medical Society Privilege.

(a) Definitions. As used in this rule:

(1) Hospital. A "hospital" is a facility defined in Idaho Code § 39-1301(a)(1) and either licensed under Idaho Code §§ 39-1301 through 39-1314 or similarly licensed in another jurisdiction.

(2) In-hospital medical staff committee. An "in-hospital medical staff committee" is any individual doctor who is a hospital staff member, or any hospital employee, or any group of such doctors or hospital employees, or any combination thereof, who are duly designated a committee by hospital staff by-laws, by action of an organized hospital staff, or by action of the board of directors of a hospital, and which committee is authorized by said by-laws, staff or board of directors, to conduct research or study of hospital patient cases, or of medical questions or problems using data and information from hospital patient cases.

(3) Medical society. A "medical society" is any duly constituted, authorized and recognized professional society or entity made up of physicians licensed to practice medicine in Idaho, having as its purpose the maintenance of high quality in the standards of health care provided in Idaho or any region or segment of the State, operating with the approval of the Idaho State Board of Medicine, or any official committee appointed by the Idaho State Board of Medicine.

(4) Confidential communication. A communication is a "confidential communication" under this Rule if it (A) is made in connection with a proceeding for research, discipline, or medical study conducted by an in-hospital medical staff committee or medical society for the purpose of reducing morbidity and mortality, or improving the standards of medical practice or health care in the State of Idaho; (B) is a statement of opinion or conclusion concerning the subject matter of the proceeding; and (C) is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication.

(b) General rule of privilege. A hospital, in-hospital medical staff committee, medical society, and maker of a confidential communication has a privilege to refuse to disclose and to prevent any other person from disclosing the confidential communication.

P

(c) **Who may claim the privilege.** The privilege may be claimed by the maker of the confidential communication, by a representative of the hospital, in-hospital medical staff committee or medical society, or for the holder of the privilege by its lawyer. The authority of the representative or lawyer to do so is presumed in the absence of evidence to the contrary.

(d) **Exception.** There is no privilege under this rule as to a communication made in connection with the on-going provision of medical care to a patient.

(e) **Waiver of privilege by testimony.** The privilege as to a confidential communication under this rule is waived if the maker of the confidential communication gives evidence of his opinion or conclusion concerning the subject matter of the confidential communication.

COMMENT TO RULE 519

Prior Idaho Statutes or Rules: Idaho Code § 39-1392 et seq.

Comparable Federal Rule: None.

Comment: Rule 519 recognizes and provides for the hospital, in-hospital medical staff committee and medical society privilege now provided in Idaho Code § 39-1392 et seq.

> 39-1392. Statement of policy. To encourage research, discipline and medical study by in-hospital medical staff committees and recognized medical societies for the purposes of reducing morbidity and mortality, enforcing and improving the standards of medical practice in the state of Idaho, certain records of such committees and societies shall be confidential and privileged as set forth in this chapter.
>
> 39-1392a. Definitions. The following terms shall have the following meanings when used in this section:
>
> (a) "Hospital" shall mean a facility in Idaho licensed under Sections 39-1301 through 39-1314, Idaho Code, and defined in 39-1301(a)(1), Idaho Code.
>
> (b) "In-hospital medical staff committees" shall mean any individual doctor who is a hospital staff member, or any hospital employee, or any group of such doctors and/or hospital employees, who are duly designated a committee by hospital staff by-laws, by action of an organized hospital staff, or by action of the board of directors of a hospital, and which committee is authorized by said by-laws, staff or board of directors, to conduct research or study of hospital patient cases, or of medical questions or problems using data and information from hospital patient cases.
>
> (c) "Medical society" shall mean any duly constituted, authorized and recognized professional society or entity made up of physicians licensed to practice medicine in Idaho, having as its purpose the maintenance of high quality in the standards of health

care provided in Idaho or any region or segment of the state, operating with the approval of the Idaho state board of medicine, or any official committee appointed by the Idaho state board of medicine.

39-1392b. Records confidential and privileged. Except as provided in section 39-1392e, all written records of interviews, all reports, statements, minutes, memoranda, charts, and the contents thereof, and all physical materials relating to research, discipline or medical study of any in-hospital medical staff committees or medical society, for the purposes set forth in section 39-1392, shall be confidential and privileged, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence, or in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever; provided further no order of censure, suspension or revocation of licensure or hospital privilege of any physician licensed to practice medicine in Idaho shall be admissible in any civil proceeding seeking damages or other civil relief against the physician or hospital which may be a party defendant in said cause; provided, however, this section shall not prohibit or otherwise affect the use of said documents, materials or testimony in medical society or hospital proceedings, nor shall it prohibit or otherwise affect the dissemination, for medical purposes, of information contained in such documents or materials or the conclusions and findings of such in-hospital medical staff committees or medical society, and provided further, that this section shall not affect the admissibility in evidence in any action or proceeding of any original medical records of any patient.

39-1392e. Limited exceptions to privilege and confidentiality. (a) In the event of a claim or civil action against a physician or a hospital arising out of a particular physician-patient relationship, or which concerns the sufficiency of the delivery of particular health care to a specific patient,

any hospital or medical society having information of the kind covered by section 39-1392b shall, when interrogated as hereinafter provided, advise any such claimant who is or was such a patient or who, in a representative capacity, acts on behalf of such patient or his heirs, as follows:

(1) Whether it has conducted or has in progress an inquiry, proceeding or disciplinary matter regarding the quality of propriety of the health care involved, which concerns the subject patient while he was under the care or responsibility of a member of such society or while he was a patient in such hospital; and, if so,

(2) Whether disposition of any kind resulted or will result therefrom; and, if so,

(3) What the disposition was, or, if not yet determined, approximately when it will be determined.

Such disclosure of information shall be limited to the medical society or hospital committee's actions in connection with the physician or hospital against whom such claim is asserted.

(b) Such a claimant shall likewise be entitled to inquire of such hospital or medical society respecting the names and addresses of persons who such hospital or society knows to have direct knowledge of the provision of the health care in question, such inquiry to be limited, however, to the particular patient and the particular times and occasions germane to the specific occurrences on which the claim is based; provided, names shall not be disclosed respecting persons who have gained secondary knowledge or formed opinions respecting the matter solely by participating as witnesses, officials, investigators or otherwise on, for, or in connection with such a committee, staff, governing board or the state board of medicine.

(c) Such limited, conditional discovery and disclosure of information as provided above shall be allowed only in response to inquiries directed to such a society or hospital, and then only if initially propounded by a claimant of the type above described. If the matter is in litigation,

inquiry may be by customary means of discovery under the Idaho Rules of Civil Procedure, or, if pending in a United States court, then under discovery as allowed by its applicable rules; provided, pendency of the claim in the United States court or before any other tribunal shall not operate to broaden the exception to the rules of privilege, confidentiality and immunity set down in this act.

(d) Such disclosures may be voluntarily made without judicial order or formal discovery if all disciplined, accused or investigated physicians consent thereto, and if privileged or confidential information regarding any other patient, physician or person will not be disclosed thereby. When the terms of this paragraph are complied with, such voluntary disclosures may be made without civil liability therefor as if in due response to valid judicial process or order.

(e) If any claimant makes such inquiry of any such hospital or society, he shall be deemed to have consented to like inquiry and disclosure rights for the benefit of all parties against whom he asserts such claim or brings such suit or action, and all other persons who are parties to such action, and thereafter all such persons and parties may invoke the provisions of this section, seeking and securing specific information as herein provided for the benefit of such claimant, to the same extent as the same is allowed to such claimant.

(f) If any physician, patient, person, organization or entity whose conduct, care, chart, behavior, health or standards of ethics or professional practice is the subject of investigation, comment, testimony, dispositive order of any kind or other written or verbal utterance or publication or act of any such hospital or society or any member or committee thereof in the course of research, study, disciplinary proceeding or investigation of the sort contemplated by this act, makes claim or brings suit on account of such hospital or society activity, then, in the defense thereof, confidentiality and privilege shall be deemed waived by the making of such claim, and such hospital, society and the members of their staffs and committees shall be allowed to use and resort to such otherwise protected information for the purpose of presenting

proof of the facts surrounding such matter, and this provision shall apply whether such claim be for equitable or legal relief or for intentional or unintentional tort of any kind and whether pressed by a patient, physician or any other person, but such waiver shall only be effective in connection with the disposition or litigation of such claim, and the court shall in its discretion, enter appropriate orders protecting, and as fully as it reasonably can do so, preserving the confidentiality of such materials and information.

Enacted in 1973, only one decision interpreting Idaho Code §§ 39-1392 to 39-1392e has been located. Murphy v. Wood, 105 Idaho 180, 667 P.2d 859 (Ct.App. 1983) involved an attempt by defendant physicians to introduce evidence that they had complied with the local standard of care before operating by obtaining a second opinion from the tumor board which had recommeded the surgery. The Court of Appeals upheld the trial court's ruling in limine barring discovery and use at trial of the evidence on the grounds that all testimony of the meeting of the tumor board was protected against disclosure as pertaining to the records and proceedings of a hospital medical staff committee under Idaho Code §§ 39-1392 to 39-1392e.

The Court of Appeals rejected the doctors' contention that the evidentiary privilege established in Idaho Code § 39-1392b applies only where the medical staff committee is pursuing "research, discipline and medical study," and should be construed to grant privilege only for retrospective discussions in peer review. The Court determined that the legislature intended to establish a broad privilege; broader than are afforded by mere peer review statutes. The Court also determined that none of the exceptions provided in the statutes are applicable to the doctors' use of the evidence. To prevent the shield of privilege from being turned into a sword and to prevent the jury from being misled that no consultation had occurred, the Court ordered that the trial court's order be modified to preclude the plaintiff from suggesting or urging to the jury that the doctors had failed to comply with a local standard of care by not seeking a second opinion before operating.

Rule 519 is intended to adopt by rule some of the evidentiary provisions of the statutes that are applicable in judicial proceedings. It is the intent of the Idaho Committee to restrict the scope of the privilege to statements of opinion or conclusion to the exclusion of statements of fact. It is further intended that the privilege not include statements of opinion or conclusion when they are made at the time of and concern the on-going treatment of a patient.

Health care providers are required to systematically monitor and review the quality of health care they provide. The review process includes the delivery of services in general by the health care provider as well as the specific peer review of physicians and staff. The health care providers of Idaho have established in-hospital medical staff committees and medical societies for this purpose. The health care providers must of necessity rely on the voluntary participation of physicians and other medical personnel to make the review process meaningful. That voluntary participation often requires that the physicians and other medical personnel express their opinion concerning the delivery of medical services and health care.

The Idaho Committee concluded that the public interest in the improvement of health care in Idaho will be served by the encouragement of full and frank review, analysis and criticism of the quality of medical services and health care by those responsible for providing it. The Committee further concluded that physicians and others involved in the provision of these services would be reluctant to express their opinions and conclusions in proceedings conducted for purposes of improving them if the opinions and conclusions were subject to subsequent disclosure.

The scope of the privilege is such that it will prevent disclosure of records, minutes, or the like reflecting the privileged communication as well as the communication itself, as well as an opinion or conclusion expressed in the findings made or actions taken by the review committee. The Committee concluded that the privilege should not be extended to communications of fact as opposed to opinion or conclusion, or to factual data developed for purposes of medical review proceedings. The facts concerning a patient's medical services are otherwise discoverable by the patient and the Committee concluded that there is no policy to be served by attaching a privilege to those facts that is not already addressed by the physician and psychotherapist-patient privilege provided in Rule 503. Comments made to the Committee by representatives of the medical community affirmed that the effective performance of these medical review proceedings would be served by a privilege extending only to expressions of opinion or conclusion made in the proceedings.

The Committee also concluded that the privilege should not apply where statements of opinion or conclusion concern the on-going treatment of a patient. There such statements would constitute an operative part of the provision of care, rather than a retrospective critique of past services. Again, comments to the Committee from representatives of the medical community confirmed that statements made in connection with on-going care

did not fall within the area deserving the protection of the privilege.

The Committee believes that the interests of truth demand that the privilege conferred by this rule be waived if the maker of a privileged communication chooses to give evidence concerning his or her opinion or conclusion on the subject matter of the privileged communication. If such evidence is inconsistent with the opinion or conclusion expressed in a medical review proceeding, fairness demands that a party affected by the evidence be given the opportunity to explore the inconsistency.

Subsection (a) provides the definitions which govern the application of the rule. It defines "hospital" in terms sufficiently broad to include hospitals located in Idaho and nonresident hospitals. The definition requires a finding of two elements. First, the hospital, regardless of location, must provide services sufficient to satisfy the definition in Idaho Code § 39-1301(a)(1). Second, the hospital must be either licensed under Idaho Code §§ 39-1301 through 39-1314 or similarly licensed in the jurisdiction where it is located. The term "jurisdiction" is intended to be sufficiently broad to encompass other states and countries, and federal jurisdictions. The definitions for "in-hospital medical staff committee" and "medical society" are stated in language identical to that used in Idaho Code § 39-1392a.

"Confidential communication" is defined to require a finding of three elements. Element (A), requiring that it be "made in connection with a proceeding for research, discipline, or medical study conducted by an in-hospital medical staff committee or medical society for the purpose of reducing morbidity and mortality, or improving the standards of medical practice or health care in the State of Idaho," is consistent with the policy of Idaho Code § 39-1392(b).

Element (B) restricts the scope of the privilege to include only those confidential communications that are a statement of opinion or conclusion concerning the subject matter of the element "(A)" proceeding. It includes statements made in written form.

Element (C) further requires that the element "(B)" statement be not intended for disclosure to third persons, except those present to further the research, or medical study, or persons reasonably necessary for the transmission of the communication, or persons participating in the process.

Subsection (b) states the rule of privilege. It confers the privilege on the hospital, in-hospital medical staff committee, medical society and the maker of the confidential communication to protect confidential communications from disclosure. The rule is applicable in any civil or criminal action. It is drafted to include only statements of opinion or conclusion.

As noted above, the rule explicitly omits and thereby excludes from the rule of privilege all communications of fact.

Subsection (c) states who may claim the privilege. It is intended to make clear that the maker of the privileged statement or a representative of the hospital, in-hospital medical staff committee and medical society, or the attorney for the holder of the privilege, may assert the claim of privilege on behalf of the holder of the privilege.

As with the other rules of privilege, the person claiming the privilege has the burden of proving the right thereto. If exercised by the attorney or a representative of the holder of the privilege, the authority of the attorney or representative is presumed to exist, but there is no presumption that the privilege exists.

Subsection (d) states the exception to the rule. It provides an exception to the rule where the statements of opinion or conclusion are made at the time of and concern the on-going treatment of a patient.

Although a patient may waive his right of privilege, the exception is necessary because under this rule the privilege is conferred on the maker of the privileged statement, hospital, in-hospital medical staff committee and medical society and a waiver by the patient will not suffice.

The scope of the exception is intended to be sufficiently broad that no communications made at the time of and relevant to on-going treatment are privileged regardless of the purpose for which the communications were made.

As provided in the act, Rule 519 does not affect the right of discovery of or the admissibility of any original medical records of any patient.

Subsection (e) provides for a waiver of the privilege if the maker of the confidential communication gives evidence concerning his or her opinion or conclusion on the subject matter of the confidential communication. This waiver is in addition to

that which exists under the general waiver provisions of Rule 510 relating to voluntary disclosure of a privileged communication.

The waiver of the privilege which under Rule 510 results from a noncompulsory disclosure of a confidential communication made during an in-hospital medical staff committee proceeding is not to be confused with the waiver which may occur under subsection (e) of this rule. A statement of opinion made by a physician during an in-hospital medical staff committee proceeding as to the propriety of a surgical procedure which is the subject matter of that proceeding would under Rule 519 generally be privileged from disclosure in a judicial proceeding. Under Rule 510 the privilege granted in Rule 519 be waived if the holder of that privilege voluntarily discloses that confidential statement. If the disclosure was compelled erroneously or made without opportunity to claim the privilege, under Rule 511 there is no waiver.

Under subsection (e) of Rule 519 the waiver may also result if the physician gives testimony at a judicial proceeding of his opinion as to the propriety of that surgical procedure. The physician with knowledge of the facts of the surgery in question may be called and in the absence of any other exclusionary rule, be compelled to testify to the facts within his knowledge. If requested to express his opinion concerning the propriety of the surgical procedure, the physician assumes the role of an expert witness and <u>may</u> elect to express an opinion as requested. <u>See</u> Rule 701. If he expresses an opinion in the judicial proceeding concerning the propriety of the surgical procedure in question and if that surgical procedure was the subject matter of the prior in-hospital medical staff committee proceeding, a waiver has been effected under subsection (e) and disclosure of the prior opinion given in the in-hospital medical staff committee proceeding may be compelled. If the physician elects to not express his opinion as requested, there is no waiver of the privilege. Testimony by the physician as to the facts of the surgery does not effect a waiver under subsection (e).

<u>Action Recommended on Idaho Statutes or Rules</u>: Amend Idaho Code § 39-1392 by deleting the words "and privileged."

Amend Idaho Code § 39-1392b by deleting all language following the words "shall be confidential" to and including the language "in said cause;".

Amend Idaho Code § 39-1392c by deleting the word "privileged."

Repeal Idaho Code § 39-1392e.

Rule 520. Medical Malpractice Screening Panel Privilege.

(a) Confidential communication. A communication is a "confidential communication" under this rule if it is made in a proceeding conducted or maintained under the authority of Idaho Code §§ 6-1001 to 6-1011 and is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication.

(b) General rule of privilege. In any civil action or proceeding, a medical malpractice screening panel or any member thereof, any party to the medical malpractice screening panel proceeding, and any witness or other person who participated in the medical malpractice screening panel proceedings has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication under this rule.

(c) Who may claim the privilege. The privilege may be claimed by any holder of the privilege or for him through his lawyer. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

COMMENT TO RULE 520

Prior Idaho Statutes or Rules: Idaho Code § 6-1001.

Comparable Federal Rule: None

Comment: Rule 520 recognizes and provides for the medical malpractice screening panel privilege now provided in Idaho Code § 6-1001.

> 6-1001. Hearing panel for prelitigation consideration of medical malpractice claims--Procedure.--The Idaho state board of medicine, in alleged malpractice cases involving claims for damages against physicians and surgeons practicing in the state of Idaho or against licensed acute care general hospitals operating in the state of Idaho, is directed to cooperate in providing a hearing panel in the nature of a special civil grand jury and procedure for prelitigation consideration of personal injury and wrongful death claims for damages arising out of the provision of or alleged failure to provide hospital or medical care in the state of Idaho, which proceedings shall be informal and nonbinding, but nonetheless compulsory as a condition precedent to litigation. Proceedings conducted or maintained under the authority of this act shall at all times be confidential, privileged and immune from civil process and evidence of them or results, findings or determinations thereof shall be inadmissible in any civil or other action or proceeding by, against or between the parties thereto or any witness therein. Formal rules of evidence shall not apply and all such proceedings shall be expeditious and informal.

No decisions interpreting Idaho Code § 6-1001 have been found.

Rule 520 is intended to adopt by rule the evidentiary provision of the statute that "[p]roceedings conducted or maintained under the authority of this act shall at all times be confidential, privileged and immune from civil process." Rule 413 adopts by rule the other evidentiary provisions of Section 6-1001.

Section 6-1001 mandates that such proceedings are compulsory as a condition precedent to litigation. The proceedings are intended by the legislature "in the public interest to encourage nonlitigation resolution of claims against physicians and hospitals." Section 1 of S.L. 1976, ch. 278. The Committee concluded that the rule of privilege is necessary to foster open and frank participation in the proceedings.

The scope of the privilege is such that it will prevent disclosure of any writing reflecting the privileged communication as well as the communication itself and any opinion or conclusion expressed in the proceedings.

The rule is not intended to render evidence, otherwise discoverable or admissible, privileged from disclosure solely because it was presented in medical malpractice screening panel proceedings. To allow a privilege on this ground would permit a party to immunize the evidence by revealing it during the panel proceedings contrary to the intent of the statute and this rule.

Subsection (a) provides the definition of a "confidential communication."

"Confidential communication" is defined to require a finding of two elements. First, the communication must be "made in a proceeding conducted or maintained under the authority of Idaho Code §§ 6-1001 to 6-1011" and second, it must be "not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication."

Subsection (b) states the rule of privilege. It confers the privilege on the panel and all persons or entities participating in the proceedings of the panel. The rule is applicable in any civil action.

Subsection (c) states who may claim the privilege. It is intended to make clear that all persons or entities participating in the panel proceedings or the attorney for the holder of the privilege may assert the claim of privilege.

As with the other rules of privilege, the person claiming the privilege has the burden of proving the right thereto. If exercised by the attorney of the holder of the privilege, the authority of the attorney is presumed to exist, but there is no presumption that the privilege exists.

There are no exceptions to this rule of privilege.

Action Recommended on Idaho Statutes or Rules: Amend Idaho Code § 6-1001 to conform the statute to the language of Rule 520 for application in nonjudicial proceedings.

INTRODUCTORY COMMENT TO ARTICLE VI

WITNESSES

Article VI, which deals generally with the subject of witnesses, contains rules of three different sorts. First, it includes rules concerning witness competency. Rule 601 sets forth a general rule of competency. Rule 602 refines this with a traditional statement of the rule requiring firsthand knowledge, carving out an exception for expert opinion testimony admissible under Rule 703. Rule 603 states the oath or affirmation requirement. Rule 604 specifically extends this requirement to interpreters. Rules 605 and 606 address, respectively, the competency of the judge or any juror to be a witness in any trial before either of them.

Second, Article VI includes impeachment rules. Rule 607 abolishes the common law "voucher" rule, permitting any party, including the party who calls a witness, to impeach that witness. Rule 608 addresses impeachment by evidence of character and conduct. Rule 609 covers impeachment by evidence of a criminal conviction. Rule 610 bars impeachment of a witness on the basis of his religious beliefs. Rule 612 deals with writings or objects used by a witness to refresh memory. Rule 613 deals with use of prior statements of witnesses.

Third, Article VI includes rules setting forth the trial court's role. Rule 611 places the mode and order of witness interrogation and evidence presentation within the discretion of the trial court. Rule 614 concerns calling and interrogation of witnesses by the court. Finally, Rule 615 deals with the exclusion of witnesses from the courtroom.

The proposed Idaho Article VI is identical to Federal Article VI with the following exceptions: Idaho Rule 601 permits the court to determine witness competency before allowing the testimony and preserves the Idaho Deadman Statute; Rule 606 adds language from I.R.C.P. 59(a)(2) permitting evidence from a juror on issues determined by resort to chance; Rule 608 merely designates the last sentence of the rule as a separate subsection for ease of reference; Rule 609 is similar in purpose but requires the weighing process in all cases and restricts use of prior convictions to felonies among other dissimilarities; Rule 612 excludes from production materials reviewed prior to testifying that are privileged or otherwise protected from disclosure; Rule 614 permits the court to call or interrogate witnesses only in court trials; and, Rule 615 makes exclusion of witnesses discretionary rather than mandatory, except in preliminary hearings as is now provided in Idaho Code § 19-810,

and incorporates the child witness provisions of Idaho Code § 19-3023.

The application of the Federal Article VI Rules has caused few problems in federal courts. Under Rule 607 questions have arisen when inconsistent statements of witnesses are offered purportedly for impeachment, but are substantively prejudicial, a matter that cannot be solved by change in the rule. Federal Rule 609 has resulted in concerns and problems in application which the Idaho Committee attempts to avoid with Idaho Rule 609. Rule 612 has created conflicts in application regarding production of privileged materials reviewed before testifying which the Idaho rule exempts from production. See generally Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 133-189 (1983).

Article VI.

WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except:

(a) Incompetency determined by court. Persons whom the court finds to be incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

(b) Claim against estate. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person as to any communication or agreement, not in writing, occurring before the death of such deceased person.

(c) Other exceptions. As otherwise provided in these rules.

R

COMMENT TO RULE 601

Prior Idaho Statutes or Rules: Idaho Code §§ 9-201 and 9-202; I.R.C.P. 43(a); I.C.R. 26.

Comparable Federal Rule: Similar to F.R.E. 601 except F.R.E. 601 contains no provision that requires or permits a determination of competency prior to testimony as in subsection (a), nor a provision incorporating the Idaho Deadman statute as in subsection (b).

Comment: Rule 601 is intended to eliminate all grounds of incompetency not specifically recognized in the succeeding rules of Article VI.

To the extent it abolishes the grounds of religious belief, conviction of crime, and interest in or connection with the litigation, Rule 601 is consistent with Idaho Code § 9-201.

To the extent it abolishs the absolute disqualification of (1) witnesses of unsound mind and (2) children under 10 who either are incapable of accurate perceptions or truthful communication, as is provided in Idaho Code § 9-202, Rule 601 modifies the language of Idaho Code § 9-202 and substitutes the general test of competency now provided in Idaho Code § 9-201 that all witnesses must be able to perceive, recollect and relate truthfully that perception. This modification of the language of the statute is not inconsistent with the past application of the statute as evidenced by the decisions of the Idaho Supreme Court. See State v. Cosler, 39 Idaho 519, 529, 228 P. 277 (1924). ("Unsoundness of mind is a relative term . . . And the statute, in prohibiting persons of 'unsound mind' from testifying, must, of necessity, have included those only who are incapable of receiving and relating impressions.") See also State v. Simes, 12 Idaho 310, 85 P. 914 (1906); State v. Sims, 35 Idaho 505, 206 P. 1045 (1922). As to child witnesses, see State v. Ross, 92 Idaho 709, 444 P.2d 369 (1968); State v. McKenney, 101 Idaho 149, 609 P.2d 1140 (1980).

Idaho Rule 601 is consistent with I.R.C.P. 43(a) and I.C.R. 26, both of which provide that the competency of witnesses shall be determined as provided by law.

Subsection (a) retains the requirements of perception, recollection and communication, and permits the court to determine the competency of a witness upon proper objection and before testimony is adduced, which is consistent with existing

law. See State v. Iwakiri, 106 Idaho 671, 682 P.2d 571 (1984); State v. Fenley, 103 Idaho 199, 546 P.2d 441 (Ct.App. 1982); Clark v. Gneiting, 95 Idaho 10, 501 P.2d 278 (1972).

Federal Rule 601 adopts as policy the premise that the inability to perceive and communicate perceptions should not render a witness incompetent to testify, but rather should go to the weight and credibility of the testimony. This view is not without authority in Idaho. In State v. Ross, 92 Idaho 709, 449 P.2d 369 (1968), the competency of a five year-old and a six year-old was challenged. Although the testimony of each child contained numerous inconsistencies which, the defendant argued, were indicative of their inability to accurately perceive and truthfully relate events, the Court found each child to be competent, holding that the questions of fact and credibility were best resolved by the fact finder. See also State v. McKenney, 101 Idaho 149, 609 P.2d 1140 (1980) (allowing testimony of a nine year-old, stating her indecisiveness went to weight as opposed to admissibility).

Contrary to the view expressed by F.R.E. 601, the Idaho Committee believes that some mechanism should be available to challenge or test the ability of a witness to testify competently before the testimony is admitted. The Idaho State courts do not have the authority to comment on the evidence as do the Federal Courts. The Committee is also of the opinion that the power of the court to grant a judgment notwithstanding the verdict or a new trial are nothing more than the application of remedies "after the fact" and after a great deal of time and expense may have been wasted. Subsection (a) is intended to provide the mechanism for the court to determine the competency of a witness to perceive, recollect and communicate that perception, before testimony is given. Although not specified in the rule, it is intended that the test be applied with reference to the subject matter to be elicited from the witness. See State v. Iwakiri, 106 Idaho at 679, 682 P.2d at 579; State v. Fenley, 103 Idaho at 201; State v. Simes, 12 Idaho at 310.

The need for the pre-trial mechanism is well illustrated by State v. Iwakiri, 106 Idaho 671, 682 P.2d 571 (1984). In that case, the Idaho Court first addressed the question whether the fact that a witness has been hypnotized prior to trial to refresh memory renders that witness incompetent to testify. The Court, citing Federal Rule 601, observed that a "trend of the law in other jurisdictions in favor of a general rule of competency, which leaves to the discretion of the trial court the determination of whether circumstances render the witness incompetent, has been evolving over the last century, resulting in rejection of any per se rules of incompetency." 106 Idaho at 676, 682 P.2d at 575. The Court expressly rejected the per se rules which admit or reject hypnotically induced or enhanced testimony and adopted its own rule for Idaho. The Court stated:

> There needs to be some method of determining the admissibility of this type of testimony that will protect against the dangers of hypnosis, particularly the dangers of cueing and confabulation, and yet allow for receipt of the benefits of memory recall which hypnosis can produce. Thus, we adopt a rule wherein trial courts are directed, in cases where hypnosis has been employed, to conduct pretrial hearings on the procedures used during the hypnotic session in question. Trial judges should then apply a "totality of the circumstances" test and make a determination whether, in view of all of the circumstances, the proposed testimony is sufficiently reliable to merit admission. If the witness's memory seems to have been altered in such a way as to render it unreliable, the trial court may rule the witness to be incompetent.

106 Idaho at 678, 682 P.2d at 578. The Court then established six guidelines for the trial court to apply under the "totality of the circumstances" test. The Court further noted that the rule adopted by the Court is a rule of competency, not an exclusionary rule, and is intended to place the hypnosis evidentiary problem within the control of the trial court to assure that reliability will be determined before submission of the evidence to the jury. Rule 601 does not change the law enunciated in the Iwakiri decision, but rather the rule expressly permits the procedure established in that decision. As observed by the Court in Iwakiri, that procedure is not limited only to hypnotically induced or enhanced testimony. It may also be applied to determine the competency of other evidence, e.g., the identification of strangers.

Subsection (b) retains as law, the Idaho Deadman provisions of Idaho Code § 9-202(3). The statute has been narrowly construed to preclude testimony only "as to any communication or agreement" with the deceased and not testimony concerning a state of affairs or matters of fact occurring before the decedent's death. See, e.g., Argyle v. Slemaker, 99 Idaho 544, 585 P.2d 954 (1978). The Committee believes there is good reason to retain this interpretation.

Subsection (c) recognizes the witness disqualifications provided in Rule 602 (lack of personal knowledge) and Rule 603 (refuses to be sworn), and the "status" disqualifications of Rule 605 (presiding judge) and Rule 606 (sitting juror).

Action Recommended on Idaho Statutes or Rules: Repeal Idaho Code §§ 9-201 and 9-202.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

COMMENT TO RULE 602

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 602.

Comment: Rule 602 is intended to continue the common law requirement that a lay witness must have "firsthand knowledge" of the facts to which he testifies. The reference to Rule 703 is designed to avoid any question of conflict between Rule 602 and the provisions of Rule 703 allowing an expert to express opinions based on facts of which he does not have personal knowledge.

The rule recognizes the power of the court to reject evidence that could not reasonably be believed - i.e., if as a matter of law no trier of fact could find that the witness actually perceived the matter about which he is testifying. The rule is also important because the opinion rule governing testimony by lay witnesses expressed in Rule 701 incorporates the knowledge requirement of Rule 602. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶¶ 602[01] - [03] (Supp. 1983).

Rule 602 does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, when he has no personal knowledge of it. See, e.g., State v. Brooks, 103 Idaho 892, 655 P.2d 99, 107 (Ct.App. 1982)(testimony by witness that conversation had taken place and disclosing who was present was not hearsay, but testimony offered for the truth of the content of the conversation is inadmissible).

Idaho has no statute or rule expressly requiring that a witness testify from personal knowledge. Presumably, such a requirement is alternatively created by rules of relevancy and against hearsay evidence. However, Idaho case law reflects that, in practice, testimony from personal knowledge is required. See State v. Johnson, 92 Idaho 533., 447 P.2d 10 (1968); Hook v. Horner, 95 Idaho 657, 517 P.2d 554 (1973). Arguably, the same conclusion is mandated by Idaho Code § 9-201, which specifies that to be competent to testify, a witness must have the ability to perceive, recollect, and communicate with reference to the occurrences involved. Adoption of Rule 602 would clarify the Idaho law and mandate the practice of establishing that a witness has personal knowledge of the subject matter of his testimony.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

COMMENT TO RULE 603

Prior Idaho Statutes or Rules: Idaho Code §§ 9-1401 through 9-1405; I.R.C.P. 43(d).

Comparable Federal Rule: Identical to F.R.E. 603.

Comment: Rule 603 mandates that every witness be sworn by oath or affirmation before testifying. It is designed to provide flexibility in satisfying the common law competency requirement that witnesses, whether they be religious, atheist, mentally unsound, or children, be administered the "oath". The rule is intended to continue the practice of allowing the administering of an affirmation in lieu of an oath.

The focus of Rule 603 is to establish a flexible method of insuring that witnesses understand and undertake the duty of testifying truthfully. This same focus is seen in the Idaho statutes, rules and case law which essentially deem any type of oath or affirmation sufficient where it is clear that the witness thereby undertakes the obligation of truthful testimony. See State v. Parker, 81 Idaho 51, 336 P.2d 318 (1959).

Idaho Code § 73-114 defines "oath" to include an affirmation or declaration. It further provides that every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose".

Idaho Code §§ 9-1401 through 9-1405 provide who may administer oaths, the form of the oath, peculiar forms of oaths for a person who has a peculiar mode of swearing or who believes in any other than the Christian religion, and the use of an affirmation in place of an oath. I.R.C.P. 43(d) also provides that a solemn affirmation may be accepted in lieu of an oath.

Rule 603 explicitly requires administration of an oath or affirmation prior to testimony, whereas such requirement appears only by implication in existing Idaho statutes and rules.

Action Recommended on Idaho Statutes or Rules: None required.

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Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

COMMENT TO RULE 604

Prior Idaho Statutes or Rules: Idaho Code §§ 9-205 and 9-1603; I.C.R. 28.

Comparable Federal Rule: Identical to F.R.E. 604.

Comment: Rule 604 treats the interpreter as an expert witness. The Federal Advisory Committee's Notes to Rule 604 state that the rule implements Rule 43(f) of the Federal Rules of Civil Procedure and Rule 28(b) of the Federal Rules of Criminal Procedure, both of which contain provisions for the appointment and compensation of interpreters.

There is no comparable civil rule in Idaho. I.C.R. 28 provides for interpreters in criminal actions in language substantially identical to that in Idaho Code § 9-205.

Idaho Code § 9-205 provides that in any civil or criminal action in which any witness or a party does not understand or speak the English language, or who has a physical handicap which prevents him from fully hearing or speaking the English language, then the court shall appoint a qualified interpreter to interpret the proceedings to and the testimony of such witness or party. Upon appointment of such interpreter, the court shall cause to have the interpreter served with a subpoena as other witnesses, and such interpreter shall be sworn to accurately and fully interpret the testimony given at the hearing or trial to the best of his ability before assuming his duties as an interpreter. The court shall determine a reasonable fee for all such interpreter services which shall be paid out of the general county funds.

The meaning of the word "qualified" as used in Idaho Code § 9-205 is not explained by any Idaho cases. However, the statute implies that an interpreter must be competent to fully and accurately report the testimony. Further, Idaho Code § 9-205 changed prior Idaho law to the extent that the power to determine an interpreter's competency is now clearly vested in the trial judge. Early Idaho law left a question of need for an interpreter to the trial judge and the question of the credibility to the trier of fact. See State v. Bogris, 26 Idaho 587, 144 P. 789 (1914).

Idaho Code § 9-1603 provides that interpreters are entitled to receive such fee for their services as set and determined by the court together with mileage to be paid out of

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the county treasury by order of the court in both civil and criminal actions.

Although not provided in Rule 604, the interpreter would be entitled to compensation under Rule 706 which provides for court appointed experts and authorizes reasonable compensation to be determined by the court. In criminal actions it would be paid from public funds. In civil actions it would be paid by the parties, unless it involves the taking of property, in which case it would be paid from public funds. To this extent Rule 706 would change existing Idaho law; however, Rule 604 would make no change.

Rule 604 is consistent with I.R.C.P. 45(c)(1). It provides that witness fees and expenses in the district court and the magistrates division shall be in the amounts provided under Rule 54(d)(1). Rule 54(d)(1)(E) permits the court to assess and apportion as costs between and among the parties to the action, all fees and expenses of masters, receivers or expert witnesses appointed by the court in the action.

The rules take varying approaches to the question of when an interpreter shall be appointed. Idaho Code § 9-205 provides for an interpreter in any civil or criminal action in which any witness or party does not understand or speak English or has a physical handicap which prevents him from hearing or understanding. In such a case, an interpreter is mandated. Under Rule 604 an interpreter, as an expert, may be appointed by the court on its own motion or that of a party. The court has the final word on the person appointed under Rule 706. Further, the use of experts is authorized where the experts' specialized knowledge would assist the trier of fact to understand the evidence or to determine a fact in issue.

<u>Action Recommended on Idaho Statutes or Rules</u>: None required.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

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COMMENT TO RULE 605

Prior Idaho Statutes or Rules: Idaho Code § 9-204.

Comparable Federal Rule: Identical to F.R.E. 605.

Comment: Rule 605 states an absolute prohibition to testimony at trial by the presiding judge. No objection need be made to preserve the point. The absolute ban is based on the feeling that such testimony involves too great a potential for abuse and prejudice. Further, the ban eliminates practical problems in the conduct of a trial should the judge continue hearing the case, e.g., can the judge rule on his own testimony. The automatic objection is afforded to allow counsel to preserve the point without the risk of offending or alienating the judge.

By contrast, Idaho Code § 9-204 permits testimony at trial by the presiding judge but gives the court unqualified discretion to suspend or postpone the proceedings. There is no Idaho rule on point.

Adoption of Rule 605 would reverse Idaho Code § 9-204. Idaho is the only jurisdiction surveyed which allows a trial judge discretion to decide whether the proceedings should continue in light of the necessity of his testimony.

Although there is no Idaho case law regarding actual testimony by the judge at trial, the Idaho court has recognized the potential for prejudice even when the judge comments on the weight of the evidence and has ruled that remarks or comments are forbidden. See, e.g., State v. White, 97 Idaho 708, 711, 551 P.2d 1344 (1976), cert. denied, 97 S.Ct. 118, 429 U.S. 842, 650 L.Ed.2d 111 (1976)("Remarks or comments by a trial judge which would tend to prejudice either of the parties to a jury trial are proscribed because of the great possibility that such an expression will influence the jurors.").

It should be noted that the rule restrictively uses the phrase "testimony at trial." It should not be interpreted to preclude the court from stating during sentencing or post-sentencing hearings what he observed in his presence. Nor does the rule preclude the court from stating what he observed in his presence in a summary contempt proceeding.

Action Recommended on Idaho Statutes or Rules: Repeal Idaho Code § 9-204.

Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror and may be questioned about or may execute an affidavit on the issue of whether or not the jury determined any issue by resort to chance.

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COMMENT TO RULE 606

Prior Idaho Statutes or Rules: Idaho Code §§ 9-201, 19-1112 and 19-1113; I.R.C.P. 59(a); I.C.R. 6(e).

Comparable Federal Rule: Substantially the same as F.R.E. 606 as amended December 12, 1975, except to add language from I.R.C.P. 59(a)(2) permitting testimony or an affidavit from a juror on the issue whether or not the jury determined any issue by resort to chance.

Comment: Rule 606 is designed to prohibit testimony by a juror before the jury in a trial in which he is sitting and to restrict juror testimony and affidavits impeaching the validity of a verdict or indictment.

Subsection (a) imposes the same disqualification on a juror to be a witness as does Rule 605 on a judge and for many of the same reasons. However, recognizing that the juror is not similarly involved in the trial as is the judge, the rule contains no provision for an automatic objection and the error is lost unless objection is made. The court must, however, provide the opportunity to make an objection out of the presence of the jury to avoid the obvious danger of prejudice to the objecting party.

Rule 606(a) would modify existing Idaho law to the extent that Idaho Code § 9-204 now permits the calling of a juror as a witness, subject to the discretion of the court to postpone or suspend the trial and order that it take place before another jury.

Subsection (b) only restricts the matters to which a juror may testify or depose when the validity of a verdict or indictment is challenged. It is not intended to specify the substantive grounds for setting verdicts or indictments aside.

Rule 606(b) specifically prohibits any testimony or affidavit from a juror to impeach a verdict on any matter or statement occurring during the course of the jury's deliberations, with two exceptions: (1) the rule does provide that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror; (2) a juror may testify whether a verdict was reached by resort to chance.

To the extent that testimony or affidavits from jurors of extraneous prejudicial information or outside influence is admissible, Rule 606(b) would expand existing Idaho law as interpreted by the Idaho Court under a rule of strict statutory construction adopted from California.

I.R.C.P. 59(a) which sets forth grounds for a new trial provides at subsection (2): "Misconduct of the jury; and when any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors."

The language of I.R.C.P. 59(a)(2) was first enacted by statute in 1881. Prior to that enactment the Idaho Court adopted the rule followed by the "weight of authorities" at common law, that jurors cannot impeach their own verdict. Jacobs v. Dooley, 1 Idaho 41 (1866).

Under the Idaho decisions following enactment of what is now I.R.C.P. 59(a)(2), no evidence from a juror is admissible to impeach a verdict unless it was determined by resort to chance. Thus, testimony or affidavits have been held incompetent to show matters such as an unauthorized jury view of the scene with an explanation of events in issue by plaintiff, Griffiths v. Montandon, 4 Idaho 377, 39 P. 548 (1895); alcohol consumed by jurors, Bernier v. Anderson, 8 Idaho 675, 70 P. 1027 (1902); and erroneous extrajudicial statements by a juror about the defendant's record, State v. Abbott, 38 Idaho 61, 213 P. 1024, 224 P. 791 (1923). See also State v. Boykin, 40 Idaho 536, 234 P. 157 (1925)(statements by juror during deliberations); J. P. Seeburg Corp. v. Johnson, 59 Idaho 439, 83 P.2d 432 (1938)(reasons why verdict omitted attorney fees); Hall v. Johnson, 70 Idaho 190, 214 P.2d 467 (1950)(misconduct of counsel); Dawson v. Ledredge, 84 Idaho 331, 372 P.2d 414 (1962)(remarks during deliberations regarding defendant's failure to testify); Robinson v. White, 90 Idaho 548, 414 P.2d 666 (1966)(bias of a juror).

The application of the rule of strict statutory construction applied by the Idaho Court to exclude all testimony from jurors to impeach their verdict, except when determined by resort to chance, appears to be in derogation of Idaho Code § 73-102(1).

Idaho adopted the language of the Idaho statute (now provided in Rule 59(a)(1)) verbatim from California. In its early decisions the California Supreme Court determined that the statute allowing affidavits to impeach a verdict determined by resort to chance was in derogation of the common law, notwith-

standing conflicting common law authorities, and held, under the California rule of strict statutory construction, that it must be strictly construed to permit only affidavits that a verdict was determined by resort to chance.

In Flood v. McClure, 3 Idaho 587, 32 P. 254 (1893), a case of first impression following enactment of the Idaho statute, the Idaho Court rejected the California Court's construction of the statute because, unlike California, Idaho had also enacted what is now codified as Idaho Code § 73-102(1). It provides that:

> The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice.

The Court, in Flood, reasoned that the California Court reached its conclusion by applying the rule of strict statutory construction forbidden by the Idaho statute; that the rule of liberal construction must prevail; and, that the California Court's construction of the statute and the California cases cited in support of that construction were "most unsatisfactory, and especially so when tested by the rule of statutory construction that obtains in this state." Id.

Notwithstanding its decision in Flood, subsequent decisions of the Idaho Court adopted the California rule of strict statutory construction of the statute (now I.R.C.P. 59(a)(2)) without reference to Idaho Code § 73-102(1). See Griffiths v. Montandon, 4 Idaho at 379; Bernier v. Anderson, 8 Idaho at 677; State v. Abbott, 38 Idaho at 71; State v. Boykin, 40 Idaho at 542; Dawson v. Eldredge, 84 Idaho at 339; Robinson v. White, 90 Idaho at 555.

The Idaho Court has implied that a distinction may exist which would permit use of affidavits submitted to disclose communications or other improper acts of third parties. See Dawson v. Eldredge, 84 Idaho at 339. But prior decisions rejected this distinction. See Griffiths v. Montandon, 4 Idaho at 378; State v. Abbott, 38 Idaho at 70 (Special Concurring Opinion of McCarthy, J.); State v. Boykin, 40 Idaho at 543 (Special Concurring Opinion of Givens, J.).

The more liberal rule, rejected by California and consequently Idaho, was recognized in the federal courts and made applicable to state courts prior to enactment of F.R.E. 606. In Mattox v United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917

(1892), affidavits of jurors were offered to show that the bailiff made prejudicial statements and introduced a prejudicial newspaper article to the jury. The Supreme Court stated that such evidence should always be received with great caution, but that cases might arise in which it would be impossible to refuse juror affidavits without violating the "plainest principles of justice." The Court recognized a distinction between matters resting in the personal consciousness of a juror which, being personal, are not accessible to other testimony, as opposed to overt acts which are accessible to the knowledge of all the jurors. The Supreme Court held that a juryman could testify to any facts bearing upon the question of any "extraneous influence," although not as to how far that influence operated on his mind. See also Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966)(reversing the state court conviction based in part on testimony of a juror regarding the bailiff's statements to jurors, finding that the statements were an "outside influence" and that defendant had been denied his constitutional right of confrontation and cross-examination).

The more liberal rule may not be without precedent in Idaho. In the recent decision of Rueth v. State, 100 Idaho 203, 596 P.2d 75 (1978), the Idaho Supreme Court obtained and considered juror affidavits in its effort to determine the content of communications between the trial court and jury. Although it may be argued that it was an I.R.C.P. 59(a)(1) proceeding, which permits granting of a new trial for "irregularity in the proceedings of the court, jury or adverse party," the fact remains that inquiry of the jury was made for the purpose of impeaching the verdict.

The Committee recognizes that protection against verdict impeachment "is, of course, necessary to prevent instability of verdicts, fraud, and harassment of jurors . . ." Dawson v. Eldredge, 84 Idaho at 339; Robinson v. White, 90 Idaho at 555. On the other hand there is no justification for a distinction between allowing juror testimony to impeach the verdict for misconduct of the trial court under I.R.C.P. 59(a)(1) and to impeach the verdict for misconduct of the jury or others under I.R.C.P. 59(a)(2), when both may result in the denial of the constitutional right to a fair trial.

Adoption of Rule 606 would accomodate the procedure followed in Rueth. See also State v. Randolph, 102 Idaho 153, 627 P.2d 782 (1981). Expanding it to include improper communications or outside influence improperly brought to bear upon the jury by persons other than the judge would not be unreasonable. Testimony or affidavits from jurors in these limited situations would not invade the privacy of the jury or cause "instability of verdicts, fraud, and harassment of jurors" and the principles of justice would be better served.

The second exception to the prohibition on juror testimony or affidavits which would allow such evidence on the issue whether the jury determined any issue by resort to chance, as now provided in I.R.C.P. 59(a), merits retention in Rule 606.

It should be noted that subsection (b) applies also to grand jury verdicts. To the extent it permits evidence of improper communications or outside influence, it appears to be consistent with the requirements of secrecy imposed by Idaho Code § 19-1112 and I.C.R. 6(e), and the limitations on questioning jurors imposed by Idaho Code § 19-1113. No Idaho decisions on the issue have been found.

Action Recommended on Idaho Statutes or Rules: Repeal Idaho Code § 9-204 and amend I.R.C.P. 59(a)(2) by deleting all language except "misconduct of the jury."

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party including the party calling him.

COMMENT TO RULE 607

Prior Idaho Statutes or Rules: I.R.C.P. 32(a)(1) and 43(b)(7).

Comparable Federal Rule: Identical to F.R.E. 607.

Comment: Rule 607 eliminates the common law voucher principle.

The Federal Advisory Committee's Notes state that the rule rejects the previous federal practice that, in general, precluded a party from impeaching his own witness. "The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witness as worthy of belief, since he rarely has a free choice in selecting him. Denial of the right leaves the party at the mercy of the witness and the adversary."

The Notes further point out that F.R.C.P. 32(a)(1) (amended following adoption of F.R.E. to add that a deposition may be used for any other purpose allowed by F.R.E.) allows any party to impeach a witness by means of a deposition, and F.R.C.P. 43(b)(abrogated following adoption of F.R.E.) has allowed the calling and impeachment of an adverse party or person identified with him.

Rule 607 allows impeachment of one's own witness by use of a prior inconsistent statement. As proposed by the Federal Advisory Committee, Rule 801 would have admitted that same prior inconsistent statement substantively as nonhearsay. Congress, however, restricted substantive admissibility to statements made under oath. Consequently, unsworn inconsistent statements may be used only for impeachment purposes. Accordingly, federal courts have engrafted certain limitations upon the apparently broad authorization in Rule 607, in order to prevent prejudicial "impeachment" which is actually calculated to bring inadmissible statements to the jury's substantive attention. Under the principle established in United States v. Morlang, 531 F.2d 183 (4th Cir. 1975), such statements are not permitted in criminal actions "where employed as a mere subterfuge to get before the jury evidence not otherwise admissible." Id. at 190. See also United States v. Shoupe, 548 F.2d 636, (6th Cir. 1977). The same principle has been applied in civil actions where the sole basis for calling the "straw man" witness is to impeach him. See Whitehurst v. Wright, 592 F.2d 834, (5th Cir. 1979). See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607[01] at 607-17 (Supp. 1983)(advocates approaching questions of conflict between the goals of Rules 607 and 801 by applying the balancing principles of Rule 403); Epstein, Emerging Problems

Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 147-151 (1983).

I.R.C.P. 32(a)(1) provides that any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness. It is identical to F.R.C.P. 32(a)(1), with the exception noted above that F.R.C.P. 32(a)(1) was amended to further provide that the deposition may also be used "for any other purpose permitted by the Federal Rules of Evidence."

I.R.C.P. 32(c) provides that a party does not make a person his own witness for any purpose by taking his deposition. However, the introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this does not apply to the use by an adverse party of a deposition of a party or a representative of a party. Moreover, at the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

I.R.C.P. 43(b)(7) provides that the party producing a witness shall not be allowed to impeach such witness' credibility by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made, at other times, statements inconsistent with his present testimony. Former F.R.C.P. 43(b)(7), (abrogated following adoption of F.R.E.), did not contain the restriction on use of evidence of bad character found in I.R.C.P. 43(b)(7).

Idaho case law has permitted a party to impeach his own witness if the testimony is actually damaging to him, but not if merely negative. Wurm v. Pulice, 82 Idaho 359, 353 P.2d 1071 (1960); Bodenhamer v. Pacific Fruit & Produce Co., 50 Idaho 248, 295 P. 243 (1931). In Wurm, the Court stated the rule as follows: "The theory under which the impeaching evidence is admitted is that appellant was surprised at the unfavorable testimony given by the witness called by him, or the witness is hostile, or the party in calling him has been entrapped to his prejudice. (Citation). But this rule does not extend to a mere failure to testify to all the facts he was expected to testify to. (Citations). This is true in jurisdictions having statutes similar to ours. (Citation). See Agalianos v. American Cent. Ins. Co., 62 Cal.App. 349, 217 Pac. 107, 113, holding that the testimony * * * must be damaging, not merely negative. (Citation)." Wurm v. Pulice, 82 Idaho at 364. Since Wurm, California has amended its statute and allows impeachment of one's own witness. Calif.Evid.Code § 786 (West 1966). Rule 607 follows the Uniform Rule approach adopted from California.

Under existing Idaho authority there is no requirement that the party producing the witness must show that the witness is hostile before he may impeach him by proof of prior inconsistent statements. See Wyman v. Dunne, 83 Idaho 179, 359 P.2d 1010 (1961). See also Franklin v. Wooters, 55 Idaho 619, 45 P.2d 804 (1935)(allowing proof of contrary statements when party claimed surprise at the changed statements of his witness).

Adoption of Rule 607 would change Idaho law to the extent that the prohibition against impeachment of one's own witness by evidence of bad character would be eliminated and no foundation for attacking credibility such as surprise, hostility or entrapment would be required.

The Idaho Supreme Court has addressed the question whether a party may call a witness solely for the purpose of laying foundation for impeachment of that witness. In State v. Carter, 103 Idaho 917, 655 P.2d 434 (1982) the Court upheld the trial court's ruling that permitted the prosecutor to recall the defendant's wife as a witness on rebuttal solely to set her up for impeachment pursuant to I.R.C.P. 43(b)(8). The Court treated the issue as a procedural question under I.R.C.P. 43(b)(5) and held it was a discretionary matter for the trial court, citing State v. Anthony, 6 Idaho 383, 55 P. 884 (1899). There is no indication that the evidentiary aspects of the procedure, i.e., the use of prejudicial "impeachment" to bring inadmissible statements to the jury's substantive attention, were ever raised by objection on those grounds.

It should be noted that the Rules of Evidence do not comprehensively treat the method that may be used to attack credibility or to rehabilitate. Only a few aspects are expressly covered. Rules 608 and 609 govern impeachment of character and conviction of a prior felony, respectively; Rule 613 establishes the foundation requirements for impeachment by prior inconsistent statements; Rule 610 abolishes impeachment by evidence of religious belief; and Rule 608 deals with some aspects of rehabilitating testimony. "At common law - apart from observed reaction on the witness stand - there had been six modes of impeachment: by proof of bias, mental incapacity, contradiction, prior inconsistent statements, bad character including convictions, and religious opinions or beliefs . . . Such an approach is outmoded and should be discarded now that the federal rules are in effect since the technicalities surrounding impeachment tend to submerge the basic aim of all credibility rules, i.e. to admit evidence which better enables the trier of fact on the basis of his experience to determine whether it is reasonable to conclude that the witness is lying or telling the truth." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶607 [02] at 20-21 (Supp. 1983).

Action Recommended on Idaho Statutes or Rules: Amend I.R.C.P. 32(a)(1) to add at end "or for any other purpose permitted by Idaho Rules of Evidence" and repeal I.R.C.P. 43(b)(7).

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning (1) his character for truthfulness or untruthfulness, or (2) the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) Effect of giving testimony. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

COMMENT TO RULE 608

Prior Idaho Statutes or Rules: Idaho Code § 9-201; I.R.C.P. 43(b)(6), (9).

Comparable Federal Rule: Identical to F.R.E. 608, except to designate subsection (c) as a separate subsection for ease of reference.

Comment: Rule 608 governs the use of evidence of character to impeach the credibility of a witness.

As noted in the Comment to Rule 404, regarding the role of each of the rules relating to character evidence, Rule 404(a) provides that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is evidence of character of a witness as bearing upon his credibility. Rule 608 develops that exception. It is designed to allow the use of evidence of the character of a witness as to credibility with limitations. The inquiry is restricted to character for veracity rather than character generally.

The use of character witnesses to attack and, where proper, to rehabilitate a witness is much the same under Rule 608 as it was at common law, except that under the rule opinion, as well as reputation, testimony is admissible. The rule further changes prior law by allowing impeachment of credibility through inquiry on cross-examination of bad acts not the subject of criminal convictions.

The reason for the rule limiting impeachment to veracity was well stated by the Idaho Court in State v. Branch, 66 Idaho 528, 539, 164 P.2d 182, (1945):

> While the authorities are not in entire accord upon the question, the better rule seems to be that in impeaching a witness the inquiry ought to be as to his credibility, his reputation for truth and veracity, rather than as to his moral character. The great weight of authority supports this rule.
>
> The contrary view is based upon the theory of the kindred nature of vices. This involves the necessity for sanctioning the drawing of an inference from an inference. A witness having been shown to be dishonest or

> immoral, it is inferred from that trait of character that he is untruthful; then upon the inference that he is untruthful generally it may be inferred that he is untruthful in the testimony which he has given. This violates the rule that an inference shall not be based upon an inference. It follows, therefore, that the impeachment shall go to his general character or reputation for veracity.

Subsection (a) permits use of reputation and opinion evidence to attack or support the credibility of a witness, but it is limited: (1) only to character for truthfulness or untruthfulness, and (2) evidence of truthful character can be used only to rebut an attack on the witness' character for truthfulness.

Idaho law is in accord. See Idaho Code § 9-201 ("credibility of the witness may be drawn in question . . . by evidence affecting his character for truth, honesty or integrity . . ."); I.R.C.P. 43(b)(6) ("A witness may be impeached . . . by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except . . . a prior conviction of a felony . . ."); I.R.C.P. 43(b)(9) ("Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.").

Under Idaho case law, a witness can be impeached by evidence of his general reputation for untruthfulness, but not by evidence of bad character in general. See, e.g., State v. Hammock, 18 Idaho 424, 110 P. 169 (1910); but cf. dicta in Kralick v. Shuttleworth, 49 Idaho 424, 289 P. 74 (1930). See also State v. Branch, 66 Idaho 528, 537, 164 P.2d 182, (1945), overruled on other grounds, State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953)(failure to include the word "general" in question was reversible error), (inquiry as to reputation for honesty and integrity for impeachment was error; they are "moral traits of character and are only remotely, if at all, connnected with or indicative of his reputation for truth and veracity.").

Evidence of the good character of a witness presumably is likewise restricted under I.R.C.P. 43(b)(9). No Idaho decisions have been found on this point.

Rule 608(a) changes existing Idaho law to the extent that credibility of a witness can be attacked or supported by opinion evidence. See Comment to Rule 405.

Subsection (b), in conformity with Rule 405 relating to methods of proving character, prohibits extrinsic evidence of specific instances of conduct of a witness to attack or support credibility except: (1) for prior conviction of a crime, or (2) on cross-examination of the witness, with limitations. Impeachment by use of a prior conviction is treated in Rule 609. Impeachment of the victim in rape or sexual assault cases is treated in Rule 412.

The exception allowing inquiry into specific instances of conduct of a witness on cross-examination is subject to the discretion of the court, is restricted to conduct probative of truthfulness or untruthfulness, and is further restricted to conduct: (1) concerning his character for veracity, or (2) concerning the character for veracity of another witness if the witness being cross-examined has testified to the veracity of the other witness.

Under existing Idaho law, evidence of particular wrongful acts may not be admitted for the purpose of impeachment, I.R.C.P. 43(b)(6); see also, e.g., State v. Maguerza, 46 Idaho 456, 268 P. 1 (1928); Labonte v. Davidson, 31 Idaho 644, 175 P. 588 (1918); State v. Anthony, 6 Idaho 383, 55 P. 884 (1899); except to prove conviction of a felony, see, e.g., State v. Reding, 52 Idaho 260, 13 P.2d 253 (1932); but, such evidence may be admitted for other purposes, such as proof of motive or intent. See, e.g., State v. Dayley, 96 Idaho 527, 531 P.2d 1172 (1975).

Rule 608(b) changes Idaho law to the extent that inquiry into specific instances of conduct is allowed on cross-examination of the witness.

Subsection (c) is intended to preserve the witness' constitutional right against self-incrimination when examined with respect to matters which relate only to credibility. The Federal Advisory Committee's Note to Rule 608 states:

> The final sentence constitutes a rejection of the doctrine of such cases as People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950), that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-

> examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity.

The right not to testify nor be prejudiced by the refusal to testify, and the right against self-incrimination are clearly recognized and provided for in Idaho law. See Idaho Constitution, Art. I, § 13; Idaho Code §§ 9-1302, 19-108 and 19-3003. Whether testimony by a witness constitutes a waiver of the right against self-incrimination as to matters which relate only to credibility, e.g., other crimes, is not clear.

The rule in Idaho defining the scope of permissible cross-examination of the defendant who testifies has been stated as follows:

> Where the defendant voluntarily takes the witness stand in his own behalf, he waives his constitutional privilege of not answering proper questions that may tend to convict him of the crime for which he is on trial, he subjects himself to the same rules that govern other witnesses, and he subjects himself to cross-examination and impeachment to the same extent as any other witness in the same situation, . . .

State v. Dunn, 91 Idaho 870, 875-876, 434 P.2d 88 (1967).

No Idaho decision has been found, however, which specifically addresses the issue of whether the waiver would apply to matters which relate only to credibility, if inquiry into specific instances of conduct would be allowed on cross-examination. Language in some decisions leaves the issue in doubt. See, e.g., State v. Martinez, 43 Idaho 180, 195, 250 P. 239 (1926) (The Court recited the rule that the accused who becomes a witness may be cross-examined as to any facts stated in his direct examination or connected therewith and stated: "The immunity from giving testimony is one which the defendant may waive by offering himself as a witness . . . His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrasssing.").

Other decisions of the Idaho Supreme Court indicate that the scope of cross-examination and impeachment of the accused are limited, and that the accused who takes the stand does not waive the right against self-incrimination if he invokes it. See, e.g., State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953); State v. Jesser, 95 Idaho 43, 501 P.2d 727 (1972). In any event, inclusion of the final sentence in Rule 608 will clarify the issue.

The limitation on cross-examination "with respect to matters which relate only to credibility" does not operate to preclude cross-examination as to specific instances of conduct which relate to substantive issues, e.g., intent, or facts of independent significance, e.g., motive. See, e.g., State v. Mundell, 66 Idaho 297, 158 P.2d 818 (1945).

Action Recommended on Idaho Statutes or Rules: Delete words "honesty or integrity," from Idaho Code § 9-201.

Repeal I.R.C.P. 43(b)(6) and 43(b)(9) if Rules 404, 405, 608 and 609 are adopted.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence of the fact that he has been convicted of a felony and the nature of the felony shall be admitted if elicited from him during cross-examination or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to his credibility and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness. If the evidence of the fact of a prior felony conviction, but not the nature of the conviction, is admitted for the purpose of impeachment of a party to the action or proceeding, he shall have the option to present evidence of the nature of the conviction, but evidence of the circumstances of the conviction shall not be admissible.

(b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Withheld or vacated judgment; pardon for innocence.** Evidence of a withheld judgment or a vacated judgment shall not be admitted as a conviction. Nor shall a conviction that has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence be admissible under this rule.

(d) **Pardon, annulment or certificate of rehabilitation not based on innocence; pendency of an appeal.** If the conviction has been the subject of a pardon, annulment or certificate of rehabilitation or other equivalent procedure not based on a finding of innocence, or is the subject of a pending appeal, the evidence of a conviction is not rendered inadmissible, but shall be considered by the court in determining admissibility. Evidence of the pardon, annulment, certificate of rehabilitation or other equivalent procedure, or pendency of an appeal is admissible if evidence of the conviction is admitted.

COMMENT TO RULE 609

Prior Idaho Statutes or Rules: Idaho Code §§ 9-201, 9-1302, 9-2110 and 16-1840; I.R.C.P. 43(b)(6).

Comparable Federal Rule: Subsection (a) is similar in purpose to F.R.E. 609(a) with exceptions noted below. Subsection (b) is identical to F.R.E. 609(b). Subsection (c) is similar in purpose to that part of F.R.E. 609(c) relating to pardons based on innocence. Subsection (d) covers the same subject as that part of F.R.E. 609(c) relating to pardons based on grounds other than innocence and F.R.E. 609(e).

Comment: Rule 609 governs the use of evidence of prior conviction for a felony for impeachment of the veracity of a witness. It incorporates the policy of F.R.E. 609 to the extent it requires a weighing process and restricts use of certain evidence and the policy of I.R.C.P. 43(b)(6) and Idaho case law.

Since 1881, the Idaho civil statutes have included a provision that the credibility of a witness may be questioned by evidence affecting character for truth, honesty and integrity, Idaho Code § 9-201 (formerly I.C.A. 16-201), and that a witness must answer as to the fact of his previous conviction for felony, Idaho Code § 9-1302 (formerly I.C.A. 16-302).

From 1881 until 1975, our civil statutes also included the provision that a witness may be impeached by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that he had been convicted of a felony. Idaho Code § 9-1209 (formerly I.C.A. 16-1209).

In 1975, Idaho Code § 9-1209 was repealed and re-enacted as I.R.C.P. 43(b)(6). In 1978 Rule 43(b)(6) was amended to add the requirement that the court must first find that a prior conviction of a felony is relevant to the witness' credibility and to add the language permitting evidence of the nature of the felony in addition to the fact of the conviction.

The Idaho criminal statutes have, since 1881, included the provision that the rules of evidence in civil actions are applicable also to criminal actions except as provided in the code. Idaho Code § 19-2110 (formerly I.C.A. 19-2110). No provision excepts the application of the above cited civil laws.

The rule permitting impeachment of the accused who takes the stand in a criminal proceeding by evidence of the "fact" of a

prior felony conviction is well established in Idaho. See State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953) and collected authority. However, the issue whether evidence of the "nature" of the conviction should be admissible has been the cause of much criticism and controversy.

In Lebak v. Nelson, 62 Idaho 96, 107 P.2d 1054 (1940), the Court held that the witness could not explain the circumstances of a conviction because such evidence is collateral and inadmissible.

In State v. Branch, 66 Idaho 528, 164 P.2d 182 (1945), the Court held that the statute then in force (I.C.A. 16-1209, re-codified Idaho Code § 9-1209, and then adopted as I.R.C.P. 43(b)(6)) did not apply to a defendant in a criminal action because there was no statute providing that the accused who voluntarily takes the stand becomes subject to impeachment the same as any other witness and governed by the same rules of evidence. The Court inexplicably made no reference to what was then I.C.A. 19-2110 (now Idaho Code § 19-2110). In Branch the Court also held that because no statute permitted impeachment of a defendant on traits of character until he first put his reputation in issue, general character could not be put in issue by the state; but if he testified or offered evidence of good character for truth, the state could show his general reputation for truth, but not his character for honesty and integrity.

However, in State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953), the Court overruled Branch to the extent that it restricted the application of Idaho Code § 9-1209 in a criminal case until the accused put his general reputation in issue. Citing Idaho Code § 19-2110, the Court held that Idaho Code §§ 9-1209 and 9-1302 are applicable to the accused witness and when he testifies, he subjects himself to cross-examination and impeachment under the same rules and conditions as any other witness, including the right to impeach by evidence of the number of prior convictions and the nature of them to test his credibility on cross-examination. Justice Keeton wrote a vigorous dissent reasoning that the commissison of other crimes has no bearing on guilt; that impeaching credibility is not the real purpose that the state elicits such evidence; and, that if allowed, it ought be limited only to the "fact" of the prior felony.

In State v. Dunn, 91 Idaho 870, 434 P.2d 88 (1967), the Court followed its ruling in Owen and upheld the trial court's order that the accused witness must answer, revealing ten prior felonies and the nature of each, notwithstanding his objection that it was self-incriminating.

Then, in State v. Shepherd, 94 Idaho 227, 486 P.2d 82 1971), the Court overruled Owen to the extent it allowed evidence of the number or nature of the felonies when the accused witness

admits to a prior felony conviction. The Court rejected the majority rule in the U.S., stating it is erroneous. The Court reasoned that Idaho Code §§ 9-1209, 9-1302 and 19-2110 do not require disclosure of either the number or the nature of prior felonies to impeach the accused witness; that defendant would be prejudiced regardless of any instruction to the jury; and, that the defendant may feel compelled to not testify in his own defense for fear of prejudice if the prior conviction is revealed. The Court in Shepherd discussed "what might be deemed the more enlightened rule now extant in the District of Columbia" which permitted the defendant to have the court weigh the probative value of such evidence as to credibility against the prejudice that might result and whether it was more important for the jury to hear defendant's story than to know of the prior convictions, but inexplicably did not feel Idaho was ready for that rule. Instead, the Court adopted the rule that an affirmative answer from the accused witness revealing the "fact" of a prior felony conviction precluded any further inquiry or proof as to the number or nature thereof. A denial, however, would permit the prosecutor to prove by cross-examination or the record "any and all felony convictions in the record of the accused." In support of its decision, the Court quoted extensively from Justice Keeton's dissent in Owen.

Shepherd was followed by Fowler v. Uezzell, 94 Idaho 951, 500 P.2d 852 (1972), in which the Court distinguished the application of the rule in a civil case from a criminal proceeding, and refused to find grounds for a mistrial based on an inquiry as to whether the defendant witness had ever been convicted of a felony and a colloquy between counsel and the court in front of the jury that revealed that the adverse party thought he could prove circumstances amounting to a felony, but not a conviction. In reference to the rule allowing impeachment by evidence of a prior conviction, the Court stated: "While we entertain certain reservations as to the continued vitality of such a theory, the privilege is nevertheless accorded by statute." 94 Idaho at 956.

In State v. Cliett, 96 Idaho 646, 534 P.2d 476 (1975), the Court refused to allow use of a judgment which had been vacated and referred to State v. Barwick, 94 Idaho 139, 483 P.2d 670 (1971) where it had rejected use of a withheld judgment, stating: "Regardless of its wisdom, Idaho's impeachment statute - unchanged since its original enactment as R.S. § 6082 in 1887 - conclusively determines that a prior conviction of "a felony" is relevant to the issue of the credibility of a witness." 96 Idaho at 649. In that same year - 1975 - the Court adopted Rule 43(b)(6), I.R.C.P., and Idaho Code § 9-1209 was repealed.

State v. Palmer, 98 Idaho 845, 574 P.2d 533 (1978), followed adoption of Rule 43(b)(6). The Court in Palmer held that Rule 43(b)(6) governs, but added that because of the obvious

danger when the accused is the witness, strict limitations are imposed on the use of such impeachment evidence. The Court noted that the theory behind Rule 43(b)(6) "is evidently that a witness, if shown to have been a convicted felon, is probably unworthy of belief." 98 Idaho at 534. The Court held that the evidence of a prior conviction can be used, but "[a] careful line must be drawn between impeaching a witness' credibility and using a prior conviction to imply that a criminal will commit another crime simply because he has committed a crime in the past." 98 Idaho at 534. In this context, the Court determined it was proper for the prosecutor in final argument to refer to defendant's testimony as "the theory of an ex-convict." Justice Bistline dissented, opining that Idaho was ready for the more enlightened rule discussed in Shepherd and urged its adoption.

Effective July 1, 1978, I.R.C.P. 43(b)(6) was amended to require a prior hearing as to "relevancy" of the prior conviction on the issue of credibility, and to make evidence of the "nature" of the felony admissible. State v. Stroisch, 100 Idaho 617, 603 P.2d 572, (1979) had been tried before the rule was amended. The Court thus refused to decide whether the trial court was proper in restricting the evidence to the "fact" of a prior felony because Rule 43(b)(6), as amended in 1978, would thereafter admit evidence of the "nature" of the felony and would be dispositive of the issue.

In Palmer v. State, 101 Idaho 379, 613 P.2d 936 (1980), on appeal from a denial of post-conviction relief, the Court held that because defendant's counsel had elicited the defendant's testimony as to the fact of a prior conviction, he was precluded from raising the constitutionality of the felony-impeachment rule on appeal.

In State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980), the Court rejected the defendant's argument that use of a prior felony conviction for impeachment purposes deprived him of his right to a fair trial, stating that "the widespread practice of using a prior felony conviction for impeachment purposes has never been recognized as inherently unfair," and that "while there is some possibility that the fact of a prior felony conviction could be prejudicial to the defendant, it should be noted that the use of a prior felony conviction for impeachment purposes is not without precautionary measures." 101 Idaho at 486. The Court in Knee further determined that rules of evidence are procedural in nature and rejected defendant's argument that the Court was without authority to adopt I.R.C.P. 43(b)(6).

Finally, the Court appears to have come full circle to Lebak v. Nelson, 62 Idaho 96, at least to the extent that an accused can show the nature of the conviction. In State v. Ybarra, 102 Idaho 573, 634 P.2d 435 (1981), the trial court had entered a ruling prior to trial that the state could impeach the

accused if he testified, with evidence of the "fact" of his prior felony conviction, but would not allow evidence of the nature of the crime. Defendant did not testify, but asserted on appeal that Rule 43(b)(6) mandates that either both the "fact" and the "nature" of the conviction be put in evidence or neither are allowed. The Court rejected the argument stating that the "[b]etter rule would be to allow a defendant so impeached and taking the stand to at least have the option of disclosing the nature of the felony the use of which has been to impugn his credibility." 102 Idaho at 581. Otherwise defendant's counsel would be foreclosed from arguing to the jury that the conviction is not relevant to the credibility of the defendant.

The Idaho Supreme Court has also held a misdemeanor conviction is not admissible for the purposes of impeachment. State v. Alvord, 46 Idaho 765, 271 P. 322 (1928); State v. Scott, 72 Idaho 202, 239 P.2d 258 (1951); State v. Bassett, 86 Idaho 277, 385 P.2d 246 (1963), and that restricting evidence of prior convictions does not disturb the rule that evidence of other crimes by the defendant is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, (5) the identity of the person charged with the commission of the crime on trial, and (6) other similar issues. E.g., State v. Owen, 73 Idaho 394.

Subsection (a) restricts evidence of a prior conviction to a felony conviction in accordance with I.R.C.P. 43(b)(6) and Idaho case law. See State v. Scott, 72 Idaho 202; State v. Bassett, 86 Idaho 277; State v. Cliett, 96 Idaho 646; State v. Barwick, 94 Idaho 139. It also restricts use of such evidence to the purpose of attacking credibility only, in accordance with I.R.C.P. 43(b)(6) and Idaho case law. State v. Branch, 66 Idaho 528; State v. Palmer, 98 Idaho 845.

Evidence of the "fact" of a prior conviction or the "nature" of the conviction, or both, may be admitted to impeach only if the court makes the required findings. This incorporates the policy of I.R.C.P. 43(b)(6) which now allows evidence of both the "fact" and the "nature" of the conviction. However, should the court determine to allow impeachment by evidence of the "fact" only, the accused would have the option to disclose the "nature" of the conviction, in accordance with State v. Ybarra, 102 Idaho 573, but could not explain the circumstances of the conviction which would be collateral and inadmissible. See Lebak v. Nelson, 62 Idaho 96.

Impeachment by evidence of the prior conviction may be introduced during cross-examination, if elicited from the witness, and during cross-examination or on rebuttal if shown by

public record which is in accord with I.R.C.P. 43(b)(6). The issue as to timing has never been raised in Idaho.

Before evidence of the "fact" of the prior conviction or the "nature" thereof can be admitted the court must conduct a hearing outside of the presence of the jury, and determine that it is "relevant" to credibility as is now required under I.R.C.P. 43(b)(6). See also State v. Ybarra, 102 Idaho 573. In addition, however, the court must also determine that the evidence outweighs its prejudicial effect to the party offering the witness. This "weighing process" requirement, not found in Rule 43(b)(6), is borrowed from F.R.E. 609(a). It is consistent with our Court's ruling in State v. Shepherd, 94 Idaho 227, to the extent it held that such prejudicial evidence can result in the denial of a fair trial.

The requirement that the court weigh probative value against prejudice to "the party offering the witness" is applicable in both criminal and civil cases and is based on the premise that the right to a fair trial is equally applicable, although the elements affecting prejudice are not the same. The potential for abuse and unfair prejudice to the criminal defendant is more sensitive than to a civil party and the court is required to consider this element when weighing probative value. To this extent Rule 609(a) is consistent with the policy of Fowler v. Uezzell 94 Idaho 951. Prejudice to a witness who is not a party is not to be considered.

In this regard the Federal Rule differs in two respects: (1) the weighing process is required under the Federal Rule only when the evidence is of a felony conviction other than one involving dishonesty or false statement and then the weighing process is applicable only to determine the prejudice to a criminal defendant; (2) evidence of convictions involving dishonesty or false statement regardless of the punishment, i.e., both felonies and misdemeanors, require no weighing process and are equally admissible against the criminal defendant and the civil party regardless of consequence. The distinction was made in the Federal Rule to protect the criminal defendant from unfair prejudice resulting from evidence of felony convictions not involving dishonesty or false statement. See Federal Advisory Committee Notes to F.R.E. 609. Because Idaho Rule 609 does not distinguish crimes involving dishonesty or false statement from those that do not, and because the rule is restricted to felonies, it is deemed necessary that the weighing process be required as to each conviction and that it be required in civil proceedings as well as criminal.

Subsection (b) imposes a time limit on the use of prior convictions. It is new to Idaho law. It is identical to F.R.E. 609(b).

Rule 609(b) imposes additional restrictions on the admissibility of a conviction that is more than 10 years old consisting of: (1) a requirement of specific findings that the probative value substantially outweighs its prejudicial effect; and (2) notice of intent to use such evidence.

Although I.R.C.P. 43(b)(6) includes no similar provision, the policy of subsection (b) is consistent with the concerns expressed by our Court in State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971), where the conviction was five years old.

The Idaho Committee first determined to recommend a mandatory ten year time limit on the use of a conviction. However, during the process of our deliberations a Michigan Court of Appeals decision was rendered which caused the Committee to reconsider and recommend the more flexible F.R.E. 609(b). People v. Redmon, 315 N.W.2d 909, 112 Mich. App. 246 (1982), involved an attempt by the accused to impeach a state's witness and a mandatory ten year cut-off rule identical to the rule this Committee had preferred. The Michigan Court held that the prohibition against introducing evidence of convictions more than ten years old contained in the Michigan Rule must yield to the Sixth Amendment right to confrontation so fundamental to the system of criminal justice. The court further held that its conclusion in this regard is subject to two conditions. First, it was limited to impeachment of prosecution witnesses and does not extend to situations involving impeachment of a defendant because the considerations relating to the propriety of impeaching defendants and other witnesses are not identical; second, only constitutionally valid convictions more than ten years old may be used.

Subsection (c) prohibits the use of certain convictions. It is a new provision in Idaho law. It is based on Idaho case law to the extent it prohibits use of a withheld judgment, State v. Barwick, 94 Idaho 139, or a vacated judgment. State v. Cliett, 96 Idaho 646. The provision prohibiting use of a conviction that was the subject of a pardon based on innocence is borrowed from F.R.E. 609(c) with the additional phrase "under this rule" to limit the application of the exclusion, in recognition of the fact that such evidence may be admissible for some purpose other than impeachment of a witness, and to avoid argument that it is not admissible for any purpose.

Subsection (d) permits the use of certain convictions notwithstanding what might be considered as mitigating circumstances. It also is new to Idaho law. There are no Idaho cases in point.

F.R.E. 609(c) covers pardons, annulments and certificates of rehabilitation based on a finding of rehabilitation and renders the conviction inadmissible if the convicted person has not been subsequently convicted of a felony. The Idaho Committee believes that the better rule would be to not render the evidence of the conviction inadmissible, but rather make the pardon, etc., a matter for the court to consider in the weighing process and, if the conviction is admitted, allow evidence of the pardon, etc. Evidence of the circumstances of the conviction is not allowed. Nor is evidence of a probation or parole allowed. Evidence of a pending appeal is treated the same way which is consistent with F.R.E. 609(e). No Idaho cases have been found on this point.

F.R.E. 609(d) treats juvenile adjudications. Since they do not constitute a felony conviction in Idaho, except when the offender is treated as an adult, and cannot by statute "be received in evidence or used in any way in any proceeding in any court" with certain inapplicable exceptions, see Idaho Code § 16-1840, no provision for them is included in this rule.

The Committee intends that the Idaho trial courts admit for impeachment purposes under Rule 609 only evidence of felony convictions involving dishonesty or false statement, or which otherwise are relevant to the witness' credibility. Obviously, not all felony convictions are relevant to a witness' character for truthfulness or untruthfulness, e.g., crimes of force or violence, and those lacking such relevancy should not be admitted. Conversely, it is recognized that convictions for perjury or fraud are relevant to a witness' credibility and should be admissible if not otherwise excludible, e.g., under this rule or Rule 403.

There exists an uncertain grey area in which the courts, including the federal courts, are divided. By way of example, the authorities are divided on the question whether robbery, larceny or burglary are relevant to a witness' credibility. When the question was posed to the Idaho Supreme Court in State v. Ybarra, 102 Idaho at 581, the Court quoted with approval from Ladd, Credibility Test - Current Trends, 89 Univ. Pa. L. Rev. 166 (1940) (the Court cited State v. Thomas, 220 Kan. 104, 551 P.2d 873, 876 (1976) which relied on the same quoted language), wherein it was said:

> . . . On the other hand robbery, larceny, and burglary, while not showing a propensity to falsify, do disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness. If the witness had no compunction against stealing another's

> property or taking it away from him by physical threat or force, it is hard to see why he would hesitate to obtain an advantage for himself or friend in a trial by giving false testimony. Furthermore, such criminal acts, although evidenced by a single conviction, may represent such a marked break from sanctioned conduct that it affords a reasonable basis of future prediction upon credibility . . . .

The Idaho Court concluded "[w]e agree with those courts which hold that a crime such as burglary can be relevant to credibility, and we hold that there was no error in the court's decision to allow use of the prior felony conviction to impeach Ybarra." Id. at 581. No other Idaho decisions as to particular convictions have been found.

Weinstein points out that the Congressional Conference Report "explained that crimes involving 'dishonesty and false statement' ' means crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." . . . It is the . . . definition of the crime that governs, not the details of the particular crime committed. Thus, a lesser plea may take a conviction out of the rule even though the details of the criminal act underlying the charge showed extreme dishonesty or involved use of false statements." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 609[04] at 71 (Supp. 1983).

Weinstein further observes that the courts have no difficulty in finding that those crimes specified in the Conference Report or those involving fraud fall within the rule, while crimes solely involving force do not. However, in the uncertain grey area, courts have differed in their treatment of crimes involving the taking of property, e.g., robbery, burglary, theft and larceny, and crimes involving narcotics. Id.

Citing United States v. Mahone, 537 F.2d 922 (7th Cir.), cert. denied, 429 U.S. 1025, 97 S.Ct. 646, 50 L.Ed.2d 627 (1976), Weinstein lists some of the factors which should be considered by the trial judge when weighing probative value against prejudicial effect when the witness is the accused:

> (1) The impeachment value of the prior crime.
> (2) The point in time of the conviction and the witness' subsequent history.
> (3) The similarity between the past crime and the charged crime.

(4) The importance of the defendant's testimony.
(5) The centrality of the credibility issue.

3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 609[04] at 77-78 (Supp. 1983). See also United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980)("This list . . . does not exhaust the range of possible factors, but it does outline the more basic concerns relevant to the balancing under Rule 609(a)(i)."); United States v. Hayes, 553 F.2d 824 (2d Cir.), cert. denied, 434 U.S. 867, 98 S.Ct. 204, 54 L.Ed.2d 142 (1977)(court applied similar factors and upheld admission of smuggling conviction). See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 609[04] (Supp. 1983).

Weinstein further points out that the balancing approach is not limited to the defendant as a witness.

> The balancing approach of Rule 609(a) is not limited to defendant as a witness; it applies to all defense witnesses. Of course, when the issue of impeaching a witness by a prior conviction does not arise in connection with an accused, the strong rationale of protecting the defendant from impeachment so that he will take the stand does not apply. Nevertheless, there may be instances where the defense witness' prior criminal past would be held against the defendant thereby prejudicing the accused to a degree which outweighs any probative value the conviction may have in allowing the jury to assess the witness' credibility. For instance, if the witness is a close relative of the defendant, especially if they are therefore both members of an ethnic group to which criminal proclivities are popularly ascribed, the jury's distrust of the witness if informed of his criminal past may wash off on the defendant. In deciding whether to permit the convictions of the witness to be used, the trial judge should take into consideration the degree of prejudice likely because of the relationship, as well as the significance of the witness' testimony, the similarity between witness' crime and defendant's crime, and the probative value of the prior conviction on the witness' credibility. The rule on prejudice does not apply if the defendant offers the conviction.

Ibid at 78.

It must be kept in mind that the Federal Rule requires the weighing process only to determine whether the probative value outweighs its "prejudicial effect to the defendant," whereas the Idaho rule requires the court to determine whether the probative value outweighs its "prejudicial effect to the party offering the witness." Consequently, many of the factors to be considered as to the defendant witness also apply under the Idaho rule to prosecution witnesses and in civil cases, although differing weights may be ascribed, and, where a criminal defendant seeks to impeach a prosecution witness constitutional rights may be involved.

In regard to procedures, Weinstein points out that, "generally the questions of which convictions will be usable to attack credibility should be determined prior to trial. Counsel need to know what the ruling will be on this important matter so that they can make appropriate tactical decisions." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 609[05] at 81 (Supp. 1983). It is further observed that:

> Most circuits agree that a defendant does not waive his objection to adverse advance ruling by not taking the stand. The Ninth Circuit has ruled en banc that a defendant does not waive his right to challenge the judge's ruling refusing to exclude his convictions, if he does not thereafter testify, provided the defendant must "at least by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609.

Id. at 82. Cf. State v. Ybarra, 102 Idaho at 580-581 ("advance" ruling that conviction would be admitted was upheld)(as to defendant's desire to introduce evidence of the nature of the conviction, "[h]ere, the question is in a sense moot, as Ybarra did not take the stand . . . while it is true that the court preliminarily gave an advance ruling, so to speak, directly confronted with the defendant testifying, a contrary ruling might have resulted.").

Weinstein continues:

> According to one panel of the Fifth Circuit, if defendant makes a motion in limine which is decided adversely to him and he then takes the stand, he must object when his other

convictions are admitted since the motion in limine does not serve as a standing objection.

> Trial judges should make their determination after a hearing on the record (see Rule 104), at which the pertinent factors are explicitly identified and weighed. The District of Columbia Circuit, although it does not go so far as to hold that each time an issue of admissiblity of a prior conviction arises under 609(a) the district court must conduct a full fledged hearing followed by an explanation in defense of its decision to allow use of the prior conviction for impeachment, does require some indication of the reasons for the finding. . . .
>
> At the hearing, it is the government which has the burden of showing why a given conviction should be admissible for impeachment purposes. Of course, despite this burden on the government to make the argument for admissibility, counsel for defendant must be prepared to analyse the pertinent factors as well.
>
> If the trial judge admits a conviction, counsel for the government should not be allowed to add to the pungency of the impeachment by inquiring about the details of an admitted crime. He may ask about the name of the crime, the time and place of conviction, and the punishment. Id.

Under Idaho Rule 609, evidence of the nature of the crime is allowed only if the court so rules or if offered by the defendant. Contrary to the practice in some federal courts, defendant is not allowed to explain the circumstances of the conviction.

> Under previous practice it was considered improper, though apparently seldom an independent ground necessitating reversal, for counsel to indulge in fishing expeditions about the witness' criminal past unless counsel had proof of the witness' prior convictions. In the case of defense witnesses, such unethical behavior by counsel will now be unlikely since a hearing on the admissibility of the witness' convictions will usually have been held outside the jury's hearing before he was put on the stand. Once

> the judge has ruled which convictions may be used, insinuations about any other crimes should not be countenanced. Although Rule 609(a) is silent on the point, nothing prevents counsel from bringing out the witness' conviction on direct in order to remove some of the sting from cross-examination.

3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 609[05](Supp. 1983).

Action Recommended on Idaho Statutes or Rules: Repeal I.R.C.P. 43(b)(6) and 43(b)(9).

R

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

COMMENT TO RULE 610

Prior Idaho Statutes of Rules: None.

Comparable Federal Rule: Identical to F.R.E. 610.

Comment: Rule 610 forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature. However, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus, disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule.

Idaho Code § 9-201 provides in part, that the opinions of witnesses on matters of religious belief are not grounds for disqualification; although in every case the credibility of the witness may be drawn in question by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence.

There appear to be no Idaho decisions on point and no statutory or rule provision dealing directly with the issue of religious beliefs has been found. However, Idaho Code § 9-201 and I.R.C.P. 43(b)(6), which govern the scope of impeachment, arguably limit evidence of this kind to reputation evidence for truth, honesty or integrity, which would not include evidence of religious beliefs. In addition, I.R.C.P. 43(b)(9) prohibits evidence of good character of a party until character has been impeached - thus presumably prohibiting evidence of religious beliefs offered to support credibility, at least until character is attacked. Adoption of Rule 610 would eliminate any question.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

COMMENT TO RULE 611

Prior Idaho Statutes or Rules: I.R.C.P. 43(b)(1)-(5).

Comparable Federal Rule: Identical to F.R.E. 611.

Comment: Rule 611 codifies the common law traditions concerning the scope of cross-examination and the use of leading questions (Rules 611(b) and (c)), while granting the trial court broad discretion to control the order of proof, to allow a wider scope of questioning on cross in some instances, to permit leading questions to be used with hostile or adverse witnesses or to refuse to allow such questioning on nominal cross-examination. The rule further provides objectives which the judge should seek to achieve in the exercise of that discretion.

Subsection (a) imposes an obligation on the trial court to exercise control over the conduct of the trial to obtain the stated objectives. The purpose of the rule is to encourage flexibility and the court is given broad discretion in that regard. It governs such questions as to whether testimony may be in narrative form rather than by answers to specific questions, the order of proof, when exhibits may be introduced, the use of demonstrative evidence, whether re-direct or re-cross will be allowed, whether witnesses may be recalled, the scope of rebuttal and surrebuttal, and the many other questions that arise during the course of the trial "which can be solved only by the judge's common sense and fairness in view of the particular circumstances." See Federal Advisory Committee Notes to Rule 611. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 611[01] (Supp. 1983).

The rule is consistent with existing Idaho law to the extent that it vests broad discretionary powers in the court. See, e.g., Cardozo v. Cardozo, 76 Idaho 347, 282 P.2d 475 (1955)(a trial judge is vested with broad discretionary powers in the conduct and during progress of a trial and his exercise of that discretion will not be disturbed unless abused or material harm be done the complaining party). See also, e.g., Bank of Idaho v. Colley, 103 Idaho 320, 647 P.2d 776 (1982); J.E.T. Development v. Dorsey Const. Co., 102 Idaho 863, 642 P.2d 954 (1982); Robert V. DeShazo & Associates v. Farm Management Services, Inc., 101 Idaho 154, 610 P.2d 109 (1980); Owen v. Burcham, 100 Idaho 441, 599 P.2d 1012 (1979); Nottingham v. McCormick, 95 Idaho 188, 505 P.2d 1260 (1973).

The rule is consistent with existing Idaho law in two problem areas of frequent occurrence. The first is the situation when the witness is deemed to act officiously and volunteers statements. In Giffen v. City of Lewiston, 6 Idaho 231, 55 P. 545 (1898), the Idaho Court stated:

> The trial court should not permit a witness to act officiously, and voluntary statements from a witness, as a rule, should not be permitted over the objection of the party adversely interested. But it is only fair to the witness, as well as right to the parties, to permit a witness to make any explanation proper to prevent his evidence from being misunderstood, or correct any mistake that he may have made. The witness should, of course, not be permitted to wander outside of the issues, or to make any incompetent, immaterial, or irrelevant statements. Id. at 250.

The other situation involves the witness giving an unresponsive answer. In State ex rel. Rich v. Bair, 83 Idaho 475, 365 P.2d 216 (1961), the Idaho Supreme Court recognized that only the examining party can move to strike the answer of a witness as being unresponsive, "subject, however, to the inherent power of the trial judge in his sound discretion to control the progress of the trial to promote the ends of justice." The Court, quoting 58 Am. Jur. Witnesses § 575, p. 322, adopted the following rule for Idaho:

> The right to have an irresponsive answer of a witness striken out is a right of the party examining the witness, and not a right of the party adverse to the examiner; if the answer of a witness is competent and pertinent in itself, the adverse party has no right to have it expunged from the record merely because it was irresponsive; in such a case it is optional with the court to strike it out, and a denial of a motion to do so is no ground of error. The party examining the witness is not, however, bound or precluded by an irresponsive answer, and may himself object to its competency, although the person is his own witness. He would seem to have an absolute right to have the irresponsive matter expunged, regardless of its competency." Id. at 481.

See also Kelley v. Troy Laundry Co., 46 Idaho 214, 267 P. 222 (1928)(where a witness voluntarily makes a statement while testifying not in response to any question, the adverse party may move to strike such voluntary statement, but he has no right to cross-examine thereon).

The proper procedure for the examining attorney to follow when the witness gives an unresponsive answer is to object to the answer, ask that it be stricken from the record, and that the jury be instructed to disregard it. State v. Major, 105 Idaho 4, 665 P.2d 703, 708 (1983); State v. O'Bryan, 96 Idaho 548, 531 P.2d 1193 (1975).

Rule 611(a) would strengthen the authority of the trial court to control these situations.

Rule 611(a) is consistent with I.R.C.P. 43(b)(1) requiring that the direct examination must be completed before the cross-examination begins, "unless the court otherwise directs."

The rule also is consistent with I.R.C.P. 43(b)(5) governing the reexamination and recalling of witnesses. It provides that leave to reexamine or recall a witness "shall be granted or withheld by the court in the exercise of sound discretion." See, e.g., State v. Anthony, 6 Idaho 383, 55 P. 884 (1899); State v. Carter, 103 Idaho 917, 655 P.2d 434 (1982).

The rule would have no effect on Idaho Code § 19-2101, which provides for the order of trial in criminal cases, nor on Section 19-2102 which permits the court to depart from the order of trial prescribed in section 19-2101 "in the sound discretion of the court."

Subpart (3) of Rule 611(a) is consistent with the policy expressed in Idaho Code § 9-1302 permitting a witness to refuse to give an answer that would have a direct tendency to degrade his character, unless it be in issue. See also State v. Harness, 10 Idaho 18, 76 P. 788 (1904).

Subsection (b) states the traditional "restricted" rule of cross-examination as opposed to the more liberal wide-open form of cross-examination. The rule restricts cross-examination to the subject matter of direct examination and matters affecting the credibility of the witness.

The "wide-open" form of cross-examination proposed by the Federal Advisory Committee was rejected by Congress in favor of the "restricted" rule. The Report of the Committee on the

Judiciary explained that the traditional rule facilitates the orderly presentation by each party at trial. However, in recognition of the strong arguments for broad cross-examination from prospectives of developing all relevant evidence and the need to provide flexibility in situations where broad cross-examination is appropriate, Congress also added the last sentence to subsection (b) conferring the power on the court to permit "inquiry into additional matters as if on direct examination." This provision is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

"Rule 611(b) is silent on the extent to which the privilege against self-incrimination limits the permissible scope of cross-examination. Some protection is granted by Rule 104(d) on testimony of the accused upon a preliminary matter and Rule 608(b) on examinations with respect to matters which relate only to credibility." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 611[03] at 36 (Supp. 1983). The question raised is to what extent the accused waives his right against self-incrimination when he testifies, i.e., whether the right against self-incrimination is waived as to all relevant facts or whether it is waived only as to matters covered by his direct testimony. Under the "restricted" rule of cross-examination, the rule in the federal courts apparently is that the scope of the waiver is restricted to the scope of cross-examination. See Harrison v. United States, 392 U.S. 219, 222, 88 S.Ct. 2008, 20 L.Ed.2d 1047, 1051 (1968)("A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives."); Brown v. United States, 356 U.S. 148, 154-155, 78 S.Ct. 622, 626, 2 L.Ed.2d 589, 596, 72 A.L.R.2d 818 (1958)(dictum-if the accused takes the stand and testifies his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination). See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 611[03] (Supp. 1983).

In civil cases in the federal courts, if a party testifies, the same rule applies and he is deemed to waive the privilege to the extent of the scope of permissible cross-examination. See Brown v. United States, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958). See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 611[04] (Supp. 1983).

Rule 611(b) is consistent with existing Idaho law to the extent that it restricts cross-examination. I.R.C.P. 43(b)(3) states the "restricted" rule: "[t]he opposite party may cross-examine the witness as to any facts stated in his direct

examination or connected therewith . . ." See, e.g., Towne v. Northwestern Mut. Life Ins. Co., 58 Idaho 83, 70 P.2d 364 (1937); Rosenberg v. Toetly, 94 Idaho 413, 489 P.2d 446 (1971).

To the extent that Rule 611(b) empowers the court in the exercise of discretion, "to permit inquiry into additional matters as if on direct examination," the rule may expand Idaho law. Prior to adoption of I.R.C.P. 43(b)(3) and repeal of Idaho Code § 9-1205 in 1975, Section 9-1205 provided authority for cross-examination of a witness by leading questions and further provided, "but if he examine him as to other matters such examination is to be subject to the same rules as a direct examination." The reason this language was omitted from Rule 43(b)(3) is unknown. No Idaho cases interpreting this language have been located.

In criminal actions where the accused testifies, the Idaho Court has held that when the accused takes the stand "he subjects himself to cross-examination and impeachment under the same rules and conditions as any other witness." State v. Owen, 73 Idaho 394, 405, 253 P.2d 203 (1953). As to the extent of the waiver of constitutional privilege the Idaho Court has stated: "[w]here the defendant voluntarily takes the witness stand in his own behalf, he waives his constitutional privilege of not answering proper questions that may tend to convict him of the crime for which he is on trial, he subjects himself to the same rules that govern other witnesses, and he subjects himself to cross-examination and impeachment to the same extent as any other witness in the same situation." State v. Dunn, 91 Idaho 870, 876, 434 P.2d 88 (1967).

In a later decision the Idaho Supreme Court broadly interpreted the language "any facts stated in * * * direct examination or connected therewith" to mean that the accused could be examined as to any details relating to the charge. The Court reasoned that "[t]he phrase, 'connected therewith,' is an elastic device by which the legislature essentially has assisted the trial courts toward the exercise of sound judicial discretion in fashioning the bounds of cross-examination. Exercise of that discretion is not abused, nor does it create a constitutional issue, if the inquiry is addressed to the same events or events proximate in time and space to those covered on direct examination." State v. Jesser, 95 Idaho 43, 49, 501 P.2d 727 (1972)(citing Brown v. United States, 356 U.S. 148 and stating: "[t]he Supreme Court of the United States has articulated no constitutional limit on cross-examination of a testifying defendant, beyond the requirement that the questions must address 'matters raised' by testimony on direct examination . . .").

In a still later decision the Idaho Court stated: "[w]hile it is normally true that a defendant who takes the stand exposes himself to cross-examination, the evidentiary scope of cross-examination is still limited by the constraints and protections of the constitution. Only that cross-examination which is not constitutionally prohibited is proper." State v. White, 97 Idaho 708, 715, 551 P.2d 1344 (1976)(defendant can testify to statements he made at the time of arrest without opening up the issue of his post-arrest silence).

Subsection (c) continues the traditional mode of dealing with leading questions. The rule recognizes that although leading questions are generally undesirable on direct examination and are permissible on cross-examination, there are exceptions to the general rule. It is implicit in the rule that the matter lies within the sound discretion of the court which has long been the view of the appellate courts.

To the extent that the rule controls the use of leading questions, it is consistent with Idaho law. See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 30-33 (2d ed. 1972). I.R.C.P. 43(b)(2) similarly prohibits the use of leading questions on direct examination "except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it. A party may interrogate any unwilling or hostile witness by leading questions." See, e.g., McLean v. Lewiston, 8 Idaho 472, 69 P. 478 (1902); State v. Herr, 97 Idaho 783, 554 P.2d 961 (1976).

To the extent that Rule 611(c) permits the use of leading questions on direct examination of a witness "identified with an adverse party," regardless of whether the witness appears "unwilling or hostile," it expands existing Idaho law in that it declares that certain witnesses may as a matter of law, be examined by leading questions without demonstrating that they are in fact "hostile."

The rule prohibiting the use of leading questions on direct examination of a witness "identified" with the party presenting the witness is based in part on the presumption that the witness is biased in favor of the proponent of his testimony and, consequently, may be unwilling to tell all he knows. Conversely, when it is apparent that the bias of the witness is in favor of the opponent, the justification to prohibit leading questions disappears, and leading questions are appropriate without having to demonstrate that the witness is in fact "unwilling or hostile."

Rule 611(c), as modified and enacted by Congress, retains the principle that the witness who is shown to be "hostile" in fact, may be examined by leading questions regardless of which party he is identified with. In a similar manner, Idaho Code § 9-1206, prior to adoption of Rule 43(b)(4) and repeal of the statute in 1975, permitted cross-examination by leading questions of a non-party witness. In addition to a party or the directors, officers, superintendent or managing agent of any corporation which is a party, the statute permitted cross-examination of a "person for whose benefit such action or proceedings is prosecuted or defended." See, e.g., Burrow v. Idaho, Etc. R.R. Co., 24 Idaho 652, 135 P. 838 (1913). The reason the statutory language was omitted from Rule 43(b)(4) is unknown.

To the extent that Rule 611(c) permits the use of leading questions on direct examination of an adverse party and does not limit the scope of the examination to "matters which are peculiarly within the knowledge of the witness and which are not otherwise readily available," the rule is contrary to I.R.C.P. 43(b)(4) and Idaho case law.

Prior to enactment of the Federal Rules of Evidence, F.R.C.P. 43(b)(abrogated following enactment of F.R.E.), like I.R.C.P.43(b)(4), provided that, "a party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict him and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party [I.R.C.P. substituted 'examined by his counsel'] only upon the subject matter of his examination in chief."

The Federal Advisory Committee considered this category which is a "limitation virtually to persons whose statements would stand as admissions" to be far too narrow. See Federal Advisory Committee Notes to Rule 611(c). The Idaho Committee agrees with this view. The phrase "witness identified with" an adverse party, is designed to enlarge the category of persons thus callable.

I.R.C.P. 32(c) provides that the deposition of a party or an officer, director, or managing agent of a party, or a person designated under I.R.C.P. 30(b)(6) or 31(a) to testify on behalf of an organization which is a party may be used by an adverse party for any purpose. To the extent that this rule allows such use of a deposition of a person designated to testify on behalf of an organization, it recognizes that persons identified with the adverse party may make admissions that are

binding on the adverse party. However, unless the designated witness also happens to be an "officer, director or managing agent" of the organization that is the adverse party, he cannot be examined by leading questions under I.R.C.P. 43(g). The Idaho Committee concluded that this distinction cannot be justified.

Unlike the former Federal Rule 43(b), I.R.C.P. 43(b)(4) contains the additional language: "provided such adverse party may be cross-examined only as to matters which are peculiarly within the knowledge of the witness and which are not otherwise readily available." This proviso was added in 1975 to conform the language of the rule to the interpretation placed on the predecessor statute by the Idaho Supreme Court.

At common law, the party presenting the witness was bound by his testimony and could not elicit direct testimony by leading questions. Sess. Laws 1909, p. 334, was enacted to modify these rules and permitted a party to call "an adverse party, a person for whose benefit the action was prosecuted or defended, or a director, officer or managing agent of a corporation which is a party" and examine the witness as if under cross-examination, propound leading questions to the witness and rebut the testimony of the witness. From the time of enactment, parties attempted to use the privilege of the statute to call the opposing party or those identified with the opposing party to prove their case in chief; a tactic that the Idaho Court condemned.

Although not expressly restricted by the Legislature, in a line of decisions following the enactment of Sess. Laws 1909, p. 334, the Idaho Supreme Court placed restrictions on the scope of cross-examination allowed under the statute. See Osborn v. Carey, 24 Idaho 158, 168, 132 P. 967 (1913)(the statute was "not intended to enable an adverse party to call an opposing party as an expert and seek to establish his side of the case by such expert evidence . . ."); Darry v. Cox, 28 Idaho 519, 155 P. 660 (1916)(it is an abuse of the statute to allow plaintiff to call the defendant as a witness and inquire into the entire defense, not confining himself to facts which cannot be otherwise readily shown); Boeck v. Boeck, 29 Idaho 639, 161 P. 576 (1916)(the statute is not to be construed to mean that the order of proof may be reversed in civil actions); Hessman v. Anschustigui, 37 Idaho 127, 131, 215 P. 460 (1923); Morton v. Morton Realty Co., 41 Idaho 729, 742, 241 P. 1014 (1925); Portland Cattle Loan Co. v. Gemmell, 41 Idaho 756, 766, 242 P. 798 (1925); Franklin v. Wooters, 55 Idaho 619, 45 P.2d 804 (1935); Evans v. Bannock County, 59 Idaho 443, 446, 83 P.2d 427 (1938)(the purpose of the statute was to enable a litigant to call an adverse party or his representative and examine him concerning matters that are "peculiarly within the knowledge of the witness and not easily accessible to the party calling the witness.").

Thus, from a rule that restricted the scope of the cross-examination under the statute to "facts which cannot be otherwise readily shown," Darry v. Cox, 28 Idaho at 523; Boeck v. Boeck, 29 Idaho at 643, the rule evolved that restricts the scope of the examination to "matters that are peculiarly within the knowledge of the witness and not easily accessible to the party calling the witness." Evans v. Bannock County, 59 Idaho at 446. Cf. I.R.C.P. 43(b)(3)("provided, such adverse party may be cross-examined only as to matters which are peculiarly within the knowledge of the witness and which are not otherwise readily available."). See also, e.g., Stearns v. Williams, 72 Idaho 276, 240 P.2d 833 (1952)(there was no abuse where "the cross-examination of the adverse party covered matters which were peculiarly within the knowledge of the witnesses examined and not readily obtainable otherwise."); Willes v. Palmer, 78 Idaho 104, 298 P.2d 972 (1956)(explains Stearns is in harmony with Darry and Boeck; it was error to permit examination beyond the scope of "matters which were peculiarly within the knowledge of the witnesses and which were not otherwise readily available," but no prejudice shown).

Shrivers v. Talbot, 88 Idaho 209, 398 P.2d 448 (1965) was the first case before the Court following adoption of I.R.C.P. 43(b). The rule was at that time almost identical to former Federal Rule 43(b) as noted above. The Court observed that there were no federal decisions construing Rule 43(b) in regard to the permissible scope of cross-examination and that "[s]ince the defendants have cited no cases, and we have found none, which define the scope of examination in chief under Federal Rule 43(b), we are inclined to presume no conflict exists with the Boeck rule. Therefore, I.R.C.P. 43(b) will be interpreted in harmony with the Boeck rule." Id. at 219. See also Montgomery v. Montgomery, 89 Idaho 319, 404 P.2d 610 (1965)(examination is limited to facts peculiarly within the knowledge of the witness, and not otherwise readily available to the examining party); Cox v. Widmer, 94 Idaho 451, 490 P.2d 318 (1971); Ross v. Olson, 95 Idaho 915, 523 P.2d 518 (1974).

In 1975, I.R.C.P. 43(b)(4) was adopted with the amendment adding the language of the proviso in accordance with the rule discussed above. No decisions have been found interpreting I.R.C.P. 43(b)(4) in its present form.

It must be observed that the restrictions which came to be known as the Boeck rule that are now codified in I.R.C.P. 43(b)(4) developed before the rules of discovery were adopted. Since the adoption of the discovery rules, there is no necessity and little likelihood that a party would call the opponent for cross-examination during trial to inquire into the opponent's entire case. In fact, that result can now be accomplished under

I.R.C.P. 32(c). One need only depose the opponent to inquire into his entire case and then read the deposition into evidence pursuant to I.R.C.P. 32(c) which permits use of such deposition "for any purpose." Moreover, the Idaho Committee sees no danger in a party making his case through the other side's witnesses who are in a position to be protected.

With regard to cross-examination under Rule 611(c), it must be noted that I.R.C.P. 43(b)(3) expressly permits the use of leading questions on cross-examination. In this regard, Rule 611(c) may be narrower than I.R.C.P. 43(b)(3) and 43(b)(4), because the court has discretion to restrict the use of leading questions even when the witness is an "adverse party" or an agent of an "adverse party," and because of sympathy, bias, or interest of the witness, it would be an abuse to allow examination by leading questions. An example is the "sweetheart" cross-examination that results where one party in a suit with multiple parties on the same side calls and examines a witness and other parties on the examiner's side then seek to examine the witness (technically "cross-examination") and employ leading questions even though the witness may be quite favorable.

By recommending adoption of Rule 611(c), the Idaho Committee intends that the trial court exercise control over the use of leading questions, keeping in mind that they are not generally permitted on direct examination for three reasons: "First, that the witness is presumed to have a bias in favour of the party calling him; secondly, that the party calling a witness, knowing what that witness may prove, might by leading bring out only that portion of the witness' story favourable to his own case; and thirdly, that a witness, intending to be entirely fair and honest might assent to a leading question which did not express his real meaning." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 611[05] at 57 (Supp. 1983). Conversely, when the witness is hostile, biased or interested, by his sympathy with the opponent's cause, or unwilling for any other reason to tell all he may know, the reason for prohibiting the use of leading questions fails and the court is empowered, in its sound discretion, to permit them.

Additionally, leading questions are permissible on direct examination in the circumstances customarily recognized under existing law, e.g., introductory questions or where necessary to elicit testimony from the reluctant, embarrassed or frightened witness. See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 30 (2d ed. 1972); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 611[05] (Supp. 1983).

Rule 611(c) is applicable at depositions pursuant to I.R.C.P. 30(c), which commands that the Idaho Rules of Evidence govern the form of examination at depositions.

Action Recommended on Idaho Statutes or Rules:

Amend I.R.C.P. 43(a) to add at end of first sentence "or by the Idaho Rules of Evidence."

Amend I.R.C.P. 43(b)(2) by deleting the last two sentences of the rule.

Repeal I.R.C.P. 43(b)(3).

Repeal I.R.C.P. 43(b)(4).

Rule 612. Writing or Object Used to Refresh Memory

(a) **While testifying.** If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) **Before testifying.** If, before testifying, a witness uses a writing or object, not privileged under these rules or not protected from disclosure under Rule 26 of the Idaho Rules of Civil Procedure or Rule 16 of the Idaho Criminal Rules, to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) **Terms and conditions of production and use.** A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

COMMENT TO RULE 612

Prior Idaho Statutes or Rules: I.R.C.P. 43(b)(11).

Comparable Federal Rule: Substantially similar to F.R.E. 612 except to exclude from the requirement of production those writings or objects used for refreshment purposes prior to testifying that are privileged under these rules or protected from disclosure under I.R.C.P. 26 or I.C.R. 16.

Comment: Rule 612 generally codifies the traditional practice that permits an opponent to see any writing used by a witness to refresh his memory while testifying, to cross-examine the witness concerning it, and to introduce any relevant portion. The rule extends the practice to include objects and the right to production of any writing or object that is not privileged under these rules or not protected from disclosure under I.R.C.P. 26 or I.C.R. 16, used for refreshment purposes prior to testifying, when "necessary in the interest of justice." It further provides for protection from disclosure of unrelated portions and provides procedures and sanctions when dealing with a refusal to produce the writing or object when ordered.

The Idaho Committee opted for the language and organization of Uniform Rule of Evidence 612 (1974), 13 U.L.A. 288 (Supp. 1983), rather than Federal Rule 612, because the Uniform Rule is adapted to state practice and it is believed that it better points out the distinction between the use of materials to refresh memory while testifying as opposed to the use of materials to refresh memory before testifying. Although the Federal Rule does not use the word "object", the federal courts have defined "writing" to include objects.

The Idaho Committee further modified the rule by adding the language "not privileged under these rules or not protected from disclosure under Rule 26 of the Idaho Rules of Civil Procedure or Rule 16 of the Idaho Criminal Rules" in subsection (b). This language is not found in either the Federal Rule or Uniform Rule 612. See discussion under subsection (b).

Subsection (a) continues established law regarding the use of a writing to refresh memory while the witness is testifying.

Rule 612(a) is not inconsistent with existing Idaho law with respect to writings, however it expands the type of matter that may be used to refresh memory.

I.R.C.P. 43(b)(11)(formerly Idaho Code § 9-1204) is actually two rules in one: first, it provides for refreshment of memory; second, it provides for the admission of "past recollection recorded." The rule states:

> A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he chooses, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

The foundational requirement has been variously interpreted by the Idaho Supreme Court. In an early decision it was broadly construed to permit a witness to refresh his memory by reference to a transcript of his testimony from a prior trial. State v. Marren, 17 Idaho 766, 107 P. 993 (1910). See also State v. McCandless, 70 Idaho 468, 222 P.2d 156 (1950)(reference to newspaper articles was allowed); Gardner v. Hobbs, 69 Idaho 288, 206 P.2d 539 (1949)(reference was allowed to notes of measurements witness helped obtain but which he had copied from the notebook of another person who had assisted with and recorded the measurements).

However, in State v. Ramirez, 33 Idaho 803, 199 P. 376 (1921), the Idaho Court strictly construed the statute to preclude use by the witness of a transcript which had been made by another of an interview the witness had held with the accused. After quoting Marren, the Court held the language of the statute to be controlling and since the transcript was not made by the witness, it should not have been used. The decision has been criticized: "It would seem that the Ramirez case was incorrectly decided. If the memory of a witness is refreshed after reference to a document and the witness testifies as to his present memory, then it would seem immaterial what the nature of the document was which refreshed his memory. Section R9-1204 I.C. [now I.R.C.P. 43 (b)(11)] should be so construed." G. Bell, Handbook of Evidence for the Idaho Lawyer, 32 (2d ed. 1972).

In a more recent decision the Idaho Supreme Court found no error in allowing a witness to refresh his memory from a copy of a report dictated by him, to which certain material had been

added. See State v. Powers, 100 Idaho 614, 603 P.2d 569 (1979). And in State v. Gallatin, 106 Idaho 564, 682 P.2d 105 (Ct.App. 1984), the Idaho Court of Appeals found no error when the witness used written notes to refresh his recollection although the writing had not been prepared by that witness. The Court cited State v. Powers, 100 Idaho 614, and State v. Marren, 17 Idaho 766, in support of its decision.

The foundational requirement under I.R.C.P. 43(b)(11) is similar to that required for admission of a document under the "past recollection recorded" exception to the rule against hearsay and seems to be far more restrictive than necessary when a document or object is used only to refresh memory and is not testified from nor offered as evidence. That the document or object may be suggestive to the witness should make no difference because that is the very purpose it is intended to serve. Cf. State v. Jester, 46 Idaho 561, 270 P. 417 (1928)(witness had written questions and answers and was testifying from notes under guise of refreshing memory).

Further, it should make no difference what writing or object is used to refresh memory, e.g., photograph, tape recording, scent, or exemplary object, nor whether the witness prepared it, if in fact it does refresh memory and the witness then testifies from recollection. This has been the rule in the federal courts even prior to enactment of F.R.E. 612. See, e.g., United States v. Rappy, 157 F.2d 964 (2d Cir.), cert. denied, 329 U.S. 806, 67 S.Ct. 501, 91 L.Ed. 688 (1947).

Witnesses do use documents and objects prepared by others to refresh memory prior to testifying. As stated by the Idaho Court in an early decision:

> If in truth the memory has been refreshed, and he is enabled in consequence to speak to facts with which he was once familiar, but which afterward escaped him, it cannot signify, in effect, in what manner or by what means these facts were recalled to his recollection. Common experience tells every man that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of a transaction made up of many circumstances. . . Why, then, if a man may refresh his memory by such means out of court, should he be precluded from doing so when he is under examination in court?

State v. Marren, 17 Idaho at 782.

The Committee believes that Rule 612(a) would be the better rule for Idaho. It removes any ambiguity that the rule

applies at any time the witness is testifying, including at pre-trial hearings and depositions. The latter point has never been decided in Idaho. See Barnett v. Reed, 93 Idaho 319, 460 P.2d 744 (1969)(Idaho Court upheld contempt order of probate court against witness who refused to produce report at preliminary hearing, but refused to decide whether report used by witness to refresh memory prior to the hearing had to be produced under the statute).

Subsection (b) extends the right to examine writings and documents to include those used by a witness to refresh memory prior to a hearing, deposition or trial that are not privileged under these rules or not protected from disclosure under I.R.C.P. 26 or I.C.R. 16, but only if "the interests of justice so require." The provision allowing discovery of materials used to refresh memory prior to testifying was new to federal law and is new to Idaho law. See Barnett v. Reed, 93 Idaho 319, 460 P.2d 744 (1969).

As previously noted the Idaho Rule with respect to production of documents or objects used to refresh memory prior to testifying varies from the Federal Rule and the Uniform Rule in that it excepts matter that is privileged under these rules or protected from disclosure under I.R.C.P. 26 or I.C.R. 16 from the requirement of production.

Federal Rule 612(b) has raised a number of troublesome questions for federal practitioners. It has been broadly interpreted by the federal courts to include production of privileged matter. See, e.g., James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144-146, 557 F.Supp. 1058 (D.Del. 1982) (required production of work-product documents); Wheeling-Pittsburgh Steel v. Underwriters Laboratories, 81 F.R.D. 8 (N.D. Ill. 1978)(ordered production of communications with counsel used by witness to prepare for deposition); R.J. Herely & Son Co. v. Stotler & Co., 87 F.R.D. 358, 466 F.Supp. 345 (N.D. Ill. 1980) (attorney-client privilege was waived by attorney's use of memorandum from client even though only used by attorney to refresh memory at a settlement conference); Prucha v. M. & N. Modern Hydraulic Press Co., 76 F.R.D. 207 (W.D. Wis. 1977) (plaintiff's statement to his attorney relied on to refresh his memory before deposition) Cf. Berkey Photo Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), rev'd on other grounds, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (discovery of arguably work-product privileged or attorney-client privileged notebooks furnished to economics expert prior to deposition by counsel as general background material; court withheld disclosure order because counsel unaware of consequences but said it was now giving fair warning for the future). And cf. Al-Rowaishan Establishment v. Beatrice Foods Co., 92 R.F.D. 779 (S.D.N.Y. 1982)(denied discovery of earlier deposition digest

annotated by lawyer reviewed by deponent in preparation for later deposition); Jos-Schlitz Brewing Co. v. Muller & Phipps, Ltd., 85 F.R.D. 118, 120 (W.D. Mo. 1980)(denied production where attorney deponent reviewed own correspondence file, but no showing of his reliance on particular documents therein). See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 612[04] (Supp. 1983).

The Idaho Committee concluded that materials protected from disclosure by a rule of privilege or by the work-product rule under I.R.C.P. 26 and I.C.R. 16 should not be subject to production merely because they were reviewed by the witness before testifying.

The Committee recognizes a distinction between the use of matter to refresh memory while testifying from the use of materials before testifying. Often before testifying a witness will review a great deal of material that does not form the basis of his testimony and the mere fact that he has reviewed privileged or protected matter before testifying should not constitute a waiver of the privilege from disclosure. On the other hand, the use of matter to refresh memory while testifying, even when memory is not refreshed, creates a question whether or not it forms a basis of the witness' testimony that only disclosure can satisfy and in fairness requires that even privileged or protected matter then be produced. Consequently, the Idaho Committee intends by Rule 612 that any material used to refresh memory while testifying in a deposition, hearing or trial, including privileged or protected matter, must be produced, but only matter "not privileged under these rules or not protected from disclosure under I.R.C.P. 26 or I.C.R. 16" is required to be produced if used prior to testifying.

To the extent that Rule 612(a) and (b) require production only if the writing or object is actually used to refresh memory, they are consistent with existing Idaho law. See, e.g., Bess v. Bess, 58 Idaho 259, 72 P.2d 285 (1937); State v. Rodriguez, 93 Idaho 286, 460 P.2d 711 (1969); State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970). Under both I.R.C.P. 43(b)(11) and Rule 612, it is immaterial whether the writing or object would be admissible in evidence. See Prudential Insurance Co. v. Folsom, 48 Idaho 538, 283 P. 609 (1929).

To the extent that it applies to materials used before testifying, the rule may have a significant impact on discovery practice in Idaho, particularly as applied in criminal actions where discovery is more limited than in civil matters. Under this rule all documents and objects used by a witness to refresh memory prior to a pre-trial hearing, deposition or trial that are not privileged or protected may be subject to production and examination by the opposing party, even though the document or object may not be otherwise discoverable.

Subsection (c) provides procedural guidelines which apply after it has been determined that a party is entitled to production of a writing or object. The party may (1) inspect it, (2) use it on cross-examination, or (3) "introduce in evidence those portions which relate to the testimony of the witness." The consequences of introducing the writing or object in evidence are not covered by the rule. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 612 [05] (Supp. 1983)(advocating it should be limited to use "(1) as a guide to assessing the credibility of the witness and (2), to the extent that it would otherwise have been admissible, for its normal evidential value."). Id. at 43.

Under Rule 612(c) if production at the hearing, deposition or trial is impracticable, the court may order it be made available for inspection. If it is claimed to contain unrelated matter, the court is required to examine it in camera, excise the unrelated portions, order delivery of the remainder, and preserve the portion excised for appellate review. Upon disobedience to an order, the court is required to "make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony" or, the court may declare a mistrial.

To the extent that Rule 612 permits the opposing party to inspect the writing or object and use it for cross-examination, it is consistent with I.R.C.P. 43(b)(11). Although Rule 612(c) permits the opposing party "to introduce in evidence those portions which relate to the testimony of the witness," whereas I.R.C.P. 43(b)(11) only permits that it be read to the jury, there seems to be little distinction according to the Idaho Court. See Skaggs Drug Centers, Inc. v. City of Idaho Falls, 90 Idaho 1, 11, 407 P.2d 695 (1965)("There is no practical difference between reading the exhibit and admitting into evidence the physical document which merely recites the same information as could be found in the record.").

I.R.C.P. 43(b)(11), like Rule 612(c), is silent as to the effect of introducing such evidence and no Idaho decisions have been found on point. Cf. Ausich v. Frank, 70 Idaho 494, 222 P.2d 1073 (1950)(testimony of adverse party called for cross-examination under the statute is before the jury for all purposes and, although it may be rebutted by the party calling the witness, it is error to instruct the jury that the party calling the witness was not bound by any unfavorable responses).

To the extent Rule 612(c) empowers the court to impose sanctions for disobedience of its orders, the rule is consistent with I.R.C.P. 37 and I.C.R. 16(j). In other respects, Rule 612(c) would create new law.

That part of I.R.C.P. 43(b)(11) relating to "past recollection recorded" is covered under Rule 803(5).

I.R.C.P. 43(b)(12) entitled "Inspection of writings" which provides that, "[w]henever a writing is shown to a witness it may be inspected by the opposite party," would not be altered or affected by adoption of Rule 612.

<u>Action Recommended on Idaho Statutes or Rules</u>: Repeal I.R.C.P. 43(b)(11).

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

COMMENT TO RULE 613

Prior Idaho Statutes or Rules: I.R.C.P. 43(b)(8).

Comparable Federal Rule: Identical to F.R.E. 613.

Comment: Rule 613 governs the foundational requirements for the introduction of written or oral prior inconsistent statements to impeach a witness. The rule is designed to strike a balance between two extremes; giving the witness advance notice and an opportunity to reshape his testimony or denying the witness notice and an opportunity to deny or explain. The rule is intended to deprive the dishonest witness of the opportunity to reshape his testimony, particularly when dealing with collusive witnesses who have made a joint prior inconsistent statement. In fairness, the rule gives the witness an opportunity to deny or explain and provides the opposite party an opportunity to examine, without specifying the sequence in which this must be done.

Subsection (a) abandons the traditional common law requirement known as the Queen's case rule that a witness be confronted with the content of the prior statement and the circumstances of time, place and persons present before he can be questioned about it. This requirement, derived from old English law, was abolished in England in 1854. The requirement has been severely criticized in this country, see 4 Wigmore, Evidence § 1259 (3d. ed. 1940); McCormick, Evidence § 28 (1954), and was significantly modified by the federal courts even prior to adoption of F.R.E. 613. See, e.g., United States v. Dillard, 101 F.2d 829 (2d Cir. 1938), cert. denied, 306 U.S. 635, 59 S.Ct. 484 83 L.Ed. 1036 (1939); Wright Root Beer Co. of New Orleans v. Dr. Pepper Co., 414 F.2d 887 (5th Cir. 1969). See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 613 [03] (Supp. 1983).

To protect the witness from being misled by unfair or unwarranted insinuations about the statement, subsection (a) includes a provision requiring disclosure to opposing counsel upon request.

Subsection (b) modifies the traditional insistence upon specifying the time and sequence of prior statements. Under subsection (b) the witness must be given a chance to deny or

explain the apparent discrepency and the opposite party must be given an opportunity to draw a denial or an explanation from the witness at some point during the trial, but it need no longer be done during cross-examination or before the statement is used to impeach.

In recognition of the fact that occasions may arise where the witness may not be available to deny or explain through absence or death at some later point in the trial, the rule grants the court discretion to allow the impeaching statement where "the interests of justice" require it.

The rule does not require that the party introducing the statement afford the witness an opportunity to deny or explain. It only requires that the witness "be afforded" that opportunity. It may, however, be prudent for the impeaching party to inform the court and opposing counsel at the time the witness testifies that he intends to introduce an impeaching statement and that the opponent may wish to keep the witness available to deny or explain. To avoid the need of the witness waiting, the court may even require that the impeaching statement be used while the witness is on the stand or immediately after he leaves the stand and grant the opposing party the opportunity to call him at once to explain so the witness can then be excused.

Adoption of the rule should not result in a major change in the practice now followed. Moreover, the requirements of the authentication rules or best evidence rules will in many cases require that the witness be used to satisfy these requirements before the statement is introduced or read to the jury.

Adoption of Rule 613 would modify existing Idaho Law. I.R.C.P. 43(b)(8) (formerly Idaho Code § 9-1210) provides:

> A witness may also be impeached by evidence, that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

The Idaho Court has consistently held that the foundational requirements must be satisfied before a prior inconsistent statement may be used to impeach a witness, see, e.g., Keane v. Pittsburg Lead Mining Co., 17 Idaho 179, 105 P. 60

(1909); State v. Mundell, 66 Idaho 297, 158 P.2d 818 (1945); State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976); State v. Warden, 100 Idaho 21, 592 P.2d 836 (1979), or at least, there must be substantial compliance. See, e.g., State v. Boyatt, 59 Idaho 771, 87 P.2d 992 (1939); State v. Brassfield, 40 Idaho 203, 232 P. 1 (1925).

The Idaho Supreme Court has stated that: "[t]he reasons for requiring a foundation are three-fold:

> 1. to avoid unfair surprise to the witness;
> 2. to save time, as an admission by the witness may make extrinsic proof unnecessary; and
> 3. to give the witness in fairness to him, a chance to explain the discrepancy. (Citations omitted).

State v. Drapeau, 97 Idaho at 688.

There should be no unfair surprise to the witness, if he in fact made the prior statement. The more valid purpose would seem to be to prevent unfair surprise to the party presenting the witness. As stated by the Reporter for the Federal Advisory Committee in hearings before the Special Subcommittee on Reform of Fed. Crim. Laws of the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., on Proposed Rules of Evidence:

> The objectives of the procedure are: (1) to save time, since the witness may admit having made the statement and thus make the extrinsic proof unnecessary; (2) to avoid unfair surprise to the opposite party by affording him an opportunity to draw a denial or explanation from the witness; and (3) to give the witness himself, in fairness, a chance to deny or to explain the apparent discrepancy. These are desirable objectives. The second and third can, however, be achieved by affording an opportunity to explain at any time during the trial, and no particular time sequence is required. Only the first of the objectives named above, saving time, points in the direction of the traditional foundation requirement on cross-examination, and even here countervailing factors are present: the time saved is not great; the laying of the foundation may inadvertently have been overlooked; the impeaching statement may not

> have been discovered until later; and premature disclosure may on occasion frustrate the effective impeachment of collusive witnesses. The argument may be made that the recalling of a witness for further cross-examination will afford an adequate solution for these difficulties and hence that the traditional procedure should be retained. The argument is not a sound one. In the first place, recall for cross-examination has traditionally been very much within the discretion of the judge and seems likely to continue so. And secondly, the admissibility of prior inconsistent statements ought not to be enmeshed in the technicalities of cross-examination when all that is being sought is the presentation of an opportunity to deny or explain.
>
> In view of these considerations, the Advisory Committee concluded that the objectives could better be achieved by allowing the opportunity to deny or explain to occur at any time during the trial, rather than limiting it to cross-examination.

3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 613 at 2 (Supp. 1983).

The Idaho Committee agrees that the change in Idaho law is justified in view of the fact it would further the function of cross-examination to test the truthfulness or untruthfulness of the witness.

It should also be noted that Rule 613 applies to inconsistent statements used to impeach even though they may be admissible as evidence under Rule 801(d)(1). As provided in Rule 613(b), the provisions of Rule 613 do not apply to inconsistent statements of a party-opponent as defined in Rule 801(d)(2), since they qualify as admissions. Accord Coffin v. Bradbury, 3 Idaho 770, 35 P. 715 (1894).

When the prior inconsistent statement "is introduced at trial as impeaching evidence, it is admitted solely for the purpose of attacking the credibility of the witness, and not as substantive evidence of its truth." State v. Drapeau, 97 Idaho at 688. See also State v. Boyatt, 59 Idaho 771, 87 P.2d 992 (1939); Bodenhamer v. Pacific Fruit & Produce Co., 50 Idaho 248, 295 P. 243 (1931); Portland Cattle Loan Co. v. Gemmell, 41 Idaho 756, 242 P. 798 (1925). But cf. State v. Crea, 10 Idaho 88, 76

P. 1013 (1904); Hilbert v. Spokane R.R. Co., 20 Idaho 54, 116 P. 1116 (1911). See generally G. Bell, Handbook of Evidence For The Idaho Lawyer, 47-48 (2d ed. 1972). An instruction to this effect must be requested at the time provided for making formal requests for or objections to instructions or it is waived. See Gayhart v. Schwabe, 80 Idaho 354, 330 P.2d 327 (1958). See also State v. Flitton, 52 Idaho 374, 15 P.2d 397 (1932).

Rule 613 would not abrogate or affect the right of a party to discover statements under I.R.C.P. 26 and I.C.R. 16.

Action Recommended on Idaho Statutes or Rules: Repeal I.R.C.P. 43(b)(8).

Rule 614. Calling and Interrogation of Witnesses by Court

(a) **Calling by court.** When the court is the trier of fact, the court may on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) **Interrogation by court.** The court may interrogate witnesses, whether called by itself or by a party.

(c) **Objections.** Objections to the interrogation of a witness by the court may be made at the time of interrogation or at the next available opportunity when the jury is not present.

COMMENT TO RULE 614

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Substantially the same as F.R.E. 614 except to limit the power of the court to call witnesses to proceedings where the court is the trier of fact. Subsection (a) is identical to F.R.E. 614(a) except to add "when the court is the trier of fact." Subsection (b) is identical to F.R.E. 614(b). Subsection (c) is identical to F.R.E. 614(c) except to substitute the language "interrogation of a witness by the court" in place of "calling of witnesses by the court or to interrogation by it."

Comment: Rule 614 recognizes the rule at common law that permitted the trial judge to call and question witnesses in both civil and criminal cases, see 9 Wigmore, Evidence § 2484 (3d ed. 1940), but restricts the calling of witnesses to cases when the court is the trier of fact.

Subsection (a) recognizes the authority of the court to call witnesses, to obtain information which it deems essential to a just and proper decision but which the parties have failed to provide when the court is the trier of fact. The rule preserves the right of all parties to cross-examine witnesses thus called.

Idaho has no general statute or rule expressly conferring or denying the power of our courts to call witnesses and no case law has been found. An example of a special proceeding is Idaho Code § 7-1116 which empowers the court to call experts to testify to their findings as to blood tests in paternity proceedings and provides they shall be "subject to cross-examination by the parties."

Under Idaho Code § 1-1603(6) the court has power "[t]o compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code." The same power is conferred on judicial officers by Idaho Code § 1-1901(3). In addition, Idaho Code § 1-1622 confers incidental powers:

> When jurisdiction is, by this code, or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by

this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

As noted above, the power of the court to call witnesses was well recognized at common law. By statute, Idaho has provided that the common law is the rule of decision in our courts "so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws." Idaho Code § 73-116. On other issues, the Idaho Court has held, "that where the statute or rule does not prescribe the procedure, the common law or other appropriate method will be followed in the exercise of inherent judicial power." J.I. Case Company v. McDonald, 76 Idaho 223, 230, 280 P.2d 1070 (1955).

In the absence of any statute or statutory scheme depriving the court of the power to call witnesses, it is the opinion of the Idaho Committee that the power exists in Idaho by virtue of Idaho Code §§ 1-1603(6), 1-1622 and 73-116, and that it is desirable to prescribe its operation by rule.

The Committee, in its Report dated December 16, 1983, recommended adoption of Federal Rule 614 which permits the court to call witnesses in non-jury and jury trials. In its deliberations, the Supreme Court questioned the practice in jury trials. Upon reconsideration, the Committee concluded that the practice should be limited to situations when the court is the trier of fact. There is a danger that a jury will place undue emphasis upon the testimony of a witness called by the court merely because the witness is the court's witness. There also is a feeling among members of the Committee that the parties should be allowed to present their case to a jury without interference by the court. Thus, the rule permits the court to call witnesses only when the court is the trier of fact.

The rule does not prohibit the court from calling witnesses for the purpose of ruling on preliminary questions, e.g., under Rule 104, in which situations the court is the trier of fact. Should the court find it necessary to do so during a jury trial, the witness should be called and the testimony elicited outside the hearing of the jury. Similarly, the rule does not prohibit the court from calling witnesses in pre-trial proceedings, e.g., to determine whether an accused has the mental capacity to stand trial, or in post-trial proceedings, e.g., sentencing.

The appointment and use of an interpreter by the court in a jury trial is not prohibited or restricted by this rule.

For the appointment and compensation of expert witnesses by the court, see Rule 706.

Subsection (b) continues the right of the court to interrogate witnesses in non-jury and jury trials. As pointed out in the Federal Advisory Committee Notes to Rule 614, "[t]he authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse." See, e.g., United States v. Welliver, 601 F.2d 203, 208-209 (5th Cir. 1979); United States v. Allsup, 566 F.2d 68, 72-73 (9th Cir. 1977).

Idaho has no general provision expressly granting both parties the right to cross-examine a witness following interrogation by the judge. I.R.C.P. 43(b)(1) provides that the examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise directs. Although there is no Idaho authority either way, this rule suggests a prohibition against cross-examining one's own witness, and might require leave of court for the party calling him to cross-examine a witness following interrogation by the judge. Rule 614(a) would remove any ambiguity in this regard.

The Idaho Court has recognized the power of the trial judge to question a witness, provided it does not reveal the court's opinion as to guilt or innocence. In State v. Freitag, 53 Idaho 726, 27 P.2d 68 (1933) the Court reversed where the judge's cross-examination was of such a nature as to prejudice the jury against the accused. In so holding the Court quoted with approval from 16 C.J., p. 831, sec. 2100, as follows:

> "For the purpose of eliciting evidence which has not otherwise been brought out, it is proper for the judge to put questions to a witness either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness. The judge may recall and examine a witness in order to supply an omission of proof on a material point. But he must conduct his examination in such a manner as to impress the jury with the idea that he is entirely impartial, and he must also conduct the examination in such a way as not to indicate his opinion on the

> merits or any doubt as to the credibility of the witness. He should not ask a question which is based upon the assumption of defendant's guilt of the offense charged. It has been held, however, that, although it is the right of the judge to examine witnesses when necessary in the administration of justice, it is better practice for him not to do so unless it is necessary." Id. at 732.

In the only other Idaho decision located, the Court approved in dictum the judge's questioning of a witness called by a party, finding that it did not reveal the opinion of the trial court upon defendant's guilt or innocence and in no way tended to be prejudicial. See State v. Neil, 58 Idaho 359, 74 P.2d 586 (1937).

In respect to the competency of a witness to testify, the Idaho Court has held that upon objection as to the competency of a witness, the court has a duty to examine the witness on the objection. See State v. Simes, 12 Idaho 310, 85 P. 914 (1906).

Subsection (c) affords counsel the opportunity to avoid the embarrassment or potential bias that may result from making objections to the court's questions before the jury. At the same time, to afford the court the opportunity to correct error or make repairs as soon as possible, objections not made during interrogation must be made at the next recess or the objection is lost.

To the extent that Rule 614(c) requires that objections be made during the interrogation or a recess, the rule may modify Idaho case law. In Freitag the Court rejected the State's argument that defendant's failure to object barred judicial review, holding that the active questioning and the conduct of questioning by the trial judge were "judicial acts" within the meaning of I.C.A. 19-2301 (now I.R.C.P. 46) and formal exception to the questioning was not required. However, in Neil the Court observed that no objection was made or taken to the remark of the trial judge when he opened his questioning of the defendant ("I have to ask some questions. I don't think it would be a fair trial to the state if I didn't ask a question or two."), and held the matter was not reviewable.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 615. Exclusion of Witnesses

(a) General rule. At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

(b) Preliminary hearings. Notwithstanding subsection (a) of this rule, in a preliminary hearing if either party requests it the magistrate must exclude all non-party witnesses who have not been examined.

(c) Child witnesses. Notwithstanding subsections (a) and (b) hereof or any other statutory provision, when a child is summoned as a witness in any hearing in any criminal matter, including any preliminary hearing, parents, a counselor, friend or other person having a supportive relationship with the child may, in the discretion of the court, remain in the courtroom during the child's testimony.

COMMENT TO RULE 615

Prior Idaho Statutes or Rules: Idaho Code §§ 19-810 and 19-3023; I.R.C.P. 43(b)(10) and 77(b).

Comparable Federal Rule: Subsection (a) is similar to F.R.E. 615, the only change being the substitution of the word "may" for "shall," making the Idaho Rule discretionary rather than mandatory. Subsection (b) is added to incorporate Idaho Code § 19-810 and subsection (c) is added to incorporate Idaho Code § 19-3023.

Comment: Rule 615 contains a general rule that permits the exclusion, with exceptions, of witnesses in all actions and proceedings and two special rules incorporating a mandatory provision applicable only in preliminary hearings and a discretionary provision relating to child witnesses in criminal actions and proceedings.

Subsection (a) permits the court to exclude witnesses upon request of a party. It is a matter of discretion. The court may also order exclusion on its own motion. The intent of this part of the rule is to discourage and expose fabrication, inaccuracy and collusion. No time is specified for making the request.

As noted above, the language of Idaho Rule 615(a) is identical to F.R.E. 615 except to substitute the word "may" for "shall," making the Idaho Rule discretionary rather than mandatory as in the Federal Rule.

Rule 615(a) further provides that certain witnesses are not subject to exclusion. Under subpart (1) a party who is a natural person may not be excluded which avoids constitutional problems of confrontation and due process.

Under subpart (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney may not be excluded. The rule is silent whether more than one "representative" may be designated and no federal decisions have been found on the issue. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 615[02] at 9 (Supp. 1983), advocating that "[t]here must be wide discretion in the trial judge to allow multiple representatives." That part of the rule allowing the attorney to designate the "representative" was borrowed from the California Evidence Code as being "simple and workable." See Federal Advisory Committee Notes to Rule 615.

Subpart (3) confers discretion on the court to exempt from exclusion "a person whose presence is shown by a party to be essential to the presentation of his cause," e.g., an expert needed to advise counsel during trial or one who will testify and base his opinion on the facts in the particular case.

The rule is silent as to conduct of "excluded witnesses" outside the courtroom and whether they can or should be instructed to refrain from discussing the case with other persons. The federal courts have indicated that the court should instruct the witnesses not to discuss the case with anyone other than counsel for either side. See, e.g., Milanovich v. United States, 275 F.2d 716 (4th Cir. 1960), aff'd in part and rev'd in part on other grounds, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961); Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966). Directing the witnesses to discuss the case with no one, to the exclusion of counsel for either side, may deprive a defendant-witness of his Sixth Amendment right to effective assistance of counsel or amount to a denial of due process in a civil case. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 615[02] (Supp. 1983).

The rule is also silent with respect to the consequences of noncompliance with an order of exclusion. The federal courts have held that the failure of a witness to comply with a sequestration order does not alone render his testimony inadmissible, United States v. Warren, 578 F.2d 1058 (5th Cir. 1978), cert. denied, 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980), and that the sanctions to be imposed lie within the discretion of the court, which may include citing the witness for contempt, permitting comment on the witness' noncompliance in order to reflect on his credibility, and refusing to let the witness testify or striking his testimony. See 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 615[03] at 14 (Supp. 1983).

Rule 615(a) is consistent with existing Idaho law to the extent that exclusion under subsection (a) is discretionary as is now provided in I.R.C.P. 43(b)(10) (formerly Idaho Code § 9-1201):

> If either party requests it the judge may exclude from the courtroom any or all witnesses, not at the time under examination, so that he may not hear the testimony of other witnesses.

Under I.R.C.P. 43(b)(10) exclusion is wholly in the court's discretion and may be ordered on the court's own motion. Paine v. Strom, 51 Idaho 532, 6 P.2d 849 (1931). See also State v. Madrid, 74 Idaho 200, 259 P.2d 1044 (1953)(no abuse of

discretion to refuse to exclude mother and daughter from trial for crying while son is testifying in lewd conduct case); State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971)(exclusion rests in sound discretion of the court and when requested by defendant, it is not error to exclude witnesses for both sides).

Three other Idaho cases have dealt with issues related to exclusion of witnesses. In State v. Oldham, 92 Idaho 124, 438 P.2d 275 (1968), the Court held that permitting a witness to testify after earlier being present in the courtroom in violation of an exclusion order was not an abuse of discretion or reversible error in the absence of a showing of prejudice.

State v. Lopez, 100 Idaho 99, 593 P.2d 1003 (1979) involved a defendant's motion that witnesses be excluded and segregated. The court suggested to the bailiff that he "try to comply." The Court found that there was no abuse of discretion in the court's recommendation to the bailiff in the absence of specific authority imposing a duty on the court to cause witnesses to be kept separated. It is at most discretionary and there was no showing of prejudice.

In State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979) the Court reaffirmed that the decision to grant or deny a request for exclusion under I.R.C.P. 43(b)(10) is discretionary and held that "it follows that permitting exceptions to or variation of the sequestration order must also lie within the court's discretion, as does the nature of the sanction imposed, if any, for violation of the order." Id. at 634.

Another provision of the Idaho Rules of Civil Procedure may be affected by Rule 615. I.R.C.P. 77(b) provides in part that, "in an action for a divorce, annulment, criminal conversation, seduction, or breach of promise of marriage, the court may exclude all persons from the courtroom except the officers of the court, the parties, their witnesses, and counsel, provided that in any cause the court may, in the exercise of a sound discretion during the examination of a witness, exclude any and all witnesses in the cause."

Subsection (b) incorporates the mandatory provision of Idaho Code § 19-810. It provides that in a preliminary hearing, the magistrate "must, upon motion of either of the parties, exclude all non-party witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until all witnesses have been examined."

The Idaho Committee was concerned that failure to expressly provide in Rule 615 for the mandatory exclusion of non-party witnesses in a preliminary hearing would be misconstrued to mean that exclusion is discretionary and thus have expressly incorporated that provision of the statute in the rule. In addition to reducing and exposing fabrication and collusion, the provision is deemed desirable to protect the right of privacy of an accused at the preliminary hearing stage of the process before probable cause has been determined.

The failure to include the discretionary provision in the statute allowing the court to segregate witnesses is not meant to abrogate it. Rather that part of the statute is deemed to be a matter more of procedure than of evidence.

Subsection (c) incorporates the recently enacted Idaho Code § 19-3023 which provides that "[w]hen a child is summoned as a witness in any hearing in any criminal matter, including any preliminary hearing, notwithstanding any other statutory provision, parents, a counselor, friend or other person having a supportive relationship with the child may, in the discretion of the court, remain in the courtroom during the child's testimony."

Rule 615 is not intended to affect the statutes or rules allowing or requiring exclusion of persons other than witnesses from hearings and trials, e.g, preliminary hearings under Idaho Code § 19-811 or juvenile hearings under Idaho Code § 16-1608, I.J.R. 10 and 22, nor the provisions of I.R.C.P. 26(C)(5) (that discovery may be conducted with no one present except persons designated by the court) and I.R.C.P. 77(b) to the extent it permits the court in an action for divorce, annulment, criminal conversation, seduction, or breach of promise of marriage to exclude spectators from the courtroom.

Action Recommended on Idaho Statutes or Rules: Repeal I.R.C.P. 43(b)(10).

Amend I.R.C.P. 77(b) to delete the language ", in the exercise of a sound discretion during the examination of a witness, exclude any and all witnesses in the cause." and substitute the language, "exclude witnesses as provided in the Idaho Rules of Evidence."

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INTRODUCTORY COMMENT TO ARTICLE VII

OPINIONS AND EXPERT TESTIMONY

Article VII concerns opinions and expert testimony and is intended to liberalize the rules governing admissibility. It appears to have done so in the federal system without significant problems in application and has been well received in the federal courts.

Rule 701 removes the common law restraint barring laymen from testifying as to opinions or inferences. The rule permits admission of lay opinion or inference if it is based on personal observation and helpful to the determination of an issue of fact. Rule 702 adopts a similar helpfulness standard for expert testimony. In addition, the qualifications requisite to the assumption of "expert" status have been broadened to include skill, experience or training.

Rule 703 permits an expert, in forming an opinion, to rely upon hearsay or other inadmissible evidence--"if [it is] of a type reasonably relied upon by experts in a particular field"--as well as on firsthand knowledge or facts presented at the trial. The rule markedly widens the basis on which experts at common law could rest their opinions and is intended to reflect more realistically the practice of experts.

Rule 704 provides that experts and laymen may give opinions on the ultimate issues to be decided by the trier of fact. The rule reflects the underlying helpfulness standard and the liberalizing tendency of Article VII.

Rule 705 concerns procedure. It removes the necessity of adducing the foundation for an expert opinion before that opinion may be admitted. The burden of testing the adequacy of an opinion's foundation is now placed on the opposing party's cross-examination.

Finally, Rule 706 sets forth the procedure for court appointment of expert witnesses.

Idaho Article VII is identical to Federal Article VII with the following exceptions: Idaho Rule 704 omits subsection (b) of the Federal Rule which was added by Congress on October 12, 1984; Rule 705 includes a provision requiring prior disclosure of the underlying facts or data in discovery, if requested; and Rule 706 is conformed to state practice and Rule 614(a), and omits subsection (c) of the Federal Rule.

The Federal Article VII rules have resulted in few problems of application in the federal courts. Under Rule 702

some conflicts have developed with regard to novel scientific evidence and the standard that should be applied for admission of such evidence, but no generally applicable standard appears feasible at this time. Also some division in the federal decisions has occurred under Rule 703 with respect to the admissibility of otherwise inadmissible hearsay which forms the underlying facts or data of expert opinion. Some courts have applied a "reasonable reliance" standard while others prefer a trustworthiness approach. Notwithstanding this difference in approaches to the question, no significant problems have resulted. See generally, Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 190-203 (1983).

Article VII.

OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witness

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

COMMENT TO RULE 701

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 701 except that the numbering of the subdivisions are changed to arabic numerals.

Comment: Rule 701 changes the common law rule that lay witnesses cannot give opinion testimony. It abandons the traditional rule of exclusion in favor of a discretionary rule of admission in recognition of the actual practice of the courts in this area of law.

Under the traditional rule opinions of lay witnesses are allowed under the "collective facts" exception where a shorthand expression is "necessary" because articulation of more primary components is impossible or highly impracticable (as where a lay witness is allowed to testify in terms of "sanity," "speed," or "intoxication").

Rule 701 seeks to balance the need for relevant evidence against the danger of admitting unreliable testimony. It recognizes that necessity and expedience may dictate receiving opinion evidence, but that a factual account insofar as feasible may further the values of the adversary system. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 701[01] (Supp. 1983).

Rule 701 imposes two requirements before a lay witness' testimony in the form of opinions or inferences can be received in evidence: first, the opinions or inferences must be rationally based on the witness' own perception and second, the opinions or inferences must be helpful to the trier of fact. "In order to comply with the first requirement, the testimony must initially pass the personal knowledge requirement of Rule 602 which is incorporated in Rule 701. But even if the witness does have the requisite personal knowledge, any inferences or opinions he expresses must thereafter pass the rational connection and "helpful" tests of Rule 701. . . . The rational connection test means only that the opinion or inference is one which a normal person would form on the basis of the observed facts. He may express the opinion or inference rather than the underlying observations if the expression would be helpful to a clear understanding of his testimony or the determination of a fact in issue." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 701[02] at 10-11 (Supp. 1983).

The Idaho decisions are in substantial conformance with the objective stated in Rule 701. The rule in Idaho was stated in State v. Williams, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982):

> "The traditional rule in Idaho has been that a witness may testify only as to concrete facts within the scope of his own observation, common knowledge and recollection - as distinguished from his opinion. . . . However, an exception to this rule has evolved. Our Supreme Court has held that a trial court, in its discretion, may allow a lay witness to state an impression or conclusion about a matter of fact within his knowledge. . . .
>
> However, all opinion testimony - whether lay or expert - is subject to the restriction that opinions should not extend to factual matters capable of being presented fully to the triers of fact."

Id. at 576-577. See also, e.g., State v. Fenley, 103 Idaho 199, 203, 646 P.2d 441 (Ct. App. 1982)("A trial court, in its discretion, may allow a lay witness to state an impression or conclusion about a matter of fact within his knowledge."); State v. Curry, 103 Idaho 332, 647 P.2d 788 (Ct. App. 1982); State v. Crook, 98 Idaho 383, 565 P.2d 576 (1977)(admissibility and competency of opinion testimony, either expert or non-expert, is largely discretionary with the trial court); State v. Cutler, 94 Idaho 295, 486 P.2d 1008 (1971); Howard v. Missman, 81 Idaho 82, 337 P.2d 592 (1959)(a non-expert witness may give his conclusion or impression he gains from conduct of another where, because of its nature, the ultimate fact in issue is difficult to express in terms of evidentiary facts; but witness must be one who was in position to know facts upon which conclusion is based, and he must first have testified to such facts). Cf., e.g., Sturgis v. Garrett, 85 Idaho 364, 368, 379 P.2d 658, 660 (1963)("It is for the jury or the court, as the case may be, whenever the question is one which can be decided by ordinary experience and knowledge, to determine the truth as to the evidential facts from the facts stated by the witness, and to draw the conclusions deductible from such evidential facts by the exercise of their own judgment and reasoning powers without hearing the opinions of witnesses.").

Because a trial court, in its discretion, may allow a lay witness to state an impression or conclusion about a matter of fact within his knowledge, "it is the underlying factual basis of the . . . [witness'] testimony, not the opinion format of his testimony, that is at issue . . ." State v. Fenley, 103 Idaho at 202.

The Idaho Supreme Court has allowed lay witness opinions to describe the appearance of an apparent physical condition, see, e.g., State v. Reyna, 92 Idaho 669, 448 P.2d 762 (1968)(odor, bloodshot eyes, staggering, slurred speech); State v. Thomas, 79 Idaho 372, 318 P.2d 592 (1957)(intoxication); Reinhold v. Spencer, 53 Idaho 688, 26 P.2d 796 (1933)(to describe pain suffered by another person); McClain v. Lewiston Interstate Fair & Racing Ass'n., 17 Idaho 63, 104 P. 1015 (1909)(extent of suffering from injury), and to describe mental condition or capacity, see, e.g., Chamberlin v. George, 63 Idaho 658, 125 P.2d 307 (1942)(sanity of another person); Herring v. Davis, 47 Idaho 211, 273 P. 757 (1929)(a person's mental condition); McGrath v. West End Orchard & Land Co., 43 Idaho 255, 251 P. 623 (1926)(sanity); Weber v. Della Mountain Min. Co., 14 Idaho 404, 94 P. 441 (1908)(comparisons between acts and conduct of a person who was at a given time sane and his acts at a time when he was laboring under mental disabilities), (sanity and competency to transact business by close acquaintance).

The Idaho Courts have upheld testimony by a lay witness that stains had the appearance of blood, State v. Ramirez, 33 Idaho 803, 199 P. 376 (1921); State v. Rice, 7 Idaho 762, 66 P. 87 (1901); that a lay witness familiar with a person's handwriting can give his opinion as to the genuineness of the signature, State v. Eubanks, 86 Idaho 32, 383 P.2d 342 (1963); State v. Myers, 36 Idaho 396, 211 P. 440 (1922); State v. Bond, 12 Idaho 424, 86 P. 43 (1906); and a lay witness' testimony as to his recognition of the voice and an opinion concerning the identity of the caller, see, e.g., State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972); State v. Fenley, 103 Idaho 199, 646 P.2d 441 (Ct. App. 1982).

Idaho has also allowed a lay witness, who is the owner, to testify to the value of personal property, see, e.g., Howes v. Curtis, 104 Idaho 563, 568, 661 P.2d 729, 734 (1983)("It is settled rule in Idaho that the owner of property is a competent witness to its value, as he is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales."); Bratton v. Slininger, 93 Idaho 248, 460 P.2d 383 (1969); Weaver v. Village of Bancroft, 92 Idaho 189, 439 P.2d 697 (1968); Riley v. Larson, 91 Idaho 831, 432 P.2d 775 (1967), 42 A.L.R.3d 1274 (1972); the value of real property, see, e.g., Bratton v. Slininger, 93 Idaho 248; Weaver v. Village of Bancroft, 92 Idaho 189; Taysom v. Taysom, 82 Idaho 58, 349 P.2d 556 (1960); the value of services rendered, Chapman v. Booth, 71 Idaho 359, 232 P.2d 668 (1951); and the amount of damages suffered, Thomas Helicopters, Inc. v. San Tan Ranches, 102 Idaho 567, 633 P.2d 1145 (1981); Nora v. Safeco Ins. Co., 99 Idaho 60, 577 P.2d 347 (1978); Smith v. Big Lost River Irr. Dist., 83 Idaho 374, 364 P.2d 146 (1961).

Lay witness testimony has been allowed as to speed, Dawson v. Olson, 97 Idaho 274, 543 P.2d 499 (1975); Werth v. Tromberg, 90 Idaho 204, 409 P.2d 421 (1965) and that brakes on a vehicle were no good, Gayhart v. Schwabe, 80 Idaho 354, 330 P.2d 327 (1958).

In contrast, a lay witness may not give an opinion as to a question of law, Hawkins v. Chandler, 88 Idaho 20, 396 P.2d 123 (1964); the state of mind of another person, Colwell v. Bothwell, 60 Idaho 107, 89 P.2d 193 (1939); the ultimate fact to be determined by the jury, see, e.g., State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971); Pierce v. Barenberg, 91 Idaho 354, 421 P.2d 149 (1966); Berland v. City of Hailey, 61 Idaho 333, 101 P.2d 17 (1940); or the cause of his medical condition, Flowerdew v. Warner, 90 Idaho 164, 409 P.2d 110 (1965).

As to testimony on the ultimate issue, see Rule 704 which abolishes the objection to opinion testimony on the ultimate issue of fact.

Adoption of Rule 701 places the emphasis on the issue of whether there is the underlying factual basis for the witness' testimony rather than whether it is in the opinion format. As is the case under existing Idaho law, if the witness does not possess the personal knowledge of the facts or if his observations or conclusions would not be helpful to a clear understanding of his testimony or the determination of a fact in issue, it remains inadmissible.

Action Recommended on Idaho Statutes or Rules: None required.

R

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

COMMENT TO RULE 702

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 702.

Comment: Rule 702 favors the admissibility of testimony by experts if relevant and if it will assist the trier of fact to understand the evidence or resolve a controverted issue of fact, regardless (under Rule 704) of whether it is an ultimate issue of fact. The test of "helpfulness" under this rule is essentially the same as is embodied in Rule 701.

The determination whether the testimony of an expert will be helpful to the trier of fact must be made on a case-by-case basis. Consequently, the federal courts have recognized that "the trial judge has broad discretion in the matter of admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." Salem v. United States Lines, 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962). See also McGregor-Doniger Inc. v. Drizzle Inc., 599 F.2d 1126 (2d Cir. 1979); United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977).

The rule is said to "favor" admissibility of expert testimony to the extent that it modifies the former federal decisions which excluded expert testimony on the ground that there was no need for expert testimony unless the issue to which the testimony would be directed is "not within the common knowledge of the average layman." Bridger v. Union Railway Co., 355 F.2d 382, 387 (6th Cir. 1966). Such a test is deemed to be incompatible with the standard of helpfulness expressed in Rule 702. Zenith Radio Corp. v. Matsushita Electric Industrial Co., Inc., 505 F.Supp. 1313 (E.D. Pa. 1980). See also 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02] (Supp. 1983).

It is recognized that trial courts may differ in their assessment of the helpfulness of particular kinds of expert testimony. Because of the rules' emphasis on liberalizing expert testimony, doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusion. Irrelevant testimony would obviously not be "helpful." Expert testimony may also be excluded when it would confuse the jury, be more prejudicial than probative, or be needlessly time-consuming. In making its determination, as under Rule 403, the court will have to consider the particular facts of

the case. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02] (Supp. 1983).

If the proffered opinion evidence would be a novel form of expertise which has not yet received judicial sanction, the court must make an initial inquiry to determine whether the new technique or principle is sufficiently reliable so that it will aid the jury in reaching accurate results.

Prior to enactment of the Federal Rules of Evidence, the federal courts often applied the "general scientific acceptance" standard which originated in Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923). Under that standard the technique or principle "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. at 1014. The standard has been criticized, McCormick, Evidence § 203 at 491 (1972). The federal courts are divided on the issue in their application of Rule 702 and it does not appear that any clear generally applicable standard can be detected or formulated at this time. It is also unclear to what extent a Frye analysis will produce results different from a helpfulness or relevance analysis as under Rule 403. Compare United States v. McDaniel, 538 F.2d 408, 413 (D.C. Cir. 1976) and United States v. Baller, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019, 95 S.Ct. 456, 46 L.Ed.2d 391 (1975)(both dealt with spectographic voice identification). See also United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981). See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[03] (Supp. 1983)(cites Ninth Circuit decisions requiring general scientific acceptance as a prerequisite to admissibility).

The requirement of general scientific acceptance is in effect a requirement that the probative value of the evidence not be significantly outweighed by the risks of jury confusion, time wasting, or undue prejudice. Since that balancing is required under Rule 403, and since literal application of the general scientific acceptance test would preclude use of newly developed processes, even in contexts where they would pose no significant risks to the adjudicatory process, this rule requires only evidence of reliability for the foundation. Treating admissibility of scientific evidence as a relevancy problem accords with the modern view. See e.g., State v. Williams, 446 N.E.2d 444 (Ohio 1983); Barmeyer v. Montana Power Co., 657 P.2d 594 (Mont. 1983); State v. Hall, 297 N.W.2d 80 (Iowa 1980); State v. Williams, 388 A.2d 500 (Me. 1978); United States v. Williams, 583 F.2d 1194 (2d Cir. 1978).

In addition to weighing probative factors under Rule 403, the court should also assess the dangers posed by the particular kind of expert scientific evidence and evaluate the degree to which jurors might be over-impressed by the aura of reliability surrounding the evidence lest they abdicate their

role of critical assessment. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[03] (Supp. 1983).

Rule 702 defines the qualifications of an expert in broad terms. It requires that the expert witness be qualified by "knowledge, skill, experience, training or education." Under Rule 104(a) the determination of the qualification of the expert is a matter for the judge, and lies within his sound discretion. The federal courts have held his ruling will not be overturned in the absence of a clear abuse of discretion. See, e.g., Soo Line R. Co. v. Fruehauf Corp., 547 F.2d 1365 (8th Cir. 1977).

The federal decisions have pointed out that the expert need not have complete knowledge about the field in question. He need not be certain and he need not be unbiased. He need only be able to aid the jury in resolving a relevant issue. See 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[04] (Supp. 1983).

As noted by the Federal Advisory Committee, the rule is broadly phrased. "[T]he expert is viewed, not in a narrow sense, but as a person qualified by knowledge, skill, experience, training or education. Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values." Notes of Federal Advisory Committee on Proposed Rule 702.

Rule 702 recognizes that an expert may testify in the form of an opinion or otherwise. Thus, the expert might provide factual data or give the jury background material in a technical area or give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. E.g., an expert may explain techniques of pickpockets in a criminal prosecution for such activity or the mechanics of the numbers game in case of that kind.

Idaho law is substantially in accord with Rule 702.

In Sturgis v. Garrett, 85 Idaho 364, 379 P.2d 658 (1963), expert testimony was defined as follows: "Expert testimony is the testimony of persons who are particularly skilled, learned, or experienced in a particular art, science, trade, business, profession, or vocation, a thorough knowledge of which is not possessed by men in general, in regard to matters connected therewith." Id. at 368, (quoting with approval 20 Am.Jur. Evidence, Sec. 764, p. 634).

In several decisions the Idaho Court has defined an expert as follows: "An expert is generally defined as someone possessing a certain skill or knowledge which is beyond the

competence of the average layman or juror." Potter v. Mulberry, 100 Idaho 429, 432, 599 P.2d 1000 (1979); Stoddard v. Nelson, 99 Idaho 293, 297, 581 P.2d 339 (1978); Bean v. Diamond Alkali Company, 93 Idaho 32, 34, 454 P.2d 69 (1969); Basye v. Hayes, 58 Idaho 569, 76 P.2d 435 (1938). See also Greenstreet v. Greenstreet, 65 Idaho 36, 139 P.2d 239 (1943), where the Court, quoting from Ausmus v. People, 47 Colo. 167, 107 P. 205 (1909), defined an expert as:

> " * * * one who has superior knowledge of a subject, and is therefore able to afford the tribunal having the matter under consideration a special assistance, and his knowledge may have been acquired by professional, scientific, or technical training or by practical experience in some field of human activity conferring on him an especial knowledge not shared by men in general." 65 Idaho at 42, 139 P.2d at 242.

The special knowledge need not be obtained from formal training or education: "It is settled that formal training or education is not essential to qualify a witness as an expert. Practical experience will suffice for such purpose." Bean v. Diamond Alkali Company, 93 Idaho at 35 (citing Greenstreet v. Greenstreet, 65 Idaho 36). See also the following cases in which witnesses by reason of occupational experience were allowed to express expert opinions on various issues: Basye v. Hayes, 58 Idaho 569; Hobbs v. Union Pacific R.R. Co., 62 Idaho 58, 108 P.2d 841 (1940); Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 424 P.2d 733 (1967).

In Bean v. Diamond Alkali Company, the majority permitted onion farmers to testify that it was their opinion that an onion seed crop had been damaged by a certain chemical. The dissenting opinion by McQuade, J., and Donaldson, J., concurring, pointed out that the witnesses may have known a lot about growing onion seed and onions, but were "just fairly familiar" with diseases in such crops, and thus not qualified to express their opinion on that point, quoting from Wigmore, Evidence § 555 (3d ed. 1940), that "the capacity [to give expert testimony] is in every case a relative one, i.e., relative to the topic about which the person is asked to make his statement. . . ." 93 Idaho at 36.

The diverse opinions in Bean point out the need for a rule that permits flexibility in determining whether the expert is qualified and whether his testimony will be "helpful" to the trier of fact. There is no fixed rule by which a trial judge shall determine the exact degree of knowledge and skill an expert shall possess, but his competency to testify must be determined by the court. Carscallen v. Coeur d'Alene & St. Joe Transp. Co.,

15 Idaho 444, 98 P. 622 (1908). See also, e.g., State v. Lowe, 50 Idaho 96, 294 P. 339 (1930); Lowe v. Skaggs Safeway Stores, Inc., 49 Idaho 48, 286 P. 616 (1930).

Whether a witness is sufficiently qualified as an expert to state an opinion is a matter which is largely within the discretion of the trial court. E.g., Curtis v. DeAtley, 104 Idaho 787, 663 P.2d 1089 (1983); Sorensen v. Pickens, 99 Idaho 564, 585 P.2d 1275 (1978)(per curiam); State v. Watson, 99 Idaho 694, 587 P.2d 835 (1978); Bean v. Diamond Alkali Co., 93 Idaho 32, 454 P.2d 69 (1969); Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 424 P.2d 733 (1967); Hobbs v. Union Pac. R.R.Co., 62 Idaho 58, 108 P.2d 841 (1941).

The Idaho Court has also held that the "[a]dmissibility of expert opinion testimony is discretionary with the trial court and will not be disturbed absent a showing of an abuse of discretion." Brown v. Jerry's Welding and Const. Co., 104 Idaho 893, 665 P.2d 657 (1983); Stoddard v. Nelson, 99 Idaho at 29. See also, e.g., State v. Griffiths, 101 Idaho 163, 610 P.2d 522 (1980); Sorensen v. Pickens, 99 Idaho 564, 585 P.2d 1275 (1978)(per curiam); State v. Crook, 98 Idaho 383, 565 P.2d 576 (1977); Bean v. Diamond Alkali Company, 93 Idaho at 35; Davis v. Nelson-Deppe, Inc., 91 Idaho 463.

The test for determining whether to allow an expert to testify was enunciated by the Court in Bean: "A person possessing skill or knowledge qualifying him as an expert is generally allowed to express his opinion as to matters in issue when an opinion would be of appreciable help to the jury in finding the facts." 93 Idaho at 35, 454 P.2d at 72. See also Potter v. Mulberry, 100 Idaho 429; Stoddard v. Nelson, 99 Idaho at 297; Greenstreet v. Greenstreet, 65 Idaho 36.

In criminal proceedings the Idaho Court has stated that the necessity for expert testimony is confined to matters requiring special skill and knowledge not within the scope of understanding of ordinary untrained persons who make up a jury. State v. Griffiths, 101 Idaho 163, 610 P.2d 522 (1980).

In Idaho, the foundation for establishing a witnesses' qualifications as an expert must be offered before his testimony will be received in evidence. Failure to object to an insufficient showing constitutes a waiver of the error on appeal. Hobbs v. Union Pacific R.R. Co., 62 Idaho 58; Butler v. Anaconda Copper Mining Co., 46 Idaho 326, 268 P. 6 (1928).

No Idaho decisions have been found that deal with a novel form of expert testimony or the "general scientific acceptance" standard.

IDJI 124 provides in part that "[a] witness who has special knowledge in a particular matter may give his opinion on that matter." The Comments to the instruction advise against an instruction on "weighing expert testimony."

Action Recommended on Idaho Statutes or Rules: None required.

Rule 703. Basis of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

COMMENT TO RULE 703

Prior Idaho Statutes or Rules: None

Comparable Federal Rule: Identical to F.R.E. 703.

Comment: Rule 703 widens the basis on which experts at common law could rest their opinions and is intended to reflect more realistically the practice of experts.

"Rule 703 which governs the permissible bases upon which the opinion of an expert may be founded provides that the facts or data underlying the opinion may be derived from three possible sources. The first sentence of the rule codifies the universally accepted principle that an expert may base his opinion on (1) first hand information or (2) facts or data presented to him at trial. The second sentence--in a departure from some prior practice--allows an expert to base his opinion on data which could not be admitted in evidence provided it is of the type reasonably relied upon by experts in forming opinions upon the subject in their particular field of competence." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703 [01] (Supp. 1983).

Opinions based on non-admissible evidence were not ordinarily admitted because of the rule excluding hearsay. Such testimony was and by some still is considered unreliable and not subject to effective cross-examination as to the validity of the underlying facts. Rule 703 recognizes the practice in the federal courts that existed prior to the rule, which allowed experts to base their opinions on hearsay data in a number of situations, e.g., physicians and appraisers. See generally 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703 [02] (Supp. 1983).

Under Rule 703 expert testimony based on hearsay would be the rule, if certain conditions are met, rather than the exception. Thus, the trial court will have to find pursuant to Rule 104(a) that the particular underlying data is of a kind that is reasonably relied upon by experts in the particular field in reaching conclusions. See, e.g., Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1144 (4th Cir. 1980). Since Rule 703 is concerned with and focuses on the trustworthiness of the resulting opinion, it should not be allowed if the expert can show only that he customarily relies upon such material or that it is relied on only in preparing for litigation. The expert must demonstrate that the data used by him in formulating his opinion "is of the type reasonably relied

upon by experts in forming opinions upon the subject in their particular field of competence."

The federal courts appear to be divided in their application of the second sentence of Rule 703 between those favoring the admissibility of expert testimony and those taking a far more restrictive approach. Those taking the restrictive approach have determined that the expert could not have "reasonably relied upon" the data if it would have been excluded as hearsay. See, e.g., Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 505 F.Supp. 1313 (E.D. Pa. 1981). As is pointed out in 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703 [03] at 18 (Supp. 1983), the difficulty with cases such as Zenith Radio Corp. lies not in the actual results but in the court's "apparent assumption that trustworthiness of the underlying data is an independent factor which Rule 703 requires the judge to verify in order for the expert's testimony to pass the threshhold of admissibility. Were that so, Rule 703 would be redundant since the hearsay rules would be determinative and the second sentence of Rule 703 would be meaningless, except for saving the proponent of the expert the inconvenience of having to offer the underlying data into evidence."

The authors of Weinstein's Evidence suggest that the dangers feared by courts espousing the restrictive view of Rule 703 can in many cases be avoided through the use of pre-trial discovery and extensive cross-examination of the expert at trial. 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703 [03] (Supp. 1983). For a discussion of the relationship between the rules of discovery and Federal Rules of Evidence 703 and 705, see Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980), cert. denied, 450 U.S. 918, 101 S.Ct. 1363, 67 L.Ed.2d 344 (1981) ("[L]iberalization in the discovery area also resulted in liberalization in other areas. The increased availability of discovery concerning expert witnesses and the facts upon which they based their opinions, prompted reexamination of the hypothetical question requirement and other traditional foundational basis that were necessary prior to the introduction of opinion evidence. Criticism surrounding these areas mounted . . . It was in response to this criticism that Federal Rules of Evidence 703 and 705 . . . were enacted. . . . The combined effect of these new rules is to 'place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination.'").

In contrast to the restrictive view, Baumholser v. Amax Coal Co., 630 F.2d 550 (7th Cir. 1980) allowed an expert opinion that had relied on inadmissible hearsay consisting of a study performed by others. The expert had personally verified only about a third of the statistical information. The Court determined it was the type of data reasonably relied upon by other

experts in the field and need not be independently admissible. See also, e.g., Bauman v. Centex Corp., 611 F.2d 1115, 1120 n. 5 (5th Cir. 1980)(accountant could rely on files and financial statements of subject corporation and materials from library); Elgi Holdings, Inc. v. Insurance Co. of North America, 511 F.2d 957 (2d Cir. 1975)(fire expert testified that his conclusion that fire was a result of arson was verified by laboratory report not admissible in evidence); Nanda v. Ford Motor Co., 509 F.2d 213, 222 (7th Cir. 1974)(facts or data found in literature of the profession); United States v. Sims, 514 F.2d 147, 149 (9th Cir.), cert. denied, 423 U.S. 845, 96 S.Ct. 83, 46 L.Ed.2d 66 (1975) (trial court did not err in permitting psychiatrist testifying as expert witness on the issue of defendant's sanity to rely on conversations with government attorneys and IRS agents; court noted that "the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. . . . Years of experience teach the expert to separate the wheat from the chaff and to use only those relied upon by similar experts in arriving at sound opinions on the subject. Rule 703 is fully consistent with this view.").

Where the expert gives an opinion based upon inadmissible hearsay, the federal courts have concluded that the inadmissible hearsay used by the expert may be admitted solely to illustrate and explain the expert's opinion. It is not otherwise admissible as evidence. See American Universal Ins. Co. v. Falzone, 644 F.2d 65 (1st Cir. 1981)(witnessss was allowed to explain that his opinion was based in part on conversations with his colleagues; held, admissible so long as jury was charged that the statement was not admissible for its truth but only to show the basis for the opinion). See also United States v. Madrid, 673 F.2d 1114 (10th Cir.), cert. denied, 103 S.Ct. 96 (1982).

It has been observed that "[o]ne salutary aspect of practice under the rule is that experts who used to rely on material that was inadmissible, but who testified only on the basis of the admissible data, now may reveal the entire basis of their opinions. As a result, the jury may have a more candid statement of the reasons supporting an expert's conclusions and an opposing party might have a greater opportunity to challenge the expert's approach." Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 214-215 (1983).

In a criminal case the court may be required to consider additional factors in determining whether to admit expert opinion testimony based on inadmissible evidence. Although Rule 703 permits the use of hearsay to form the basis of an expert's opinion, the constitutional right of confrontation may require that the accused have the opportunity to cross-examine the persons responsible for the underlying data on which the expert relies. In United States v. Williams, 424 F.2d 344 (5th Cir.), petition for rehearing denied, 431 F.2d 1168 (1970), aff'd en banc, 447

F.2d 1285 (1971), cert. denied, 405 U.S. 954, 92 S.Ct. 1168, 31 L.Ed.2d 231, rehearing denied, 405 U.S. 1048, 92 S.Ct. 1308, 31 L.Ed.2d 591 (1972), decided before Rule 703 went into effect, but after it had been proposed, the court upheld the conviction, finding that the expert's opinion on value, based in part on records not introduced in evidence, was permissible and that the defendant's cross-examination of the expert satisfied confrontation requirements.

Under Idaho law, the facts or data upon which expert opinions are based may be derived from three possible sources: (1) facts personally observed; (2) facts introduced and heard by the witness at trial; and (3) facts in the form of a hypothetical question. G. Bell, Handbook of Evidence for the Idaho Lawyer, 66 (2d ed. 1972).

The Idaho Supreme Court has permitted expert testimony based in part on facts not independently admissible in evidence. It has held that an appraisal expert was entitled to testify as to his valuation opinion if the opinion was the product of the appraisal expert's independent judgment, even though based in part upon facts or opinions of others which ordinarily would be hearsay and inadmissible as independent evidence. Keller Lorenz Co., Inc. v. Insurance Associates Corp., 98 Idaho 678, 570 P.2d 1366 (1977). See also State ex rel. Symms v. Collier, 93 Idaho 19, 454 P.2d 56 (1969)(expert opinion testimony as to the value of property based on surrounding land sales was allowed as foundation or factual basis for opinion on issue of value, even though those sales were not sufficiently comparable to allow their admission into evidence as independent substantive evidence of the values of the property to which the comparison relates); Valdez v. Christensen, 89 Idaho 285, 404 P.2d 343 (1965) (objections that witness who testified as to rental value was not qualified, was not sufficiently familiar with property, and that he based his opinion on assumptions not supported by evidence were concerned with weight to be given opinion of witness rather than its admissibility). Cf. Thomas Helicopters, Inc. v. San Tan Ranches, 102 Idaho 567, 633 P.2d 1145 (1981)(farm manager's experience and responsibilities qualified him to testify concerning increased operating costs although he could not point to business records which set out additional costs).

The proposed Idaho Rule 703 is consistent with the approach in these decisions, although not with the traditional common law approach. To the extent that these decisions represent present Idaho practice, adoption of the Rule would work no change.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

COMMENT TO RULE 704

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Idaho Rule 704 is substantively identical to F.R.E. 704(a). The Idaho Rule omits subsection (b) of the Federal Rule.

Comment: Rule 704 abolishes the ultimate fact rule, as to both lay and expert witnesses.

The rule which excluded testimony on the ultimate fact because it would invade the province of the jury has been severely criticized. "The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from 'ursurping the province of the jury,' is aptly characterized as 'empty rhetoric.' 7 Wigmore § 1920, p. 17." Notes of Advisory Committee on Proposed Rules, Rule 704.

In Weinstein's Evidence it is pointed out that in practice neither the rule nor its rationale worked for a number of reasons: (1) the distinction between ultimate and non-ultimate facts proved impossible to draw; (2) it was at times impossible for a witness to couch his testimony in anything but ultimate facts; (3) the expressed rationale for the ultimate fact rule made little sense in that experts cannot invade the province of the jury because jurors are free to draw their own conclusions; (4) to further complicate the situation, a number of courts attempted to draw a distinction between testimony on an ultimate fact and testimony on an issue of law, allowing the former but barring the latter, requiring separation of matters of law from matters of fact, an often impossible task. 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 704[01] (Supp. 1983).

Prior to enactment of Rule 704, the federal courts and many other jurisdictions had all but abandoned the rule or "tolerated violation" of it. 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 704[01] (Supp. 1983). See also Federal Advisory Committee Notes to Proposed Rule 704 ("Many modern decisions illustrate the trend to abandon the rule completely.").

Fed. R. Evid. 704 was amended by Congress effective October 12, 1984 to add subsection (b) which provides "[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the

mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." Comprehensive Crime Control Act of 1984, Ch. IV, Insanity Defense Reform Act of 1984, § 404, Title II of House Joint Resolution 648, Pub. Law 98-473. See 36 Criminal Law Rptr. 3017, 3045. The amendment was not generally publicized until December 1984 and neither the Idaho Evidence Committee or the Idaho Supreme Court have considered adoption of the amendment for Idaho.

Abolition of the ultimate fact rule does not mean that all opinions must be admitted. The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. Under Rules 701 and 702 opinions must be helpful to the trier of fact and before expert testimony is allowed the court must determine that the situation is a proper one for expert testimony. Rule 403 permits exclusion of opinion testimony when its probative value is substantially outweighed by the danger of unfair prejudice, confusion or waste of time. In addition, Rule 705 authorizes the court to require preliminary disclosure of the data underlying the opinion so that the jury will have adequate information with which to evaluate the opinion.

The witness should not be allowed to merely tell the jury how to decide the case, e.g., whether plaintiff or defendant should win, because that form of testimony is not deemed helpful to the trier of fact. See, e.g., United States v. R. J. Reynolds Tobacco Co., 416 F. Supp. 316, 325 (D.N.J. 1976)("Opinions are valueless as evidence without exploration of the underlying facts and rationale showing the path from the facts to the opinion. See Fed. Ev. Rule 702-707. The testimony of these witnesses was not helpful to the finder of fact."). Similarly opinion testimony as to whether a person had capacity to make a will should be excluded; whereas, opinion testimony as to whether he had sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution would be allowed.

If the expert's opinion is a purely legal conclusion or concerns the law of the case, it is inadmissible. Decisions on the law are not decisions that the jury, the factfinder, makes. They are for the judge to make in his capacity as legal officer. See, e.g., Marx & Co. v. Diner's Club, Inc., 550 F.2d 505 (2d Cir. 1977), cert. denied, 434 U.S. 861 (1977)(error to permit expert to testify as to legal obligations under a contract).

Idaho law does not allow a lay witness to express an opinion except when he testifies from knowledge or information within his reasonable perception and it would not otherwise be available to the jury. See Comment to Rule 701. The Idaho Supreme Court has ruled that generally a witness must be asked

questions calling for the most concrete and factual description possible, and the trial court can properly exclude questions designed to elicit answers in the form of opinions which intrude on the jury's fact-finding competence, even on cross-examination of the lay witness. State v. Dillon, 93 Idaho 698, 471 P.2d 553, cert. denied 91 S.Ct. 947, 401 U.S. 942, 28 L.Ed.2d 223 (1970).

Rule 704 is consistent with Idaho case law. Idaho allows expert testimony to include an ultimate fact or issue so long as the testimony will aid the trier of fact. See, e.g., Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 424 P.2d 733 (1967); Mason v. Hillsdale Highway District, 65 Idaho 833, 154 P.2d 490 (1945); Dedman v. Oregon Short Line R.R. Co., 57 Idaho 160, 63 P.2d 667 (1936); Hayhurst v. Boyd Hospital, 43 Idaho 661, 254 P. 528 (1927)(citing Wigmore in holding that the usurpation theory had been completely exploded); Cochran v. Gritman, 34 Idaho 654, 203 P. 289 (1921); Jones v. City of Caldwell, 20 Idaho 5, 116 P. 110 (1911)(stating that no expert can usurp the function of the jury since the witness can only give his opinion and the jury may reject it if they believe the witness was mistaken).

The Idaho Court has recognized that the opinion of the witness may be excluded if not helpful to the trier of fact. See, e.g., State v. Griffiths, 101 Idaho 163, 610 P.2d 522 (1980)(in manslaughter case where defendant claimed self-defense, the refusal to permit a witness who had testified as to effects of fear to also testify whether, in his opinion, defendant had been in state of fear at time of the shooting was not error, in light of fact that fear was an emotion within the understanding of the jury and that jury was as capable as a psychiatrist in regard to determining the ultimate fact whether defendant had acted under fear); State v. Neil, 58 Idaho 359, 74 P.2d 586 (1937)(jury was as well equipped to draw inferences as were mechanics). See also State v. Greensweig, 103 Idaho 50, 644 P.2d 372 (Ct. App. 1982)(testimony would have been cumulative and exclusion was within trial court's discretion).

Action Recommended on Idaho Statutes or Rules: None required.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, provided that the court may require otherwise, and provided further that, if requested pursuant to the rules of discovery the underlying facts or data were disclosed. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

COMMENT TO RULE 705

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Substantially similar to F.R.E. 705 except to add a proviso that conditions the admissibility of the expert's unfounded opinion testimony on prior disclosure of the underlying facts or data in discovery, if discovery was requested.

Comment: Rule 705 eliminates the requirement that the facts or data underlying an expert's opinion be disclosed before his opinion or inference can be received in evidence "unless the court requires otherwise."

As is pointed out in the Federal Advisory Committee Notes to Rule 705, "[w]hile the rule allows counsel to make disclosure of underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced." Should he fail to do so, the expert may in any event be required to disclose the underlying facts or data on cross-examination.

A significant effect of the rule is the elimination of the need to propound the hypothetical question to the expert as a means of providing the foundation for his opinion testimony.

The requirement of the hypothetical question has long been condemned by the commentators. Wigmore complained that:

> The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may be so built up and contrived by counsel as to represent only a partisan conclusion.
>
> In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction.

9 Wigmore, Evidence § 686 at 812 (3d ed. 1940).

Wigmore suggested that the abuses propagated by the use of hypothetical questions could be avoided:

> By exempting the offering party from the requirement of using the hypothetical form; by according him the option of using it, --both of these to be left to the trial court's discretion; and by permitting the opposing party on cross-examination, to call for a hypothetical specification of the data which the witness has used as the basis of the opinion. The last rule will give sufficient protection against a misunderstanding of the opinion, when any actual doubt exists.

Id. at 813.

Rule 705 incorporates each feature of Wigmore's proposal. The requirement of the hypothetical question is abolished, and use of this technique is made optional, subject, however, to the discretion of the court. On cross-examination, as Wigmore proposed, the cross-examiner may bring out the underlying data. See 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 705 [01] (Supp. 1983).

Rule 705 is not intended to eliminate foundational questions. More often than not, providing the jury with the actual facts or data underlying the expert's opinion will enhance the value of the expert testimony. Rule 705 and the other rules contained in Article VII are designed "to remove stereotyped, long, belabored and nonsensical hypothetical questions from the arena of trial. They are designed to make expert testimony more communicative to the trier of fact without totally destroying exclusionary rulings." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 705 [03] (Supp. 1983), quoting from Twin City Plaza, Inc. v. Central Surety and Insurance Corp., 409 F.2d 1195, 1201 (8th Cir. 1969).

Rule 705 does not eliminate the requirement that the expert satisfy the minimal foundational requirements of Rule 703. Thus, if an expert does not have any knowledge of the facts of the case or familiarity with the data that experts in the field would reasonably rely upon, he will still have to be provided the facts to meet the foundational requirements. In this situation the hypothetical question may still be required.

Under Rule 403, the Court has the power to exclude confusing or repetitious or unnecessary hypotheticals if it finds their probative value is substantially outweighed by the dangers of prejudice, confusion or waste of time.

Idaho law allows an expert to base his opinion on facts or data obtained in three ways: (1) facts personally observed; (2) facts heard by him during trial; and (3) facts presented in the form of the hypothetical question which embraces facts which are in evidence. The facts or data underlying the expert's opinion must be disclosed before he can state that opinion. Cox v. Crane Creek Sheep Co., 34 Idaho 327, 200 P. 678 (1921). In the absence of sufficient foundation, his opinion may be rejected. Hobbs v. Union Pacific R.R. Co., 62 Idaho 58, 108 P.2d 841 (1940). See also Van v. Union Pacific Railroad Co., 83 Idaho 539, 366 P.2d 837 (1961).

The Idaho Supreme Court has held that a hypothetical question containing facts claimed to be proved may be asked an expert to obtain his opinion on such facts without infringing on the province of the jury; the jury not being compelled to accept the expert's opinion when given. Jones v. City of Caldwell, 20 Idaho 5, 116 P. 110 (1911). See also State v. Chaffin, 92 Idaho 629, 448 P.2d 243 (1968).

In Evans v. Cavanagh, 58 Idaho 324, 73 P.2d 83 (1937), the Idaho Court stated that the facts which the testimony tends to establish and which are relied on by the party propounding the question to the expert should be hypothetically stated, and the expert's testimony should be responsive to the question and be based on the assumption that such facts are true.

G. Bell observes that "[t]he scope and the limitations of hypothetical questions have caused the Idaho Supreme Court considerable difficulty. It is not easy to obtain from the Idaho decisions very clear guides as to the nature and scope of the hypothetical questions which may be asked expert witnesses. Obviously, the facts in each case largely affect the conclusion reached by the court in the particular case." G. Bell, Handbook of Evidence for the Idaho Lawyer, 67 (2d ed. 1972).

When an expert's testimony is elicited in the form of a hypothetical question, the question must generally be based on facts or data admitted by the adverse party or be supported in evidence in the record at the time the question is propounded. State v. Birrueta, 101 Idaho 915, 623 P.2d 1292 (1981); Evans v. Bannock County, 59 Idaho 442, 83 P.2d 427 (1938). But, it is within the trial judge's discretion to allow a hypothetical question based on facts not yet in evidence subject to a later motion to strike it if the necessary evidence is not forthcoming. Willis v. Western Hospital Ass'n., 67 Idaho 435, 182 P.2d 950 (1947). See also State v. Chaffin, 92 Idaho 629, 448 P.2d 243 (1968); State v. Johnson, 92 Idaho 533, 447 P.2d 10 (1968).

The ultimate test of the validity of a hypothetical question is its "fairness," Hollandsworth v. Cottonwood Elevator Co., 95 Idaho 468, 511 P.2d 285 (1973), as to both form and

content, a matter largely for the trial court's discretion. State v. Chaffin, 92 Idaho 629, 448 P.2d 243 (1968). See also Bancroft v. Smith, 80 Idaho 63, 323 P.2d 879 (1958); McKee v. Chase, 73 Idaho 491, 253 P.2d 787 (1953)(question contained a fair statement of pertinent facts in issue); Hancock v. Halliday, 70 Idaho 446, 220 P.2d 384 (1950)(form and content rests largely in trial court's discretion),(a hypothetical question which does not clearly state all the necessary facts is incompetent),(a hypothetical question should fairly reflect all facts admitted or proved by both sides, but a question should not be rejected because it does not include all facts, unless it thereby fails to present the case fairly); Willis v. Western Hospital Ass'n., 67 Idaho 435, 182 P.2d 950 (1947)(court should reject hypothetical questions which unfairly select part of the facts proved or omit material parts).

The Idaho Supreme Court has disapproved the practice of an expert basing his opinion on "all of the evidence in the case." See Evans v. Cavanagh, 58 Idaho 324, 332, 73 P.2d 83 (1937)(Court condemned question to expert whether defendant was sane "based upon all the evidence in the case" reasoning that it usurped the function of the jury and adding: "We think it is not competent, in any case, to predicate an hypothetical question to an expert upon all of the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it; for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not.").

In Flowerdew v. Warner, 90 Idaho 164, 172, 409 P.2d 110 (1965), the Idaho Supreme Court upheld the trial court's rejection of a physician's opinion testimony because it was not presented in hypothetical form stating "[n]ormally the opinion of an expert is based upon a hypothetical question, with the facts upon which the opinion is based being set out in the question itself. Evans v. Cavanagh, 58 Idaho 324, 331, 73 P.2d 83; Hancock v. Halliday, 70 Idaho 446, 220 P.2d 384. Here the question seeking the witness's opinion, was improperly presented, not being in hypothetical form."). See also Osborn v. Carey, 24 Idaho 158, 132 P. 967 (1913)(Court ruled that an opinion by a medical expert based on the case history given by the patient, his friends and his parents was improperly admitted in evidence when the history was not introduced into evidence).

The right and duty of properly framing a hypothetical question rests primarily on counsel by whom the question is asked and he should not be permitted to frame an improper question and then cast the burden of supplying its deficiencies on the opposing counsel. Willis v. Western Hospital Assn., 67 Idaho 435, 182 P.2d 950 (1947). However, the Idaho Court has also held that the counsel offering the witness may embrace in his hypothetical question such facts as he may deem established by

the evidence. If opposing counsel does not think all the facts established are included in the question, he may include them in questions on cross-examination and if on cross-examination the omitted areas are covered, the defect in the original question has been cured. State v. Tharp, 48 Idaho 636, 284 P. 201 (1930). See also Anderson v. Lloyd, 64 Idaho 768, 139 P.2d 244 (1943). And in State v. Chaffin, 92 Idaho 629, 448 P.2d 243 (1968), the Court stated that it is rarely error to admit an opinion when the foundation is insufficient since the adequacy of the facts assumed may be questioned on cross-examination.

The rules contained in Article VII may have a substantial impact on trial preparation to the extent that the opponent of the party presenting the expert witness will need to discover his identity, qualifications, the opinions he will offer, and the facts or data underlying those opinions before an effective objection can be made under Rules 702, 703 or 705.

The Federal Advisory Committee Notes to Rule 705 state that "Rule 26(b)(4) of the Rules of Civil Procedure provides for substantial discovery in this area." However, it has been observed that:

> "The Federal Rules of Criminal Procedure do not provide for any broad discovery, and Rule 26(b)(4) of the Federal Rules of Civil Procedure provides only for a written summary of the opinion and its basis. Since this summary will be prepared by the attorney presenting the expert, it will likely be cursory. Depositions are allowed only in the judge's discretion, and at some financial risk. . . . Many U.S. District Judges . . . automatically require, in pretrial conference, in every case (at least, every civil case) where there are to be expert witnesses, that the parties exchange detailed written statements of the opinions, with their grounds. The judge serves notice that he intends to strike any testimony that goes beyond what was furnished. The tactic of keeping the written submission narrow and vague becomes risky, because the testimony, if more incisive and full, could be stricken."

Clark Boardman, Federal Rules of Evidence, 292-293 (2d ed. 1978). See also, e.g., Smith v. Ford Motor Co., 626 F.2d 784, 791 (1980)(reviewed "The Interface Between Pretrial Discovery And the Presentation of Expert Testimony;" held that prejudicial error occurred in admitting medical expert's testimony where plaintiff failed to provide any information, in form of interrogatory responses, about such expert or his proposed testimony;

plaintiff's duty to supplement was not fulfilled by description of expert's testimony provided in his supplemental pretrial submission).

Idaho Criminal Rule 16 provides for broader discovery than the comparable Federal Rule. Although the Idaho Criminal Rule does not expressly provide for discovery of an expert witness' qualifications, opinion or the underlying facts or data, I.C.R. 16(b)(8) empowers the court, in its discretion, to order that "additional material or information" be made available to the defendant upon a showing that he has substantial need in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent by other means. No similar provision exists for the benefit of the prosecution.

Idaho Rule of Civil Procedure 26(b)(4) is substantially similar to Federal Rule 26(b)(4) except that the Federal Rule, under subpart (A)(i), additionally permits a party to require any other party to provide "a summary of the grounds for each opinion." I.R.C.P. 26(b)(4) provides:

> Trial preparation -- Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

In at least one jurisdiction the rules specifically require notice of proposed expert testimony, including the opinion and its grounds, in civil and criminal cases. See, e.g., Report, Canadian Law Revision Commission, Evidence, Code Section 72 (1976). See also Nebraska Evidence Rule 705 (adds a 26(b)(4) type provision applicable to civil cases); Hawaii Evidence Rule 705 ("The expert may testify in terms of opinion or inference and give his reasons therefor without disclosing the underlying facts or data if the underlying facts or data have been disclosed in

discovery proceedings."); Maine Evidence Rule 705 (permits voir dire examination of expert out of presence of jury directed to the underlying facts or data before the witness gives his opinion); Washington Evidence Rule 705 (rule is identical to F.R.E. 705; comment advises the court to liberally grant permission for depositions and other discovery with respect to experts).

In recognition of the shift in emphasis to cross-examination and the increased need for prior disclosure of the facts or data upon which an expert witness will base his opinion, when his opinion testimony is to be offered without laying the traditional foundation, the Idaho Committee determined to include a provision in the rule that would condition the admissibility of such testimony on prior disclosure of the underlying facts or data in discovery, but only if discovery was requested. If a request was made in discovery and successfully opposed, or otherwise not complied with by the proponent of the evidence, the proposed Idaho Rule would preclude an opinion given without disclosure of the underlying facts or data.

The phrase "if requested" is intended to impose the burden on the party opposing the expert's unfounded opinion testimony to request discovery of the underlying facts or data. If the party opposing the testimony fails to request discovery of the underlying facts or data, the failure of the party proffering the testimony to have previously disclosed the same will not be grounds to bar the expert's testimony "unless the court requires otherwise." This condition is applicable only if the expert's testimony in terms of opinion or inference and his reasons therefor are offered without prior disclosure of the underlying facts or data at a trial or hearing.

<u>Action Recommended on Idaho Statutes or Rules</u>: None required.

R

Rule 706. Court Appointed Experts

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by any party or by the court pursuant to Rule 614(a). He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Parties' experts of own selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

COMMENT TO RULE 706

Prior Idaho Statutes or Rules: Idaho Code §§ 9-205, 9-1603; I.C.R. 28.

Comparable Federal Rule: Substantially identical to subsections (a), (b) and (d) of F.R.E. 706. In the penultimate sentence of subsection (a) the language "by any party or by the court pursuant to Rule 614(a)" is substituted for "by the court or any party." In subsection (b) the phrase "for the taking of property" is substituted for "under the fifth amendment" to conform the rule to state practice. Subsection (c) of F.R.E. 706 is omitted.

Comment: Rule 706 recognizes the inherent common law power of the trial court to call expert witnesses. See Hart v. Community School Bd. of Brooklyn N.Y.Sch. D.#21, 383 F.Supp. 699 (E.D.N.Y.), aff'd, 512 F.2d 37 (2d Cir. 1975)(full discussion of masters as experts); Scott v. Spanjer Bros. Inc., 298 F.2d 928, 930 (2d Cir. 1962)("Appellate courts no longer question the inherent power of a trial court to appoint an expert under proper circumstances, to aid it in the just disposition of a case," citing Ex parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed 919 (1920); 9 Wigmore, Evidence § 2484, p. 270 (3d ed. 1940))(Court appointed "an impartial neurosurgeon" because it believed it had a duty to protect an infant's rights). The rule, however, restricts the power of the court to call witnesses to proceedings or situations when the court is the trier of fact as provided in Rule 614(a).

Rule 706 is applicable in both civil and criminal cases. It is patterned after Rule 28 of the Federal Rules of Criminal Procedure which codified the judge's right to call expert witnesses in criminal cases in the federal courts.

Idaho Rule 706 omits subsection (c) of the Federal Rule which permits the court to inform the jury that an expert witness have been appointed by the court. Unlike the counterpart Federal Rules, Idaho Rules 614(a) and 706(a) restrict the power of the court to call witnesses to proceedings and situations when the court is the trier of fact. Thus, there is no need for that provision in the Idaho Rules of Evidence. The restriction applies to both non-expert and expert witnesses. To ensure that result, Rule 706(a) empowers the court to call an expert witness "pursuant to Rule 614(a)." On the other hand, the

omission of subsection (c) of the Federal Rule should not be construed as prohibiting the trial courts from ever informing a jury that a witness called by a party was appointed by the court if the circumstances dictate, in the interest of due process and fair trial, that the jury should be so informed.

Subsection (a) provides restrictions on the judge's common law power to appoint experts. The trial judge has discretion on whether to appoint an expert witness and has the option to appoint an expert on whom the parties agree. The expert must consent to act. The trial judge has the option of informing the witness of his duties in writing or at a conference with the parties.

Rule 706 goes beyond Fed. Crml. Rule 28 in that it expressly permits the parties to take the deposition of the expert, a practice not previously available to the defendant in a federal criminal case.

Rule 35(a), Fed. R. Civ. Proc. empowers the court to order the physical or mental examination of a party or person in custody or legal control of a party. The party examined is entitled to a report of the examining physician. Rule 35 provides for an exchange of reports and that the exchange of reports does not bar the taking of the physician's deposition "in accordance with the provisions of any other rule." With respect to Rule 35, it has been observed that:

> Practice pursuant to Rule 35 is particularly pertinent to Rule 706 because it has been suggested that "[i]t would be possible to construe Rule 35 as it now stands as providing for impartial medical examination--i.e. that the court pursuant to Rule 35 could appoint a medical expert of its own choice.
>
> Rule 706 is silent on what use may be made of the depositions at trial. Presumably the restrictions of Rule 32 of the Rules of Civil Procedure and Rule 15 of the Rules of Criminal Procedure would apply. In a criminal case, the use of a deposition taken by the government may raise as yet unresolved questions of the scope of defendant's rights under the Confrontation Clause of the Sixth Amendment.
>
> Rule 706 will have to be read in conjunction with procedural provisions governing examinations by experts. As indicated above, Rule 35 of the Civil Rules of Procedure deal-

> ing with physical and mental examinations was interpreted by some prior to the enactment of Rule 706 as authorizing the court to appoint impartial medical experts.

3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 706 [02] at 18 Supp. 1983).

Rule 706(a) empowers any party or "the court pursuant to Rule 614(a)" to call the expert as a witness. This deviation from the language of the Federal Rule is intended to make clear that notwithstanding the power to appoint expert witnesses, the power of the court to call expert witnesses to testify is restricted to proceedings and situations when the court is the trier of fact.

The appointment and use of an interpreter under this rule is not deemed to be the same as "calling" a witness.

Each party's right to cross-examine the witness is recognized, even if a party exercises its right under Rule 706(a) to call the court appointed expert itself. See Rule 611 as to cross-examination.

Idaho has no general statute or rule expressly conferring or denying the power of the trial courts to call witnesses and no case law has been found. There are, however, specific statutes that empower the Idaho trial court to call an expert witness in particular proceedings. See, e.g., Idaho Code § 7-1116 (empowers the court to call experts to testify to their findings as to blood tests in paternity proceedings and provides they shall be "subject to cross-examination by the parties."); Idaho Code § 37-2508 (in prosecutions for adulterated or misbranded oils, "in case it is necessary" the court can subpoena a chemist for testimony and pay his expenses from county funds which are then chargeable as costs if defendant is convicted); Idaho Code §§ 9-205 (empowers trial courts to appoint interpreters in civil and criminal actions).

Idaho Criminal Rule 28 provides for the appointment of an interpreter in criminal actions in language substantially identical to Idaho Code § 9-205. Unlike Fed. R. Crml. Proc. 28, it contains no provision for appointment of other expert witnesses.

Under Idaho Code § 1-1603(6) the court has power "[t]o compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code." The same power is conferred on judicial officers by Idaho Code § 1-1901(3). In addition, Section 1-1622 confers incidental powers:

> When jurisdiction is, by this code, or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specifically pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

As noted above, the power of the court to call witnesses was well recognized at common law. By statute, Idaho has provided that the common law is the rule of decision in the Idaho courts "so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws." Idaho Code § 73-116. On other issues, the Idaho Court has held, "that where the statute or rule does not prescribe the procedure, the common law or other appropriate method will be followed in the exercise of inherent judicial power." J.I. Case Company v. McDonald, 76 Idaho 223, 230, 280 P.2d 1070 (1955).

In the absence of any statute or statutory scheme depriving the court of the power to call witnesses, it is the opinion of the Idaho Committee that the power exists in Idaho by virtue of Idaho Code §§ 1-1603(6), 1-622 and 73-116.

Subsection (b) provides for payment of compensation to the expert appointed by the court: "reasonable compensation in whatever sum the court may allow to be paid from public funds in criminal cases and civil condemnation actions." In other civil actions it is chargeable to the parties in such proportion and at such time as the court directs and may be taxed as costs. Condemnation actions are excepted to guard against reducing constitutionally guaranteed just compensation if payment of costs were required by the landowner. Contingent fee arrangements have generally been held improper. See, e.g., Osguthorpe v. Anschutz Land and Livestock Company, 456 F.2d 996, 1005-1006 (10th Cir. 1972).

In a paternity proceeding, under Idaho Code § 7-1117, "the compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by the county . . ." and the fees may be taxed as costs.

As previously noted, in a prosecution for adulterated or misbranded oil the "actual and necessary expenses" of the court

appointed chemist shall be paid by the county and may be taxed as costs upon conviction. Idaho Code § 37-2508.

Also as previously noted in the Comment to Rule 604, interpreters are entitled to receive a reasonable fee as set and determined by the court to be paid out of general county funds. Idaho code §§ 9-205 and 9-1603; I.C.R. 28.

Idaho Code § 9-1601 provides that "witnesses in civil actions in district or magistrates division thereof, or any referee, master or commissioners thereof, are entitled to receive such witness fees and travel expenses as determined by the trial court pursuant to the Idaho Rules of Civil Procedure." I.R.C.P. 45(c)(1) provides that "witness fees and expenses in the district court and magistrates division shall be in the amounts provided for under Rule 54(d)(1)." Expert witness fees which can be allowed as costs as a matter of right under I.R.C.P. 54(d)(1)(C) for an expert who testifies at a deposition or at a trial of an action cannot exceed $250 for each expert witness for all appearances. Additional items of costs in excess of those allowed as a matter of right may be awarded upon a proper showing. Under I.R.C.P. 54(d)(1)(E) "[t]he Court may assess and apportion as costs between and among the parties to the action, in the sound discretion of the court, all fees and expenses of masters, receivers or expert witnesses appointed by the court in the action."

<u>Subsection (c)</u> incorporates the last sentence of Fed. Crml. R. 28 authorizing the parties to call their own expert witnesses notwithstanding Rule 706.

<u>Action Recommended on Idaho Statutes or Rules</u>: Amend Idaho Code §§ 9-205 and 9-1603 to conform to Rule 706 in regard to the source of payment of fees.

R X

INTRODUCTORY COMMENT TO ARTICLE VIII

HEARSAY

The Federal Advisory Committee's Introductory Note On The Hearsay Problem points out that the factors to be considered in evaluating testimony of a witness are perception, memory and narration. Traditionally, to foster reliable testimony the witness has been generally required to testify: (1) under oath or affirmation, (2) in the personal presence of the trier of fact so demeanor can be observed, and (3) subject to cross-examination.

"The danger against which the hearsay rule is directed is that evidence which is untested by these three conditions will be unreliable because faults in the perception, memory and narration of the declarant will not be exposed." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 800[01] at 11 (Supp. 1983). Cf. United States v. Frank, 520 F.2d 1287 (2d Cir. 1975), cert. denied, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976)(by virtue of witness' refusal to answer "proper, relevant questions on cross-examination going directly to the heart of his testimony on direct examination, the direct testimony became hearsay, since not subject to cross-examination, and was therefore properly struck.").

Article VIII codifies the hearsay rule and its various exceptions. It creates a system of class exceptions to the hearsay rule, supplemented by two open-ended "catch all," or residual, exceptions. In addition, some statements which have traditionally been admitted as hearsay exceptions, such as party admissions, are defined in Rule 801 as non-hearsay.

The Article consists of six rules. Rule 801 is the definitional section. Rule 802 articulates the general rule that hearsay is not admissible into evidence except as permitted by specific exceptions. Rules 803 and 804 prescribe the exceptions. The twenty-four exceptions enumerated in Rule 803, unlike those enumerated in Rule 804, are not premised upon the unavailability of the extrajudicial declarant as a witness at trial. The Rule 803 exceptions were believed to reflect somewhat stronger guarantees of trustworthiness than the Rule 804 exceptions, thus accounting for the disparate treatment. Rule 805 deals in the conventional manner with the problem of multiple hearsay. Finally, Rule 806 authorizes introduction of evidence attacking or supporting the credibility of any extrajudicial declarant on the same terms as if he had appeared and testified at trial.

To further enhance reliability the first-hand knowledge requirement of Rule 602 must be read into the hearsay exceptions governed by Rules 803 and 804. See Federal Advisory Committee's Notes to Rule 803.

The trial judge must exercise discretion in applying the hearsay rules to implement the rules' paramount goal of ensuring just and accurate determinations. See Rule 102. In addition to determining whether the proffered evidence is relevant, he must weigh the need and the value of the evidence against the dangers it would pose. See Rule 403. Factors to be considered include the availability of the declarants, the availability of other evidence, the nature of the statement, the nature of the case, whether a jury or non-jury case, and whether a criminal or civil case. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 800[03] (Supp. 1983).

In a criminal case there is greater danger of prejudice to an accused and additional limiting factors must be considered such as the right of confrontation, limitations on the use of extrajudicial statements of the accused imposed by the privilege against self-incrimination and the right to counsel, and rather limited discovery. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 800[03]-[04] (Supp. 1983); Federal Advisory Committee's Introductory Note on the Hearsay Problem.

"In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility." Federal Advisory Committee's Introductory Note on the Hearsay Problem.

Idaho Article VIII is identical to Federal Article VIII, except that: Idaho Rule 802 omits exceptions prescribed by statute; Rule 803(8) states the more restrictive language of the Uniform Rule (1974) with regard to investigative reports and factual findings of administrative agencies; Rule 803(16) requires thirty years for "ancient" documents; Rule 803(18) permits physical admission of learned treatises "upon motion and order for good cause shown;" Rule 803(22) is conformed to state practice; and, Rule 803(23) regarding "judgments as to personal, family or general history, or boundaries" is not adopted.

Contrary to the predictions of some critics of the rules, the Article VIII rules have resulted in few significant problems in application in the federal courts. The issues that have arisen appear for the most part to have existed at common

law and to be the product of the application of the policy of the rules to the circumstances of individual cases, rather than the product of the language of the rules.

The types of issues that have arisen under Rule 801(d)(1) involve factual questions such as whether a witness with memory problems is "subject to cross-examination," whether a prior statement is in fact inconsistent, or whether the witness was under the "improper influence or motive" when the prior statement was made. Under Rule 801(d)(2) questions have arisen whether the declarant is an agent or authorized to make a statement for the principal, whether statements of government agents should be admissible against the government, whether the agent-declarant had or is required to have personal knowledge of the facts underlying his vicarious admission, whether the quantum of proof to establish a coconspiracy has been satisfied, and whether the hearsay statement should be considered in deciding whether the conspiracy exists. These types of questions would not be eliminated by simply changing the rules and the Idaho Committee made no attempt to do so.

Under Rule 803 factual questions have arisen such as whether the Rule 803(1) requirement of "substantial contemporaneity" has been satisfied, whether the statements made for medical diagnosis or treatment under Rule 803(4) relate to "fault," and whether the evidence offered under Rule 803(24) satisfies all of the criteria for admission. Again, the Idaho Committee determined that these types of questions could not be resolved by changes in the rules.

An issue has developed in which the federal courts are divided, whether Rule 803(3) (existing mental, emotional, physical condition) permits statements of declarant's intent as to future conduct to be admitted to prove another's future conduct. An issue has arisen with conflicting decisions whether Rule 803(6) (business records) requires that the source of the information in the record need be under a business duty to supply that information as a condition for admissibility. An issue has arisen under Rule 803(24) whether the "near miss" evidence, i.e., that evidence which is generically of a type covered but which fails to meet precise requirements of that exception can be admitted under the residual exception. An additional issue has arisen under Rule 803(24) and Rule 804(5), with conflicting decisions, whether the requirement of notice of intent to rely on the residuary exception should be strictly construed. The approach to each of these issues by the federal courts appears to be based more on a determination whether the evidence proffered is trustworthy, rather than legislative interpretation of the rules. Since the hearsay exceptions are "exceptions" to the rule of exclusion, they are better left to determination based on

"need" and "trustworthiness" on a case-by-case basis and the Idaho Committee made no attempt to formulate any changes in these rules.

The application of Federal Rule 803(8) which greatly expanded the admissibility of public records has resulted in many issues under both the hearsay rule and the confrontation clause. The Idaho Committee attempts to avoid many of the problems by recommending adoption of the more restrictive language of Uniform Rule 803(8) (1974).

Federal Rule 803(24), in what appears to be a drafting oversight, contains no provision for the physical admission of treatises or excerpts from treatises such as charts. Although it has apparently caused no significant problem in the federal system, the Idaho Committee is recommending a provision in the rule that would permit limited physical admission of these materials.

Under Rule 804, as under Rule 803, factual questions have arisen in the application of the rule such as whether a statement is against the declarant's penal or other prescribed interest. These questions cannot be solved by changing the rule and the Idaho Committee made no attempt to do so.

Under Rule 804(b)(1) a significant question has arisen in the federal courts as to when the "predecessor in interest" requirement is sufficiently satisfied to admit former testimony. The federal courts appear divided whether to apply a "similarity in motive" approach or a "community of interest" approach. In no case have they required privity. The decisions seem to turn more on the circumstances of the particular case and no articulable standard, short of requiring actual identity of the parties or privity appears feasible. Neither of these alternatives is deemed satisfactory. Thus the Idaho Committee made no attempt to change the rule.

Finally, issues have arisen under Rule 804(b)(3) whether statements against penal interest which inculpate the declarant as well as the accused or which exculpate the accused have sufficient "indicia of reliability" to be admissible. The hearsay aspects of the issues are not created by the rule and cannot be solved by changing the rule. The constitutional issues inherent in this type of evidence cannot be resolved by these rules and the Idaho Committee made no attempt to do so. See generally Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 229-311 (1983).

Rule 801. Definitions

The following definitions apply under this Article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony and was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

COMMENT TO RULE 801

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 801.

Comment: Rule 801 provides the definitions that govern all hearsay questions under Article VIII.

Subsection (a) defines a "statement" to include both "(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by him as an assertion."

The term "assertion" has particular significance in relation to nonverbal conduct offered in evidence to prove by inference the truth of the matter asserted. If nonverbal conduct is not intended as an "assertion," then it does not constitute a "statement," and if it is not a "statement," it is not then "hearsay".

Nonverbal conduct, also known as an implied assertion, proffered to prove a fact in issue was treated as hearsay at common law. See, e.g., Wright v. Doe d. Tatham, 5 CR. & Fin. 670, 7 Eng. R. 559 (1838)(final appellate stage in House of Lords)(in a will contest action, letters written to testator were proffered to prove sanity of testator on theory that authors would not have written as they did unless they believed him sane; held, inadmissible hearsay). Contrary to the common law approach treating nonverbal conduct the same as an express assertion, Rule 801 treats implied assertions as nonhearsay.

The rule recognizes a distinction between conduct, whether verbal or nonverbal, where the actor does not intend to assert the existence of the fact in issue (nonhearsay) and that where an assertion is intended. The former seldom involves questions of motivation and credibility whereas the latter often does and consequently should be tested by cross-examination. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(a)[01] (Supp. 1983).

The definition of "statement" excludes from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. Consequently "[w]hen evidence of conduct is offered, the definition of statement in Rule 801(a) requires that a finding be made whether an assertion was intended. . . . [T]he proponent of the evidence must make a minimum showing. He must at least indicate the conduct he

intends to prove and the inference he intends to draw. If at this point the judge is satisfied that the conduct was not intended as an assertion of the matter sought to be proved, the burden of demonstrating the contrary shifts to the opponent of the evidence." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(a)[02] at 62 (Supp. 1983). See, e.g., United States v. Day, 591 F.2d 861 (D.C. Cir. 1978).

Subsection (b) defines "declarant" as a person who makes a statement. By virtue of the definition of statement, a "declarant" includes the actor of nonverbal conduct when the conduct is intended by him as an assertion.

Subsection (c) defines "hearsay" as a "statement," "other than one made by the declarant while testifying at the trial or hearing," "offered in evidence to prove the truth of the matter asserted."

As previously noted, by use of the term "statement" in the definition, all evidence of conduct, verbal or nonverbal, not intended as an assertion, is removed from the operation of the hearsay rule.

The definition of "hearsay" further excludes from the scope of the rule all assertive conduct when it is offered as a basis for inferring something other than the matter asserted.

Weinstein points out that utterances may also be made for a variety of other reasons not entailing their truth and not thereby involving the credibility of the declarant. Nonhearsay utterances usually arise in the following categories of cases.

> Verbal acts in which the utterance is an operative fact which gives rise to legal consequences. See, e.g., Creaghe v. Iowa Home Mutual Casualty Co., 323 F.2d 981 (10th Cir. 1963)(insurance agent testified that the insured told him to cancel the policy; held, not hearsay).
>
> Verbal parts of act in which the utterance accompanies a nonverbal act and characterizes or defines the transaction. The utterance is merely the verbal part of an act. E.g., words accompanying the physical transfer of money. This is sometimes referred to as the res gestae principle.

> Utterance offered to show effect on state of mind in which the utterance or writing is admitted to show the effect on the hearer or reader when this effect is relevant. E.g., statements of complaint admitted to show that the recipient was on notice that his customers were generally dissatisfied.

See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(a)[02] (Supp. 1983).

The definition of "hearsay" in subsection (c) is consistent with Idaho case law. See Isaacson v. Obendorf, 99 Idaho 304, 309, 581 P.2d 350 (1978)("Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion of the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. . ."). See also State v. McPhie, 104 Idaho 652, 662 P.2d 233 (1983 Op. No. 58); State v. Brooks, 103 Idaho 892, 655 P.2d 99 (Ct.App. 1982); Frank v. City of Caldwell, 99 Idaho 498, 584 P.2d 643 (1978); Patino v. Grigg and Anderson Farms, 97 Idaho 251, 542 P.2d 1170 (1975); State v. Ortega, 95 Idaho 239, 506 P.2d 466 (1973); Martin v. Argonaut Insurance Company, 91 Idaho 885, 434 P.2d 103 (1967); Advance-Rumeley Tractor Co. v. Jacobs, 51 Idaho 160, 4 P.2d 657 (1931). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 126 (2d ed. 1972).

The Idaho Supreme Court has held that verbal acts are outside the scope of the rule against hearsay. See, e.g., Quayle v. Mackert, 92 Idaho 563, 447 P.2d 679 (1968)(witness who heard an oral offer of contract could so testify, not to show the truth of the facts contained in the offer, but to show that the offer had been made). See also State v. Ortega, 95 Idaho 239, 506 P.2d 466 (1973). Cf. Janida v. Lanning, 87 Idaho 91, 390 P.2d 826 (1964).

The Idaho Court has also held that verbal parts of acts are not hearsay. See, e.g., Taylor v. Fluharty, 41 Idaho 511, 517, 239 P. 1049 (1925)(statements made by the declarant when he delivered a promissory note to the witness, explaining changes in the note, "tended to show the intentions of the parties. It was part of the transaction, a circumstance in connection with the delivery of the note. The conversation between [the witness] and [the declarant], like the note, was original evidence and not hearsay.").

In cases involving verbal parts of acts, the Idaho Supreme Court has often used the term res gestae. See G. Bell, Handbook of Evidence for the Idaho Lawyer, 131 (2d ed. 1972). In his discussion of the concept, Bell observes that State ex rel McKinney v. Richardson, 76 Idaho 9, 277 P.2d 272 (1954), has in

effect repudiated the existence of any broad principle of admissibility of statements merely because the declaration is regarded as connected in time or place with some material happening. In Richardson the Court determined that the driver could not testify to the passenger's statement that there was plenty of clearance at the time they were crossing the bridge because it was not a verbal act nor part of the res gestae.

Consistent with Rule 801, the Idaho decisions have recognized that utterances offered to show the effect on the hearer's state of mind, and not for the truth of the matter asserted, are not hearsay statements. See, e.g., Frank v. City of Caldwell, 99 Idaho 498, 499, 584 P.2d 643 (1978)("Evidence of a statement is not excludible as hearsay when offered to show the information that a person who heard the statement had at the time of his or her subsequent conduct, as bearing upon the reasonableness of that conduct."). See also Furness v. Park, 98 Idaho 617, 622, 570 P.2d 854 (1977)(hearsay rule does not prohibit witness from testifying to his understanding of an agreement); Patino v. Grigg & Anderson Farms, 97 Idaho 251, 255, 542 P.2d 1170 (1975)(plaintiff allowed to testify to instructions received from fellow employee "to show the plaintiff's own state of mind as he approached his job."); State v. Goodrich, 97 Idaho 472, 546 P.2d 1180 (1976); Martin v. Argonaut Insurance Co., 91 Idaho 885, 434 P.2d 103 (1967); Clark v. Alloway, 67 Idaho 32, 170 P.2d 425 (1946). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 128-129 (2d ed. 1972).

Subsection (d) provides that prior statements of a witness, to the extent specified in subsection (d)(1), and admissions by a party-opponent, to the extent provided in subsection (d)(2), which might otherwise literally fall within the subsection (c) definition of hearsay, are expressly excluded from the rule against hearsay.

Subsection (d)(1) recognizes that in some circumstances admission of prior statements of a witness for substantive purposes is justified. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness and be subject to cross-examination concerning the statement. It enumerates three situations in which the statement is excepted from the category of hearsay.

Rule 801(d)(1) treats as nonhearsay prior statements of a witness, if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony and was previously given under oath, or (B) consistent with his testimony

and is offered to rebut a charge of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him.

Subpart (A) of Rule 801(d)(1), giving substantive effect to former testimony consisting of prior inconsistent statements given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, is based on two considerations. First, juries are already allowed to consider these statements for purposes of impeachment and it is unrealistic to assume that juries do not consider them substantively, despite limiting instructions. Second, statements made closer in time to the event in question and before the exertion of external pressures may be more trustworthy than testimony at trial and should not be excluded. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(1)(A)[01]-[08] (Supp. 1983).

Idaho Rule of Civil Procedure 43(b)(8) permits impeachment of a witness by evidence of a prior inconsistent statement if the proper foundation is laid. However, under Idaho case law, the evidence is admissible "solely for the purpose of attacking credibility of the witness and not as substantive evidence of its truth." State v. Drapeau, 97 Idaho 685, 688, 551 P.2d 972 (1976)(Court noted that there is recent authority to the contrary, citing 4 Jones on Evidence, §26:2 at 173 (6th ed. 1972)). See also State v. Boyatt, 59 Idaho 771, 87 P.2d 992 (1939); Bodenhamer v. Pacific Fruit & Produce Co., 50 Idaho 248, 295 P. 243 (1931).

Regarding the requirement of inconsistency, the Idaho Court has held that if a witness' prior statement shows inconsistencies with testimony only by an inference and another inference in favor of consistency may be drawn, the statement is inadmissible for impeachment purposes. State v. Bush, 50 Idaho 166, 295 P. 432 (1931).

Adoption of Rule 801(d)(i)(A) would change Idaho Law to the extent that evidence of a prior inconsistent statement would be admissible for substantive purposes under the three limited circumstances provided in the rule.

Subpart (B) of Rule 801(d)(1) treats as nonhearsay prior consistent statements offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive. It is not limited to former testimony. "These are the two situations in which all American jurisdictions concur in allowing consistent statements to be used for rehabilitation." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(1)(B)[01] at 116 (Supp. 1983).

The rule gives the statements substantive effect if admitted for rehabilitation for two reasons: (1) it is not deemed to be cumulative if the opponent opens the door by attacking credibility and (2) it is unrealistic to believe the jury does not consider the evidence substantively, notwithstanding a limiting instruction.

Impeachment is a precondition to admission of such evidence. The rule and the Federal Advisory Committee's Notes are silent as to whether the rule is limited to situations where the witness is charged with deliberately altering his testimony. The courts have admitted such evidence where offered to refute an imputation of inaccurate memory on the part of the witness by showing that he made the same statement when the event was recent. See, e.g., United States v. Mireles, 570 F.2d 1287 (5th Cir. 1978) State v. Altergott, 57 Haw. 492, 559 P.2d 728 (1977).

The Idaho Supreme Court has permitted admission in evidence of prior consistent statements on the theory that the statements are not hearsay, having been introduced merely to prove that the prior statements were made. See State v. Ortega, 95 Idaho 239, 506 P.2d 466 (1973)(prior statements identifying weapon were admitted where effort was made to prove that they had not been made).

Subpart C of Rule 801(d)(1) allows a prior statement of a declarant to be excluded from the definition of hearsay so long as it pertained to the identification of a person he perceived and provided the general requirements that the declarant testify and be subject to cross-examination are satisfied.

The purpose of the provision is to make clear, in line with the recent law in the area, that nonsuggestive lineup, photographic and other identifications are not hearsay and therefore are admissible. See, e.g., Gilbert v. California, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence at 801-3 to 801-5 and ¶801(d)(1)(C)[01] (Supp. 1983).

It should be emphasized that though the rule makes prior identification statements admissible, they still must meet constitutional muster. See, e.g., Gilbert v. California, 388 U.S. 218 (1967)(the Sixth Amendment right to assistance of counsel applied to lineup identifications).

The underlying rationale for treating these statements as non-hearsay is that in this instance the prior statement is deemed to be more probative and more reliable evidence than a later in-court statement, so long as the declarant testifies and can be cross-examined. Even then the statement may still be subject to challenge on constitutional grounds.

The Idaho Supreme Court has allowed admission of a mugshot to prove an extra-judicial identification of the accused. See State v. Cunningham, 97 Idaho 650, 653, 551 P.2d 605 (1976). See also State v. Ortega, 95 Idaho 239, 506 P.2d 466 (1973)(trial court permitted the police officer to testify that the victim had identified the defendant from one of a series of photographs he had submitted to her; held, not within definition of hearsay testimony).

On the question of an in-court identification, when a charge has been made that it was tainted by a prior impermissibly suggestive photo lineup and that it was in violation of a right to have counsel present, see State v. Crawford, 99 Idaho 87, 103-104, 577 P.2d 1135 (1978)(held no constitutional right to have counsel present at photo lineup and no basis to conclude photo lineup was impermissibly suggestive).

Subsection (d)(2) is in accord with the traditional view that admissions by a party-opponent, or his agent or representative, are admissible against him as substantive evidence of the fact stated. They are admissible whether or not the declarant is available or appears as a witness.

The rule is confined to questions of hearsay evidence and makes no attempt to resolve the constitutional questions relating to confessions. See, e.g., State v. Monroe, 103 Idaho 129, 645 P.2d 363 (1982) (confession inadmissible where arrestee not given opportunity to consult counsel).

Subpart A of Rule 801(d)(2) provides that the statement of a party offered against him is not hearsay regardless of whether it was made in an individual or representative capacity.

The statement need not have been made against interest, need not be based on personal knowledge and may be in the form of an opinion. Moreover, the rule "imposes no requirement that in order to be offered against a party in his representative capacity the statement must have been made in his representative capacity. The fact that the statement is relevant to representative affairs is sufficient." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(2)(A)[01] at 140 (Supp. 1983).

Idaho case law is in accord with Rule 801(d)(2)(A). See Jolley v. Clay, 103 Idaho 171, 646 P.2d 413 (1982)(out-of-court statements of parties to litigation are admissible, whether classified as nonhearsay or as an exception to the hearsay rule; although the better approach is simply to classify such statements as nonhearsay, citing Fed. R. Evid. 801(d)(2)). See also Crollard v. Crollard, 104 Idaho 189, 657 P.2d 486, 487 (Ct. App. 1983) (an answer to an interrogatory is hearsay and

inadmissible when offered by the answering party as substantive evidence, but when offered by the opposing party, are admissible under the admissions of a party-opponent exception to the hearsay rule), (answers to interrogatories are not part of the pleadings and are not considered evidence unless introduced as such at trial); State v. Booth, 103 Idaho 187, 646 P.2d 429 (Ct. App. 1982); Martinez v. State, 90 Idaho 229, 409 P.2d 426 (1965). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 161 (2d ed. 1972).

Subpart (B) of Rule 801(d)(2) provides that a statement of which a party has manifested his adoption or belief in its truth is not hearsay. The adoption may be prospective as when one adopts an utterance to be made by a named person. As with his own statements or actions, the adoption can be expressed either in words or conduct, provided adoption is "manifested" as required by the rule. The party contending for adoption has the burden of proving adoption was intended. See, e.g., United States v. Giese, 569 F.2d 527 (9th Cir.), cert. denied, 439 U.S. 876, 99 S.Ct. 214 (1978).

Adoption of a statement may be manifested by silence of a party where a duty to deny or otherwise respond is imposed, e.g., in cases of a continuing commercial relationship. However, in criminal cases an inference of adoption or admission from the silence of the accused may not be made if he had a right to remain silent. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(B)[01] (Supp. 1983).

The Idaho Supreme Court has recognized that silence or failure to respond may constitute an admission in a civil case, but has held that a proper foundation must first be laid. See, e.g., Quillin v. Colquhoun, 42 Idaho 522, 247 P. 740 (1926) (statement not shown to have been made in presence of party and therefore inadmissible); Cuppler v. Stanfield, 35 Idaho 466, 207 P. 326 (1922)(statements of an agent as to agency made outside the presence of the principal are not admissible to prove agency); Sabin v. Burke, 4 Idaho 28, 37 P. 352 (1894). No recent Idaho decisions have been located.

In criminal cases the Idaho Supreme Court has expressly held that post-arrest silence of the accused is not admissible. See, e.g., State v. White, 97 Idaho 708, 551 P.2d 1344, cert. denied, 97 S.Ct. 118, 429 U.S. 842, 50 L.Ed.2d 111, appeal after remand 98 Idaho 781, 572 P.2d 884 (1976). Cf. State v. Poynter, 34 Idaho 504, 205 P. 561 (1922).

Subpart (C) of Rule 801(d)(2) provides that a statement by a person authorized by a party to make a statement concerning the subject is not hearsay and is treated as an admission.

Weinstein points out that this is the orthodox rule and that "ordinarily cases falling in this category are resolved by applying agency doctrine rather than by reference to principles of evidence -- i.e., trustworthiness. There must be a showing of 'speaking authority.'" 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(2)(C)[01] at 151-152 (Supp. 1983). The question in these situations is whether the speaker has authority to act as agent and whether the statements were made in the course of exercising that authority. These facts must be shown by evidence independent of the statement itself.

See discussion of Idaho law in subpart (D).

Subpart D of Rule 801(d)(2) provides that a statement by an agent or servant of a party concerning a matter within the scope of his agency or employment, made during the existence of the relationship, is not hearsay.

Unlike subpart (C), there is no requirement under subpart (D) of "speaking authority," i.e., authority to speak for the principal, in order to bind the principal by admissions. The rule assumes that the authority to do an act conclusively implies authority to speak narratively after the act, if the utterance was made before the termination of the agency and concerns the authorized act.

Rule 801(d)(2)(D) rejects privity as a ground of admissibility by making no provision for it.

Idaho case law is in accord with Rule 801(d)(2)(D) to the extent that "speaking authority" is not required. See, e.g., Furness v. Park, 98 Idaho 617, 570 P.2d 854 (1977)(witness who had been acting as intermediary in carrying out negotiations among parties could have been found to be acting as agent for some or all of them in performing that function and his statements were admissible as statements of an agent of a party opponent); Mann v. Safeway Stores, Inc., 95 Idaho 732, 739, 518 P.2d 1194 (1974)("[i]n order for the statement of an employee to be binding on his or her employer, the statement must have been made within the scope of the employee's authority and pertain to the subject matter of the suit. . ."); Callahan v. Wolfe, 88 Idaho 444, 452, 400 P.2d 938 (1965)("[T]he statements of an agent respecting the subject matter of an action and within the scope of his authority are binding on the principal."); Thornton v. Budge, 74 Idaho 103, 257 P.2d 238 (1953). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 169 (2d ed. 1972).

The Idaho Court has allowed admissions made by an agent in speaking to his principal to be used in evidence against the principal. Hilbert v. Spokane R.R. Co., 20 Idaho 54, 116 P. 1116 (1911)(report of employee to his employer was admissible as a vicarious admission of the employer since it was within the duty

of the employee to make the report). See also G. Bell, Handbook of Evidence for the Idaho Lawyer, 172 (2d ed. 1972).

The Idaho Court has held that the existence of the agency relationship must be proved by independent evidence. Killinger v. Iest, 91 Idaho 571, 575, 428 P.2d 490 (1967) (declarations of an alleged agent, standing alone, are insufficient to prove the grant of power exercised by him). See also Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952); Lightner v. Russell & Pugh Lumber Co., 52 Idaho 616, 17 P.2d 349 (1932).

To the extent that Rule 801(d)(2)(D) rejects privity as a ground of admissibility, it would modify Idaho case law. See Jolley v. Clay, 103 Idaho 171, 646 P.2d 413 (1982)(admissions by predecessor in interest are admissible in an action against the successor in interest when there is privity between the two). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 173 (2d ed. 1972).

Subpart (E) of Rule 801(d)(2) provides that a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy is not hearsay. It applies in both civil and criminal actions, and in a criminal case there need not be a charge of conspiracy to make the rule applicable.

Weinstein points out that the Rule retains the traditional, limited approach toward conspirators' statements in that it retains the "in furtherance" requirement, i.e., a damaging statement by a co-conspirator is not authorized unless it tends to advance the object of the conspiracy. This requirement is analogous to conventional agency theory under which the acts of an agent bind his principal only when the agent acts within the scope of his authority. The rule rejects the comparable Model Code provision that requires only that the statement be "relevant" to the conspiracy and be made during its pendency. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(2)(E)[01] at 166-170 (Supp. 1983).

Rule 801(d)(2)(E) requires that the statement be made "by a co-conspirator . . . during the course . . . of the conspiracy." This language is designed to deal with two conditions. The first condition is that the party and the declarant were participating in a plan to commit a crime or civil wrong. The significance of this condition is that there must be evidence establishing the conspiracy and the defendant's participation in it before such declarations are admissible against him.

The second condition is that the statement was made while the plan was in existence and before its complete execution or other termination. This is the usual rule in the United States and has long been the stated policy in the federal courts.

See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(2)(E)[01] at 170-177 (Supp. 1983).

The Idaho decisions appear to be substantially in accord with Rule 801(d)(2)(E) with one exception hereinafter noted. In State v. Brooks, 103 Idaho 892, 655 P.2d 99 (1982) the Court of Appeals upheld the admission of testimony by a co-conspirator about discussion among the conspirators, including defendant, of a "plan" to rob and murder the victim. The Court observed that "Idaho has adopted the co-conspirator exception [to the hearsay rule]," quoting from State v. So, 71 Idaho 324, 330, 231 P.2d 734, 737 (1951), wherein it was held:

> Where a conspiracy has been established to commit a crime, each declaration of any of the conspirators, during the pendency of the criminal enterprise, in pursuance of the original plan and with reference to the common object, is competent evidence against each of them.

Id. at 901. See also State v. Thomas, 94 Idaho 430, 489 P.2d 1310 (1971). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 172-173 (2d ed. 1972).

In State v. Thomas, 94 Idaho 430, 489 P.2d 1310 (1971) the question was whether statements made by a co-conspirator after arrest and while in custody were admissible against defendant. The Idaho Supreme Court rejected the Federal Rule which limits the admissibility of co-conspirator statements to those made during the course of the conspiracy and admitted the statements made by the co-conspirator during the "concealment phase" of the conspiracy.

Adoption of Rule 801(d)(2)(E) would change the Idaho law on this point.

The Idaho Supreme Court has also applied the co-conspirator rule to testimony of an accomplice. See State v. Brown, 53 Idaho 576, 26 P.2d 131 (1933)(admitting testimony of accomplices connecting defendant to crime through declarations of the alleged accomplice is not error). For the definition of an "accomplice," see State v. Brooks, 103 Idaho at 892; State v. Emmons, 94 Idaho 605, 495 P.2d 11 (1972).

Action Recommended on Idaho Statutes or Rules: None required.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho. (Amended 3/26/85).

R

COMMENT TO RULE 802

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Substantially the same as F.R.E. 802, except to omit exceptions prescribed by statute.

Comment: Rule 802 provides that hearsay is inadmissible unless admission is mandated by these rules or other rules promulgated by the Idaho Supreme Court.

The Idaho rule differs from F.R.E. 802 in that it uses the phrase "except as provided by these rules or other rules promulgated by the Supreme Court of Idaho" rather than "except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

The omission of the general provision for statutorily prescribed exceptions is intended to make the Idaho Rules of Evidence and other procedural rules of the Idaho Supreme Court the conrolling authority for hearsay exceptions.

The draft of Rule 802 recommended by the Evidence Committee and adopted by the Court on January 8, 1985, provided that "[h]earsay is not admissible except as provided by statute or these rules or other rules promulgated by the Supreme Court of Idaho." The Committee had intended to give effect to specific statutes prescribing exceptions to the rule against hearsay for writings such as the minutes of various Idaho state commissions and others described in the commentary below. However, the general provision for statutory exceptions in Rule 802 also gave effect to the statutory exceptions allowing unlimited use of hearsay in Child Protective Act proceedings and Termination of Parent and Child Relationship proceedings, contrary to the intent of the Committee and the Supreme Court as provided in Rule 101 and stated in the Comment to Rule 101 at pp. 5-8. When the oversight was discovered, an analysis was made of the specific statutory exceptions described in the comment to Rule 802 for the purpose of determining whether they would be excepted under Rules 803 and 804. It was determined that they would be excepted, that the general provision for statutory exceptions was unnecessary to accomplish the intent of the Committee with respect to those exceptions and that deletion of the general statutory provision would accord with the intent of the Committee and the Supreme Court to exclude hearsay in Child protective Act proceedings and Termination of Parent and Child Relationship proceedings unless permitted under these rules or other Supreme Court rules. Thus,

upon request of the Committee Chairman, the Supreme Court amended Rule 802 by deleting the words "statute or" from the rule. As amended only those exceptions provided by these rules or other rules of the Supreme Court will be given effect.

Rule 802 is consistent with common law practice and Idaho case law. See, e.g., State v. Brooks, 103 Idaho 892, 655 P.2d 99 (1983); Isaacson v. Obendorf, 99 Idaho 304, 581 P.2d 350 (1978); Frank v. City of Caldwell, 99 Idaho 498, 584 P.2d 643 (1978). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 128 (2d ed. 1972). Rules 803(24) and 804(5) control the common law development of additional hearsay exceptions.

Idaho has no general statute or rule that excludes hearsay evidence. A statute of limited application is Idaho Code § 19-1105 (Grand Jury "can receive none but legal evidence and the best in degree to the exclusion of hearsay . . .").

There are many Idaho statutes which admit particular items of evidence notwithstanding the fact they are hearsay. See, e.g., Idaho Code § 9-206 (certified transcript of former testimony of deceased or absent witness); § 9-316 (Uniform Official Reports as Evidence Act); § 9-315 (other official documents); § 9-402 (historical works, books of science or art and published maps or charts are prima facie evidence of facts of general notoriety and interest); § 9-326 (certificates of purchase or location of lands as prima facie evidence of ownership); § 9-410 (certified copies of record of instruments affecting realty); § 54-102 (effect of the certificate of an abstractor); § 55-816 (recorded affidavits affecting real property as evidence); § 31-2204 (return of sheriff as evidence of contents); § 28-2-724 (admission of market quotations); § 25-1116 (brand book kept by brand inspector is prima facie evidence of contents). Rules 803 and 804 will continue to admit these items.

Other statutes permit the admission of hearsay in particular proceedings. See, e.g., Idaho Code § 16-1614 (shelter care hearings under Child Protective Act); § 16-2009 (Termination of Parent and Child Relationship proceedings). Rule 802, when read in conjunction with Rules 101 and 1102 renders these statutes inapplicable with respect to hearsay.

The Idaho Criminal Rules permit the use of hearsay in certain proceedings. See, e.g., I.C.R. 5.1 (permits limited hearsay in the form of testimony or affidavits to prove certain facts in a preliminary hearing); I.C.R. 15(e) (authorizes admission of a deposition in a criminal proceeding if the witness is unavailable); I.C.R. 4 (affidavits to determine probable cause for issuing warrants; I.C.R. 41 (search warrants).

I.R.C.P. 32(a) permits the use of depositions as substantive evidence in civil actions and proceedings under certain circumstances. Other rules of civil procedure authorize the use of affidavits in a number of circumstances, e.g., I.R.C.P. 4(g) (to prove service); I.R.C.P. 43(e) (evidence on motions); I.R.C.P. 56 (summary judgment); I.R.C.P. 65(b) (restraining orders).

Adoption of Rule 802 for Idaho changes Idaho law to the extent the rules are the controlling authority and prohibit the unlimited use of hearsay in Child Protective Act and Termination of Parent and Child Relationship proceedings.

<u>Action Recommended on Idaho Statutes or Rules</u>: None required.

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Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of informa-

tion or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident; (E) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or arts, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits, except upon motion and order for good cause shown.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Reserved.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general

purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

COMMENT TO RULE 803

Prior Idaho Statutes or Rules: Designated by subsections: (5) I.R.C.P. 43(b)(11); (6) Idaho Code §§ 9-413 through 9-416; (8) Idaho Code §§ 9-315, 9-316 through 9-320, 9-322, 9-327; (9) Idaho Code § 39-263; (10) Idaho Code § 9-1701 and I.R.C.P. 44(b); (12) Idaho Code § 32-309; (14) Idaho Code §§ 9-410 and 55-816; (15) Idaho Code §§ 9-410 and 55-816; (17) Idaho Code § 28-2-724; (18) Idaho Code § 9-402.

Comparable Federal Rule: Identical to F.R.E. 803 with the following exceptions: (8) states the more restrictive language of the Uniform Rule (1974); (16) states 30 years rather than 20; (18) permits admission of learned treatises "upon motion and order for good cause shown"; (22) is merely conformed to state practice; and, (23) regarding "judgments as to personal, family, or general history, or boundaries" is not adopted.

Comment: Rule 803 provides for exceptions to the rule against hearsay "even though the declarant is available as a witness."

The rule as stated limits the discretion of the trial judge to exclude covered hearsay exceptions since discretion in this respect is eliminated, subject to Rule 403. Discretion to admit hearsay not specifically covered by the rule is retained in Rule 803(24).

The Federal Advisory Committee Notes point out that the exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to dispel any implication that other possible grounds for exclusion are eliminated from consideration. Neither this rule nor Rule 804 dispenses with the requirement that the witness have first-hand knowledge.

Subsection (1): "present sense impression," is an exception which is often referred to by the courts as within the "res gestae" whenever statements closely connected in time to a relevant act or situation are admitted. Weinstein points out that the phrase res gestae is condemned by the commentators and is indiscriminately applied to a number of evidentiary doctrines, some of which do not involve the hearsay rule at all. 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(1)[01] (Supp. 1983).

Res gestae is a broader doctrine than Rule 803(1) and encompasses the excited utterance exception which is treated in

subsection (2). As noted by the Federal Advisory Committee, "[i]n considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement." "With respect to the time element, Exception (1) recognizes that in many, if not most instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception (2) the standard of measurement is the duration of the state of excitement." Federal Advisory Committee Notes to Rule 803(1).

"The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." Federal Advisory Committee Notes to Rule 803(1).

The rule provides that certain conditions must be satisfied for the statement to be admissible under this exception. First, the statement must be made while the event or condition is being perceived by the declarant or "immediately thereafter." The trial judge, in his discretion, pursuant to Rule 104(a) must determine whether the lapse of time is justified under the circumstances or whether it undermines the reliability of the evidence. Second, the declarant must have perceived the event or condition. He need not have been a participant. A statement by a bystander or even an unidentified bystander may be admissible, if the judge determines that the declarant did in fact perceive the event or condition. Third, the statement must be one "describing or explaining" the event or condition. Narratives of past events or conditions, or statements on other subjects, or statements evoked by the event but which do not describe or explain it are not admissible under this exception. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(01)[01] (Supp. 1983).

Idaho does not have a statute or rule allowing admission of statements, otherwise hearsay, as present sense impressions. However, Idaho case law does recognize the doctrine of res gestae which serves to admit many of the statements.

Although the Idaho Supreme Court has treated statements relating to an event or condition under the res gestae doctrine, see generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 150-152 (2d ed. 1972), an analysis of the Idaho decisions reveals that the Court has admitted statements on the same theory as that which underlies the present sense impression. See, e.g., Erickson v. E. Rutledge Timber Co., 33 Idaho 179, 191 P. 212 (1920); State v. Breyer, 40 Idaho 324, 334, 232 P. 560 (1925); McIntire v. Oregon Short Line R.R. Co., 56 Idaho 392, 55 P.2d 148 (1936); Gem State Mutual Life Ass'n v. Gray, 79 Idaho 113, 118, 311 P.2d 753 (1957). Cf. State ex rel. McKinney v. Richardson,

76 Idaho 9, 277 P.2d 272 (1954); State v. Neil, 58 Idaho 359, 368, 74 P.2d 586 (1937).

The Idaho Committee concluded that Rules 803(1), (2), and (3) cover the Idaho res gestae rule but provide more guidance to trial courts than the previously enunciated res gestae exception in Idaho.

Subsection (2): "excited utterance," also often referred to as the spontaneous declaration, is an exception generally considered to be within the scope of the res gestae doctrine.

"The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Federal Advisory Committee Notes to Rule 803(2).

In order for Rule 803(2) to apply there must have been a startling event or condition. The trial court must not only determine whether the event occurred, but also whether it was startling or exciting. Statements about non-startling events may be admitted under Rule 803(1).

The statement must be made "while the declarant was under the stress of excitement caused by the event or condition." This condition involves two factors. First, that the declarant was excited and second, that he made the statement while excited. As a consequence of the fact that the justification of this rule is the lack of capacity to fabricate rather than the lack of time to fabricate, the period of acceptable time may be considerably longer than in cases arising under the present sense impression exception. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(2)[01] at 83-87 (Supp. 1983).

The rule does not require that the statement describe or explain the event or condition as is required to qualify the present sense impression exception. The statement must, however, relate to the startling event or condition.

Idaho has no statute or rule providing for the excited utterance exception. The exception has, however, been recognized and applied by the Idaho courts and is generally discussed in terms of res gestae. See, e.g., Mason v. Mootz, 73 Idaho 461, 465, 253 P.2d 240 (1953); State v. Breyer, 40 Idaho 324, 232 P. 560 (1925); State v. Chacon, 36 Idaho 148, 155, 209 P. 889 (1948); Wilson v. St. Joe Boom Co., Ltd., 34 Idaho 253, 200 P. 884 (1921). Cf. Erickson v. E. Rutledge Timber Co., 33 Idaho 179, 187, 191 P. 212 (1920); State v. Hall, 88 Idaho 117, 129, 397 P.2d 261 (1964).

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Subsection (3): "then existing mental, emotional, or physical condition," is actually two exceptions in one, in that it combines the exception for statements of physical condition and the exception for statements of mental or emotional condition. The rationale for each is the same. As in the case of statements of present sense impressions, of which the instant statements are but a specialized application, the factor of contemporaneity provides some assurance against fabrication.

The rule provides examples of issues to which statements of the declarant's then existing state of mind may be relevant. The list is not exclusive.

Whether evidence of an intent to perform an act is admissible to prove that the act was done is not treated as a hearsay question under Rule 803(3). Instead, the question whether the inference from intent to act may be drawn is a matter of relevancy, rather than a concern of the hearsay rule. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(3)[04] (Supp. 1983).

Should the court determine that a statement of intent to perform an act is within Rule 803(3) and that as a matter of relevancy, it may be inferred from the statement that the act was done, the court must further determine whether the probative value of the statement is substantially outweighed by the dangers of prejudice, confusion or waste of time specified in Rule 403. The court may be justified in some cases to require corroborative evidence to enhance probative force before admitting the statement.

The Federal Advisory Committee intended that the rule of Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892), allowing evidence of intent as tending to prove the doing of the act intended is left undisturbed. The federal courts are divided whether statements of intent by a declarant are admissible to prove the future conduct of another person. Compare Gual Morales v. Hernandez Vega, 579 F.2d 677, 680 n.2 (1st Cir. 1978); United States v. Jenkins, 579 F.2d 840, 843 (4th Cir.), cert. denied, 439 U.S. 967 (1978)(both adopted House Judiciary Committee limitation) and United States v. Moore, 571 F.2d 76, 82 n.3 (2d Cir. 1978); United States v. Pheaster, 544 F.2d 353, 378-80 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977)(admitted statement of declarant that he was going to meet defendant to prove that defendant attended meeting).

It has been argued that if statements of intent are admissible to prove future conduct, logically they should be admissible to prove past actions. However, in recognition of the fact that the application of the rule to past conduct would

virtually destroy the rule against hearsay, "a statement of memory or belief to prove the fact remembered or believed" is admissible only if "it relates to the execution, revocation, identification, or terms of declarant's will." The class exception for statements relating to declarant's will is based on necessity and expediency.

Idaho has no statute or rule treating statements of then existing mental, emotional, or physical condition. The Idaho decisions, however, have recognized and applied this exception to the hearsay rule. See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 136-144 (2d ed. 1972).

A witness may testify to statements made by the injured person of his then existing pain but not of his past feelings and suffering. See, e.g., Roy v. Oregon Short Line R.R. Co., 55 Idaho 404, 408, 42 P.2d 476 (1934), cert. denied, 56 S.Ct. 89, 296 U.S. 579, 80 L.Ed. 409 (1934). Cf. Nistad v. Winton Lumber Co., 61 Idaho 1, 99 P.2d 52 (1939)(statements of pain and suffering that are obtained by interrrogation and are not spontaneous are inadmissible).

With regard to mental state, the Idaho Court has allowed the witness to testify as to his motive, intent, knowledge, belief or emotion and has held that such testimony does not involve hearsay. See, e.g., Gem Valley v. Small, 90 Idaho 354, 411 P. 943 (1966)(grantor allowed to testify as to his intent when he made a conveyance in an action whether mortgage was intended); State v. Hopple, 83 Idaho 55, 357 P.2d 656 (1960)(where charged with larceny, defendant was allowed to testify as to his intent in taking property). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 136-137 (2d ed. 1972).

The Idaho Supreme Court has allowed evidence of statements or conduct to show the declarant's then existing state of mind when his state of mind was in issue. See, e.g., Frank v. City of Caldwell, 99 Idaho 498, 584 P.2d 643 (1978)(police officer was allowed to testify to statements concerning family argument that led to arrest where statements were relevant to reasonableness of his conduct in making arrest); Nielsen v. Nielsen, 93 Idaho 419, 462 P.2d 512 (1969)(statements of settlor of a trust were admissible to prove intent of settlor in setting up the trust); Johnson v. Richards, 50 Idaho 150, 294 P. 507 (1930)(testimony as to quarrels between husband and wife were admissible to prove husband's state of mind on issue of his affections toward wife in action for alienation of affection). As to evidence of threats in battery and homicide cases where self-defense, motive or intent is in issue, see generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 139-141 (2d ed. 1972).

The Idaho Supreme Court has held that statements of intent are excepted from the hearsay rule when offered to prove that the declarant acted in accordance with that intent. See In re Coleman, 53 Idaho 339, 23 P.2d 1115 (1933)(is in accord with holding of U.S. Supreme Court in Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892)). See also Quayle v. Mackert, 92 Idaho 563, 447 P.2d 679 (1968)(admitted subsequent statements to show intent and that the declarant had acted previously in accordance with that intent). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 137-138 (2d ed. 1972).

In Idaho this exception is apparently broader than that provided in the rule. The Idaho Court has permitted evidence of a decedent's declarations as to past intent in making a deed as well. See Crenshaw v. Crenshaw, 68 Idaho 470, 199 P.2d 264 (1948)(the declarations of a decedent before or after doing an act which go to show intent to deliver the deed are admissible even if self-serving). However, the most recent case on point seems to recognize that this extension of the exception should be cautiously permitted. See Silver Syndicate Inc. v. Sunshine Mining Co., 101 Idaho 226, 611 P.2d 1011 (1979)(Court approved the admission of declarations of a decedent made after the execution of a contract, as to his intention in making the contract, but noted that where under the general rule this would have been inadmissible, here it was corroborated by other evidence).

It should be noted that none of the Idaho cases in this area specifically address the distinction between statements of then existing state of mind and statements of memory as to past state of mind.

Adoption of Rule 803(3) may modify the rule in Idaho to the extent that a statement of memory or belief to prove the fact remembered or believed would not be admissible unless it relates to declarant's will.

Subsection (4): "statements for purposes of medical diagnosis or treatment," considerably liberalizes prior practice pertaining to this exception. Congress approved the rule with the understanding that it is not intended in any way to adversely affect the privilege rules. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(4)[01] at 803-9 (Supp. 1983).

Rule 803(4) is based on the rationale that the declarant's motive to disclose the truth because his treatment will depend in part on what he says, guarantees the trustworthiness of the statements and there is a need for the statement when other evidence is unavailable. Because the declarant's motive to promote treatment or diagnosis is the factor crucial to

reliability, the rule, as indicated in the Federal Advisory Committee Notes, does not require the statement to be made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family will qualify if made for purposes of diagnosis or treatment.

Admissible statements are not restricted to the declarant's condition and may include statements concerning someone else's condition if made for purposes of diagnosis or treatment of that person, e.g., statements by a parent relating to the symptoms of his child.

The rule expands prior practice which limited the exception to statements made for purposes of treatment. Rule 803(4) includes statements made for the sole purpose of diagnosis. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(4)[01] (Supp. 1983).

The statements made need not relate to physical--as opposed to psychiatric or other medical--diagnosis or treatment. See United States v. Lechoco, 542 F.2d 84, 89 n.6 (D.C. Cir. 1976). See generally Annot., 55 A.L.R. Fed. 689, 699 (1981).

Unlike Rule 803(3), this exception includes statements as to past symptoms, pain or sensations, medical history and even causation if made for the purposes of diagnosis or treatment. However, statements as to fault would usually not be excepted. See, e.g., Roberts v. Hollocher, 664 F.2d 200, 204-205 (8th Cir. 1981). Compare United States v. Iron Shell, 633 F.2d 77, 82-85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); United States v. Nick, 604 F.2d 1199, 1201-02 (9th Cir. 1979)(per curiam). See generally Annot., 55 A.L.R. Fed. 693, 697-98 (1981).

Idaho has no statute or rule specially admitting statements made for medical treatment. The exception, however, has been recognized by the Idaho Supreme Court. See Gonzales v. Hodsdon, 91 Idaho 330, 420 P.2d 813 (1966)(applied rule to statements to a psychiatrist on same basis as physician and excluded statements made solely for diagnosis); Hillman v. Utah Power & Light Co., 56 Idaho 67, 51 P.2d 703 (1935). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 142-143 (2d ed. 1972).

Conversely, it is noted that in a personal injury suit, plaintiff's testimony as to what her doctor told her concerning her injuries was inadmissible as hearsay. See Foberg v. Harrison, 71 Idaho 11, 225 P.2d 69 (1950).

As is evident, Idaho tracks the more restrictive common law regarding statements made to physicians. The physician must

be the treating physician, and the law requires the relationship to encompass both diagnosis and treatment.

It is the opinion of the Idaho Committee that there is no reason to distinguish between statements made for the purpose of diagnosis and statements made for the purpose of treatment. The Committee believes that the policy considerations apply equally to both. The Committee concluded that the better policy favors the admissibility of statements made for diagnosis even though made in preparation for trial, which would go to the weight given the statements but not their admissibility unless excludible pursuant to Rule 403.

Subsection (5): "recorded recollection," codifies a well recognized exception to the hearsay rule. See Annot., 82 A.L.R.2d 473, 520 (1962).

The rule is justified under two theories: first that use of the memorandum is necessary because the witness is unavailable as a result of his lack of memory of the event in question (cf. Rule 804(a)(3)) and second, that a contemporary, accurate record is inherently superior to a present recollection subject to the fallibility of human memory. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(5)[01] at 136 (Supp. 1983). In this regard Weinstein points out that Rule 803(5) seeks to accommodate both rationales. It recognizes that requiring some demonstration of impaired memory discourages the use of self-serving statements especially prepared for litigation. On the other hand, memory need not be wholly exhausted before the memorandum can be used. By providing for admission of the memorandum if the witness "now has insufficient recollection to enable him to testify fully and accurately," Rule 803(5) decrees that admission of the memorandum should not be on an all or nothing basis. Admissibility of those portions about which memory is lacking should be determined on a question by question basis rather than by viewing the witness' testimony as a whole.

The rule requires that the memorandum or record concern a matter "about which a witness once had knowledge," meaning that the memorandum or record is not admissible under this rule unless the witness had sufficient knowledge of the events to satisfy the personal knowledge requirement of Rule 602 were he testifying about these matters.

Two additional conditions are intended to ensure that the witness correctly recorded his knowledge. First, to ensure trustworthiness, the rule requires the memorandum or record "to have been made or adopted by the witness when the matter was fresh in his memory." Second, to ensure that it was properly transcribed, it requires that the memorandum or record "reflect that knowledge correctly."

The requirement of "freshness" is more liberal than the stricter formula which required the memorandum to have been made or adopted "at or near the time of the events in question." The federal courts have allowed the witness to satisfy the requirement of correct transcription by testimony that he recalls having made an accurate memorandum or record, or that though he has no present recollection, that he would not have made it unless it was correct. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(5)[01] (Supp. 1983).

If the witness adopted the memorandum, the author need not be called. If one person perceived the event and another recorded it, both must ordinarily be called, unless the reporter adopts the transcription. An oral report to another person who does not record it does not qualify under the rule. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(5)[01] at 144-145 (Supp. 1983).

Because the memorandum or recording is a substitute for the testimony of a witness and to avoid the jurors giving disproportionate weight to this form of "testimony," the rule provides that if admitted, it may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party." It may also be received as an exhibit by stipulation.

Since the content of a writing is being proved, the best evidence rule is applicable to the memorandum. See Rule 1003.

Idaho recognizes and provides for a similar exception in I.R.C.P. 43(b)(11). As noted in the Comment to Rule 612, I.R.C.P. 43(b)(11) embodies two distinct rules of evidence, i.e., refreshment of memory and past recollection recorded, but inexplicably imposes the same foundational requirements on both. See Rule 612 and commentary as to use of a writing to refresh memory.

Adoption of Rule 803(5) would change existing Idaho law with respect to the past recollection recorded exception to the extent that it would expand the scope of the rule to include memoranda adopted by the witness.

Rule 803(5) is consistent with I.R.C.P. 43(b)(11) to the extent that it allows the memorandum to be made at a time when the fact was "fresh in his memory" and that it may be read to the jury. Cf. Skaggs Drug Centers, Inc. v. City of Idaho Falls, 90 Idaho 1, 407 P.2d 695 (1965)(it was not error to admit an inventory prepared under the supervision of the witness when the inventory could have been used by the witness to refresh his memory).

The Idaho Committee questioned whether adoption of Rule 803(5) would conflict with the ruling of the Idaho Supreme Court in Owen v. Burcham, 100 Idaho 441, 599 P.2d 1012 (1979), overruling Bell v. O'Connor Transp. Ltd., 94 Idaho 406, 489 P.2d 439 (1971)(held Idaho Code § 49-1511 governs admissibility of police accident reports and precludes admission notwithstanding Idaho Code § 9-316 which provides for admission of reports and findings of officers of this state in general), (the court reaffirmed the ruling in Bell that such reports may be used to refresh memory even though inadmissible). It is the opinion of the Idaho Committee that adoption of Rule 803(5) would not affect the rule established in Owen v. Burcham. Although not rendered inadmissible under R 803(5), police accident reports would still be inadmissible under Rule 803(8).

Subsection (6): "records of regularly conducted activity," applies in effect to any regularly conducted activity. The requirement that the records be of a regularly conducted "business" activity is not limited in the conventional sense. The definition of "business" is sufficiently broad that it may include personal records kept for business reasons.

The rule imposes several foundation requirements that must be met before the record can be admitted.

Because records of regularly conducted activity are not normally self proving, as public records may be under Rule 803(8), the testimony of the custodian or other person who can explain the record keeping of the organization is ordinarily essential. The custodian need not have personal knowledge of the actual creation of the document nor need he have been an employee of the business when the record was made. The test is whether he has knowledge of the system used to make the record and not whether he has knowledge of the contents of the record.

The rule mandates that each participant in the chain producing the record--from the initial observer-reporter to the final entrant--must be acting in the course of this regularly conducted business, or must meet the test of some other hearsay exception. See Advisory Committee Notes to Rule 803(6)(rule "follows th[e] lead" of Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930) and "require[s] [as the source of information] an informant with knowledge acting in the course of the regularly conducted activity." See also United States v. Plum, 558 F.2d 568, 572 (10th Cir. 1977)(excluded buyer's declaration of value on claim form since buyer not part of shipper's business organization); United States v. Lieberman, 637 F.2d 95, 99-101 (2d Cir. 1980)(excluded hotel guest registration card). But cf. United States v. Saint Prix, 672 F.2d 1077 (2d Cir.), cert. denied, 102 S.Ct. 2274 (1982)(admitted hotel guest registration supported by other corroborating evidence); Matter of Ollaq

Constr. Eq. Corp., 665 F.2d 43, 46 (2d Cir. 1981)(admitted debtor's financial statements on bank's forms).

The initial informers or reporters providing the information that is recorded must have personal knowledge, unless the information qualifies under some other hearsay exception, e.g., admissions, excited utterances, or statements for purposes of medical diagnosis or treatment, but the person transmitting or recording the information need not have this first-hand knowledge.

The memorandum, report, record, or data compilation must be "made at or near the time" of the events recorded. The expression "data compilation" was added to include, without limitation, electronic computer storage.

Rule 803(6) expands from previous practice in the types of information that will be admissible under the rule by including records of medical diagnosis and opinions, and nonmedical opinions in business records, subject to the trial court's discretion to exclude a particular record where there are inadequate indications of trustworthiness. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(6)[06] (Supp. 1983).

The provision mandating exclusion of an otherwise admissible record if "the sources of information or other circumstances indicate lack of trustworthiness," permits the trial court, when ruling on admissibility, to consider problems of motivation in the preparation of the material, including factors such as whether it was prepared specifically for litigation, the purpose for which it was prepared and by whom it was prepared.

Idaho adopted the Uniform Business Records As Evidence Act in 1939. Idaho Code § 9-413 provides that "the term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not."

Section 9-413 defines "business" in substantially the same language as does Rule 803(6). "Business" is used in its broadest possible sense to include noncommercial as well as commercial activities. See Daniel v. Moss, 93 Idaho 612, 469 P.2d 50 (1970).

Idaho Code § 9-414 provides:

> A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to the identity and the mode of its

> preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The Idaho Supreme Court has stated that the legislative intent for Idaho Code § 9-414 requires that the business record exception be broadly construed. Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 665 P.2d 661 (1983).

Under this act the Idaho Supreme Court has admitted records of daily feed weights and end of month summaries made by a cattle feeder, Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 665 P.2d 661 (1983); a ledger sheet prepared and supplied by a non-party to the action, Curiel v. Mingo, 100 Idaho 303, 597 P.2d 26 (1979); exhibits consisting of papers listing the charge per acre for various farming services signed by a defendant and a record of the charges to that defendant, Simplot Soil Builders, Inc. v. Leavitt, 96 Idaho 17, 523 P.2d 1363 (1974); minutes of a board of directors' meeting of a corporation as prima facie evidence of contents, Silver Bowl v. Equity Metals, 93 Idaho 487, 464 P.2d 926 (1970); an estate tax return to prove agreed attorney fee, Daniel v. Moss, 93 Idaho 612, 469 P.2d 50 (1970); a financial statement of a corporation prepared by a certified public accountant who testified that the statement had been prepared by him with the assistance of the bookkeeper of the company in the ordinary course of business, Hammond v. Hammond, 92 Idaho 623, 448 P.2d 237 (1968); books of account showing the amount of cash advanced to a party, Kelson v. Ahlborn, 87 Idaho 519, 393 P.2d 578 (1964); business records of a store, John Scowcroft & Sons Co. v. Roselle, 77 Idaho 142, 289 P.2d 621 (1955); payroll records and copies of a form letter used by the business, In re Potlatch Forests, Inc., 72 Idaho 291, 240 P.2d 242 (1952); and a signature card and deposit slip along with the ledger account at the bank, State v. Baldwin, 69 Idaho 459, 208 P.2d 161 (1949). Cf. Sparks & Sons v. Joe Campbell Construction Co., 99 Idaho 139, 578 P.2d 681 (1978)(the Court held inadmissible a photostatic copy of a list of principal contract bidders for a project where the proposed exhibit was covered with scribblings not labeled in any way and where the figures thereon were not in and of themselves intrinsically understandable); Heston v. Payne, 97 Idaho 193, 541 P.2d 617 (1975)(reversal granted when exhibit represented to be a business record of data relating to application of herbicide was found to have been a "doctored up" document prepared in anticipation for trial).

Although probably more often arising in civil cases, the rule is also applicable in criminal actions and has been so applied in Idaho, even before the Uniform Act was adopted. See, e.g., State v. Lockie, 43 Idaho 580, 253 P. 618 (1927)(assistant

postmaster testifying in embezzlement prosecution held properly permitted to read book entries properly identified). Cf. State v. Proud, 74 Idaho 429, 262 P.2d 1016 (1953). Idaho Code § 9-414 has also been applied to admit a price tag made in the ordinary course of the store's business proffered to establish the value of the stolen item in a prosecution for grand larceny. State v. McPhie, 104 Idaho 652, 662 P.2d 233 (1983).

Section 9-414 provides the foundational requirements for admission of business records. It provides that records are admissible if a custodian or other qualified witness testifies to the method of preparation, and to preparation in the regular course of business at or near the time of the event. Idaho Rule 803(6) requires all of this foundation with an additional condition that the record have been made at or near the time by, or from information transmitted by, a person "with knowledge."

The Idaho Supreme Court has applied a strict foundational requirement. See, e.g., In re Estate of Brock, 94 Idaho 111, 482 P.2d 86 (1971); Simplot Soilbuilders, Inc. v. Leavitt, 96 Idaho 17, 523 P.2d 1363 (1974); Daniel v. Moss, 93 Idaho 612, 469 P.2d 50 (1970); Hammond v. Hammond, 92 Idaho 623, 448 P.2d 237 (1968). But cf. Curiel v. Mingo, 100 Idaho 303, 597 P.2d 26 (1979).

Whether Idaho permits the trial court to consider problems of motivation in the preparation of the material as an element of admissibility is unclear. Idaho Code § 9-414 appears to condition admission on the court finding that "the sources of information, method and time of preparation were such as to justify its admission." However, in Kelson v. Ahlborn 87 Idaho 519, 393 P.2d 578 (1964) the Court indicated that whether records are self-serving affects probative value rather than admissibility.

Attention is also directed to Idaho Code § 9-408(2) which provides:

> 9-408. ENTRIES MADE BY DECEDENT--WHEN ADMISSIBLE.--The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:
>
> . . . .
>
> 2. When it was made in the professional capacity, and in the ordinary course of professional conduct.

This section appears to overlap to some extent the provisions of Idaho Code §§ 9-413 et seq. if "business records" are interpreted in the broadest sense, but not if treated in the conventional sense. The apparent intent of the statute is to expand the admissibility of such evidence beyond the conventional "business records" definition. See County of Bonner v. Dyer, 92 Idaho 699, 448 P.2d 986 (1968)(in an action to enjoin defendant from obstructing an alleged county road, a survey made by a county surveyor, since deceased, was admissible under Idaho Code § 9-408(2).

Should Idaho adopt Rule 803(6), the foundational requirements for admissibility will probably be stricter than those required in Curiel v. Mingo, 100 Idaho 303. Idaho judges would also have, under Rule 803(6), broader discretion to deny admission based on the "lack of trustworthiness" of the item proffered.

Subsection (7): "absence of entry in records kept in accordance with the provisions of paragraph (6)," is in accord with prior federal law in treating evidence of the failure of a record to mention a matter which would ordinarily be mentioned, offered to prove the non-occurrence or non-existence of the matter, as an exception to the hearsay rule.

Although Idaho recognizes and has codified an exception for proof of lack of a public record or entry in I.R.C.P. 44(b), no statute, rule or decision has been found that applies to the absence of entry in private records. The Committee believes, however, that Rule 803(7) is consistent with the Idaho approach to hearsay.

Subsection (8): "public records and reports," is an exception to the hearsay rule that was recognized at common law and has been previously codified by federal and state statutes.

The Idaho Committee compared the Federal Rule to Uniform Rule of Evidence 803(8)(1974), 13 U.L.A. 328 (Supp. 1983), and recommends the Uniform Rule for Idaho. The Idaho Committee prefers the specificity of the Uniform Rule and its more restrictive approach to the problem.

Although similar in content, F.R.E. 803(8) is substantially different in form and is significantly different in its treatment of some types of reports. The principal substantive difference between the Federal Rule and the Uniform Rule relates to the treatment of investigative reports and factual findings as is hereinafter discussed.

The application of Federal Rule 803(8)(B) has resulted in conflicting decisions with regard to the admissibility of law enforcement records and reports against criminal accuseds. The extent to which Federal Rule 803(8)(C) "factual findings" embrace opinions contained in investigative reports is unclear and has resulted in conflicting decisions. Similarly the nonadjudicatory administrative findings have not uniformly been admitted and have imposed burdens on the federal courts that the drafters of the rule may not have contemplated. Agency findings can be lengthy and complex, and the data relied upon to support those findings may be complicated and extensive. Challenges to the trustworthiness of those findings can lead to protracted litigation. See Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 268-274 (1983).

In essence the Federal Rule is far more liberal than the Uniform counterpart and represents a significant expansion of the typical public records exception.

Both rules use the phrase "records, reports, statements, or data compilations in any form."

Both rules provide an exception to the hearsay rule for the records, etc., of a public office or agency when setting forth the activities of the office or agency. However, the Uniform Rule contains additional language requiring that the exhibit set forth the office's or agency's "regularly recorded activities." Because the Uniform Rule contains this additional language it is deemed by the Idaho Committee to be more restrictive than the Federal Rule and more consistent with Rule 803(6) in that it imposes conditions similar to those required under Rule 803(6) for the admission of "regularly conducted business activity" that is routinely recorded.

The Idaho Committee cannot justify a distinction in treatment between the records or reports of private organizations or agencies and those of public organizations or agencies with respect to the records or reports of activities to be admitted as an exception to the hearsay rule. The Idaho Committee does not agree with the contention that merely because persons are employed in a public office or agency, their records will be more accurate and trustworthy than those kept or made by persons working for a private organization. As was pointed out in the Congressional debate relating to this rule, even government employees are fallible.

Moreover, the Idaho Committee does not agree with the proposition that merely because the public agency is required by law to keep records and make reports of its activities, that such records or reports are entitled to be admitted where similar records and reports of private organizations are not. Even private organizations are required by law to maintain certain

records and reports; yet, under the Federal Rule those records and reports are not admissible unless they relate to regularly conducted business activity that is routinely recorded.

The Idaho Committee is of the belief that it is the fact that the matters are of regularly conducted activities that are routinely recorded which renders the records and reports trustworthy, and not the fact that they are prepared by a government employee or are required by law. Consequently, both the records of a private "business" activity under subsection (6) and the records of the activities of a public office or agency should be and are treated alike under Idaho Rule 803(8).

The Federal Rule and the Uniform Rule both provide an exception for reports of "matters observed pursuant to duty imposed by law and as to which there was a duty to report." At this point, however, the treatment under the two rules differs. The Federal Rule excludes from this provision reports of matters observed by police officers and other law enforcement personnel" in criminal cases only. The Uniform Rule, however, excludes "investigative reports by police and other law enforcement personnel" and "investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party," in both criminal and civil cases.

The Idaho Committee favors the broader exclusion contained in the Uniform Rule. The Committee is of the opinion that the exclusion should apply not only to police investigative reports, but also to investigative reports prepared by other agencies. The Committee further believes that the exclusion should be applicable in both criminal and civil cases.

Excluding these reports only from criminal cases merely recognizes the right of confrontation accorded an accused. It does not recognize or prevent abuse of the hearsay rule which is founded on considerations other than the constitutional guarantees of confrontation. To avoid abuse of the hearsay rule, when police investigative reports or investigative reports of other agencies are proffered by the government for the truth of the matters stated therein, the observers and reporters should be under oath, on the stand so their demeanor can be observed, and subject to cross-examination.

Both the Federal and Uniform Rules provide an exception for reports of "factual findings resulting from an investigation made pursuant to authority granted by law." Again, however, the treatment accorded this provision differs between the Federal Rule and the Uniform Rule.

The Federal Rule admits these reports in civil actions, but in criminal cases they may be admitted only against the Government. The Uniform Rule is more specific and more

restrictive. The Uniform Rule, as does the Federal Rule, expressly excludes factual findings offered by the government in criminal cases. The Uniform Rule, however, further excludes factual findings resulting from a special investigation of a particular complaint, case or incident. This latter exception recognizes that motivational problems, concerns about the qualifications of the person preparing the report, and the use of hearsay opinions without the opportunity for cross-examination are more crucial when "factual findings from special investigation of a particular complaint, case, or incident" are involved.

In applying Rule 803(8), it must be kept in mind that it is not a rule of exclusion. It is a rule of admissibility in certain defined circumstances. As a result, evidence not admissible under Rule 803(8) may, at least theoretically, be admissible under other provisions of the Rules, e.g., Rules 803(5) and (6).

For reasons similar to those relating to reports of "matters observed," the Idaho Committee prefers the Uniform Rule with respect to evaluative reports.

Idaho has codified the public records and reports exception to the hearsay rule by adoption of the Uniform Official Reports as Evidence Act. See Idaho Code §§ 9-316 through 9-318. For other statutes relating to specific matters, see, e.g., Idaho Code § 9-315 (proof of other official documents); § 9-322 (entries in public and official books); and § 9-327 (entries by officers). Additionally, many statutes creating or providing for various public offices and agencies contain provisions making their records or reports admissible as prima facie evidence of the facts stated therein. See, e.g., Idaho Code § 54-1210 (Board of Professional Engineers and Land Surveyors).

With regard to authentication of official records, see Idaho Code Title 9, chapter 3 and I.R.C.P. 44(a), (c) and 80. See also Article IX, Idaho Rules of Evidence.

As noted in the Comment to Rule 509, Idaho Code § 19-5101 defines "law enforcement" to mean any and all activities pertaining to crime prevention or reduction, including police, courts, prosecution, corrections, rehabilitation, and juvenile delinquency. See also M.C.R. 2(g)(1983) ("'Police officer' or 'peace officer' includes a member of the Idaho State Police, a sheriff or deputy sheriff, a city policeman or marshall, a constable or any other officer duly authorized to enforce municipal, county, or state laws.").

Other provisions of Idaho statutes also provide for the admission of public records for the truth of their content. Special attention is directed to Idaho Code § 9-315 which

provides that certain types of official documents may be proved as specified in the first nine subsections of the statute. Subsection 10 of § 9-315, added in 1980, provides that "the above requirements notwithstanding, if in the discretion of the court the document, or copy thereof, whichever is being submitted for submission into evidence, is an unaltered official document of any agency or department of the State of Idaho or of any other state, then such document may be admitted into evidence." It would appear that by virtue of Idaho code § 9-315(10), any record, report, statement or data compilation in any form of a public agency could be admitted so long as one can lay the foundation that it is an "unaltered official document of" the agency or department of the State of Idaho or of any other state. No decisions relating to this provision have been located.

Attention is also directed to Idaho Code § 9-322 which provides:

> 9-322. ENTRIES IN PUBLIC AND OFFICIAL BOOKS--EFFECT AS PRIMA FACIE EVIDENCE.--Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specifically enjoined by law, are prima facie evidence of the facts stated therein.

and to Idaho Code § 9-327 which provides:

> 9-327. ENTRIES BY OFFICERS--EFFECT AS EVIDENCE.--An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

Attention is further directed to Idaho Code § 9-408(3) which provides that "[t]he entries and other writings of a decedent, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases: . . . 3. When it was made in the performance of a duty specially enjoined by law." No decisions interpreting this provision have been found.

Idaho adopted the Uniform Official Reports as Evidence Act in 1939. The sections pertinent to this discussion are:

> Section 9-316. Written reports or findings of fact made by officers of this state, on a matter within the scope of their duty as defined by statute, shall, insofar as

relevant, be admitted as evidence of the matter stated therein.

Section 9-317. Such report or finding shall be admissible only if the party offering it has delivered a copy of it, or so much thereof as may relate to the controversy, to the adverse party a reasonable time before trial, unless in the opinion of the trial court the adverse party has not been unfairly surprised by the failure to deliver such copy.

Section 9-318. Any adverse party may cross-examine any person making such reports or findings or any person furnishing information used therein; but the fact that such testimony may not be attainable shall not affect the admissibility of the report or finding, unless, in the opinion of the court, the adverse party is unfairly prejudiced thereby.

Idaho case law on the public records exception to the hearsay rule reveals a general willingness of the Idaho Supreme Court to admit public records and reports provided they are properly certified, and the statutory pattern regarding delivery to the opposing parties and an opportunity to cross-examine the compiler is followed. See, e.g., Dawson v. Olson, 97 Idaho 274, 543 P.2d 499 (1975); State v. Polson, 93 Idaho 912, 478 P.2d 292 (1970), cert. denied, 402 U.S. 930, 91 S.Ct. 1527, 28 L.Ed.2d 863 (1971); In re Brock's Estate, 94 Idaho 111, 482 P.2d 86 (1971); Johnson v. Boise Cascade Corp., 93 Idaho 107, 456 P.2d 751 (1969); Corey v. Wilson, 93 Idaho 54, 454 P.2d 951 (1969); Barthel v. Johnston, 92 Idaho 94, 437 P.2d 366 (1968); Idaho Publ. Utils. Comm. v. V-1 Oil Co., 90 Idaho 415, 412 P.2d 581 (1966); But cf. Owen v. Burcham, 100 Idaho 441, 599 P.2d 1012 (1979), overruling, Bell v. O'Connor Transp. Ltd., 94 Idaho 406, 489 P.2d 439 (1971)(Idaho Code § 49-1511, providing in effect that police officer's accident report is not admissible as substantive evidence, controls over previously enacted Idaho Code § 9-316 allowing admission of official reports), (the Court observed such reports may contain unreliable hearsay from non-parties, conclusions and speculations of the officer, and a variety of hearsay not susceptible to the fire of cross-examination).

The Idaho Committee concluded that Uniform Rule 803(8) is the better rule for Idaho and with respect to investigative reports, is consistent with the policy expressed in Idaho Code § 49-1511 and the concerns expressed in Owen v. Burcham, 100 Idaho 441, 599 P.2d 1012 (1979).

Subsection (9): "records of vital statistics," is an exception that has been codified by federal and state statutes.

Rule 803(9) does not require that the person furnishing the information on which the record was based have a public or official status. It requires only that the report be made to a public office pursuant to law. Consequently, reports by parents about the birth or death of their children are admissible. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶803(9)[01] (Supp. 1983).

"In order to determine whether a particular record qualifies pursuant to Rule 803(9), a preliminary showing will have to be made -- usually by means of the certificate accompanying the record (cf. Rules 902(4) and 1005)) -- that the report was made to a public office pursuant to requirements of law. The form of the record does not matter; the wording of Rule 803(9) is broad enough to include data compilations." Id. at 219.

Rule 803(9) is silent about the requirement of first-hand knowledge and so are the Federal Advisory Committee Notes to this exception, although the general Notes to Rule 803 state that "neither this rule nor Rule 804 dispenses with the requirement."

Idaho Code Title 39, chapter 2, contains the Idaho Vital Statistics Act of 1949 beginning at Section 39-241. It provides for the preservation of official records including the registration of births, registration of foundlings, and registration of deaths and stillbirths, marriages and divorces.

Idaho Code § 39-263 provides:

> Any certificate filed in accordance with the provisions of this act and the regulations prescribed by the board, or any copy of such records or part thereof, duly certified by the state registrar, shall be prima facie evidence of the facts recited therein.

The Idaho Supreme Court has ruled that as an exception to the hearsay rule, a properly filed certificate of death, or a copy thereof certified by the state registrar, is prima facie evidence of the facts stated therein. Corey v. Wilson, 93 Idaho 54, 454 P.2d 951 (1969). See also Hillman v. Utah Power & Light Co., 56 Idaho 67, 51 P.2d 703 (1935).

Idaho Code §39-259 contains a provision directing the local registrar to refer cases to the coroner who is required to make an investigation and supply the necessary medical data, and

certify to the cause of death when a physician is not in attendance or is unable to act, or when the "death or stillbirth occurred as a result of other than natural causes." In Idaho the county coroner is not required to have medical training, see Idaho Code § 34-622, and often is not qualified to render a medical opinion as to cause of death.

Adoption of Rule 803(9), together with Rule 403, would provide the court and the parties the authority to question the trustworthiness of these death certificates and, if found to be untrustworthy, they may be denied admission in the first instance rather than having them blindly admitted for the truth of their content.

Attention is also directed to Idaho Code § 15-1-107 relating to probate proceedings. It provides that the rules of evidence in courts of general jurisdiction including any relating to simultaneous deaths, are applicable unless specifically displaced by the Code. In addition, a certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death and the identity of the decedent, and a certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the date, circumstances and places disclosed by their record or report.

Subsection 10: "absence of public record or entry," is another exception that has been codified by statute or rule.

"Rule 803(10) is concerned with two problems: (1) that evidence of the absence of a public record or an entry in a public record is not excluded by the hearsay rule and (2) how the absence of the public record or entry may be proved." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶803(10)[01] at 223-224 (Supp. 1983).

With regard to the first problem, the rule duplicates Rule 803(7) (Absence of Entry of Regularly Conducted Business Activity).

No Idaho statute of general application has been located. Statutes of specific application include Idaho Code § 9-1701 which provides that:

> The existence or nonexistence of licensure by any public authority in this state, the United States or any state of the United States may be proved, prima facie, in

> any criminal or civil action, by the affidavit of the custodian of the records of the licensing authority, or one acting with the authorization of the custodian, stating that the conclusion given was based on a diligent search of the records, and accompanied by a certificate that such person has the custody.

See also Idaho Code § 47-606 which provides that the recorded affidavit of proof of labor on a mining claim is admissible in evidence to prove that the work was performed and further provides that "[t]he failure to file such affidavit shall be considered prima facie evidence that such labor was not done."

Similar to the federal practice, Idaho has adopted I.R.C.P. 44(b) and I.C.R. 26 which makes I.R.C.P. 44(b) applicable to criminal proceedings in Idaho.

I.R.C.P. 44(b), which is very similar to the Federal Civil Rule, provides:

> A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contains no such record or entry.

No decision interpreting Idaho Code § 9-1701 or I.R.C.P. 44(b) has been located.

<u>Subsection (11): "records of religious organizations,"</u> allows regularly kept records of religious organizations to be used to prove facts of personal or family history contained in those records.

This exception broadens the possible use of such records over that available under Rule 803(6) to prove matters reflected beyond the "business" of the religious organization, e.g., by authorizing use of a record of baptism to prove age, as well as the fact of baptism.

Although Idaho has recognized an exception to the hearsay rule for hearsay declarations and reputation evidence to prove pedigree and marriage, <u>see</u> G. Bell, <u>Handbook of Evidence for the Idaho Lawyer</u>, 160 (2d ed. 1972), no Idaho statute, rule or decision has been found relating to this particular exception.

Subsection (12): "marriage, baptismal, and similar certificates," is an exception that duplicates the public records exceptions in Rule 803(8) and (10) to some extent. The rule, however, extends beyond public officials to include clergymen and others who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptisms or confirmation, as well as marriage, are included.

The Federal Advisory Committee Notes point out that when the person making the certificiate is not a public official, the self-authentication provisions of Rule 902 are not applicable and proof is required that the person making the certificate was authorized and did make it.

There appear to be no applicable Idaho statutes, rules, or decisions other than Idaho Code § 32-309 which provides:

> The original certificate and record of marriage made by the judge, justice or minister, as prescribed in this chapter, and the record thereof by the recorder of the county, or a copy of such record duly certified by such recorder, must be received in all courts and places as presumptive evidence of the fact of such marriage.

Subsection (13): "family records," is an exception that was recognized at common law, but is somewhat broader in that it does not require that the declarant be unavailable. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(13)[01] (Supp. 1983).

The Federal Advisory Committee Notes state that records of family history kept in family bibles have by long tradition been received in evidence. Opinions in the area also include inscriptions on tombstones, publically displayed pedigrees, and engravings on rings.

No Idaho statute or rule for this exception has been found.

Idaho has recognized statements of family history (pedigree) as an exception to the hearsay rule, but the decisions do not relate to the use of statements found in family bibles, geneologies, etc. In the case of In re Stone's Estate, 77 Idaho 63, 286 P.2d 329 (1955) the Court held the declaration of a deceased mother as to the paternity of her child admissible. However, in Lea v. Galbraith, 64 Idaho 724, 137 P.2d 320 (1943), the Court declared inadmissible an exemplified copy of a

complaint filed in a sister state which contained an allegation that the party was married.

Subsection (14): "records of documents affecting an interest in property," is an exception that has been created by statute. It is concerned with the rather limited problem of allowing a record of a title document to be used as proof of the contents of the original document, and its due execution and delivery. If the particular record meets the recording requirements of the local jurisdiction, receipt of the record, as an exception to the hearsay rule is authorized.

Idaho Code § 9-410 imposes a similar standard. It provides:

> Every instrument conveying or affecting real property, acknowledged or proved, and certified, as provided by law, may, together with the certificate of acknowledgement or proof, be read in evidence in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may also be read in evidence, with the like effect as the original, on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing the certified copy.

In Oatman v. Hampton, 43 Idaho 675, 256 P. 529 (1927), the Idaho Supreme Court held that the provisions of that section are mandatory and it is erroneous to admit a copy of a deed in evidence without compliance with its requirements.

Attention is also directed to Idaho Code § 55-816 concerning the admission of recorded affidavits relating to the title to real property. It provides:

> AFFIDAVITS. -- Any affidavit setting forth facts showing or explaining marital status, identity of persons, possession of real property when the title thereof is deraigned through tax deed, delivery of deed by grantor during grantor's lifetime, occupation of real property as a homestead, date of birth, date of death, date of marriage, or place or [of] residence, with respect to any person mentioned in any recorded instrument affecting title to real property, and also any affidavit as to the identification of plats or descriptions of

> real property, may be recorded in the office of the county recorder of the county wherein the real property is situate; and any such recorded affidavit or the record or certified copy thereof whether heretofore or hereafter recorded shall constitute a part of the record of title to the real property to which it relates and may be received in evidence in any cause affecting the title to such real property, by all courts and all boards, and before all officers, in the state of Idaho as part of such record of title.

See also Idaho Code § 47-606, allowing admission of a certified copy of an affidavit of performance of labor on a mining claim in lieu of the original if it is lost.

Adoption of Rule 803(14) would be consistent with the present effect of these Idaho statutes.

Subsection (15): "statements in documents affecting an interest in property," excepts from the hearsay rule recitals of fact contained in dispositive instruments "if the matter stated was relevant to the purpose of the document," and provided there have been no dealings subsequent to the making of the document inconsistent with its purport or the recited facts. The rule is not restricted to deeds and wills as were prior uniform codifications.

It is applicable to instruments dealing with personalty as well as realty.

The Federal Advisory Committee Notes point out that dispositive documents often contain recitals of fact. Thus, a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all of the heirs of the last record owner. Under the rule, these recitals are excepted from the hearsay rule.

Idaho Code § 9-410 would seem to allow all matters set forth in such an instrument into evidence. See, e.g., In re Estate of Brock, 94 Idaho 111, 482 P.2 86 (1971)(homestead declaration was admitted to prove parties were husband and wife).

It should also be noted that Idaho Code § 54-102 provides that an abstract, policy of title insurance, or title report may be "received in all courts as prima facie evidence of the existence of the record of deeds, mortgages and other instruments, conveyances, or liens, affecting the real estate mentioned in such abstract, policy of title insurance, or title

report, and that such record is as described in said abstract of title, policy of title insurance or title report" if the other provisions of Idaho Code Title 54, chapter 1 are satisfied.

See also Idaho Code § 55-816 relating to the admissibility of recorded affidavits affecting an interest in real property as proof of the contents therein and Idaho Code § 47-606 relating to the admissibility of affidavits of performance of labor on mining claims as prima facie evidence of the performance of such labor.

Subsection (16): "statements in ancient documents," provides for a period of thirty years rather than the twenty year period provided in the comparable Federal Rule. The common law period for this exception has generally been thirty years.

No Idaho statutes, rules or decisions have been located that are relevant to this exception.

In G. Bell, Handbook of Evidence for the Idaho Lawyer, 186 (2d ed. 1972), it is noted that "[a]lthough no Idaho cases have been found concerning ancient documents, and there are no statutes covering their admissibility, it would seem that the common law rule would be applied permitting the admission of documents which purport to be over thirty years old and come from a proper custody with no suspicious appearances."

The Idaho Committee concluded that twenty years is not sufficient vintage to guarantee trustworthiness and determined to recommend the rule requiring that the ancient document be in existence for thirty years. Idaho Rule of Evidence 901(b)(8) similarly imposes the thirty year requirement for the documents to be self-authenticating.

Subsection (17): "market reports, commercial publications," is an exception that, under prior uniform codifications, was restricted to those reports that were prepared for, and relied upon, by persons engaged in a particular occupation.

Rule 803(17) broadens the scope of the exception by making them admissible if "generally used and relied upon by the public or by persons in particular occupations." This "is in accord with actual practice which had allowed such publications as newspaper market reports, telephone directories and city directories to be admitted even though they had not been prepared for the use of a trade or business." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(17)[01] at 245 (Supp. 1983).

Idaho Uniform Commercial Code § 28-2-724 provides:

> Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

Idaho Code § 9-402 provides:

> Historical works, books of science or arts, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

Prior to enactment of Idaho Code § 28-2-724 in 1967, the Idaho Supreme Court treated standard price lists and market reports as part of the "learned treatise" exception to the hearsay rule and recognized them as admissible. See Mohr v. Shultz, 86 Idaho 531, 388 P.2d 1002 (1964)(admitted catalog to prove reasonable value of equipment). See also State v. Jensen, 47 Idaho 785, 280 P. 1039 (1929)(witness was allowd to read a listing from a commercial chronicle of accredited price lists and market reports); American Bonding Co. v. Regents of Univeristy, 11 Idaho 163, 81 P. 604 (1905)(witness allowed to testify from a comparison of prices he made from a catalog).

In the case of In Re Estate of Brock, 94 Idaho 111, 482 P.2d 86 (1971), the Idaho Supreme Court held that the page from a city directory was admissible to prove marriage. The directory showed both parties residing at the same address. The Court cited McCormick on Evidence (1954), § 296, p. 621 and Williams v. Campbell Soup Co., 80 F. Supp. 865 (W.D. Mo. 1948), without discussion.

The Idaho Committee determined that Rule 803(17) is consistent with existing Idaho law.

Subsection (18): "learned treatises," provides an exception "long advocated by legal writers, but contrary to the great weight of authority." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(18)[01] at 252 (Supp. 1983).

The Federal Advisory Committee Notes to Federal Rule 803(18) observe that the decisions rejecting the admission of learned treatises as substantive evidence do so partly because of the fear that the treatise will be misunderstood and misapplied

without expert assistance and supervision. They further state:

> This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. The rule avoids the danger of misunderstanding the misapplication by limiting the use of treatises as substantive evidence to situations in which the expert is on the stand and is available to explain and assist and the application of the treatise is declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

It should be noted at this point that for reasons hereinafter described the proposed Idaho Rule contains langauge not found in the Federal Rule counterpart. Idaho Rule 803(18) adds at the end of the rule the language, "except upon motion and order for good cause shown," to permit the physical admission of the exhibit under limiting conditions.

Weinstein points out that the use of learned treatises in cross-examination of an expert witness to test his qualifications and credibility was allowed by the courts, but that the prerequisites for use varied and ranged from the most restrictive requirement that it be first shown that the expert relied on the treatise in forming his opinion, to the most liberal view that allowed such use of a treatise when its status as an authority is established by any means. The most liberal position is in accord with Reilly v. Pinkus, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949). Rule 803(18) extends the exception beyond the holding in Reilly to allow the treatise to be used as substantive evidence, but only under limiting conditions. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(18)[02] at 255-257 (Supp. 1983).

As noted in the Comment to Rule 803(17), Idaho has codified similar exceptions by statute enacted in 1881. Idaho Code § 9-402 is repeated here for convenience:

> Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

The Idaho Supreme Court has recognized and applied the "learned treatise" exception under the authority of the statute. See, e.g., Tucker v. Union Oil Co. of California, 100 Idaho 590,

603 P.2d 156 (1979)(enlargement of journal article dealing with dangers of handling liquid ammonia, although hearsay, was admissible as a "book of science" written by a person indifferent between the parties, citing Idaho Code § 9-402); McKay Const. Co. v. Ada County Bd. of County Commr's., 96 Idaho 881, 538 P.2d 1185 (1975)(held trial court erred in not admitting a solid waste disposal report prepared by out-of-state planning agency and a report by U.S. E.P.A. under "learned treatise" exception, for limited purpose as foundation for expert's opinion, citing Idaho Code § 9-402); Julien v. Barker, 75 Idaho 413, 272 P.2d 718 (1954)(admitted manufacturer's instructions for the use of a drug and treated it as prima facia evidence). See also Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952)(Court upheld judicial notice of a treatise on geology and ground water resources of the Snake River plain prepared by the United States Department of Interior). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 158 (2d ed. 1972).

With regard to the use of treatises for cross-examination in Idaho, see Osborn v. Carey, 28 Idaho 89, 152 P. 473 (1915) (the Idaho Supreme Court upheld the ruling allowing the cross-examination of a medical doctor by reading from a medical textbook which was admitted by the witness to be a standard authority and asking the witness whether he agreed or disagreed with it); Martineau v. Walker, 97 Idaho 246, 542 P.2d 1165 (1975) (texts are only used in cross-examination . . . they are not in evidence).

The Idaho Committee concluded that the Federal Rule is the better rule for Idaho with one exception. The Committee determined to add a provision to the Federal Rule that would permit relevant portions of the treatise to be marked and admitted as an exhibit in conformance with Idaho Code § 9-402, but only "upon motion and order for good cause shown."

In taking this approach the Committee acknowledges that there are times when an unusually complex document may of necessity be physically admitted into evidence. However, permitting all scientific treatises to be given to a jury could result in undue weight being placed by the jury upon the statements contained in the treatise as proof of the facts recited therein. Without the limitation, the rule allowing admission of such statements, "to the extent called to the attention of an expert witness upon cross-examination, or relied upon by him in direct examination," would be lost or thwarted.

The Idaho Committee believes that the rule, as amended, is more flexible than the Federal counterpart and permits recognition of the fact that different types of treatise evidence may warrant different treatment and that it may be appropriate and desirable to physically admit into evidence relevant portions of the treatise, particularly in non-jury cases.

The Idaho variation in Rule 803(18) also permits use of the learned treatise excerpt in chart form, a situation possibly overlooked by the drafters of the Federal Rule. See United States v. Mangan, 575 F.2d 32, 48 (2d Cir.), cert. denied, 439 U.S. 931 (1978)(court upheld use of a chart by handwriting expert stating it is "not clear that a chart can be 'read into evidence'" but that "good sense would seem to favor its admission.").

Subsection (19): "reputation concerning personal or family history," in accordance with recent trends, liberalizes the use of reputation evidence to prove facts of personal or family history.

Such facts may include, without limitation, marriage, divorce, legitimacy, relationship by blood, adoption, birth, death, or ancestry.

The evidence may be reputation among (1) family members, (2) the community or (3) associates. Weinstein points out that repute in the family has always been allowed as a means of proving matters of family history and that repute in the community has always been allowed to prove marriage, and in recent times, to prove other aspects of family history. The Federal Advisory Committee added "associates" in recognition of the fact that a person's reputation may no longer exclusively be found in the place where he lives, but frequently can be found among the people with whom one associates in work, religious and other activities in which a reputation may be generated. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(19)[01] (Supp. 1983).

"Before a witness can testify to reputation pursuant to Rule 803(19), he must be qualified by showing his membership in a group that could have been familiar with the personal or family history of the person in question." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(19)[01] at 264 (Supp. 1983).

Rule 803(19) omits the common law requirement that the reputation have been formulated before the controversy arose. However, under Rule 403, the trial judge may, in his discretion, exclude testimony as to reputation that postdates the controversy if he finds that the possibility of prejudice, confusion or delay substantially outweighs the probative value of the evidence.

Although not codified by statute or rule, the Idaho Supreme Court has recognized an exception to the hearsay rule for these declarations when the declarant is not available. See In Re Estate of Freeman, 95 Idaho 562, 566, 511 P.2d 1338 (1973) (declaration of decedent on V.A. form listing children but omitting petitioner would be admissible regarding alleged

relationship "under the well-recognized exception to the hearsay rule in matters of family history, relationships and pedigree."); In Re Stone's Estate, 77 Idaho 63, 69, 286 P.2d 329 (1955) (declarations of a deceased mother as to paternity were made at a time when declarant had no motive to distort the truth and "[t]he mother being deceased, the declarations are admissible."). But cf. In Re Stone's Estate, 78 Idaho 632, 640, 308 P.2d 597 (1957) (on appeal following remand), (Court observed that offers of proof were made to prove hearsay statements of persons still living and stated that "[d]eclarations of a living person may not be received under the exception to the hearsay rule as proof of matters of family history, relationship and pedigree.").

No other Idaho decisions have been found on this subject. It must be noted that the Idaho decisions applying the exception for declarations have been limited to situations where the declarant was unavailable, the situation which is covered by Rule 804(b)(4), and have not dealt with evidence of reputation. It must also be noted, however, that evidence as to reputation has been held admissible in the similar case of boundaries. See Eagen v. Colwell, 86 Idaho 525, 388 P.2d 999 (1964).

With regard to proof of marriage, the Idaho Supreme Court holds that evidence of reputation in the community is admissible. See, e.g., Metropolitan Life Ins. Co. v. Johnson, 103 Idaho 122, 645 P.2d 356 (1982); Hamby v. Simplot Company, 94 Idaho 794, 498 P.2d 1267 (1972); In Re Estate of Brock, 94 Idaho 111, 482 P.2d 86 (1971). See also G. Bell, Handbook of Evidence for the Idaho Lawyer, 160 (2d ed. 1972).

Subsection (20): "reputation concerning boundaries or general history," follows the American majority rule in allowing reputation to prove private and public boundaries, land customs and events of general history.

With regard to boundaries and customs, the rule retains the requirement that the reputation be one "arising before the controversy," but rejects the common law requirement of antiquity and the requirement that no better evidence be available.

With regard to events of general history, the rule similarly omits the requirement of antiquity and the requirement that living witnesses be unavailable. However, unlike matters affecting boundaries and customs, the reputation need not have arisen before the controversy. The requirement that the event be "important to the community or state or nation" is inserted to ensure reliability. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(20)[01] (Supp. 1983).

No Idaho statute or rule of general application has been found. Of limited application is Idaho Code § 6-410 which provides:

> Mining customs admissible in evidence.--In actions respecting mining claims, proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim, and such customs, usages or regulations, when not in conflict with the laws of this state, must govern the decision of the action.

The exception for boundaries has been recognized by the Idaho Supreme Court. See White v. Boydstun, 91 Idaho 615, 428 P.2d 747 (1967)(testimony in quiet title action that property in dispute was, in the community, generally known as or was referred to by a particular name, the name being that of the predecessors in interest of litigants asserting adverse possession, was admissible); Eagen v. Colwell, 86 Idaho 525, 388 P.2d 999 (1964)(witnesses who were familiar with area of property in dispute were properly permitted to testify that plaintiff was reputed owner of disputed property), ("evidence as to reputation regarding a boundary, and declarations of deceased persons with reference thereto, is admitted because of necessity and because it is the best evidence available."); Lucky Five Mine Co. v. Central Idaho Placer Gold M. Co., 71 Idaho 490, 235 P.2d 319 (1951)(testimony of witness as to the pointing out of boundaries by another held admissible); Case v. Ericson, 44 Idaho 686, 694, 258 P. 536 (1927)("The necessity for relying upon reputation evidence to prove boundaries must appear, and some facts from which its reliability may be reasonably inferred. . . . Reputation as to a boundary must be ancient, that is, of a past generation, in order to be admitted in evidence, because if not ancient there must naturally be available better evidence consisting of testimony of witnesses who can testify of their own knowledge (citation); and such evidence of reputation must also be as of a reputation ante litem motam.").

In two decisions the Idaho Supreme Court has recognized a separate exception and held that in cases of obliterated boundaries and where witnesses with first-hand knowledge are unavailable, it becomes necessary to accept evidence of ancient fences and other improvements as evidence of the original boundaries, though in its nature hearsay. See Day v. Stenger, 47 Idaho 253, 274 P. 112 (1929); Case v. Ericson, 44 Idaho 686, 258 P. 536 (1927). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 159 (2d ed. 1972).

No Idaho statutes, rules or decisions have been found on the subject of evidence of reputation to prove events of general history. Attention is directed, however, to Idaho Code § 9-101(8) which authorizes the courts to take judicial notice of the "political history of the world," and permits the court "to resort for its aid to appropriate books or documents of reference."

Subsection (21): "reputation as to character," recognizes the traditional exception for reputation evidence as a means of proving human character. The exception deals only with the hearsay aspect of this kind of evidence when used as a substantive fact.

When character evidence is used to support or impeach the credibility of a witness under Rules 404(a)(3) and 608 it is not used substantively, but only as an aid in evaluating testimony.

Character evidence may be used as a substantive fact when character is in issue or under Rule 404(a), when character of the accused or the victim for peacefulness is made an issue by the accused. Rule 405(a) provides that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation . . ." To insure that a hearsay objection cannot bar the reception of such evidence, the exception is expressly provided in Rule 803.

The exception, like Rule 405(a), is expanded beyond the rule in Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), to include "reputation of a person's character among his associates" as well as in the community.

No applicable Idaho statute or rule was found.

Idaho case law permits use of testimony as to general reputation in the community for substantive purposes to prove an essential element of the claim, charge or defense, e.g., Kralick v. Shuttleworth, 49 Idaho 424, 289 P. 74 (1930); to prove character when offered by the accused in a criminal case, e.g., State v. McGreevey, 17 Idaho 453, 105 P. 1047 (1909); to prove character when offered by the prosecution in a criminal case in rebuttal, e.g., State v. Rodriguez, 93 Idaho 286, 460 P.2d 711 (1969); and, to prove character of the victim for peacefulness, e.g., State v. Ward, 51 Idaho 68, 1 P.2d 620 (1931). See Comment to Rule 405. See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 146-150 (2d ed. 1972).

Subsection (22): "judgment of previous conviction," is an exception for evidence of a final criminal felony judgment in subsequent criminal or civil proceedings "to prove any fact essential to sustain the judgment."

Idaho Rule 803(22) is substantially the same as the federal counterpart. Changes have been made only to conform the rule to state practice. The word "state" is substituted for "government."

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Weinstein observes that, "while the rule is probably not in accord with the majority of American decisions, it is consistent with recent decisional trends, expresses the views of most legal authorities, and is in harmony with previous federal practice and policy." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(22)[01] at 274 (Supp. 1983).

Rule 803(22) is restricted to prior criminal judgments offered in subsequent proceedings. The judgment must have been entered after a trial or have been based upon a plea of guilty. The offense must have been of felony grade, measured by federal standards under the Federal Rule and by state standards under the Idaho Rule. The limitation to felony grade recognizes that one is not always motivated to defend a lesser charge.

Although excepted from the hearsay rule in both criminal and civil cases, the rule expressly prohibits the use by the prosecution of a prior judgment against a person other than the accused in a criminal case for purposes other than impeachment. This limitation is dictated by Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), wherein the Supreme Court reversed a conviction for possession of stolen goods when the only evidence they were stolen was the record of conviction of the thieves, on the ground that the accused had been denied his constitutional right of confrontation.

No Idaho statute or rule of general application has been found.

Idaho Code § 18-8004(7), adopted by the Forty-seventh Legislature and effective March 1, 1984, includes a provision that notwithstanding any other provision of law any evidence of conviction for driving under the influence of alcohol, drugs or any other intoxicating substances, based upon a plea of guilty or a finding of guilty, notwithstanding the form of the judgment or withheld judgment, is admissible in any civil action for damages resulting from the occurrence.

The Idaho Supreme Court has held that a plea of guilty to a criminal charge which alleges facts that are in issue in a civil action is admissible against the party entering the plea, as an admission against interest. Coch v. Elkins, 71 Idaho 50, 225 P.2d 457 (1950). As such, a plea of guilty to the crime of involuntary manslaughter is admissible in a civil action based on the same factual situation. Mattson v. Bryan, 92 Idaho 587, 448 P.2d 201 (1968).

However, the Uniform Act Regulating Traffic on Highways (Idaho Code §§ 49-1101 through 49-1127) includes a provision (Section 49-1119) which states that no evidence of a conviction

for a violation of the act shall be admissible in a civil action. The act includes offenses which may be punishable as felonies.

In Jones v. Talbot, 87 Idaho 498, 394 P.2d 316 (1964), Idaho Code § 49-1119 was construed to exclude a plea of guilty to the crime of failing to yield the right of way, when the plea was to be considered in a subsequent civil action. (Note that Jones is cited in the Federal Rule Advisory Comment to support the reasoning for exclusion of convictions of minor offenses from the rule. Apparently, the Federal Advisory Committee feels that Jones vs. Talbot is consistent with the Federal Rule.).

Mattson, which arose out of a wrongful death caused by an automobile accident, was distinguished from Jones on the grounds that the guilty plea was entered on a count of involuntary manslaughter, rather than a violation of The Uniform Act Regulating Traffic On Highways.

The Federal Rule uses the federal definition of felony to distinguish serious offenses from minor offenses. It should be noted that under Idaho law a felony is a crime "punishable with death or by imprisonment in the state prison." Idaho Code § 18-111. There is no time limitation per se on the definition of a felony in Idaho.

Subsection (23): "Reserved," is not recommended by the Idaho Committee for adoption in Idaho.

Federal Rule 803(22), entitled "judgments as to personal, family or general history," "allows a judgment to be admitted as prima facie evidence of a fact essential to the determination, if the fact is concerned with a matter of personal, family or general history or boundaries, and would be provable by evidence of reputation pursuant to Rules 803(19) and 803(2).

A hearsay exception for jury verdicts and judicial orders was originally justified at early common law on the ground that these were evidence of reputation. But, in modern times, it was recognized that this type of evidence could not be forced into the hearsay exception for reputation" 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(23)[01] at 283 (Supp. 1983).

The Federal Rule does not specify the kind of action, civil or criminal, in which the prior judgment must have been rendered or the kind of subsequent action in which it may be offered, which raises questions concerning the different burdens of proof. Nor does the rule distinguish a judgment entered by default from a judgment following adjudication.

No Idaho statutes, rules or decisions applicable to this exception could be found.

The Idaho Committee considered adoption of Exception (23) without reference to "boundaries" but rejected this approach. The Committee is of the opinion that there are not sufficient guidelines under Exception (23) and that such evidence may be covered under Exception (24) which does provide guidelines for admission. Consequently, the Committee recommends that subsection (23) be "reserved."

Subsection (24): "other exceptions," recognizes "that not every contingency can be treated by detailed rules, that the hearsay rule has never been a closed system and should not be . . ., and that, in a particular case, hearsay evidence which does not fall within one of the stated exceptions may have greater probative value than evidence which does." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(24)[01] at 286 (Supp. 1983).

Prior to the adoption of the Federal Rules, the courts determined the admissibility of hearsay evidence by assessing relevancy, need and reliability instead of insisting on compliance with a particular class exception. This same approach should be used in ruling on proffers made pursuant to Rule 803(24.).

As substantially amended by Congress, Rule 803(24) requires five findings by the trial court. They should be made explicitly on the record unless there is a waiver explicitly, or by silence, or the basis for the ruling is obvious. The five findings are summarized below in large part from 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(24)[01] (Supp. 1983):

> (1) The statement must have "circumstantial guarantees of trustworthiness" "equivalent" to those in Rules 803(1) to (23). Since there is an enormous variation in the guarantee of trustworthiness among the twenty-three exceptions, the range of discretion granted the trial judge is large. In effect, he must balance need against trustworthiness. Need involves two aspects: (1) the availability of other evidence not raising hearsay dangers, see, e.g., deMars v. Equitable Life Assurance Society, 610 F.2d 55 (1st Cir. 1979) (opinion of another expert could have been obtained); and (2) if the extra-judicial declarant is available, the trial judge may condition admissibility on his being called to testify. See, e.g., United States v. Mathis, 559 F.2d 294 (5th Cir. 1977)

(declarant's presence in courtroom held to preclude application of Rule 804(b)(5). In order to determine reliability, a trier must be able to determine the credibility of the declarant when he made the statement attributed to him, and to do this the statement must be viewed as part of the other evidence in this case. Factors to be considered include whether the statement is oral or written, the relationship of the parties, the probable motivation of the declarant in making the statement, the circumstances under which it was made, and the knowledge and qualifications of the declarant. Also significant may be whether it is a jury or nonjury case, whether civil or criminal in nature, and whether offered by prosecution or defense.

(2) The statement "is offered as evidence of a material fact." This would, in any event, be required by Rules 401 and 402. If offered not for its truth, but only on the issue of credibility it will not be hearsay.

(3) The statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." What is "reasonable" depends upon such matters as the importance of the evidence, the means at the command of the proponent and the amount in controversy. It must be determined in the sound discretion of the trial judge. See, e.g., United States vs. Fredericks, 599 F.2d 262 (8th Cir. 1979) (better evidence was available, e.g., testimony of other eyewitnesses).

(4) Admissibility must accord with "the general purposes of these rules and the interests of justice." This is a restatement of Rule 102.

(5) The proponent must give notice of his intention to offer the statement "sufficiently in advance of the trial or hearing to provide . . . a fair opportunity to meet it . . . and the particulars . . . including the name and address of the declarant. The federal courts appear to be divided whether to grant a continuance or deny

admissibility when advance notice has not been given. See, e.g., United States v. Bailey, 581 F.2d 341 (3d Cir. 1978) (proponent of evidence without fault and continuance was granted); United States v. Iaconetti. 540 F.2d 574 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977). But cf., e.g., United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978) (lack of knowledge of need to rely on 803(24) is irrelevant; requirement of advance notice is to be rigidly enforced).

See also Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 279-294 (1983).

Rule 803(24), like the rest of Rule 803, is subject to Rule 403.

The notes of the Committee On The Judiciary, Senate Report No. 93-1277, 93rd Cong., 2nd Sess. 19-20 (1974), state:

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now recognized exceptions to the hearsay rule.
>
> In order to establish a well defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

A major concern of some members of Congress was that certain types of hearsay deliberately excluded from the specific class exceptions might nevertheless be admitted under Rules 803(24) or 804(5), thus frustrating Congress's intention to prevent the admission of such material. In Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F.Supp. 1190 (E.D.Pa. 1980), the court discussed this issue, which is described as the "near miss" question--that is, the question whether evidence which is generically of a type covered by a specific exception, but which fails to meet the precise requirements of that exception, is nonetheless admissible under the residual exception. The court determined that Congress intended the residual exceptions to be used in "exceptional and unanticipated" situations, not where a specific exception sets forth conditions governing the admissibility of clearly defined category of hearsay.

However, the Zenith Court distinguished those exceptions dealing with well-defined categories, such as Rules 803(18) (learned treatises), 803(22) (judgment of previous convictions) and 804(b)(1) (former testimony, declarant unavailable), from those exceptions dealing with "amorphous" categories, such as Rules 803(1) (present sense impression), 803(5) (recorded recollection) and 803(6) (business records). The Zenith Court reasoned that to apply the "near miss" doctrine to these latter categories would, in effect negate the residual exceptions altogether. See also United States v. Oates, 560 F.2d 45 (2d Cir. 1977).

For other decisions which provide a fair representation of how the federal courts have applied the "catch-all" exception to the hearsay rule, see United States v. Carlson, 547 F.2d 1346 (8th Cir. 1967); Copperweld Steel Co. v. Demag-Mannesman-Bohler, 578 F.2d 953 (3d Cir. 1978); Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979); Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979).

Idaho appears to have no similar provision in its statutes and rules.

In McKay Constr. Co. v. Ada County Bd. of Comm'rs, 96 Idaho 881, 538 P.2d 1185 (1975), the Idaho Supreme Court held it was error for the trial court to refuse admission of two reports, one of which was prepared by a planning agency and the other of which was prepared by the United States Environmental Protection Agency. The Court stated that although the reports did not clearly fall within Idaho Code § 9-402, that statute was to be read broadly. The Court also quoted Federal Rule 803(13) in support of its decision. In so holding, the Court indicated a general approach to hearsay exceptions in line with Rule 803(24), stating that the major justifications for creating or enlarging an exception to the hearsay rule are necessity and reliability. See also State v. Nagel, 98 Idaho 129, 559 P.2d 308 (1977) (Court

implied that the trial court had some additional discretion beyond what may be called normal bounds when determining the admissibility of former testimony which does not meet statutory and precedential requirements).

The catch-all exception is simply a logical extension of the other hearsay exceptions. Each of the "recognized" exceptions is based on two main factors: necessity and trustworthiness.

Idaho law has recognized these factors as the foundation to its hearsay exceptions. See McKay Constr. Co. v. Ada County Bd. of Comm'rs, 96 Idaho 881; Washington County v. First National Bank, 35 Idaho 438, 206 P. 1054 (1922); G. Bell, Handbook of Evidence for the Idaho Lawyer, 131 (2d ed. 1972). The catch-all exception merely applies these criteria without attempting to restrain them in an overly burdensome formula. Arguably, by so doing it promotes "the interests of justice" because, if the purpose of justice is to ascertain the truth, this rule simply provides a flexible structure to reach this end.

It is the belief of the Idaho Committee that adoption of 803(24) would be consistent with Idaho practice and would provde further protection to the litigants by requiring advance notice of the intent to use such evidence.

Action Recommended on Idaho Statutes or Rules: With respect to the designated subsections of Rule 803, the following is recommended:

(5) Repeal I.R.C.P. 43(b)(11).

(6) Repeal Idaho Code §§ 9-413 through 9-416.

(8) Repeal Idaho Code §§ 9-315, 9-316 through 9-320, 9-322 and 9-327.

(9) Repeal Idaho Code § 39-263.

(10) Repeal I.R.C.P. 44(b).

(14) Repeal Idaho Code § 9-410.

(15) Repeal Idaho Code § 9-410.

(18) Repeal Idaho Code § 9-402.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

COMMENT TO RULE 804

Prior Idaho Statutes or Rules: Idaho Code §§ 9-206, 9-408, 19-824, 19-3111, 19-3214, ; I.R.C.P. 32(a); I.C.R. 15.

Comparable Federal Rule: Identical to F.R.E. 804.

Comment: Rule 804, by design, recognizes that when a declarant is not available to testify in person and subject to cross-examination, there are situations where it is better to have his extra-judicial statement than no evidence at all. Thus the rule provides for certain exceptions to the hearsay rule which are applicable only when the declarant is "unavailable."

The rule as enacted by Congress substantially modified the rule that was submitted by the Federal Advisory Committee. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶804-3 to 804-15 (Supp. 1983).

Rule 804(a) provides a broad definition of unavailability of a declarant. Rule 804(b) offers a classification of hearsay exceptions all dependent on the declarant's unavailability.

The common law did not provide an independent definition of "unavailability" as does the rule. Under the common law unavailability was inextricably tied to the hearsay exception in which it was required. Also, what was sufficient to constitute unavailability or its equivalent varied with each hearsay exception. The Federal Rule drafters attempted to simplify and clarify this situation by creating a provision that applied as uniformly as possible to this class of hearsay exceptions.

Idaho follows the common law in this respect. Idaho law does not separate unavailability from the given hearsay exceptions which require it. Also, Idaho generally uses a defintion of unavailability more limited than that of the Federal provision. While adoption of the rule would give Idaho law a broader and more uniform definition of unavailability, it should be noted that the rule does not change the common law as much as it reorganizes it.

Subsection (a) governs the definition of unavailability which is essential for admitting hearsay statements under the exceptions stated in subsection (b).

It is important to recognize that the crucial factor is not the unavailability of the witness but, rather the unavailability of his testimony. The declarant's presence on the witness stand will not block use of his extra-judicial statement if he refuses to answer, exercises a privilege not to answer, or is suffering from a mental disability or impairment of memory which results in the unavailability of his testimony.

In accordance with previous case law, Rule 804 provides that if the unavailability was caused by the party offering the hearsay statement, the requirement of unavailability will not be regarded as satisfied. Whether the unavailability has to be deliberately caused is not clear. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶804(a)[01] at 33-34 (Supp. 1983).

Weinstein also observes that:

> The admissibility of hearsay against a defendant in a criminal case is also subject to overriding constitutional considerations. In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), . . . the Supreme Court held that the confrontation clause of the Sixth Amendment requires the government to make stringent efforts to render a declarant available. A lesser standard prevails in civil cases and in criminal cases where the statement is offered on behalf of the accused." Id. at 34.

Subsection (a)(1) is in accord with the weight of authority and previous practice in the federal courts in stating that exercise of a claim of privilege by a declarant satisfies the requirement of unavailability. A ruling by the judge is required, which, as the Federal Advisory Committee Notes point out, "clearly implies that an actual claim of privilege must be made." Also, as the rule points out, the scope of the privilege must include the subject matter of the hearsay statement at issue.

Subsection (a)(2) provides that if the declarant persists in refusing to testify regarding the subject matter of his statement despite an order to so testify, he is considered unavailable. This situation could arise when the witness refuses to testify under an improper claim of privilege. If the court thereby orders the witness to testify and he persists in refusing, the witness will then be considered unavailable for the purpose of this rule.

Subsection (a)(3) provides that the declarant is considered unavailable if he testifies to a lack of memory of the subject matter of his statement. The Federal Advisory Committee Notes make it clear that the declarant must actually testify as to his lack of memory. This indicates that the declarant will be subject to cross-examination on this issue. A problem is the possibility that the witness might feign forgetfulness. But as a practical matter, if the judge believes this to be the situation, he should order the witness to testify and if the witness persists in refusing he would be unavailable under Rule 804(a)(2).

> If the court disbelieves the witness and finds that unavailability has not been established, the extra-judicial statement may, nevertheless, at times, be admissible as a prior inconsistent statement if the requirements of Rule 801(d)(1)(A) are met.

4 J. Weinstein & M. Berger, Weinstein's Evidence ¶804(a)[01] at 37. See also id. at ¶801(d)(1)(A)[06].

Subsection (a)(4) provides that the declarant is considered unavailable when death or then-existing illness prevent him from appearing to testify.

A problem is presented by the "then-existing" language of this subsection. The question, not answered by the Federal Advisory Committee Notes, is whether the court should grant a continuance when the illness or infirmity appears temporary. While in fairness it appears that it should, the wording of the rule seems to necessitate only that the declarant be unable to appear at the time he was to testify. In other words, the trial judge may consider the declarant unavailable for the purpose of allowing the admission of hearsay even though the unavailability of the declarant is transitory. McCormick writes that "most of the cases involving temporary disability are handled by continuance." McCormick, Evidence § 253 at 610 (2d ed. 1972).

This is a matter for the trial judge's discretion considering the nature of the disability, and its expected duration, length of time the case has been pending, whether delays, if any, are attributable to the proponent of the hearsay, the nature of the case, the significance of the disabled witness' testimony, the availability of other evidence on the point, and whether the nature of the expected testimony and the subject of the hearsay statement is such that cross-examination would be expected to be particularly helpful. This problem is accentuated by the accused's right of confrontation in criminal proceedings.

The Federal Advisory Committee Notes to Rule 804(a) do not mention how the confrontation clause should be read into the rule. But, in a situation such as where the witness is only temporarily incapacitated by illness, the confrontation clause may mandate that the trial judge grant a continuance so the accused can face the witness. Cf. Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). See also generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(a) [01] at 39-41 (Supp. 1983). The finding of inability to testify may be made without holding a formal hearing. In making this determination, the trial court is not bound by the rules of evidence except those respecting privilege. See Rule 104(a).

Subsection (a)(5) provides that the declarant is unavailable if he "is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in case of a hearsay exception under subsection (b)(2), [dying declaration], (3) [statement against interest], or (4) [personal or family history], his attendance or testimony) by process or other reasonable means."

This definition of unavailability is, along with death or illness, the most widely accepted common law form of unavailability. However, most common law jurisdictions further qualify this type of unavailability with the requirement that the proponent of the testimony must have used "reasonable diligence" to secure the attendance of the absent witness.

The parenthetical phrase "(or in case of hearsay exception under subsection (b)(2), (3), or (4) his attendance or testimony)" was added by Congress "to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The [House] Committee [that proposed the amendment], however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1)." Report of Committee on the Judiciary, House of Representatives, 93rd Congress, 1st Session, Federal Rules of Evidence, No. 93-650, p. 15 (1973).

Weinstein points out that the requirement that the proponent show inability to procure the declarant's attendance by process or other reasonable means has had a constitutional component since Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)(held accused deprived of right to confrontation where prior testimony of a witness was admitted without a showing that prosecutor had made good-faith effort to obtain his presence at trial). Prior to that decision, it was assumed that unavailability resulted if declarant was absent from the jurisdiction and immune to process. But cf. Mancusi v.

Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); Ohio v. Roberts, 488 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). This is still the rule in civil cases where inability to procure the declarant's attendance by reasonable means is equivalent to inability to serve a subpoena.

Weinstein observes that Congress has, by requiring depositions, where possible, in certain situations, expressed a strong policy in favor of depositions rather than the hearsay exceptions under (b)(2), (3) or (4) if absence under (a)(5) is the predicate for unavailability. Weinstein advocates that practical considerations must be taken into account when determining whether the requirement that an attempt to depose the declarant have been made should be a condition of admission. There are situations when a deposition may legally be obtainable, but it is not reasonably practicable to do so, particularly where a relatively small claim is overbalanced by the cost to obtain the deposition or where the evidence comes to light during the trial and a continuance is not possible. Some states (Hawaii, Maine, Montana, and Wyoming) resolved the problem by omitting the deposition requirement. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(a) [02] at 48-54 (Supp. 1983).

The rule is qualified by the final paragraph of subsection (a) which states that a declarant is not unavailable when the declarant's absence, refusal to testify, loss of memory, etc., "is due to the procurement or wrongdoing of the proponent of his statement." This portion of the rule is designed to prevent a party from creating the unavailability of the declarant in order to gain an unfair advantage. It does not seem to apply to the situation where the unavailability is procured by a party who then does not offer the testimony. In such a situation it seems the declarant would still be considered unavailable and the party who did not procure the declarant's absence, etc., may offer the testimony.

As previously noted, Idaho follows the common law approach to unavailability. As such, Idaho law does not separate unavailability of the witness from the hearsay exception which requires it. Also, in only two hearsay exceptions does Idaho law address unavailability in terms somewhat similar to the Federal Rule approach. These are former testimony and statements against interest. For the other two hearsay exceptions in which unavailability of the witness is required under the Federal Rule - dying declarations and statements of family history - Idaho law requires the declarant to be deceased.

The policy of recognizing the unavailability of the witness' testimony, notwithstanding his physical presence on the stand, is not without some authority in Idaho. Under Idaho Code § 55-721, the execution of an instrument may be established by proof of the handwriting of a party and of a subscribing witness

in the usual cases where the party and witness are deceased, nonresidents or unlocatable, or additionally "[i]n case of the continued failure or refusal of the witness to testify for the space of one (1) hour, after his appearance."

With regard to the exception for former testimony, Idaho Code § 9-206 allows the admission at trial of testimony given at a former trial when "the witness is deceased, absent from the state or otherwise unavailable or unable to testify as a witness." It provides:

> 9-206. Deceased or absent witness -- Transcribed testimony admissible. -- The testimony of a witness who testified at the trial in an action or proceeding in any district court of the State of Idaho, when transcribed and certified to be true or correct by the court reporter reporting such testimony at such trial or proceeding, shall be admissible at any subsequent trial between the same parties and relating to the same subject matter, when such witness is deceased, absent from the state or otherwise unavailable or unable to testify as a witness.

A companion provision to Idaho Code § 9-206 is I.R.C.P. 80 which permits proof of former testimony at a trial or hearing by a certified copy of the transcript of the former testimony when such evidence "is admissible in evidence at a later trial."

With regard to unavailability as a requirement for the admission of former testimony, Idaho Code § 9-206 has a scope similar to that of Federal Rule 804(a). In circumstances where the witness is deceased or absent from the state, the statute is similar to the Federal counterpart; where the witness is "otherwise unavailable or unable to testify" the Idaho statute would seem to apply to situations where the witness is physically or mentally incapacitated, or is exempted from testifying on grounds of privilege, or is disqualified from testifying.

Only two cases have dealt expressly with Idaho Code § 9-206, and they have not addressed the issue of unavailability. In both State v. Gish, 87 Idaho 341, 393 P.2d 342 (1964) and State v. Nagel, 98 Idaho 129, 559 P.2d 308 (1977), the witness who testified at the former trial was deceased at the time of the subsequent action. The Court, therefore, did not mention the situation where a witness is "otherwise unavailable or unable to testify." In Gish, the Court did cite with approval an earlier Idaho case, State v. Brassfield, 40 Idaho 203, 232 P. 1 (1925), which dealt with the situation where the witness was absent from the state. In Brassfield, the Court followed the rule at common law, stating "when it appears that the witnesses who testified at

a former trial are beyond the jurisdiction of the court, and the evidence is competent and between the same parties, involving the same issues, and proper diligence to secure their attendance is shown, as in this case, such evidence is admissible . . ." Id. at 207. The requirement that "proper diligence" be used to secure the attendance of the absent witness is a common condition in other jurisdictions.

In another decision predating Idaho Code § 9-206, the Idaho Supreme Court upheld the admission of former testimony given at a prior trial, stating that the question whether the state had made a sufficient showing that it was unable to locate the witness and had exercised due diligence was addressed to the discretion of the trial court. State v. Ward, 51 Idaho 68, 1 P.2d 620 (1931).

With regard to the admission at trial of former testimony given at the preliminary hearing, the Idaho Supreme Court has not treated this exception under Idaho Code § 9-206, notwithstanding the language "trial or proceeding" contained in this statute, perhaps because the wording of this section is either incomplete or inconsistent. In essence, the statute provides that testimony given at "the [prior] trial in an action or proceeding" is admissible at a subsequent trial when "such testimony at such [prior] trial or proceeding" is transcribed and certified. (Emphasis added.)

State v. Mee, 102 Idaho 474, 632 P.2d 663 (1981), overruling State v. Villarreal, 94 Idaho 246, 486 P.2d 257 (1971) and its predecessor case, State v. Potter, 6 Idaho 584, 57 P. 431 (1899), overruling Territory v. Evans, 2 Idaho 651, 23 P. 232 (1890) presented "[t]he single issue . . . whether the trial court erred in allowing the use of the preliminary hearing testimony of a witness who was present at trial but refused to testify." 102 Idaho at 476. Although the Court made reference to Idaho Code §§ 19-3101 et seq. (Examination of Witnesses Conditionally), §§ 19-3201 et seq. (Examination of Witnesses on Commission), and §§ 19-821, 19-824 (allowing for preservation of testimony through deposition by the state), in its discussion of the admissibility of the former testimony under the applicable Idaho law, the Court inexplicably failed to mention Idaho Code § 9-206. 102 Idaho at 477, n. 6. Rather, the Court relied on other authorities in holding the former testimony admissible.

On the issue of unavailability, the Court in Mee upheld the trial court's finding that the witness was "unavailable" for live testimony, notwithstanding her presence on the witness stand under the standards established by the Supreme Court in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In so ruling, the Idaho Court included Fed. R. Evid. 804(a)(2) among the authorities cited in support of its ruling.

The Court in Mee discussed the requirement of unavailability only in the constitutional sense and not in the hearsay context. As previously noted, the definition of "unavailability" under the hearsay rule may impose a lesser duty to produce the testimony at trial than is required when the prior testimony is proffered against an accused and constitutional considerations require a "good-faith" effort to produce the witness' testimony, which may include effort to obtain a voluntary appearance.

Attention is also directed to State v. Sharp, 101 Idaho 498, 616 P.2d 1034 (1980), finding that the declarant "was unavailable as a witness in the constitutional sense since 'the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.' Barber v. Page, 390 U.S. 719, at 724-25, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968)." 101 Idaho at 502.

With regard to the exception for deposition testimony, the Idaho statutes and rules which expressly provide for the admission of such testimony when the witness is not available express a broad policy as to the requirement of unavailability of the physical presence of the witness.

I.R.C.P. 32(a)(3) permits the use of a deposition of a witness, whether or not a party, for any purpose, "if the court finds:

> (A) That the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state of Idaho, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

In criminal matters, Idaho Code §§ 19-3101 through 19-3112 provide for examination of witnesses conditionally. Section 19-3102 permits such examination "[w]hen a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial." Section 19-3111 permits either party to use the testimony of a witness examined

conditionally "upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness or infirmity, or of his continued absence from the state." No Idaho decisions interpreting unavailability under this section have been located.

Similarly Idaho Code §§ 19-3201 through 19-3214 provide for examination of witnesses on a commission. Section 19-3202 permits this examination "[w]hen a material witness for the defendant resides out of state." Section 19-3214 permits either party to use a deposition taken under a commission "upon it being shown that the witness is unable to attend from any cause whatever."

Idaho Code §§ 19-821 through 19-825 provide for conditional examination of a material witness on behalf of the state when the witness is unable to procure sureties. A deposition in a criminal case taken under Idaho Code § 19-824 is admissible as evidence. State v. White, 7 Idaho 150, 61 P. 517 (1900). See also State v. Zarlenga, 14 Idaho 305, 94 P. 55 (1908)(among prerequisites for admission, state must show that witness is unable to attend by reason of his death, infirmity, sickness, or insanity, or of absence from the state, and that due diligence has been exercised to procure presence of such witness at trial); State v. Ireland, 9 Idaho 686, 75 P. 257 (1904). These cases must, of course, be read against the constitutional considerations described above.

Idaho Criminal Rule 15 incorporates the policy of these criminal code provisions. I.C.R. 15(a) permits either prosecution or defense to depose a witness upon order of the court "[i]f it appears, that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice."

I.C.R. 15(d) provides that the deposition may be taken orally or by written interrogatories as provided in the Idaho Rules of Civil Procedure. I.C.R. 15(e) provides for substantive use of the deposition and the requirements of unavailability at trial as follows:

> (e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears:
>
> (1) That the witness is dead; or
> (2) That the witness is out of the state of Idaho, unless it appears that the absence of the witness is procured by the party offering the deposition; or

(3) That the witness is unable to attend or testify because of sickness or infirmity;

(4) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

In the only decision located interpreting I.C.R. 15, the Idaho Court upheld the denial of defendant's request to depose the prosecutrix where there was no showing whatsoever that she would be unable to attend the trial. See State v. Filson, 101 Idaho 381, 613 P.2d 938 (1980).

With regard to the exception for declarations against interest, Idaho Code § 9-408 allows the admission of declarations against interest when in writing and the witness is deceased, provided other requirements are satisfied.

Adoption of Rule 804 would replace current Idaho law with an independent definition of unavailability applicable in the hearsay context. The definition would apply in substantially the same manner to each of the hearsay exceptions that traditionally require the unavailability of the declarant: former testimony, dying declarations, statements against interest, and statements of personal or family history. The rule would simplify and clarify the law in Idaho because it uses a uniform approach which is not dependent on the hearsay exception under which the testimony is offered. In addition, adoption of the rule would broaden the definition of unavailability under Idaho law. The rule focuses on whether the witness' testimony is unavailable and not merely whether the witness' person is unavailable.

Also, by adopting the rule, Idaho law would be provided with two important safeguards. Most important, and worthy of consideration, is the Rule 804(a)(5) requirement that the proponent of the testimony must have reasonably attempted to procure the testimony as well as the attendance of the absent witness when the testimony is offered under 804(b)(2), (3) or (4). This requirement that the proponent attempt to depose the absent witness would impose a burden. But, at the same time, it points out the fact that if at all possible the courts prefer that the declarant be subject to some type of examination.

Idaho has not ruled on the question whether a declarant is unavailable notwithstanding the fact that he can be subpoenaed through the court of a sister state if located in such state. I.R.C.P. 32(a)(3) is the same as Federal Rule of Civil Procedure 32(a)(3). The Idaho Committee is of the opinion, in view of the House Committee comments, that an attempt to subpoena and depose in a sister state would be required before a witness in a sister state would be declared unavailable in Idaho, if Rule 804 is adopted. The Idaho Committee is of the opinion that the better

policy is to require the testimony of a witness when it can be made available rather than resorting to hearsay testimony as to what the witness might have said.

For the Idaho statutory and rule provisions relating to subpoena powers, see Idaho Code § 9-704 (service on concealed witness); § 9-709 (attachment of witness); §§ 9-711, et seq. (examination or production of prisoners); I.R.C.P. 45 (subpoena for attendance of witnesses). With regard to criminal actions, see Idaho Code §§ 19-3004, et seq. (subpoenaes for attendance of witnesses); §§ 19-3012, et seq. (Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act); I.C.R. 17 (subpoena for attendance of witnesses).

With regard to depositions see I.R.C.P. 27 (depositions before action); I.R.C.P. 30 (depositions upon oral examination); I.R.C.P. 31 (depositions upon written questions); I.R.C.P. 32 (use of depositions). As to depositions in criminal actions, see Idaho Code §§ 19-3101, et seq. (examination of witnesses conditionally); §§ 19-3201 et seq. (examination of witnesses on commission); I.C.R. 15 (depositions).

Subsection (b) provides for four specific hearsay exceptions conditioned on the unavailability of the witness. Subpart (5) provides for "other exceptions" not specifically covered by the four specific exceptions if they have "equivalent circumstantial guarantees of trustworthiness" and if additional criteria are satisfied. Subpart (5) is identical to the "other exceptions" provision of Rule 803(24).

The notes of the Federal Advisory Committee with regard to Rule 804(b) state that Rule 803 is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the position that the availability of a declarant is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory; hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the rule.

Subsection (b)(1): "former testimony" is defined as testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with

law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Just what type of proceeding or hearing qualifies under this rule is unclear. The federal decisions suggest that it is only necessary that the prior proceeding gave the party against whom the former testimony is offered the opportunity and motive to cross-examine the declarant. See, e.g., U.S. V. Bowdach, 414 F. Supp. 1346 (1976), (testimony by unavailable declarant at a bond revocation hearing was admissible in a subsequent criminal action because the government had an opportunity and motive to examine the witness); NLRB v. McClure Assoc., Inc., 556 F.2d 725 (4th Cir. 1975), (the court assumed, but did not decide, that 804(b)(1) applied to an administrative hearing, but because of a lack of opportunity to cross-examine the declarant, the former testimony did not qualify under the rule).

In the case of depositions, the condition of cross-examination is satisfied if the deposition is taken before an officer authorized by law to take depositions.

The rule requires that "the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the former testimony."

The common law developed two requirements in order to ensure that the former examination of the witness was equivalent to what would have occurred at the subsequent trial had the witness been available: identity of issues and identity of parties. Rule 801(b)(1) broadens the common law rule but does so explicitly only insofar as the identity of issue requirement is concerned. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶804(b)(1)[04] (Supp. 1983). The rule places the focus on motive to develop the prior testimony rather than similarity of issues, although similarity or dissimilarity of issues can affect motive. The decision whether there is sufficient similarity of motive lies within the discretion of the trial judge.

With regard to identity of the parties, Weinstein states that "the cases decided since the enactment of Rule 804(b)(1) for the most part indicate a reluctance to interpret 'predecessor in interest' in its old, narrow, substantive law sense, of privity which would require the party to share a property interest with the predecessor in interest." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶804(b)(1)[04] at 67 (Supp. 1983).

The "predecessor in interest" limitation applicable in civil actions was added by Congress and has led to some conflict in the federal decisions as to its effect on the "similar motive" approach contained in the rule proposed by the Federal Advisory Committee. The House Judiciary Committee inserted the limitation, having decided that it would be generally unfair to impose upon a party the responsibility for another's examination of a witness. In Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir.), cert. denied, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428, 47 A.L.R.Fed. 874 (1978), the Court construed the "predecessor in interest" language to require only that "it appear that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination. . . ." Id. at 1187. Thus, testimony from a Coast Guard administrative inquiry was held admissible in an action by injured crewmen. Accord Carpenter v. Dizio, 506 F.Supp. 1117, 1124 (E.D. Pa.), aff'd w'out opinion, 673 F.2d 1298 (3d Cir. 1981)(admitted testimony from criminal prosecution in a subsequent civil rights action arising out of an alleged beating). But cf. Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 505 F.Supp. 1190, 1252-55 (E.D. Pa. 1980)(distinguished Lloyd); In re Screws Antitrust Litigation, 526 F.Supp. 1316, 1319 (D.Mass. 1981)(rejected Lloyd approach but admitted prior testimony under Rule 805(b)(5); In re IBM Peripheral EDP Devices Antitrust Litigation, 444 F.Supp. 110 (N.D. Cal. 1978)(rejected "similarity in motive" approach and refused to admit testimony from prior proceedings under Rule 804(b)(5)). Also cf. In re Master Key Antitrust Litigation, 72 F.R.D. 108 (D.Conn. 1976)(testimony in prior antitrust prosecution admitted in civil antitrust action; United States was deemed to be predecessor in interest of plaintiffs). See generally Annot., 47 A.L.R.Fed. 874 (1980).

With regard to the opportunity to cross-examine, it must be noted that actual cross-examination is not required under the hearsay rule. Generally, the mere opportunity to exercise the right to cross-examine will suffice. However, in some situations, the federal courts have held that the "opportunity" for cross-examination must be meaningful in light of the circumstances which prevail when the former testimony is offered. The federal courts, however, have apparently not extended this philosophy to exclude prior testimony given at preliminary hearings. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶804(b)(1)[02]-[03] (Supp. 1983).

As previously noted, Fed. R. Civ. P. 32(a), Fed. R. Crim. P. 15 and federal statutes govern the use of depositions in civil and criminal cases in the federal courts. They create their own exceptions to the hearsay rule in the case of unavailable deponents, which Rule 802 continues.

Rule 804(b)(1) provides that former testimony may be offered against the party by whom it was originally offered who had the opportunity to develop the testimony "by direct . . . or redirect examination." Weinstein observes that although in accord with prevailing practice, the provision raises problems whether direct examination ought to be deemed the equivalent of cross-examination as an adequate satisfaction of the hearsay rule. The commentators answer "yes," as did the Federal Advisory Committee. See Federal Advisory Committee Notes to Rule 804(b)(1); McCormick, Evidence § 255 at 617 (2d ed. 1972); 5 Wigmore, Evidence § 1389 at 105 (3d ed 1940). See also United States v. Henry, 448 F.Supp. 819 (D. N.J. 1978)(defendant may offer in evidence grand jury testimony of witness who refuses to testify at trial since it will be offered against the United States, the same party which had the opportunity and similar motive to develop the testimony on direct examination).

With regard to former testimony given at a prior trial, Idaho Code § 9-206 seems to be a codification of the common law rules. As seen in the statute, it is required that (1) the proceeding from which the former testimony is taken be a state district court; (2) the testimony be offered between the same parties as in the former trial; (3) the testimony relate to the same subject matter; and (4) the declarant be shown to be unavailable. Although the statute refers to identify of "subject matter", in its decisions interpreting the requirements of the statute, the Idaho Supreme Court has implied that identity of "issues" will suffice as well. See State v. Gish, 87 Idaho 341, 393 P.2d 342 (1964); State v. Nagel, 98 Idaho 129, 559 P.2d 308 (1977). Cf. Matter of Estate of Eliasen, 105 Idaho 234, 668 P.2d 110 (1983)("The subject matter requirement of I.R.C.P. 32(a) does not demand precisely the same subject matter but only that the issues be substantially identical.").

In State v. Brassfield, 40 Idaho 203, 232 P. 1 (1925), the Court presented what may be called the general rule regarding the use of former testimony in Idaho. The Court stated "when it appears that the witnesses who testified at the former trial are beyond the jurisdiction of the court, and the evidence is competent and between the same parties, involving the same issues, and proper diligence to secure their attendance is shown, as in this case, such evidence is admissible . . ." Id. at 207. Accord State v. Ward, 51 Idaho 68, 1 P.2d 620 (1931); State v. Johnston, 62 Idaho 601, 113 P.2d 809 (1941).

With regard to former testimony given at a preliminary hearing, Idaho has no statute or rule providing for admissibility of such evidence.

Although Idaho Code § 9-206 refers to testimony transcribed and certified by the court reporter "reporting such testimony at such trial or proceeding," and arguably may include

a proceeding such as a preliminary hearing, the point has apparently never been raised and there are no Idaho cases discussing it. The Idaho decisions relating to former testimony given at a preliminary hearing contain no reference to the statute, which was enacted in 1945.

In the early case of Territory v. Evans, 2 Idaho 651, 23 P. 232 (1890), the Idaho Court ruled that former testimony given at a preliminary hearing was admissible at trial.

However, in State v. Potter, 6 Idaho 584, 57 P. 431 (1899), the Idaho Court determined that the statutory scheme for depositions in criminal actions (Section 9-206 did not exist), indicated an intent to exclude preliminary hearing testimony at trial and pointed out that a preliminary hearing does not offer a sufficient incentive to effectively cross-examine witnesses. The Court held such evidence inadmissible, overruling Evans. Potter was followed by State v. Villareal, 94 Idaho 246, 486 P.2d 257 (1971), holding that former testimony given at a preliminary hearing did not qualify in this hearsay exception.

State v. Mee, 102 Idaho 474, 632 P.2d 663 (1981) again presented the question whether preliminary hearing testimony can be admitted at trial against the accused for substantive purposes. In a three to two decision the Idaho Supreme Court overruled Villarreal and Potter, holding that former testimony given at the preliminary hearing is admissible when the declarant is unavailable and where the state has made a good-faith effort to produce the declarant. The decision discusses the confrontation issue at length but fails to specifically address the hearsay question other than to conclude that state statutes do not mandate exclusion and that the majority of other courts recognize the former testimony exception.

The Court in Mee distinguished former testimony at a preliminary hearing (equating it more with former testimony at a prior trial) from deposition testimony, and determined that the Idaho statutes governing the use of depositions in criminal cases were not determinative as to the use of "former testimony" at a preliminary hearing. The Court observed that while there was a historic concern by the courts to admit deposition testimony, "the constitutional propriety of using former testimony upon the unavailability of a witness had never been questioned." Id. at 478.

The Idaho Supreme Court has held that the use of former testimony given at a preliminary hearing for purposes of impeachment at trial does not fall within the hearsay rule and does not violate the confrontation clause when the declarant is unavailable and cannot be located despite good-faith efforts of the prosecution. State v. Sharp, 101 Idaho 498, 616 P.2d 1034 (1980).

With regard to depositions, as previously noted I.R.C.P. 32(a), (b) and (c) and Idaho Code §§ 19-3111, 19-3214, 19-824, together with I.C.R. 15 govern the use of depositions in civil and criminal cases. As with the Federal counterparts, they create their own exceptions to the hearsay rule in the case of unavailable deponents, which Rule 802 continues.

I.R.C.P. 32(a), (b) and (c) were substantially identical to the Federal Rules of Civil Procedure until the Federal Rules were amended to conform to the Federal Rules of Evidence. Federal Rules 32(a) and (b) were amended to permit the broader use of depositions in accordance with the Federal Rules of Evidence. Federal Rule 32(c) was abrogated as being unnecessary in light of the Rules of Evidence. Federal Criminal Rule 15(e), which was similar to I.C.R. 15(e), was also amended to permit the broader use of depositions in accordance with the Federal Rules of Evidence.

I.R.C.P. 32(a)(4) addresses the subsequent use of depositions taken in former proceedings. The requirements for such use of a deposition are: (1) the former proceeding must have been an action in any state or United States court; (2) the same parties, or their representatives or successors in interest, must be involved; and (3) the subsequent action must involve the same subject matter as that of the former proceeding.

As noted above, in Matter of Estate of Eliasen, 105 Idaho 234, 668 P.2d 110 (1983), the Idaho Supreme Court held that "[t]he subject matter requirement of Rule (32)(a)[4] does not demand precisely the same subject matter but only that the issues be substantially identical."

Also, with regard to proof of former testimony, as previously noted, I.R.C.P. 80 provides that former testimony may be proven by use of a certified transcript. I.R.C.P. 80 is substantially identical to the Fed. R. Civ. P. 80(c), adding only reference to the state courts and to electronically recorded reports.

Additionally, I.R.C.P. 44 provides for proof of an official record, proof of lack of an official record, and other proof of record.

The Idaho Committee is of the opinion that adoption of Rule 804(b)(1) would not significantly change existing Idaho law.

The exact scope of the proceedings from which former testimony may be taken under Rule 804(b)(1) is unclear. As mentioned earlier, case law seems to indicate that any proceeding is sufficient under 804(b)(1) as long as the party against whom

the testimony is offered had an opportunity and motive to develop that testimony. This would indicate the scope is quite broad.

Idaho law, on the other hand, appears to be more limited. Idaho Code § 9-206 requires that the former testimony be taken from a state district court. In State v. Mee, 102 Idaho 474, the Court held former testimony may be taken from a preliminary hearing. In regard to using depositions as former testimony in civil actions, I.R.C.P. 32(a)(4) expands the proceedings to include any court of the United States, or any state court. However, both State v. Gish, 87 Idaho 341 and State v. Nagel, 98 Idaho 129 imply that the trial court has discretion in determining the admissibility of former testimony when the situation does not meet the requirements of Idaho Code § 9-206.

Rule 804(b)(1) requires that the party against whom the testimony is now offered must have been either present at the former proceeding or represented by a predecessor in interest. While Idaho Code § 9-206 and I.R.C.P. 32(a)(4) state that the parties in the subsequent actions must be the same or successors in interest to those in the former action, State v. Nagel, 98 Idaho 129 indicates that the trial court has discretion in determining the admissibility of such evidence when the parties are not the same. In this respect, Idaho law may have a scope similar to that of Federal Rule 804(b)(1).

Rule 804(b)(1) requires that the party, or in a civil proceeding, the party's predecessor in interest have had a similar motive to develop the former testimony. Idaho Code § 9-206 appears to require identity of issues or subject matter, but State v. Nagel, 98 Idaho 129 seems to expand this Idaho requirement by allowing the trial court to use its discretion when the issues are not the same. Moreover, Matter of Estate of Eliasen, 105 Idaho 234, 668 P.2d 110 (1983) establishes that the subject matter requirement of I.R.C.P. 32(a)(4) requires only that the issues be substantially identical. Also, in a practical sense, for the Rule 804(b)(1) requirement of similarity of motive to exist, there must in most situations be some identity of issues. In this respect, Idaho law will not be significantly changed by the adoption of Rule 804(b)(1).

Rule 804(b)(1) specifically mentions the opportunity to develop the testimony by direct and redirect examination, in addition to cross-examination. Idaho case law only mentions the opportunity to develop the testimony by cross-examination. See State v. Gish, 87 Idaho 341. The implication is that while the rule liberally allows former testimony to be offered against the party who originally offered it, Idaho does not. However, this conclusion may be qualified by the discretionary power of the trial court in allowing former testimony as discussed above.

Subsection (b)(2): "statement under belief of impending death" is defined as "a statement made by a declarant while believing that his death is imminent, concerning the cause or circumstances of what he believed to be his impending death."

Weinstein points out that Rule 804(b)(2) is a reworking of the common law hearsay exception for dying declarations. It broadens the former restrictive scope of the exception by allowing it to be used in all civil cases, as well as homicide cases, and in not confining unavailability to death. The rule continues the common law restriction of admissibility concerning the cause or circumstances of what decedent believed to be his impending death. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(b)(2)[01] at 80 (Supp. 1983).

The rule applies in civil cases without restriction, but in criminal cases, it is limited to homicide prosecutions.

The requirement that the declarant actually be dead has been eliminated for the reason that it is the declarant's belief at the time the statement is made, rather than his death, that makes the statement reliable. Unavailability pursuant to Rule 804(a) will suffice. In a homicide case, death will have occurred except in cases of attempted homicide or in the instance when there was more than one victim.

"The declarant's belief in the imminence of his demise may be shown by his own statements, or through circumstantial evidence such as the nature of his wounds, opinions of his physicians, the fact that he received last rites, and statements made in his presence." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(b)(2)[01] at 84 (Supp. 1983).

The Federal Advisory Committee Notes to Rule 804(b)(2) indicate that "continuation of a requirement of first-hand knowledge is assured by Rule 602."

Finally, the statement must concern "the cause or circumstances" of what declarant "believed to be his impending death." Whether a declarant's statement relating to something like an earlier argument between the parties, or a previous threat would be admissible under the rule is unclear. There are situations in which courts have often excluded statements on the basis of the "cause and circumstances" limitation prior to the enactment of Rule 804(b)(2). A broad interpretation of the rule may result in admission of these and similar statements. No federal decisions have been located. Weinstein states:

> The trial judge's decision should turn on the particular circumstances presented: the nature and the date of the earlier occurrence, its relationship to the present death, and the

> existence of other evidence. The true test of admissibility is whether admission of the statement will help the jury in its task, i.e., whether it is sufficiently reliable and relevant to withstand exclusion because its probative value is substantially outweighed by the danger of prejudice to the party against whom it is offered.

4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(b)(1)[01] at 86-87 (Supp. 1983).

Idaho has no equivalent statute or rule.

Idaho follows the common law approach regarding the admissibility of dying declarations. The requirements may be simply stated as follows: (1) these declarations may only be used in homicide actions, and impliedly only when the statement is that of the victim; (2) the declarant must have had a belief in his impending death at the time the statement was made; (3) the statement must concern the cause of death; and (4) the declarant must be cognizant of his condition. See G. Bell, Handbook of Evidence for the Idaho Lawyer, 135-136 (2d Ed. 1972).

The Idaho Supreme Court has held that a belief in impending death rendered a statement concerning the cause of death sufficiently trustworthy to allow its admission, State v. Williams, 36 Idaho 214, 209 P. 1068 (1922), and that the statement may be admitted to show who caused the death and how, State v. Wilson, 41 Idaho 616, 243 P. 359 (1925). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 135 (2d ed. 1972). But cf. State v. Gilbert, 8 Idaho 346, 69 P. 62 (1902)(Court implied that the statement must be somewhat contemporaneous to the infliction which causes death).

The Idaho Supreme Court has declared that dying declarations are not admissible in civil cases except where offered as part of the res gestae. See McCarthy v. Harrop, 51 Idaho 107, 3 P.2d 548 (1931). G. Bell states "[t]here is no logical basis for this distinction between civil and criminal cases." G. Bell, Handbook of Evidence for the Idaho Lawyer, 136 (2d ed. 1972).

All of the Idaho decisions which address the use of dying declarations are homicide prosecutions where the victim made the declaration. Whether the use of a dying declaration is limited to prosecutions for homicide in which the victim made the statement is unknown. No Idaho cases addressing such a limitation have been found.

The dying declaration may be impeached on the ground that the declarant was incompetent to know or understand what he

was doing or saying. See State v. Wilmbusse, 8 Idaho 608, 70 P. 849 (1902).

Adoption of Rule 804(b)(2) would allow the use of dying declarations in civil actions and may have an impact on Idaho law in this respect. In regard to criminal actions, the rule limits the use of this hearsay exception to homicide, as does Idaho.

The Rule 804(b)(2) requirements that the statement be made under a belief of impending death and concern the "cause or circumstance" of what one believes to be his imminent death are also required in Idaho. In this respect, the rule would not affect the use of dying declarations in Idaho.

Under Rule 804(b)(2), the declarant must only be unavailable. Idaho may require that the declarant be deceased.

While it is not certain under the cases, it seems Idaho does require the statement to be that of the homicide victim which was the common law rule. The rule is unclear in this respect. The Advisory Committee Notes to the proposed rule 804(b)(2) mention this aspect and discuss why the rule has been extended to all criminal actions. But this extension was rejected by Congress. The House Report does not mention whether the House intended to limit the use of dying declarations in criminal actions to the situation where the homicide victim made the statement.

Subsection (b)(3): "statement against interest" codifies the common law rule in making declarations against declarant's pecuniary or proprietary interest admissible and, in recognition of modern decisions, extends the rule to include statements against penal interest when corroborating circumstances exist.

The Federal Advisory Committee Notes to exception (3) state that:

> The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. (citation) If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

By virtue of Rule 804(a), the requirement of unavailability is retained as a condition of admission but extends it beyond the common law requirement of death of the declarant. Also, by virtue of Rule 602, first-hand knowledge is required of the declarant.

The requirement that the statement be such "that a reasonable man would not have made the statement unless he believed it to be true" seeks to enforce the rationale of the exception: that a man will not make a damaging statement against himself unless it is true. Weinstein observes that this formulation can create problems with respect to statements against penal interest "because the very real danger exists that liars, crackpots and publicity seekers may confess to acts they never committed." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(b)(3)[02] at 97 (Supp. 1983). Weinstein suggests that the Court should evaluate the statement, considering any evidence that the opposing party can present that the declarant was probably lying. Additionally Rule 403 requires the judge to evaluate the probative value of proferred evidence prior to admission.

Another aspect of the "reasonable man" test is whether the declarant believed the statement was against his interest. If not, the rationale for the exception fails. Weinstein points out "'it is not the fact that the declaration is against interest but the awareness of the fact by the declarant which gives the statement significance.' . . . Rule 804(b)(3), in conjunction with Rule 403, gives the court sufficient discretion to exclude statements if it finds that they are inherently unreliable because the particular declarant would not have had the requisite belief due to circumstances such as currying favor or ignorance." Id. at 99.

With regard to statements which are both self-serving and disserving, Weinstein suggests that the paramount consideration must be whether the rationale for the exception still holds when determining which approach to follow; (1) admit all, (2) weigh the self-serving against the disserving and admit the statement only if the disserving interest predominates, or (3) admit the disserving parts of the declaration, and exclude the self-serving facts where the self-serving and disserving parts can be severed. Id. at 101-102.

With regard to statements against penal interest, Weinstein observes that:

> The inclusion of statements against penal interest in the exception for statements against interest raises a host of intertwined constitutional and evidentiary problems, resolution of which will depend on the Supreme

> Court. At the moment, little more can be done than suggest some of the problems that may arise. Prediction is particularly difficult because this aspect of the statement against interest rule is affected by such matters as the uncertain standard for confrontation since Dutton v. Evans, the questionable scope of Bruton v. United States in light of later developments, the future of Miranda v. Arizona and the effect of Brady v. Maryland and discovery rules. Id. at 103.

While Rule 804(b)(3) provides that "a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances thereby indicate the trustworthiness of the statement," the rule has no similar requirement for inculpatory declarations offered by the prosecution. Several circuits, however, have judicially imposed a requirement that inculpatory declarations be similarly corroborated by other "indicia of reliability." See, e.g., United States v. Riley, 657 F.2d 1377, 1383 (8th Cir. 1981), cert. denied, 103 S.Ct. 742 (1983). It has been held that the confrontation clause of the constitution requires no less. See United States v. Sarmiento-Perez, 633 F.2d 1092, 1099-1100 (5th Cir. 1980) cert. denied, 103 S.Ct. 77 (1982).

The requirement of corroboration was included to avoid dangers of a trumped-up confession by a professional criminal or some person with a strong motive to lie. Before the exculpating statement is admitted or heard in the presence of the jury, the judge will be required to make a preliminary finding pursuant to Rule 104(a) that sufficient corroborative evidence has been offered. No rule can be formulated as to the amount of corroborating evidence that will suffice to "clearly" permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. Weinstein suggests that "[i]n effect, the test of Rule 403 is applicable." Id. at 104-105. See also Chambers v. State of Mississippi, 410 U.S. 284, 303, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297, 313 (1973)(trial court rejected proffer of confession by third party; Supreme Court reversed conviction finding "[t]he testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest."). But cf. Lowery v. State of Maryland, 401 F. Supp. 604 (D. Md. 1975), aff'd., 532 F.2d 750 (4th Cir. 1976), cert. denied, 429 U.S. 919, 97 S.Ct. 312, 50 L.Ed.2d 285 (1977); United States v. Guillette, 547 F.2d 743 (2nd Cir. 1976). See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence 804(b)(3)[03] (Supp. 1983).

As noted above, statements inculpating the accused create confrontation problems since they are offered against the

accused, and by definition the declarant is unavailable. Weinstein points out that:

> Although Bruton [Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)] held it error to admit the confession of a non-testifying declarant co-defendant which implicated the accused, the court added a caveat in a footnote that "There is not before us . . . any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view that such exceptions necessarily raise questions under the Confrontation Clause." [Id. at 128, n. 3, 88 S.Ct. at 1623-1624, 20 L.Ed.2d at 480-481.]
>
> Subsequently, in Dutton v. Evans [400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)], the Court held that an extra-judicial statement by a declarant who could have been produced but was not, inculpating accused, was admissible despite Bruton. The court noted that a recognized hearsay exception for co-conspirators statements was involved.
>
> . . .
>
> If the confrontation clause is to have any meaning, then every statement that on its face is against declarant's interest cannot be admitted without analysis of its reliability in the setting of the case. Even aside from constitutional considerations, unreliable statements must be excluded as a matter of evidentiary law. Pursuant to Rule 403, evidence must be excluded if its probative value is substantially outweighed by the danger of prejudice, a danger far more pressing in a criminal case when the evidence is offered against the accused than in a civil case. . . .

4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(b)(3)[03] at 109-114 (Supp. 1983).

Particularly troublesome are inculpatory declarations made while declarant is in custody. Often they are made to curry favor with the police and alleviate culpability by implicating an accomplice. When made after the declarant has been offered a plea bargain in exchange for a confession, they have been held inadmissible. See, e.g., United States v. Sarmiento-Perez, 633 F.2d 1092, 1102-1104 (5th Cir. 1980), cert denied, 103 S.Ct. 77

(1982); United States v. Bailey, 581 F.2d 341, 345 n.4 (3d Cir. 1978). But cf. United States v. Garris, 616 F.2d 626 (2d Cir.), cert. denied, 447 U.S. 926 (1980). Similarly, declarations made following a grant of immunity have been held inadmissible as not being against penal interest. See, e.g., United States v. Love, 592 F.2d 1022 (8th Cir. 1979).

An exception for declarations against interest made by the unavailable witness has been codified in Idaho. Idaho Code § 9-408 provides:

> 9-408. Entries made by decedent--When admissible.--The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:
>
> 1. When the entry was made against the interest of the person making it.
>
> 2. When it was made in the professional capacity, and in the ordinary course of professional conduct.
>
> 3. When it was made in the performance of a duty specially enjoined by law.

Under this provision entries and writings of a decedent may be admissible as evidence when they were (a) against the interest of the person making them, (b) made at or near the time of the transaction, and (c) based on facts within the knowledge of the decedent. See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 154-155 (2d ed. 1972).

It is clear the statute only applies to writings by deceased persons. But the scope of the statements that qualify as being against interest is not clear. The only case which has dealt with this section of the statute did not shed any light on the statute's construction. See In Re Foster, 77 Idaho 26, 287 P.2d 282 (1955). The Court simply stated the "statute, § 9-408 I.C., limited to writings, makes declarations of a decedent admissible when made against interest." 77 Idaho at 31. While observing that the statement at issue, a denial of marriage, appeared to have both self-serving and against-interest aspects, the Court failed to clearly state whether the declaration was properly admitted under this hearsay exception.

The most recent Idaho decision addressing this hearsay exception appears to be State v. Thomas, 94 Idaho 430, 489 P.2d 1310 (1971), in which the hearsay statements of all three

participants in the crime were admitted. The inculpatory statements of the co-actor at the scene of arrest, who died prior to trial and was therefore not a co-defendant, were deemed admissible under Idaho's "well established rules in past cases regarding exceptions to the hearsay rule such as spontaneous statements, res gestae and declarations against interests." Id. at 435-436. The in-custody statements of one co-defendant were found not inculpatory and thus their admission was not erroneous. The in-custody statements of the other co-defendant were deemed admissible under the co-conspirator exception even though made during the "concealment phase" of the conspiracy, and were found reliable because they were spontaneous and were against the penal interest of declarant. Confrontation rights were satisfied by cross-examination of the declarant.

As previously noted, adoption of Rule 801 would restrict the co-conspirator rule to statements made during the course of and in furtherance of the conspiracy contrary to the Idaho Court's holding in Thomas, which expanded the rule to include statements made during the "concealment phase" of the conspiracy. See Comment to Rule 801(d)(2)(E).

Two other relatively recent decisions of the Idaho Supreme Court involve hearsay statements inculpating the accused, but did not involve the hearsay rule because they were offered only for impeachment against the accused. In each case, the question of admissibility turned on whether there had been a violation of the confrontation clause. See State v. Stewart, 100 Idaho 185, 595 P.2d 719 (1979)(prosecutor's attempted impeachment of defendant by the use of a co-defendant's written statements violated defendant's right to confront witnesses against him and required reversal because admission of statements disrupted the testimonial equipoise that was then existing on the crucial element of defendant's defensive theory); State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976)(prior inconsistent statement signed by defendant was admissible for impeachment and prosecutor's failure to call the cellmate who prepared it did not violate defendant's right of confrontation).

State v. Larsen, 91 Idaho 42, 415 P.2d 685 (1966) extended the scope of statements against interest which qualify under this exception to those affecting penal interests. With regard to exculpatory statements by third persons, the Court noted the possibility of defendants using "fraudulent confessions by others who, for some unexplained reason, have disappeared or are otherwise unavailable." Id. at 49. The Court therefore limited the use of third party confessions by unavailable declarants to the situation where it is clearly shown "that the declarant is in fact the person guilty of the crime for which the accused is on trial." Id.

In an early decision, State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901), the Court held that a statement by the declarant regarding her pregnancy fell under this exception. The Court noted the statement, made just prior to an abortion during which the declarant died, "tended to show a state of unchastity." 7 Idaho at 609. Whether the Court would follow this precedent of including statements placing one in social disgrace within the against interest exception is unclear.

In Wheller v. Oregon R.R. Co., 16 Idaho 375, 102 P. 347 (1907), the Court held that a statement by the declarant in which she stated an accident was her fault was not against interest as she had no interest in the trial at hand. It appears the Court confused this situation with an admission by a party. In Webster v. Magleby, 98 Idaho 326, 562 P.2d 50 (1977), the Court held that statements by deceased declarant that he was crossing property of another with permission were against interest, the inference in this case being that this statement hindered the declarant's heirs' possibility of acquiring a prescriptive easement.

In Idaho, declarations against penal, proprietary, pecuniary and perhaps social interest qualify under this exception. Rule 804(b)(3) includes declarations against penal, proprietary, pecuniary interest, and also includes statements tending to subject one to civil liability, or tending to render a claim against another invalid.

Arguably, declarations against proprietary and pecuniary interests have the same scope as those involving civil liability or those rendering claims invalid. Therefore, adoption of the rule probably would not have a substantial impact on Idaho law in this respect. However, the rule would remove any questions as to what types of statements do qualify for this exception.

It is unclear whether Alcorn, which involved a statement placing one in social ill-repute, is still a viable precedent. If so, adoption of the rule would disallow the use of such testimony.

Rule 804(b)(3) requires the statement to be such that a reasonable person would not have made it unless he believed it to be true. Idaho cases do not mention such a requirement. It is unclear what the impact of the rule would be on Idaho law in this respect. Presumably, it is necessary in Idaho to look into the circumstances in which the statement is made to test its reliability. The rule would simply provide a standard on which to measure the statement's trustworthiness.

Under 804(b)(3), to allow the admission of a statement which tends to implicate the declarant and exculpate the accused, corroboration sufficient to guarantee the trustworthiness of the statement is necessary. In Larsen, the Idaho Supreme Court

required substantially the same thing when they stated that substantial evidence must be offered showing the declarant is actually guilty of the crime for which the accused is on trial before a third party confession is admissible. In this respect, the rule would merely codify what is already required by Idaho case law.

Subsection (b)(4): "statements of personal or family history" codifies what McCormick characterized as "[o]ne of the oldest exceptions to the hearsay rule." McCormick, Evidence § 322 at 745 (2d ed. 1972). The rule also broadens the traditional rule in a number of ways.

Rule 804(b)(4) drops the ante litem motam requirement "as bearing more appropriately on weight than admissibility." Federal Advisory Committee Notes to Rule 804(b)(4). Thus, the statement need not have been made before the controversy arose. At the same time, it can no longer be argued that trustworthiness is established because the statement was made before bias or interest existed. "Rather, the rule rests on the assumption that the type of declarant specified by the rule will not make a statement about the type of fact covered by the rule unless it is trustworthy." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 804(b)(4)[01] at 117 (Supp. 1983).

The rule also broadens the traditional exception by rejecting the view that only death is sufficient to constitute unavailability. Any form of unavailability within Rule 804(a) will suffice.

The rule broadens the traditional scope of matters excepted beyond "pedigree", to encompass the whole area of personal or family history.

Subpart (A) recognizes that a person cannot have competent first-hand knowledge of one's own birth and may not have personal knowledge of other facts of his personal or family history. Consistent with former practice, personal knowledge is not required of the declarant when making statements of his own personal or family history.

Subpart (B) expands the common law rule to include statements made about matters of personal and family history as described in subpart (A), and death also, of another person if the declarant was related by blood, adoption, or marriage or "was so intimately associated with the other's family as to be likely to have accurate information concerning the matter described." The Federal Advisory Committee Notes indicate that the declarant need be related to only one of the other persons about whom the statement is made.

Idaho has no comparable statute or rule.

In Re Stone's Estate, 77 Idaho 63, 286 P.2d 329 (1955), reheard in 78 Idaho 632, 308 P.2d 597 (1957), held that statements in respect to proof of family history, relationship, and pedigree, fall into a well-recognized exception to the hearsay rule. The Court stated "a witness may testify to such facts of family history as marriage, kinship, name and death where his knowledge of the subject is derived from intimate acquaintance with the family or families." Id. at 69. However, in the second appeal, the Court clarified its previous decision somewhat: "[D]eclarations of a living person may not be received under the exception to the hearsay rule as proof of matters of family history, relationship and pedigree." 78 Idaho at 640.

Two other cases dealing with this exception to the hearsay rule are of note. In the case of In Re Estate of Freeman, 95 Idaho 562, 511 P.2d 1338 (1973), the Court quoted favorably from a Georgia case where it was stated, "'[W]here the question is whether any, or what, relationship exists between two branches of the same family, it is sufficient to establish the connection of the deceased declarant with either branch, in order to render such declaration admissible.' Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942); 5 Wigmore, Evidence § 1491 (3d ed., 1940)." 95 Idaho at 567.

In Lea v. Galbraith, 64 Idaho 724, 137 P.2d 320 (1943), the Court held inadmissible a copy of a complaint from a proceeding in another state which was offered to prove that one of the parties was married at the time of a subsequent marriage. The Court held that the statement was self-serving and therefore inadmissible. The Court also implied that the declarant might have had a motive to distort the truth.

Rule 804(b)(4) requires only that the declarant be unavailable at the time of trial. Idaho, on the other hand, requires that the declarant be deceased before his statements regarding family history will qualify under this hearsay exception. Adoption of the rule would in this respect broaden the admissibility of this testimony in Idaho.

Rule 804(b)(4) liberally allows the use of statements by unavailable declarants which concern their own family history. The law in Idaho in this respect is unclear; case law does not specifically distinguish situations where the statements are of the declarant's own family history, or of the history of another.

Rule 804(b)(4) requires that for statements concerning the family history of another to qualify, the declarant must either be related to the other by blood, marriage or adoption, or so intimately associated with the other's family as to be likely to have accurate information. Again, Idaho law is unclear in

this respect. In Re Stone's Estate mentioned that an intimate associate may testify as a witness to another's family history. But the Court there did not state what the result would be if the intimate associate were unavailable to testify, as is the situation under Rule 804(b)(4). Adoption of the rule would at least clarify the existing Idaho law in this respect, if not change it.

Again, the rule drops the requirement that the statement have been made before the controversy arose. In Re Stone's Estate implied that this is required in Idaho. However, the Court may have simply been looking at this as a factor in determining whether the declarant had a motive to distort the truth. Whatever the actual reasoning of the Court, the rule does not impose this requirement. As the Federal Advisory Committee Notes to 804(b)(4) state, the before controversy requirement bears "more appropriately on weight than admissibility." If the rule is adopted, Idaho's requirements may, in this respect, be lessened.

As noted above, the Federal Advisory Committee Notes to Rule 804(b)(4) state that relationship is reciprocal. This deviates from the rule in some jurisdictions that when the declaration concerns the relationship between two persons, the declarant needs to qualify as to both. The Idaho Court in In Re Estate of Freeman quoted favorably from a Georgia case which follows the rule. Therefore, it appears existing Idaho law is the same as Rule 804(b)(4) in this situation.

Subsection (b)(5): "other exceptions" is identical in language and purpose to Rule 803(24). See Comment to Rule 803(24).

Action Recommended on Idaho Statutes or Rules:

Repeal Idaho Code § 9-206.

Repeal Idaho Code § 9-408.

Amend I.R.C.P. 32(a)(1) to add at end of sentence "or for any other purpose permitted by the Idaho Rules of Evidence."

Amend I.R.C.P. 32(a)(4) to add at end of second paragraph a new sentence: "A deposition previously taken also may be used as permitted by the Idaho Rules of Evidence."

Repeal I.R.C.P. 32(c).

Amend I.C.R. 15(e) by deleting the language: "if it appears: (1) That the witness is dead; or (2) That the witness

is out of the state of Idaho, unless it appears that the absence of the witness is procured by the party offering the deposition; or (3) That the witness is unable to attend or testify because of sickness or infirmity; or (4) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena." and substitute in place thereof the language: "as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Idaho Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition."

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

COMMENT TO RULE 805

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 805.

Comment: Rule 805 provides that hearsay included within hearsay (multiple hearsay) is not excluded if each of the statements involved falls within an exception to the hearsay rule. This is a continuation of former practice.

The problem of multiple hearsay arises most frequently with respect to hospital records, police reports or business records when the entrant has no personal knowledge of the underlying event and has based his entry on information supplied by someone else. If the statement of the person furnishing the information independently qualifies as a hearsay exception the record is admissible under Rule 805. The record would also be admissible if the statement was exempt from the hearsay rule by Rule 801, such as an admission. See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 805[01] (Supp. 1983). Moreover, the "business record" exception, 803(6), applies to records based on hearsay from "a person with knowledge", "unless the source of information or circumstances of preparation indicate lack of truthworthiness." See Comment to Rule 803.

The trial judge has authority under Rule 403 to exclude a statement of multiple hearsay, even if it technically satisfies the rule, when he finds the statement so unreliable that its probative value is substantially outweighed by the danger of prejudice or confusion.

No applicable Idaho statutes, rules or decisions relating to this provision have been found.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

COMMENT TO RULE 806

Prior Idaho Statutes or Rules: I.R.C.P. 43(b)(8).

Comparable Federal Rule: Identical to F.R.E. 806.

Comment: Rule 806, in effect, eliminates all foundation requirements when impeaching the hearsay statements of declarants.

Weinstein explains the rule as follows:

> Rule 806 proceeds on the theory that the trier of fact will be most likely to reach a just determination if all pertinent evidence is made available to him. Confronted with a choice of limiting the impeachment of declarants in a variety of situations and ways, the Advisory Committee chose to eliminate all foundation requirements.
>
> The most troublesome situation--and one on which the courts have been divided--arises with respect to the impeachment by inconsistent statements of declarants whose hearsay declarations had been admitted under some exception to the hearsay rule. Ordinarily a prior inconsistent statement cannot be used until the proper foundation has been laid, a requirement which in Rule 613(b) is relaxed to the extent of requiring only that the witness be given an opportunity to explain, and the opponent a chance to examine.
>
> Nevertheless, liberal as this foundation requirement is, it obviously cannot be met in the case of some hearsay statements. If the declarant made the inconsistent statement after the declaration admitted as a hearsay exception, the possibility of asking him for an explanation is sharply curtailed. Only in the case of prior testimony and depositions where cross-examination exists, is there a possibility that the subject of the inconsistent statement may at least have been explored, though this is still very different than cross-examination on the inconsistent statement itself or along lines suggested by it.

> Many courts including the Supreme Court in Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), have insisted on the foundation requirement without drawing a distinction between the ordinary situation where the person being impeached is a witness, and the case where the inconsistent statement is being proffered against a hearsay declarant. McCormick objects to this approach: "when the inconsistent statement was made after the testimony was given, the foundation should be dispensed with." This is the result under the federal rules. Rule 806 dispenses with a foundation requirement for an inconsistent statement made by a declarant "at any time."

4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 806[01] at 5-6 (Supp. 1983). See also Federal Advisory Committee Notes to Rule 806.

As amended by Congress the rule includes statements admitted as non-hearsay under Rule 801(d)(2), (C) statements by a person authorized to speak for a party, (D) statements by agents or servants and (E) statements by coconspirators. Congress considered it unnecessary to include statements contained in Rule 801(d)(2)(A) and (B)--the statement by the party-opponent himself or the statement of which he has manifested his adoption--because the credibility of the party-opponent is always subject to an attack on his credibility.

Weinstein also points out that:

> The last sentence of Rule 806 allows a party against whom a hearsay statement has been admitted to examine the declarant as under cross-examination if the party calls him as a witness. This is a corollary of general principles of cross-examination (See Rule 611(c) allowing leading questions to hostile witnesses) and is in accord with Rule 607's abandonment of the rule against impeaching one's own witness. The rule is broad enough to authorize questions to the witness about his assessment of the declarant's credibility.

4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 806[01] at 8 (Supp. 1983).

Idaho has no equivalent provision in its laws or rules and no Idaho decisions recognizing this exception for foundation requirements have been located.

I.R.C.P. 43(b)(8) imposes the foundation requirements in all cases of impeachment by showing inconsistent statements. It provides:

> Rule 43(b)(8). Impeachment by showing inconsistent statements.--A witness may also be impeached by evidence, that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

The Idaho Supreme Court has held in a very early decision that evidence of statements in the nature of admissions made by a party may be proved without first calling his attention to them, or laying any foundation for impeachment. Coffin v. Bradbury, 3 Idaho 770, 35 P. 715 (1894). However, under Rule 43(b)(8) and its predecessor statute, the Court has consistently held that where no proper foundation is laid for introduction of evidence of inconsistent statements of a witness, the evidence is excludible. See, e.g., State v. Warden, 100 Idaho 21, 592 P.2d 836 (1979); Hodge v. Borden, 91 Idaho 125, 417 P.2d 75 (1966). See also Comment to Rule 613.

Adoption of Rule 806 would eliminate these foundational requirements. The Committee recommends adoption of the rule for the reasons stated above.

Action Recommended on Idaho Statutes or Rules: Repeal I.R.C.P. 43(b)(8).

INTRODUCTORY COMMENT TO ARTICLE IX

AUTHENTICATION AND IDENTIFICATION

When evidence other than that from a witness who is testifying to his first-hand observations is proffered, the first question that must be decided is whether that evidence is genuine. The type of evidence may be a writing, an object or testimony of words heard from a person unseen by the witness, such as in a telephone conversation. Each of these types of evidence must be shown to be what the proponent claims it to be.

Article IX governs and provides guidelines for resolving this question of genuineness. Article IX has generally relaxed common law authentication requirements. Rule 901 states a liberal general definition of the authentication requirement and provides ten illustrations of acceptable authentication. Rule 902 identifies another ten categories of evidence which are self-authenticating and require no extrinsic evidence of authenticity to be admissible. Rule 903 dispenses with the necessity of subscribing witnesses' testimony unless it is otherwise required by law.

Idaho Article IX is identicial to Federal Article IX, except that: Rule 901(b)(8)(C) requires that an ancient document be in existence thirty years; Rules 901(b)(10) and 902 are merely conformed to state practice; and Rule 903, although substantively the same as the federal counterpart, states the language of the more explicit California Rule.

The application of the Federal Article IX rules has resulted in no significant problems in the federal courts. There apparently is some question among the commentators whether Rule 901 is to be read literally or, alternatively, should be construed somewhat more conservatively as, at least in part, a codification of the common law requirements. Compare 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(a)[02] at 901-19 (Supp. 1983)(liberal construction) with S. Saltzburg and K. Redden, Federal Rules of Evidence Manual 699-700 (3d ed. 1983) (codification "of a good portion of the common law").

Decisions which appear to reflect this scholarly discord have affirmed trial court holdings and it appears that, at least in practice, these are matters left to the sound discretion of the trial court. Compare Durns v. United States, 562 F.2d 542, 546-547 (8th Cir.), cert. denied, 434 U.S. 959 (1977)(applied common law standard requiring proof of chain of custody and careful handling to admit tape recording stating "[t]hese requirements do not, however, exist in vacuo; they become meaningful only when viewed in light of the facts of a specific

case."); with United States v. Biggins, 551 F.2d 64, 66-67 (5th Cir. 1977)(considered common law requirements to be the "preferred" but not exclusive method of authentication); and United States v. Cortellesso, 663 F.2d 361, 364 (1st Cir. 1981); United States v. Haldeman, 559 F.2d 31, 107 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); United States v. Scully, 546 F.2d 255, 269 (9th Cir. 1976), cert. denied, 430 U.S. 970 (1977) (all stating a seemingly more liberal standard under Rule 901(a)). See generally Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 312-323 (1983).

Idaho has a complex set of statutes and rules of general application and many statutory provisions and rules of limited application which provide for "proof" of writings. Many of these statutes treat questions of admissibility relating to authentication, best evidence and hearsay in a single provision, thereby serving a much broader purpose than Article IX. See, e.g., Uniform Proof of Statutes Act, Idaho Code § 9-304.

Rules 901 through 903 treat only of authentication and identification, which is considered to be a special aspect of relevancy, and itself only one aspect of admissibility. When genuineness of the evidence is established by extrinsic proof or self-authentication, other conditions of admissibility for substantive purposes must still be satisfied. It must be shown to be the best evidence (see Article X), that it is relevant and not specially excluded (see Article IV) or privileged (see Article V), and because writings and evidence of conversations are by their very nature hearsay, that it is excepted from the rule against hearsay (see Article VIII). Questions of prejudice outweighing probative value are considered an aspect of relevancy under Article IV.

Article IX.

AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 30 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Supreme Court rule or by a statute or as provided in the Constitution of this State.

COMMENT TO RULE 901

Prior Idaho Statutes or Rules: Idaho Code Title 9, chapters 3 and 4; Idaho Code §§ 9-601, 9-1701, 9-1702, 15-1-107, 32-309, 39-263, 55-718 through 55-722, and 55-816; I.R.C.P. 4(g), 30(f), 31(b), 44(a) and (c), and 80.

Comparable Federal Rule: Identical to F.R.E. 901 except subsection (b)(8)(C) requires that an ancient document be in existence 30 years rather than 20 and subsection (b)(10) is conformed to state practice by providing for authentication or identification by methods provided by rule of the Idaho Supreme Court, State statute or constitution.

Comment: Rule 901 governs questions of authentication and identification, which are considered to be special aspects of relevancy. These conditions precedent to admission fall in the category of relevancy dependent upon fulfillment of a condition of fact and are governed by the procedure set forth in Rule 104(b). See Federal Advisory Committee Notes to Rule 901.

Subsection (a) imposes the requirement and the standard for establishing the genuineness of the evidence. Subsection (b) merely provides examples of the type of extrinsic evidence that will satisfy the requirement of authentication or identification in given situations when the document or object is not self-authenticating under Rule 902, or is not established by stipulation or by admission of the adverse party.

Subsection (a) states the requirement that the proponent of the proffered evidence prove that it is genuine. The standard for establishing genuineness "requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authentication or identification." 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(a) [01] at 16 (Supp. 1983).

The trial court should not consider inadmissible evidence in determining whether an adequate prima facie showing of authenticity has been made. See, e.g., Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 505 F. Supp. 1190, 1220 (E.D. Pa. 1980)(Rule 901(a) mandates that authenticity determinations be based upon evidence "sufficient to support a finding . . ." that the proffered evidence is genuine), (although, theoretically, Rule 104(a) authorizes the court to "consider" inadmissible evidence when ruling on relevancy conditioned on fact, "it would be a pointless exercise for a judge to rely upon inadmissible

evidence to fulfill the substantial evidence requirement when the trier of fact [under Rule 104(e)] can only consider admissible evidence that a proffered document is authentic.").

The rule is not limited to writings. All evidence must be shown to be genuine.

Idaho apparently has no statute or rule governing authentication in areas other than writings, with the exception of Idaho Code § 9-421 (establishes requirements for authenticating photographs of merchandise taken or converted in civil cases for shoplifting).

Idaho law with respect to authentication recognizes a distinction between public and private writings. The authentication of public writings in general is governed by I.R.C.P. 44(a) and (c), and Title 9, chapter 3, Idaho Code. For additional discussion regarding public writings, see commentary to Rule 901(b)(7).

Idaho statutory law governing authentication of private writings in general is contained primarily in Idaho Code § 9-405. It provides that any writing may be proved either: (1) by anyone who saw the writing executed; or (2) by evidence of the genuineness of the handwriting of the maker; or (3) by a subscribing witness.

The general statute is supplemented by other statutes of more narrow scope: e.g., Idaho Code § 9-406 (Denial by subscribing witness--Proof by other evidence); § 9-407 (Evidence of admission of execution); § 9-409 (Acknowledgment of private writings); § 9-410 (Instruments affecting realty--Certified copies of record--Admissibility); § 9-412 (Exemplar); § 9-420 (Proof of hospital medical charts or records); § 9-601 (Explanation of alterations); §§ 55-718 to 55-722 (Proof of execution of an instrument). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 186-191 (2d ed. 1972).

Although Idaho Code § 9-405 and the supplementing sections do not facially limit the proof of authentication, § 9-405 has been construed strictly by the Idaho Supreme Court, resulting in a far narrower approach to authentication of private writings than the method approved by other jurisdictions or the Federal Rules. See Idaho First Nat'l Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979)(failure to comply with Idaho Code § 9-405 meant promissory note not properly authenticated). See also State v. Golden, 67 Idaho 497, 186 P.2d 485 (1947)(mere receipt of letter does not establish authenticity and failure to meet specifications of predecessor of Idaho Code § 9-405 required exclusion); Doxstater v. Northwest Cities Gas Co., 65 Idaho 814, 154 P.2d 498 (1944); Beloit v. Green, 43 Idaho 265, 251 P. 621 (1926). Cf. Stolz v. Scott, 28 Idaho 417, 154 P. 982 (1916)(it

is within the discretion of the trial court as to whether evidence is sufficiently authenticated).

With regard to objects other than writings, the rulings of the Idaho Supreme Court have been consistent with Rule 901(a). See, e.g., State v. Campbell, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983); State v. LaMere, 103 Idaho 839, 655 P.2d 46 (1982); State v. Ruybal, 102 Idaho 885, 643 P.2d 835 (Ct. App. 1982); State v. Crook, 98 Idaho 383, 565 P.2d 576 (1977); State v. Hatton, 95 Idaho 856, 522 P.2d 64 (1974); State v. Thomas, 94 Idaho 430, 489 P.2d 1310 (1971); State v. Rodriquez, 93 Idaho 286, 460 P.2d 711 (1969). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 175-183 (2d ed. 1972).

Subsection (b) provides, for illustrative purposes, ten examples of authentication or identification conforming with the requirements of 901(a). "The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development of this area of law." Federal Advisory Committee Notes to Rule 901(b).

Subsection (b)(1) "testimony of witness with knowledge," provides that testimony of a witness with knowledge that a matter is what it is claimed to be will satisfy the requirement of authentication or identification.

The example contemplates a broad spectrum of authenticating evidence, ranging from testimony of a witness present at the signing of a document to the identification of confiscated objects. The witness' testimony need not, in and of itself, suffice to authenticate so long as it is relevant to the issue of authentication. Any combination of evidence will suffice so long as 901(a) is satisfied.

A witness may be able to authenticate the item of evidence because of knowledge acquired through his position or experience, such as the person responsible for business records, though he did not personally make the entries. In determining authenticity, the court is not bound by the rules of evidence. See Rule 104(a).

As noted above, Idaho Code § 9-405 expressly provides for authentication of a writing by the testimony of one who saw the writing executed, by evidence of the genuineness of the handwriting of the maker, or by a subscribing witness. With respect to writings, Rule 901(b)(1) expands the scope of this statute to include the testimony of any witness with knowledge that the writing is what it is claimed to be.

With regard to other items of evidence, the Idaho courts have adopted a standard similar to that of the rule. See, e.g., State v. Campbell, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983); State v. LaMere, 103 Idaho 839, 655 P.2d 46 (1982); State v. McKenna, 78 Idaho 647, 309 P.2d 206 (1957)(tangible evidence other than writings in criminal cases); State v. Spencer, 74 Idaho 173, 258 P.2d 1147 (1953)(sound recordings); State v. McPhie, 104 Idaho 652, 662 P.2d 233 (1983)(photographs); McKee v. Chase, 73 Idaho 491, 253 P.2d 787 (1953)(photographs of relevant objects or places); Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952)(maps of accident scenes); Call v. City of Burley, 57 Idaho 58, 62 P.2d 101 (1936)(X-ray pictures). Cf. State v. Sharp, 104 Idaho 691, 662 P.2d 1135 (1983)(tape recording admitted notwithstanding unintelligble parts and inability to identify speakers where trial judge allowed defense counsel the right to stop the tape at any time to identify the person speaking), (Court stated that judgment of trial court is presumed correct). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 175-181 (2d ed. 1972).

Subsection (b)(2) "non-expert opinion on handwriting," provides that non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation, will satisfy the requirement of authentication or identification.

The trial judge must decide whether the lay witness has sufficient familiarity. The knowledge can be acquired by any means so long as it is not acquired especially for trial. Only an expert can testify on the basis of familiarity acquired for trial. See subsection (b)(3).

Generally, the federal courts have held that the extent of familiarity, e.g., number of times the witness saw a person write, or length of time the witness and author corresponded, or the nature of the relationship between the witness and the author, goes to the weight and not the admissibility of the testimony if the witness can identify the handwriting. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(2)[01] (Supp. 1983).

As noted above, Idaho Code § 9-405 expressly provides that any writing may be proved "by evidence of the genuineness of the handwriting of the maker."

In accordance with the Idaho statute and consistent with Rule 901(b)(2), the Idaho Supreme Court has held that anyone who is familiar with a person's writing from having seen him write is competent as a non-expert to give his opinion as to the genuineness of such person's signature, and that the weight of the

evidence to prove genuineness of handwriting by those who know the party's handwriting is wholly for the jury. State v. Eubanks, 86 Idaho 32, 36, 383 P.2d 342 (1963)(Court indicated that seeing one write is not the only method of obtaining the requisite familiarity; "[a]nyone who is familiar with a person's writing from experience, having seen him write, or having carried on correspondence with him or from the opportunities of having frequently handled and observed the person's handwriting is competent as a non-expert to give an opinion as to the genuineness of his signature, or handwriting."). See also State v. Myers, 36 Idaho 396, 211 P. 440 (1922); G. Bell, Handbook of Evidence for the Idaho Lawyer, 61 (2d ed. 1972).

With regard to the proof of execution of an instrument of conveyance of real property, Idaho Code §§ 55-718 through 55-722 specify the methods of proof of the execution of an instrument, when it is not acknowledged. Section 55-721 provides that the execution of an instrument may be established by proof of the handwriting of the party (and of a subscribing witness, if there is one) where the party and the subscribing witness are dead, out-of-state, unlocatable or refuse to testify for a period of one hour. Section 55-722 limits testimony pertaining to proof of handwriting to those witnesses who personally knew the signators of the instrument and their signatures. See also Idaho Code § 9-409 relating to the acknowledgement of private writings, except wills, which incorporates the provisions of sections 55-721 and 55-722, and permits authentication of private writings by a non-expert through testimony as is permitted for instruments of conveyance.

Subsection (3): "comparison by trier or expert witness," provides for proving genuineness by comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

The comparison technique is often used to identify writings from a typewriter, bullets, tire tread marks, jimmy marks on door jambs, shoe prints, hair, blood and the like. The requisites for identification by comparison are a specimen whose source is known and a person who is competent to conduct the comparison. The specimen need not be admissible as evidence-in-chief as long as it is relevant for authentication purposes.

The requirement that an exemplar of a writing be proved by clear and convincing proof is eliminated by the rule. The standard for writings is the same as for other exemplars under the rule. The person offering the specimen must present "sufficient" evidence to permit a jury to find that the specimen is what it purports to be.

With regard to writings, Idaho Code § 9-412 provides:

> Whenever the genuineness of a writing is at issue, any writing admitted or proved to be genuine is competent evidence as an exemplar for the purpose of comparison with the disputed writing: provided, that such writing so admitted or proved to be genuine shall in no way refer or relate to any matter then in issue.

The Idaho Supreme Court has held that this section abrogates the common-law rule and permits any writing either admitted or proved to be genuine to be admitted as an exemplar for the purpose of comparison with a disputed writing. State v. Allen, 53 Idaho 737, 27 P.2d 482 (1933). See also Greenstreet v. Greenstreet, 65 Idaho 36, 139 P.2d 239 (1943)(compared a signature consisting of an "X"); Lowe v. Skaggs Safeway Stores, Inc., 49 Idaho 48, 286 P. 616 (1930); In re Fisher's Estate, 47 Idaho 668, 279 P. 291 (1929); State v. Brassfield, 33 Idaho 660, 197 P. 559 (1921). But cf. State v. Varnes, 67 Idaho 183, 174 P.2d 200 (1946)(Court questioned value of the testimony of a handwriting expert).

The purpose of the proviso has been interpreted by the Idaho Court to prevent prejudicial evidence from being admitted solely on the ground that it is an exemplar. See State v. Baldwin, 69 Idaho 459, 208 P.2d 161 (1949). Rule 403 would permit exclusion of an exemplar for the same reason.

The Idaho Supreme Court has required that the genuineness of the exemplar be proven by clear and convincing evidence. See Fredricksen v. Fullmer, 74 Idaho 164, 258 P.2d 1155 (1953). See also State v. Brassfield, 33 Idaho 660, 197 P. 559 (1921)(clear and undoubted evidence). Adoption of Rule 901(b)(3) would eliminate this common law requirement.

With regard to objects, the Idaho case law is consistent with Rule 901(b)(3). See, e.g., State v. Campbell, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983)(shoe prints); State v. Williams, 103 Idaho 635, 651 P.2d 569 (1982)(paint colors); State v. Watson, 99 Idaho 694, 587 P.2d 835 (1978)(fingerprints); State v. Crook, 98 Idaho 383, 565 P.2d 576 (1977) (matched piece of tape from pliers to roll of tape removed from house of accused); State v. Gonzales, 92 Idaho 152, 438 P.2d 897 (1968)(ballistics).

Subsection (b)(4): "distinctive characteristics and the like," recognizes that an item may possess such distinctive qualities as to identify its source. "Thus a document or telephone conversation may be shown to have emanated from a

particular person by virtue of its disclosing knowledge of facts known peculiarly to him." Federal Advisory Committee Notes to Rule 901(b)(4). In the case of a writing its subject matter, contents, appearance, physical characteristics, interval word and thought patterns, or its relationship to other writings or transactions may suffice for authentication." 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(4)[01] at 46 (Supp. 1983).

Idaho has no comparable statute or rule. Idaho Code § 9-405, as applied by the Idaho Supreme Court, would seem to preclude authentication of a writing by this means. See Idaho First National Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979) (authentication must satisfy the statute). See also State v. Golden, 67 Idaho 497, 186 P.2d 485 (1947)(mere receipt of letter is insufficient for authentication); Beloit v. Green, 43 Idaho 265, 251 P. 621 (1926)(authentication insufficient notwithstanding official letterhead and references in the letter to loans in issue. But cf. Malcolm v. Hanmer, 64 Idaho 66, 127 P.2d 331 (1942)(trial court erred in striking series of letters between parties; Supreme Court said they were authenticated, but did not discuss how).

Subsection (b)(5): "voice identification," provides for voice identification where the requisite familiarity based on "hearing" the voice is acquired either before or after the particular statement which is the subject of the identification. The rule is particularly, though certainly not exclusively, applicable to identification of the speaker in connection with telephone calls received, as distinguished from telephone calls made to another which are also treated in Rule 901(b)(6).

The federal courts have held that the witness need not be certain and qualifying remarks go to the weight, not admissibility. The identification may be made whether the voice was heard directly or indirectly as over a transmitting device. Similarly, sound recordings are admissible if the speakers are identified and other elements of a proper foundation for recordings are established. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(5)[01]-[02] (Supp. 1983).

The weight of recent decisions is that compelling a witness to speak in a line-up for the sole purpose of identification of his voice does not violate his privilege against self-incrimination. 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(5)[[03] at 75 (Supp. 1983).

Idaho has no comparable statute or rule. The Idaho appellate courts have recognized that voice identifications will suffice to authenticate or identify a telephone caller. See State v. Fenley, 103 Idaho 199, 646 P.2d 441 (1982)(witness was allowed to identify an anonymous caller based on subsequent voice

recognition); State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972)(Court stated that voice recognition is the most usual if not the most reliable mode of identification of a party placing a call and that voice recognition may be based upon the same voice, speech mannerisms, or other identifying characteristics). See also Tonkin-Clark Realty Co. v. Hedges, 24 Idaho 304, 133 P. 669 (1913).

Subsection (b)(6): "telephone conversations," recognizes the distinction between authentication of telephone calls received and those made to a person or a place of business. The rule provides for additional methods of authenticating telephone conversations (assuming other methods of authentication such as by the content of statements or the reply technique under example (4), or voice identification under example (5) are not available) when a call is made "to the number assigned at the time by the telephone company to a particular person or business." The rule recognizes and conditions the general rule that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that some additional evidence of identity is required.

Subpart (A) of the rule relates to calls made to a person. It permits self-identification by the person called or other circumstances to authenticate calls made to the number assigned to that person by the telephone company.

Subpart (B) relates to calls made to a place of business. It permits authentication merely by showing that "the conversation related to business reasonably transacted over the phone." All that is necessary is to show that the place of business was called and that someone at that place answered and purported to act for the business establishment. Identification of the person answering is not required when the issue is the identity of the place of business called and not the individual purporting to represent the business. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(6) [01]-[03] (Supp. 1983).

Idaho has no comparable statute or rule. The Idaho Supreme Court, in a case involving identification of the person calling, has recognized a distinction between authentication of calls received from calls made to another. See State v. Marlar, 94 Idaho 803, 807 n.1, 498 P.2d 1276 (1972)(Court observed that several jurisdictions recognize that the identification required is measured by different rules depending on whether the party against whom the conversation is sought to be introduced is the caller or the party called, and quoted with approval the rule that where one calls another by telephone, calling or dialing the number listed, the identity of the party called is thus presumptively established).

In the only Idaho case relating to authentication of a call made to a place of business, the Court held that self-identity by the party answering the phone, plus other circumstances, justified admission of the conversation. Tonkin-Clark Realty Co. v. Hedges, 24 Idaho 304, 133 P. 669 (1913)(Court adopted the general rule that forms the basis for Rule 901(b)(6)(B) that when a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication through that channel; the fact that the voice at the telephone is not identified does not render the conversation inadmissible).

No Idaho case relating to a call to a person as under 901(b)(6)(A) has been located.

Subsection (b)(7): "public records or reports," provides that evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept, satisfies the requirement of authentication.

The rule is based on the assumption that public officers properly perform their duties and that records kept in a public office are ordinarily what they purport to be.

The proponent of the evidence need only show that the office from which the records were taken is the legal custodian of the records. Legal custodianship can be shown by a certificate of authenticity from a public office, by the testimony of a public official whose duty it is to keep such records, or by the testimony of a witness with knowledge that the evidence is in fact from a public office authorized to keep such a record.

A person offering a writing or data compilation in evidence under Rule 901(b)(7) has the burden of making a prima facie showing of two facts: (1) that the material offered is a public record; and (2) that the public record is from the public office where such items are kept. The court may also take judicial notice of the genuineness of a purported public record. See Rule 201. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(7)[01] (Supp. 1983).

Public records generally include acts of legislatures, judicial records, and reports of administrative offices. The rule also recognizes for purposes of authentication that any writing authorized by law to be recorded or filed in a public office is a public record.

Idaho has an extensive set of rules and statutes governing the admission of public records, reports and other writings. I.R.C.P. 44(a) provides that an official record or an entry therein, when admissible, may be evidenced by an official publication thereof or by a copy thereof attested by the custodian and accompanied by the proper certificate identifying the custodian. Other rules of limited scope include I.R.C.P. 30(f) and 31(b)(deposition authenticated by certificate of officer taking the deposition) and I.R.C.P. 80 (authentication of transcripts of hearings and trials).

The authentication of public writings generally is governed primarily by various provisions in Title 9, chapter 3 Idaho Code. The Idaho statutes divide public writings into four classes: (1) laws; (2) judicial records; (3) other official documents; and (4) public records kept in this state of private writings. Idaho Code § 9-311.

Idaho has adopted the Uniform Proof of Statutes Act codified at Idaho Code §§ 9-304 through 9-306. Other statutory provisions for the authentication of laws include § 9-307 (Certified copies of foreign laws and writings--Admissibility); § 9-308 (Oral evidence of common law--Reports of decisions); and § 9-309 (Recitals in statutes--Conclusiveness).

Methods of authenticating judicial records are provided in Idaho Code § 9-310 (Judicial record defined); § 9-312 (Authentication of judicial record); § 9-313 (Authentication of judicial record of foreign country); § 9-314 (Compared copy of foreign record); § 9-323 (Transcript of docket of justice of another state--Admissibility); and § 9-324 (Proof of transcript--Certificate of justice and clerk--Proof of judgment by justice in person).

Methods of authenticating other offical documents are provided in Idaho Code § 9-315 (Proof of other official documents); the Uniform Offical Reports as Evidence Act codified in §§ 9-316 through 9-320; § 9-322 (Entries in public and official books--Effect as prima facie evidence); and § 9-327 (Entries by officers--Effect as evidence).

A public record of a private writing may be proved by the original record or by a copy thereof certified by the custodian. Idaho Code § 9-321.

Other statutes providing for authentication by certificate as to specific records include Idaho Code § 9-326 (Certificate of purchase or location of lands--Effect as evidence); §§ 9-328 through 9-330 (permit state auditor and treasurer to maintain records using a photographic process and provide for authentication of copies); §§ 9-331 through 9-334 (permit county officials to maintain records using a photographic

or mechanical process and provide for authentication of copies). See also, e.g., Idaho Code § 39-263 (certificates of vital statistics); § 15-1-107 (certificates of death in probate proceedings); § 32-309 (certificates of marriage); § 55-816 (affidavits that are recorded). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 184-186 (2d ed. 1972). See also Comments to Rule 803(8), (9), (10), (11), (12), (14) and (15).

The Idaho statutes, rules and decisions relating to the admission of public writings are far too many in number and scope to discuss in any detail in this Comment. The Committee determined that the Idaho law is consistent with Rule 901(b)(7) with the exception that Idaho generally requires that public records be authenticated only by the keeper of the records rather than by any person with knowledge. See, e.g., Idaho Code § 9-315; I.R.C.P. 44(a), (c); State v. Martinez, 102 Idaho 875, 643 P.2d 555 (Ct. App. 1982); State v. Polson, 92 Idaho 615, 448 P.2d 229, cert. denied, 395 U.S. 977, 89 S.Ct. 2129, 23 L.Ed.2d 765, appeal after remand, 93 Idaho 912, 478 P.2d 292, cert. denied, 402 U.S. 930, 91 S.Ct. 1527, 28 L.Ed.2d 863 (1968). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer 184-186 (2d ed. 1972).

It should also be noted that although the Idaho statutes provide for forms of records other than writings, such as photographs and microphotographed materials, to be admitted (see, e.g., Idaho Code § 9-329 and § 9-333, which comport with the "in any form" language in the rule), the Idaho statutory provisions do not expressly provide for, nor do they exclude, computer data and similar methods of data storage.

Subsection (b)(8): "ancient documents or data compilation" governs authentication of ancient documents and data compilations.

In recognition of the fact that records are often stored electronically, Rule 901(b)(8) modifies the common law to the extent that ancient data compilations are included, but, unlike the federal counterpart, the Idaho Rule retains the requirement that the evidence have been in existence for thirty years or more at the time it is offered. The requirement of thirty years is consistent with Idaho Rule 803(16).

The Federal Advisory Committee Notes point out that inclusion of data compilations within the rule requires a shift in emphasis from "appearance" to "custody and place" in considering authenticity. Consistent with this shift, the rule imposes two conditions, in addition to the age requirement of subpart (C).

Subpart (A) requires that the court find that the document or data compilation be free of suspicion concerning its authenticity. Suspicion may arise from its appearance, origin, method of safekeeping, content in relation to events, alterations or any other reason.

Subpart (B) requires that it be shown to have been in a place where, if authentic, it would likely be. The federal courts have held that unexplained gaps in custody during the life of the document or data compilation do not in-and-of themselves require exclusion, going to probative force rather than admissibility. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(9)[01] (Supp. 1983).

Idaho has no comparable statute or rule and no applicable decisions have been found. Idaho Code § 9-402 provides that historical works, when made by persons indifferent between the parties are prima facie evidence of facts of general notoriety and interest, but no time limit or further definition is provided. See Comment to Rule 803(16).

Subsection (b)(9): "process or system," is designed for situations in which the accuracy is dependent upon a process or system which produces it. The accuracy of the type of system may be either judicially noticed if it is generally known or its accuracy may be established by witnesses with knowledge of the system.

Systems involved may include computers, x-ray films, movies, sound recordings, radar, and laboratory chemical analysis equipment, to name but a few. See West, Manual for Complex Litigation (5th ed. 1982) listing other examples and indicating that a liberal policy of admissibility is followed in the federal courts on records produced by mechanical means. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(9) [01]-[02] (Supp. 1983).

The system may also include samples, polls and other forms of scientific surveys. The burden lies on the offeror to show that the sample was selected in a scientifically acceptable manner and that the conclusions are statistically acceptable. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(9)[03] (Supp. 1983).

Idaho has no comparable statute or rule, but Idaho case law seems to support this rule. See, e.g., Call v. City of Burley, 57 Idaho 58, 62 P.2d 101 (1936)(it was sufficient authentication of an x-ray to show that it was taken by the usual x-ray method or process, without proving that the process created valid results).

Subsection (b)(10): "methods provided by statute or rule," makes clear that any method of authentication or identification provided by Supreme Court Rule or by a statute or as provided in the Constitution of Idaho will satisfy Rule 901(a). The fact that a particular situation is expressly covered by language in Rule 901(b), any rules of procedure, or a specific statute does not make the method of authentication exclusive. Any other method which would be applicable may be used.

As previously noted, Idaho has a complex set of statutes and rules providing means of authenticating documents and additional statutes and rules of limited application. See also Comments to Rules 803(8), (9), (10), (11), (12), (14) and (15).

Allowing alternative methods of proving genuineness as provided by rule or statute is consistent with existing Idaho law. I.R.C.P. 44(c) expressly provides that Rule 44 does not prevent proof of official records, or of entry or lack of entry therein, by any method authorized by any applicable statute or by the rules of evidence at common law.

Action Recommended on Idaho Statutes or Rules: Repeal Idaho Code §§ 9-405 and 9-412. Amend I.R.C.P. 44(c) by deleting the language "at common law."

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signatures and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and

actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this State, or rule prescribed by the Idaho Supreme Court.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions created by law. Any signature, document, or other matter declared by any law of the United States or of this State, or rule prescribed by the Idaho Supreme Court, to be presumptively or prima facie genuine or authentic.

COMMENT TO RULE 902

Prior Idaho Statutes or Rules: Idaho Code Title 9, chapter 3; §§ 9-401, 9-402, 9-410, 28-1-202, 28-2-724, 28-3-307, 28-3-510, 28-8-105(2); I.R.C.P. 44.

Comparable Federal Rule: Substantively identical to F.R.E. 902 except that subsection (4) is conformed to state practice by use of the phrase "any law of the United States or of this State" rather than "Act of Congress."

Comment: Rule 902, consolidating various common law and statutory rules, makes self-authenticating certain classes of writings where various considerations make it unreasonable to require extrinsic evidence of authentication. The rule is based on the theory that the danger of forgery is slight.

Although the court should not use its discretion to exclude documents coming within Rule 902's classification, in no instance is the opposition foreclosed from contesting authenticity and evidence may be presented to the jury to be considered in deciding how much weight to give the documents. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 802[01] (Supp. 1983).

Rule 902 deals only with authentication. Other necessary elements of admissibility such as a hearsay exception and that it comply with the best evidence rule, which are traditionally combined with authenticity in a single statutory provision, are treated under other rules. See Articles VIII and X.

Subsection (1): "domestic public documents under seal," provides for self-authentication of public documents bearing a seal of any "domestic" governmental entity or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

The rule imposes no limitation on the scale of public authority below which the court will refuse to recognize the genuineness of the seal of an official without further authentication, whether the seal be that of an executing officer on the original document or the seal of a custodian on a certificate authenticating copies of public documents.

Idaho law is consistent with Rule 902(1).

I.R.C.P. 44(a) allows evidence of "official records or an entry therein, when admissible for any purpose," by a copy attested by the custodian and accompanied with a certificate that such officer has the custody. If from a "domestic" public office, the certificate may be signed either by a judge under seal of court or another public officer having a seal and political duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. I.R.C.P. 44(a) incorporates elements of the best evidence and hearsay rules as well as an authentication rule. Hearsay aspects are now covered by Idaho Evidence Rule 803(8), (9), and (10). Best evidence aspects are covered by Idaho Evidence Rule 1005. Authentication is now covered by Idaho Evidence Rule 902(1), (2), (3), (4), and (5).

I.R.C.P. 44(c) provides that official records may also be proved by any method authorized by any applicable statute or by the rules of evidence at common law.

Idaho statutory law similarly takes a liberal approach to the "proof" or "admissibility" of public documents either by judicial notice as provided in Idaho Code § 9-101(3)-(7), or by proffering the original, a certified copy or other acceptable form as provided in Idaho Code Title 9, chapter 3. See Idaho Code § 9-304 through 9-306 (Proof of Statutes Act); § 9-307 (certified copies of foreign laws and writings); § 9-312 (authentication of judicial record); § 9-315 (proof of other official documents); §§ 9-316 through 9-320 (Official Reports as Evidence Act); § 9-324 (proof of transcript of the record or docket of a justice of the peace of another state or territory.

With regard to public documents that are not specifically governed by another provision in Idaho Code Title 9, chapter 3, Section 9-315 requires essentially the same foundation for self-authentication as Rule 901(1), i.e., the certification of the custodian (see Idaho Code § 9-315(6)), or the seal of a political body along with a purported signature (see Idaho Code § 9-315(1), (2) and (3)). Section 9-315, as amended in 1980 by the addition of subsection (10), further liberalized self-authentication in the area of public and recorded instruments, granting discretion to the trial court to admit the document whenever the court is satisfied it is genuine.

Idaho Code § 9-302 provides that certified copies of public writings are admissible the same as the original. To be properly certified, Section 9-325 requires that the certificate be under the official seal of the certifying officer or in the case of the clerk of the court, under the seal of the court. The Idaho Supreme Court has held in an early decision, however, that the omission of a required seal is not fatal and is a mere irregularity which may be supplied by amendment, and does not

render the process or other paper from which it is omitted void. Harpold v. Doyle, 16 Idaho 671, 102 P. 158 (1908).

The definition of a public seal is provided at Idaho Code § 9-401. It provides:

> A public seal in this state is a stamp or impression, made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper or upon any substance attached to the paper, which is capable of receiving a visible impression. . . . A scroll or other sign made in another state or territory or foreign country, and there recognized as a seal must be so recognized in this state.

Rule 902 provides no definition of a public seal and Idaho Code § 9-401 would govern in this respect.

Subsection (2): "domestic public documents not under seal," deals with public documents signed by a "domestic" public officer who has no seal. It provides for self-authentication of the document if a public officer having a seal and having official duties in the same district or political subdivision as the officer sans seal, certifies under seal that the signator has the official capacity and that his signature is genuine.

The rule does not and would not impose this procedure as a requirement where none exists under existing state law.

Idaho law is consistent with Rule 902(2). Under I.R.C.P. 44(a), the seal of the custodian is irrelevant. Only the certification by the local judge or other public officer must be under seal.

The provisions of Idaho Code Title 9, chapter 3, which permit authentication of copies of domestic public writings by certification of the custodian, are more liberal than Rule 902(2) in their approach to the issue of authentication. They require that the certification be under seal only if the custodian has a seal and there is no requirement that the signature of the custodian who has no seal be certified as genuine by a public officer with a seal, as is required under Rule 902(2). See Idaho Code § 9-325.

The requirements for authentication of foreign public documents by attestation of the custodian and certification of a local judge or other public officer under seal which are imposed by various provisions of Idaho Code Title 9, chapter 3 are

comparable to the foundation required for domestic public documents not under seal required by Rule 902(2).

Subsection (3): "foreign public documents," is designed to meet the practical problems in obtaining properly authenticated documents from abroad by abolishing all unecessary procedural requirements. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 902(3)[01] (Supp. 1983).

Rule 902(3) provides for self-authentication of foreign public documents that are executed or attested in his official capacity by a person authorized under the foreign law to make the execution or attestation, and are accompanied with the appropriate final certification. The copy may be attested by either the custodian or an authorized official. The certification need only certify to the genuineness of the signature and official position of the person who executed or attested the document, and where the person making the certification cannot certify to these, he is allowed to certify the signature and official position of the last officer in the chain of certificates. This method of authenticating copies may also be used to authenticate originals.

The rule continues prior law that permits an American officer to make the final certification and permits the court to admit such documents in the absence of the final certification "for good cause shown," if the parties have been given an adequate opportunity to investigate the authenticity and accuracy of the documents.

Although patterned after Fed. R. Civ. P. 44(a)(2) as amended in 1966, Rule 902(3) is broader in scope to the extent it allows authentication for originals as well as copies and applies to public documents as well as public records.

Compliance with Rule 902(3) will not be required in those instances where authentication can be established pursuant to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, 527 UNTS 189, TIAS 10072, which took effect in the United States on October 15, 1981. Under the Supremacy Clause, the Convention is applicable in state courts and before state administrative agencies.

"Under the Convention, each country designates those public officials, by their titles, who may affix a form of certification known as the 'apostille'. The certificate simply states that the document was signed by an individual in his official capacity and that the seal or stamp is genuine. Documents from countries which are parties to the Convention are recognized in the courts here so long as the apostille is

affixed." 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 902(3)[02] (Supp. 1983)(provides relevant portions of text of Convention with official comments and names of countries which are parties to the Convention).

I.R.C.P. 44(a) permits authentication of copies of foreign public records by the attestation of the custodian and a final certification by an American officer. The language of I.R.C.P. 44(a) is virtually identical to that of the former Fed. R. Civ. P. 44(a)(2) (prior to 1966 amendment) and creates many of the same problems that existed under the prior Federal Rule. It applies only to proof of copies. It requires the attestation of the custodian notwithstanding that in most foreign legal systems the custodian is not authorized to make such attestation. It requires that the certifying American officer have knowledge of foreign laws (that the officer claiming to be the custodian is in fact the person who has the custody) which he often does not possess. It does not permit any type of chain certification.

Idaho statutory provisions which provide for authentication of foreign public writings create many of the same problems. See Idaho Code § 9-307 (Certified copies of foreign laws and writings); § 9-313 (Authentication of judicial record of foreign country); § 9-314 (Compared copy of foreign record); §§ 9-315(4), (8) (Proof of other official documents).

Adoption of Rule 902(3) would eliminate these problems in authentication of foreign documents.

Subsection (4): "certified copies of public records," continues the practice of treating certified copies of official records, reports, or entries therein, or documents authorized to be and in fact recorded or filed in a public office as self-authenticating, if properly certified.

Certification may be made by the custodian or other person authorized to make the certification. The certificate must comply with subsections (1), (2), or (3) or with any federal or Idaho State law.

Rule 902(4) requires no additional certification to the fact of custody or to the custodian's authority. The custodian's signature under a statement that he has custody of the original and that the copy is correct, whether or not accompanied by a seal, suffices to assure the accuracy of the copy as a substitute for the original. The authenticity of the original is guaranteed by a certificate complying with Rule 902(1), (2), or (3).

Copies need not always be literal copies of the originals. If a literal copy is not obtainable, Rules 1004, 1005, and 1006 may permit use of summaries.

The phrase "other person authorized to make certification" permits deputy custodians and others in the office of the custodian, who are authorized, to make certified copies of the records in their keeping.

Idaho law is consistent with Rule 902(4). I.R.C.P. 44(a) similarly provides that a copy of an official record or entry therein may be authenticated by attestation "by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody."

Idaho statutes provide for similar methods of authentication of public writings and private writings that are recorded pursuant to law. See, e.g., Idaho Code § 9-302 (certified copy of a public writing is admissible with like effect as original); § 9-307 (certified copies of foreign laws and writings); § 9-312 (certified copies of domestic judicial records); § 9-314 (certified copies of foreign judicial records); § 9-315 (certified copies of other official documents); § 9-321 (public record of a private writing may be proved by a copy certified by legal keeper of the record); § 9-325 (certificate for a certified copy must state in substance that the copy is a correct copy of original or a specified part thereof, and be under seal if there be one).

See also, e.g., Corey v. Wilson, 93 Idaho 54, 454 P.2d 951 (1969); State v. Polson, 93 Idaho 912, 478 P.2d 292 (1970); Kramer v. Settle, 1 Idaho 485, (1873). Cf. Kleinschmidt v. Scribner, 54 Idaho 185, 30 P.2d 362 (1934) (certificate not made by legal keeper of the record bars admission).

Subsection (5): "official publications," makes books, pamphlets or other publications issued by a public authority self-authenticating.

The rule requires only that the publication be purported to be printed by public authority. It is silent on what level of government must authorize the publication. Rule 902(1) provides for self-authentication of public documents bearing a seal of any "domestic" governmental entity or of a political subdivision, department, officer or agency thereof.

Idaho law is similar in scope and in effect. I.R.C.P. 44(a) provides for self-authentication of an official record or of an entry therein by an official publication thereof. See also, e.g., Idaho Code § 9-304 (printed books or pamphlets purporting on their face to be the session or other statutes of any state, territory or foreign jurisdiction and to have been printed and published by such public authority are prima facie evidence of such statutes); § 9-308 (printed and published books

of decisions of courts of any state, territory or country are admissible); § 9-315 (other official documents printed by order of the public bodies or published by their authority, including acts of a municipal corporation of Idaho or of a board or department thereof by a printed book, published by the authority of the corporation). See also Dawson v. Olson, 97 Idaho 274, 543 P.2d 499 (1975) (official highway maps held admissible under Idaho Code § 9-315); Barthel v. Johnston, 92 Idaho 94, 437 P.2d 366 (1968) (official edition of Napoleonic Code and its English translation held admissible under Idaho Code § 9-304).

Subsection (6): "newspapers and periodicals," treats these non-official publications as self-authenticating because the chance of forgery is remote.

Idaho has no comparable general statute or rule and no case law dealing with self-authentication of newspapers and periodicals has been located. Cf. Idaho Code 28-2-724 (reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of a commodity market are admissible and circumstances of preparation may be shown to affect weight but not admissibility); § 9-402 (historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest); Mohr v. Shultz, 86 Idaho 531, 388 P.2d 1002 (1964) (admitted price catalog); State v. Jensen, 47 Idaho 785, 280 P. 1039 (1929) (price lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy are admissible); In Re Estate of Brock, 94 Idaho 111, 482 P.2d 86 (1971) (page from city directory held admissible).

Subsection (7): "trade inscriptions and the like," treats inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin as self-authenticating because risk of forgery is minimal and there is a great public reliance on stamps, trademarks and brand names on labels.

The mark of identification must be affixed "in the course of business" which need not be a commercial business. Social and other organizations which regularly utilize tags and labels on products they distribute to their membership and to others would be included. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 902(7)[01] (Supp. 1983).

No Idaho statute, rule or decision has been located which makes these items self authenticating. In State v. McPhie, 104 Idaho 652, 662 P.2d 233 (1983) the Idaho Supreme Court upheld the admission of a price tag over a hearsay objection, to establish the value of the item stolen, noting that a store

employee had testified to the authenticity of the tag, that the tag was authentic and accurate, and that the trial court was clearly satisfied that the necessity and trustworthiness of the tag had been established.

Subsection (8): "acknowledged documents," extends prima facie authenticity to all documents accompanied by a certificate of acknowledgement under the seal of a notary public or other authorized officer.

State law governs whether a particular officer is authorized to take an acknowledgement. There is no requirement under the rule that the authority of the officer to take the acknowledgement be further authenticated or that the acknowledgement be shown to be in due form. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 902(8)[01] (Supp. 1983).

As is the case with certification pursuant to the other subsections of Rule 902, the presumption of authenticity occasioned by the notary's certificate and seal is rebuttable. Such rebutting evidence goes not to admissibility but to the weight to be given the underlying document.

Idaho law is consistent with Rule 902(8). Idaho Code § 9-409 provides:

> Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgement or proof of conveyances of real property, and the certificate of such acknowledgement or proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property.

See also Idaho Code § 9-410 (instruments conveying or affecting real property, acknowledged or proved, and certified, as provided by law, may be read in evidence without further proof); § 55-701 (acknowledgements of conveyances); § 15-2-501 (acknowledgement for a self-proved will).

Subsection (9): "commercial paper and related documents," in effect incorporates for self-authentication purposes four specific provisions of the Uniform Commercial Code. They are § 1-202 (makes certain documents required by an existing contract "prima facie" evidence of their own authenticity); § 3-307 (presumes the genuineness of signatures on negotiable instruments); § 3-510 (provides that a formal certificate of protest, a stamp by the drawee that payment was refused, or bank

records are all admissible in evidence and create a presumption of dishonor); § 8-105(2) (creates a presumption as to the genuineness of a signature on a negotiable instrument. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 902(9) (Supp. 1983).

Idaho law is in accord with Rule 902(9). See Idaho Uniform Commercial Code §§ 28-1-202, 28-3-307, 28-3-510 and 28-8-105(2).

Subsection (10): "presumptions created by law," provides that any mode of self-authentication provided for in Idaho statutes or rules of the Idaho Supreme Court adopted pursuant to statutory authority may continue to be employed concomitantly with the procedures specified in Rule 902. Most of the applicable statutes use "prima facie" or "presumptive" terminology. They often deal with best evidence aspects as well, allowing the prima facie authentic copies to be used instead of the original documents. See Comment to Rule 1002. In addition, they often operate as exceptions to the hearsay rule, and there is some overlapping with statutes discussed in the commentary to Rules 901(b)(10) and other subsections of Rule 902.

I.R.C.P. 44(c) follows this approach. It provides that the methods of authenticating official documents provided in Rule 44 are not exclusive and permits proof of official records or entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law. See, e.g., Idaho Code § 9-420 (medical charts or records of hospitals licensed in this state may be proved as to foundation, identity and authenticity by use of a legible and durable copy, certified upon verification by the custodian thereof).

Action Recommended on Idaho Statutes or Rules:

Amend I.R.C.P. 44(a) to conform the rule to Fed. R. Civ. Proc. 44(1) and (2) adapted to state practice.

Amend I.R.C.P. 44(c) to delete words "at common law."

Rule 903. Subscribing Witness' Testimony Unnecessary

Except as provided for by statute, the testimony of a subscribing witness is not required to authenticate a writing.

COMMENT TO RULE 903

Prior Idaho Statutes or Rules: Idaho Code §§ 9-405 and 9-406.

Comparable Federal Rule: Substantively the same as F.R.E. 903.

Comment: Rule 903 abolishes the common law requirement that the execution of every attested instrument must be proved by the subscribing witness if he can be produced and is capable of being examined, except in those cases where the testimony of the subscribing witness is expressly required by statute.

The rule only limits proof of execution to show the jural effect of the document--e.g., to prove a will is valid to transfer property or that a marriage contract changed marital status. It applies only in proving execution, not in using the document for other purposes. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 903[03] (Supp. 1983).

The wording of Idaho Rule 903 is identical to that of the California Evidence Code § 1411. The Idaho Committee determined that the explicit language of the California Rule is preferable to that of the Federal Rule. The Federal Rule appears to deal with the validity of the document, as well as admissibility, and is written to cover all jurisdictions; matters the Idaho Rule need not address.

Idaho law is in accord with Rule 903. Idaho Code § 9-405 makes testimony of a subscribing witness one of three alternative methods of proving a writing: (1) by anyone who saw the writing executed; or (2) by evidence of the genuineness of the writing of the maker; or (3) by a subscribing witness. Idaho Code § 9-406 provides that if the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

Idaho Code § 15-3-406 indicates that the testimony of an attesting witness is required in certain cases. It provides:

> (a) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one (1) of the attesting witnesses, if within the state, competent and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.
> (b) If the will is self-proved, compliance

with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery.

Action Recommended on Idaho Statutes or Rules: None required.

INTRODUCTORY COMMENT TO ARTICLE X

CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Article X deals with what was at common law termed the "best evidence rule," a term many commentators find misleading. As applied at common law the rule requires that the content of a writing be proved only by the original writing itself, with certain exceptions. It has been labeled a rule of preference to the extent that the original writing is preferred over secondary evidence to assure accuracy and avoid fraud. However, degrees of secondary evidence are not recognized, e.g., proof of the absence of a duplicate is not required before other evidence of the contents will be admitted.

The rule does not require that an event be proved only by a writing merely because a written record of the event exists, even though that writing may be the most probative evidence of the event.

The rules that follow expressly include recordings and photographs when their contents are offered substantively, a result that often occurred under federal decisions by broadly interpreting the definition of a "writing."

Rule 1001 provides the definitions of writings, recordings and photographs. Rule 1002 states the rule and Rules 1003 through 1007 provide exceptions to the rule and guidelines for their application. Rule 1008 establishes the roles of court and jury in the application of the rule.

Idaho Article X is identical to Federal Article X except that Rule 1001(2) adds language to include new technology within the definition of "photograph," Rule 1002 is conformed to state practice, Rule 1003 adds the language taken from the Uniform Rule, "or continuing effectiveness," and Rule 1004 includes the phrase "reasonably practicable" which is not found in the Federal Rule.

The application of the Article X rules has resulted in no significant problems in the Federal Courts. A question has been raised by a commentator with regard to Federal Rule 1004(2) as to the meaning of "any available judicial process or procedure" which suggests an imperative which is not recognized in practice. The commentator asserts that the trial courts should be afforded a good deal of discretion to use common sense and that the phrase "to the extent practicable and reasonable" should be read into the rule. 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004(2)[01] at p. 1004-24 (Supp. 1982). The federal courts appear to be in accord. See, e.g., United

States v. Marcantoni, 590 F.2d 1324, 1330 (5th Cir.), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). The Idaho Committee has changed the language of the rule to "reasonably practicable, available judicial process" in recognition of the potential problem. See generally Epstein, Emerging Problems Under the Federal Rules of Evidence, A.B.A. Sec. of Litig., 324-349 (1983).

Article X.

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) **Writings and recordings.** "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, motion pictures, and similar products of processes which produce recorded images of objects.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and minatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

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COMMENT TO RULE 1001

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 1001 except that subsection (2) adds the language "and similar products of processes which produce recorded images of objects."

Comment: Rule 1001 provides the definitions that govern all "best evidence" questions under Article X.

Subsection (1) defines "writings" and "recordings" to include all forms of accumulating and preserving data, whether tangible and readable by sight or non-visual means such as with tape recordings and computer discs. The use of the phrase "letters, words or numbers or their equivalent" is intended to encompass any future development that uses symbols as the equivalent of words.

The rule does not cover objects or chattels that are uninscribed. Whether objects bearing inscriptions are deemed to be writings and thus governed by the rule remains unclear. There have been no reported federal court decisions under the rules. Historically, the courts have never rigorously applied the best evidence rule in inscribed chattel cases. It has been a matter committed to the sound discretion of the trial court. See, e.g., United States v. Duffy, 454 F.2d 809, 812 (5th Cir. 1972); State v. Fontana, 589 S.W.2d 639, 642 (Mo.App. 1979). See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1001(1)[01] (Supp. 1983).

Idaho has no statute or rule defining a "writing" or "recording." Idaho Code § 9-411, which codifies the best evidence rule in Idaho, provides no definitions.

Idaho Code § 9-411 expressly makes the rule applicable when the content of a "writing" is proffered. Although the rule has been applied to all types of writings, see G. Bell, Handbook of Evidence for the Idaho Lawyer, 210 (2d ed. 1972), no decisions have been located where the Idaho Court has defined that term.

The question whether recordings are within the definition of "writings" has not been addressed by the Idaho Supreme Court. In the decisions which have involved recordings, the issue was apparently not raised. See, e.g., State v. Sharp, 104 Idaho 691, 662 P.2d 1135 (1983); State v. Spencer, 74 Idaho 173, 258 P.2d 1147 (1953)(both upheld admission of recordings without referring to best evidence rule).

The Idaho Supreme Court has specifically held that the stamped numbers on a motor vehicle are "identification marks," not "writings" under Idaho Code § 9-411 and testimony of the numbers was admissible. State v. Davis, 72 Idaho 115, 238 P.2d 450 (1951).

Subsection (2) defines "photographs" to include still photos, x-ray films, video tapes, motion pictures and similar products of processes which produce images of objects such as CT scans, infra-red photographs or thermograms.

Idaho has no statute or rule defining "photographs" and no decision has been found where the best evidence rule has been applied to photographs. The Idaho decisions dealing with photographs, x-rays and video tape have generally involved questions of relevancy, accuracy or prejudice, and have not addressed the best evidence rule. See, e.g., State v. Carter, 103 Idaho 917, 655 P.2d 434 (1981)(photographs); State v. Fenley, 103 Idaho 199, 646 P.2d 441 (Ct. App. 1982)(photographs); State v. Padilla, 101 Idaho 713, 620 P.2d 286 (1980)(photographs and x-ray); State v. Warden, 100 Idaho 21, 592 P.2d 836 (1979) (photograph); State v. Rice, 99 Idaho 752, 588 P.2d 951 (1979)(x-rays); State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979)(videotape). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 180-181 (2d ed. 1972).

In a civil action for a violation of the Idaho shoplifting laws, Idaho Code § 9-421 expressly permits the use of photographs in lieu of the items themselves to prove the merchandise taken or converted, provided that certain information is inscribed on the photograph. The statute is silent, however, with respect to the best evidence rule.

Subsection (3) defines "an original" of a writing or recording to be the writing or recording itself, or any counterpart intended to have the same effect by a person executing or issuing it.

An "original" in the technical sense used in this rule may be quite different from an "original" in lay terms. As used in Rule 1001(3) the "original" is the document whose contents are to be proved. Its jural significance makes it the original. The question is essentially one of relevancy, i.e., what is the document being offered to prove? Depending upon the issue, a document may be both a copy and an original in the same case. To show an offer, the original signed letter containing the offer is the original. To show that someone knew of the offer, a carbon copy in his file would be the original. Conversely, the carbon would be a copy when offered to show the contents of the letter

received by the offeree, and the signed letter a copy to show what was in the file of the sender. See generally 5 J. Weinstein & M. Berger, Weinsteins Evidence ¶ 1001(3)[01] (Supp. 1983).

The intent of the parties in creating the document may be controlling. It is common practice, particularly with contracts, to have the parties execute more than one copy of the contract and to expressly provide in the document that each is a "duplicate original." The rule expressly provides that documents executed in counterparts may each constitute the original if intended to have that effect by the person executing or issuing it.

Practical need may control what can be denominated an original. For example, the first permanent business records rather than the preliminary and temporary slips, tags and invoices are originals. They must, however, have been made in the regular course of business and must be fairly contemporaneous with the items entered.

Rule 1001(3) further defines an "original" of a photograph to include the negative or any print thereof and, with respect to data electronically stored, as in a computer, any printout or other output readable by sight, shown to reflect the data accurately, is an "original." This treatment of prints and printouts is based on practicalities and necessity because they are the first understandable or readable counterpart or reproduction of the underlying source. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1001(3) (Supp. 1983).

No Idaho statute, rule or decision defining an "original" has been found.

Subsection (4) expands the common law definition of "duplicate" beyond the "duplicate original" concept to encompass any accurate reproduction of the original, including enlargements and miniatures, made by any method except where produced manually. The purpose of making the reproduction is irrelevant to the rule.

Rule 1001(4) treats alike photocopies, re-recordings, re-prints of photographs and multiple printouts as from a computer. The test for defining and establishing limits upon a duplicate is whether the process used is "designed to insure an accurate reproduction of the original." Problems of fraud and discretion to refuse admission are treated under Rule 1003.

Idaho law contains no statute or rule defining "duplicate" and no applicable case law has been found.

Idaho Code § 9-417 recognizes that records of regularly conducted activity may be recorded, copied or reproduced by any process which accurately reproduces or forms a durable medium for reproducing the original, and the reproduction may be admitted in lieu of the original whether the original is in existence or not. An enlargement or facsimile of the reproduction is likewise admissible if the original reproduction is available. Cf. Idaho Code § 9-420 (Proof of hospital medical charts or records) which permits use of copies only if the originals are available for comparison or their nonavailability is explained by affidavit of the custodian of the original records.

In American Surety Co. of New York v. Blake, 54 Idaho 1, 27 P.2d 972 (1933), the Idaho Court quoted two decisions from other jurisdictions to the effect that a "carbon copy" is not a copy but a "duplicate original." The decision, however, should not be read as an adoption of the Federal Rules approach to the admissibility of a duplicate.

Adoption of Rule 1001 would apparently change Idaho law to the extent that recordings will be treated as writings, that photographs will be subject to the rule if proffered substantively, and that the definition of a duplicate will be substantially broader than the concept of a duplicate original.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

COMMENT TO RULE 1002

Prior Idaho Statutes or Rules: Idaho Code §§ 9-403, 9-411, 9-417, and 9-420.

Comparable Federal Rule: Identical to F.R.E. 1002 except to conform the rule to state practice by substitution of the word "statute" for "Act of Congress."

Comment: Rule 1002 continues the "best evidence" rule, although expanded in scope to expressly include recordings and photographs when offered in evidence substantively.

Significantly, neither the title or the body of the rule refer to "best evidence." The phrase is omitted to stress that, except as to matters covered by Rule 1002, there is no general rule that proof of a fact will be excluded unless its proponent furnishes the best evidence available to him. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1002[01] (Supp. 1983).

It is not intended that the rule be rigidly or mechanically applied to exclude secondary evidence. The rule is intended "to ensure that the trier of fact is presented with the most accurate evidence practicable in those situations where informed legal judgment has concluded that precision is essential." Id. at ¶ 1002[02](Supp. 1983). In applying the rule the trial courts should not lose sight of the dangers against which the rule is intended to operate.

Rule 1002 continues the traditional view in providing that an original is required when the object is "to prove the content of a writing."

The rule does not apply when a witness refreshes his memory with a document, when an expert resorts to material as a basis for his opinion, or when a witness testifies that examined books or records do not contain a particular entry. In connection with the latter statement, which is taken from the Federal Advisory Committee Notes, a distinction must be made between testimony that a particular writing or recording does not contain an entry as opposed to such testimony with respect to voluminous documents or records. Testimony whether a document such as a contract contains or does not contain a given provision is subject to the rule and the document must be produced unless excused by an exception. In other instances where documents are voluminuous and it would be unduly burdensome to show the absence

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of a certain provision in all, Rule 1006 should provide an exception.

Some transactions, such as wills, contracts and deeds, as a matter of substantive law take the form of a writing and any attempt to prove their happening necessarily involves the contents of the writing and brings the best evidence rule into play. But if an event does not take the form of a writing and is only incidentally put in writing, the rule does not apply and the witness may testify to the underlying event. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1002[03] (Supp. 1983).

Rule 1002 recognizes that there are instances when photographs of non-written or non-documentary materials should be subject to the application of the best evidence rule because the contents of the photograph, i.e., the photograph itself--will be sought to be proved. This often occurs where photographs or motion pictures are utilized in cases involving such matters as infringement of copyright, defamation and libel, pornography and invasion of privacy, in which the issue is whether the photograph exists or whether it was seen by the witness. A similar situation involves the automatic photograph, as of a bank robber or burglar, where the photograph is the only "eyewitness."

Another common instance where the photograph is usually offered for independent substantive value is the use of X-rays. Since it is the contents of the X-ray which are in dispute, substantial authority requires that the original X-rays be produced. Expert testimony which explains them is inadmissible without first producing the X-rays or accounting for them. Since the X-rays cannot be understood by laymen without expert testimony, the court is justified in not admitting one without the other.

The Federal Advisory Committee Notes point out that under Rule 703, an expert is allowed to give an opinion based on matters not in evidence, and the instant rule does not limit such testimony. Similarly, hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

The rule is not applicable in all instances where photographs are proffered. It does not apply where a witness uses a photograph to illustrate or explain his testimony and it is proffered only for such illustrative purpose.

The rule will not bar photographs of nondocumentary objects on the theory that the subject of the picture would be the best evidence. "Such items of real evidence are not included

in the definitions of Rule 1001 so that the best evidence rule does not apply to them" 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1001(2)[02] at 15 (Supp. 1983).

Idaho has codified the best evidence rule in Idaho Code § 9-411. It provides:

> 9-411. Secondary evidence of writings--When admissible.--There can be no evidence of the contents of a writing other than the writing itself, except in the following cases:
>
> 1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.
>
> 2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
>
> 3. When the original is a record or other document in the custody of a public officer.
>
> 4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statutes.
>
> 5. When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.
>
> 6. When the original consists of medical charts or records of hospitals licensed in this state, and the provisions of section 9-420, Idaho Code, have been followed.
>
> In the cases mentioned in subdivisions 3, 4 and 6, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents.

Idaho Code § 9-403 relates to exception (2) above. It provides:

> 9-403. Notice to produce writing--Proof upon failure to produce--When notice not necessary.--If the writing be in custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it

has been wrongfully obtained or withheld by the adverse party.

Other Idaho statutes of limited application also provide for the use of secondary evidence of a non-public writing. See, e.g., Idaho Code § 9-410 (instruments affecting realty); § 9-417 (business records); § 9-420 (hospital medical charts or records).

As is evident from the statutes and decisions, the best evidence rule in Idaho is limited in application to proof of the content of writings. The rule has been applied to all types of writings. See, e.g., Idaho First Nat'l Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979)(promissory notes); Smith v. Smith, 95 Idaho 477, 511 P.2d 294 (1973)(deeds); Tiegs v. Patterson, 81 Idaho 46, 336 P.2d 687 (1959)(ballots); State v. Dickens, 68 Idaho 173, 191 P.2d 364 (1948)(brand inspection certificate). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 208-214 (2d ed. 1972).

"In several decisions, the Idaho Supreme Court has indicated that the best evidence rule is essentially a rule of reason designed to assure accuracy. When accuracy can be obtained without requiring an original, the Idaho Court has not hesitated to allow secondary proof, even in situations where the original is available." G. Bell, Handbook of Evidence of the Idaho Lawyer, 210-211 (2d ed. 1972). See also Curiel v. Mingo, 100 Idaho 303, 597 P.2d 26 (1979); McCornick and Co. v. Tolmie Brothers, 42 Idaho 1, 243 P. 355 (1926).

The Idaho Court has allowed testimony to prove an event or other fact notwithstanding that the event or fact is documented, holding that the mere existence of written records does not, under the best evidence rule, ipso facto render speculative or uncertain any otherwise adequate, definite, specific and competent testimony. Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976). See also, e.g., Evans v. Jensen, 103 Idaho 937, 655 P.2d 454 (Ct.App. 1982)(testimonial evidence of consent by county to install cattle guard on county road was admissible without producing minutes of meeting when permission was given); In re Estate of Brock, 94 Idaho 111, 482 P.2d 86 (1971)(proof of marriage by testimony allowed notwithstanding public record of marriage); Driesbach v. Lynch, 74 Idaho 225, 259 P.2d 1039 (1953)(testimony as to net loss in sales upheld though records were not produced); Kelso v. Edward Rutledge Timber Co., 46 Idaho 497, 269 P. 94 (1928)(cost of particular undertaking); State v. McClurg, 50 Idaho 762, 300 P. 898 (1931)(testimony allowed at trial to prove statements made by accused at coroner's inquest notwithstanding existence of transcript of inquest). But cf. State v. Sedam, 62 Idaho 26, 34, 107 P.2d 1065 (1940)("the only competent evidence of the [justice court] proceedings had is the record required by law to be made. . . . Where there is written evidence of a fact in issue, the

writing, whether required by law or not, is as a general rule the best evidence. The record therefor is the best evidence of judgments and court proceedings generally.").

In two other decisions the Court has indicated that a party is required to present the best evidence which is within his power to produce and that secondary evidence is never admissible unless it is made manifest that the primary evidence is unavailable. Roddy v. State, 65 Idaho 137, 139 P.2d 1005 (1943); Idaho Mercantile Co. v. Kalanquin, 8 Idaho 101, 66 P. 933 (1901). These decisions appear to state a rule of preference and have not been relied upon in later cases.

The Idaho Court has recognized a distinction in the application of the rule between testimony as to the contents of a writing, which is subject to the rule, see, e.g., Russ Ballard and Family Achievement Institute v. Lava Hot Springs Resort, Inc., 97 Idaho 572, 548 P.2d 72 (1976) and testimony as to the existence of a writing which is not subject to the rule. See, e.g., Fish v. Fleishman, 87 Idaho 126, 391 P.2d 344 (1964); Union Central Life Insurance Co. v. Nielson, 62 Idaho 483, 114 P.2d 252 (1941). Testimony has also been allowed as to the giving of a notice. See Rabb v. North American Accident Insurance Co., 28 Idaho 321, 154 P. 493 (1916). However a witness may not testify that the document does not contain certain provisions. See Penn Mutual Life Insurance Co. v. Ireton, 57 Idaho 466, 65 P.2d 1032 (1937).

Evidence clearly not admissible was held properly admitted where no specific objection was stated and the only objection made was that it was irrelevant, immaterial and incompetent. Smith v. Smith, 95 Idaho 477, 481, 511 P.2d 294 (1973)("When a party fails to object to secondary evidence of a document, such secondary evidence is deemed competent.").

The Idaho Committee determined that adoption of Rule 1002 would not significantly change Idaho law with respect to writings, but would expand the scope of the best evidence rule to include recordings and photographs when offered substantively. The Committee concluded that the inclusion of recordings and photographs when offered substantively is desirable.

Action Recommended on Idaho Statutes or Rules: Repeal Idaho Code §§ 9-403, 9-411 and 9-417.

Rule 1003. Admissibility of Duplicates

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.

COMMENT TO RULE 1003

Prior Idaho Statutes or Rules: Idaho Code §§ 9-417, 9-418, 9-419 and 9-420.

Comparable Federal Rule: Identical to F.R.E. 1003 except to add the language "or continuing effectiveness" in subpart (1).

Comment: Rule 1003 states guidelines for admitting a duplicate as if it were an original. It relaxes the common law insistence that the original in the strict sense be either produced or accounted for, in recognition of the fact that modern discovery and reproduction technology provide the means of achieving the objective of the best evidence rule.

To qualify as a duplicate, the counterpart must be the product of a method which insures accuracy and genuineness as defined in Rule 1001(4).

Only when a substantial question is raised as to the authenticity of either the original or the duplicate, or in other circumstances when it would be unfair to admit the duplicate in place of the original, should the original be insisted upon. The rule purposely fails to attempt to define circumstances where it would be unfair to admit a duplicate, leaving this issue to the broad discretion of the court for decision on a case-by-case basis. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1003[03] (Supp. 1983).

When the opposing party concedes its accuracy or does not object pursuant to Rule 1003, the duplicate must be admitted unless the court has reason to believe that there is collusion to commit a fraud on the court. See, 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1003[01] (Supp 1983).

The language of Idaho Rule 1003 is identical to that of Uniform Rule of Evidence 1003 (1974), 13 U.L.A. 358 (Supp. 1983), and includes the phrase "or continuing effectiveness" which is not found in the Federal Rule. With respect to the purpose of that language, the Uniform Commissioner's Comment states:

> It is not intended that this rule will dispense with requirements for explaining the reasons a duplicate is being tendered in lieu of an original in any situation where the absence of the original might suggest that it is no longer effective or has been destroyed with an intent to revoke. The distinction

> between admission into evidence and admission to probate of will is not abrogated by the Rule.

13 U.L.A. at 358 (Supp. 1983).

Idaho has no comparable statute or rule providing for the broad use of duplicates without accounting for the original.

Idaho has adopted the Uniform Photographic Copies of Business Records as Evidence Act. Idaho Code §§ 9-417, 9-418 and 9-419. Section 9-417 provides that copies of business records are as admissible in evidence as the originals when it is established that the copies were made in the regular course of business and that the reproduction process accurately reproduced the originals, regardless of whether or not the originals are in existence. An enlargement or facsimile of the reproduction is similarly admissible, but only if the original is available for inspection.

The Idaho Supreme Court has upheld the admission of a photocopy of a ledger sheet, citing Idaho Code §§ 9-411, 9-414 and 9-417. Curiel v. Mingo, 100 Idaho 303, 597 P.2d 26 (1979). However, copies which were produced not in the ordinary course of business but for trial do not qualify under Idaho Code § 9-417 and are governed by § 9-411. School District No. 91, Bonneville County v. Taysom, 94 Idaho 599, 495 P.2d 5 (1972).

Carbon copies have been the subject of two relatively early decisions. In Stockmen's Nat. Bank v. First Nat. Bank, 38 Idaho 395, 221 P. 150 (1923), the Court held it was error to admit a carbon copy of a letter where it was not shown by whom it was written or what became of the original. However, in American Surety Co. v. Blake, 54 Idaho 1, 27 P.2d 972 (1933), the Court treated a carbon copy of a letter as a "duplicate original," upholding admissibility as not violative of Idaho Code §§ 9-403 and 9-411.

Idaho Code § 9-420 permits the use in evidence of certified copies of medical records of hospitals licensed in Idaho, but only if the original is available for inspection and provided the hospital has filed a resolution with the court designating the employee authorized to make the certification. No applicable decisions have been found. Compliance with Rule 1003 will also satisfy these "best evidence" requirements.

Excluding the use of a duplicate as an original in the absence of a satisfactory showing for the inability to produce the original when there is a genuine question of the continuing effectiveness of the original is consistent with Idaho law. See Hull v. Cartin, 61 Idaho 578, 105 P.2d 196 (1940)(unsigned carbon copy of a will is not a duplicate original).

Adoption of Rule 1003 would expand Idaho law with respect to the admissibility of duplicate writings, photographs and recordings, and would provide general guidelines for the use of duplicates where none now exist.

Action Recommended on Idaho Statutes and Rules: Repeal Idaho Code §§ 9-417, 9-418 and 9-419.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any reasonably practicable, available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

COMMENT TO RULE 1004

Prior Idaho Statutes or Rules: Idaho Code §§ 9-403, 9-411(1) and (2).

Comparable Federal Rule: Identical to F.R.E. 1004, except for the addition of "reasonably practicable" in subsection (2).

Comment: Rule 1004 continues the common law rule excusing production of the original in specified circumstances. The production of recordings and photographs as well as writings is covered by the rule.

If production of the original is excused as provided in the rule, secondary evidence of the contents is admissible. Rule 1004 recognizes no degrees of secondary evidence. Once the conditions of Rule 1004 are met, any kind of secondary evidence ranging from photographs and handwritten copies to oral testimony of a witness may be proffered. Except for public records, the Federal Advisory Committee concluded that any attempt to formulate a hierarchy of preferences would involve unwarranted complexities. See Federal Advsory Committee Notes to Rule 1004.

The Federal Rules recognize the need for utmost accuracy with respect to public records by requiring a certified copy and allowing other secondary evidence of the contents only if a copy "cannot be obtained by the exercise of reasonable diligence." See Rule 1005.

Even though the production of the original is excused, it is still necessary to authenticate the absent document. See Article IX. Before proof of contents can be admitted, the court should be satisfied that a reasonable juror could find (Rule 901(a)) the existence and due execution of the original in the same manner as if the original were produced. Rules of relevancy (Article IV) must also be satisfied. The preliminary questions as to authenticity and lack of an original are to be resolved by the court. See Rules 104, 901(a) and 1008. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004(1)[03] (Supp. 1983).

Subsection (1): "originals lost or destroyed," follows the long recognized practice of allowing secondary evidence when the originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.

The rule imposes no express requirement that the proponent show that a search was made as was usually required at common law. Weinstein suggests that some evidence of a search would be required in any event to establish that the original was not lost or destroyed by the proponent in bad faith. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004(1)[02] (Supp. 1983).

Consistent with the business records exception, the rule rejects the idea that any intentional destruction by the proponent bars the admissibility of secondary evidence. The proponent has the burden of showing the absence of "bad faith" when the original is unavailable. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004(1) (Supp. 1983).

The degree of evidence required to show a sufficient search or an absence of bad faith will depend upon the circumstances. Factors considered by the courts have included whether there is suspicion of fraud, the importance of the instrument, and the age of the instrument. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004(1)[04] (Supp. 1983).

Idaho Code § 9-411(1) permits secondary evidence of the contents of a writing "[w]hen the original has been lost or destroyed; in which case proof of the loss or destruction must first be made." Secondary evidence in the form of either is allowed. See also, e.g., Idaho First National Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979)(held the admission of a photocopy of the original promissory note was permissible when the party offering the copy made an adequate showing of loss and inability to produce the original); Smith v. Smith 95 Idaho 477, 511 P.2d 294 (1973); In re Stone's Estate, 78 Idaho 632, 308 P.2d 597 (1957)(it was erroneous to admit copy of insurance application in absence of any evidence disclosing any effort to locate and produce the original). See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 213 (2d ed. 1972).

The Idaho Supreme Court has held that secondary evidence is admissible without proof of a search when the evidence shows that the originals have been destroyed. Knowles v. Kasiska, 46 Idaho 379, 268 P. 3 (1928).

Adoption of Rule 1004(1) would not result in a significant change in Idaho law with respect to writings.

Subsection (2): "original not obtainable," is in accord with prevailing practice in excusing production of the original if it cannot "be obtained by any reasonably practicable, available judicial process or procedure." It is based on the same rationale as that which justifies secondary evidence when

the original is lost or destroyed, i.e., the need for relevant evidence.

It is intended that the rule be applied with discretion and common sense. See, e.g., Rule 102. The relative expense and delay required to effect the judicial process should be considered in determining whether the evidence can be obtained by any "reasonably practicable, available judicial process." See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004(2)[01] (Supp. 1983).

Whether judicial process is "available" will also depend upon the scope and extent of discovery allowed, whether the subpoena powers can be utilized, and whether the material sought is privileged.

Idaho has no comparable statute or rule. Idaho Code §§ 9-403 and 9-411(2) permit secondary evidence of a writing when the original is in possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice, but they do not apply when the original is in the possession of a nonparty.

No Idaho case law recognizing this particular exception has been found. The Idaho Court has indicated that production of the original would not be excused except as provided in Idaho Code § 9-411. See Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc., 97 Idaho 572, 548 P.2d 72 (1976).

Adoption of Rule 1004(2) would add a new exception to the best evidence rule in Idaho.

Subsection (3): "original in possession of opponent," continues the common law view that secondary evidence is admissible when the original is (1) in the possession or control of the opponent, (2) when demand or notice for production has been made, and (3) the opponent fails or refuses to produce the original in court.

The purpose of the rule is to excuse production of the original; not to compel it, although the proponent may resort to discovery procedures or subpoena powers to compel production.

The sufficiency of the proof of the preliminary conditions is to be determined by the court under Rule 1008.

The rule imposes no requirement that the notice be in writing or in any particular form. It permits, but does not require that notice be given in the pleadings. Oral notice is deemed adequate, but is not the best practice for obvious reasons. Notice is deemed to be timely whenever the opponent is

fairly and truly able to obtain and produce the original. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004(3)[01] (Supp. 1983).

It should be noted that the rule provides no exception to the requirement that notice be given. Prior law recognized that notice was unnecessary in some circumstances such as where the opponent fraudulently suppressed the original or denied its existence. In the absence of an excuse of notice, better practice dictates that notice be given in every case.

The rule also fails to recognize an excuse from the notice requirement when the opponent is a criminal accused. Under prior law notice was often excused on the theory that production by the accused would be tantamount to self-incrimination. The alternative available to the accused requires him to maintain silence which is not subject to comment.

Idaho Code §§ 9-403 and 9-411(2) provide a similar exception to the best evidence rule as it applies to writings.

> 9-403. Notice to produce writing--Proof upon failure to produce--When notice not necessary.--If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.
>
> 9-411. Secondary evidence of writings--When admissible.--There can be no evidence of the contents of writing other than the writing itself, except in the following cases:
>
> 1. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.

In American Surety Co. v. Blake, 54 Idaho 1, 27 P.2d 972 (1933) the Court held that a copy of a letter is admissible without notice to produce where the party against whom it is offered denies receiving the letter. Similarly, in Fairbanks v. Fairbanks, 59 Idaho 1, 80 P.2d 17 (1938), the Court held the failure to demand production of the original is not grounds for rejecting a copy where the opponent admits receiving the original. See generally G. Bell, Handbook of Evidence for the Idaho Lawyer, 213 (2d ed. 1972).

Adoption of Rule 1003(4) would not effect a significant change in present Idaho law with respect to writings.

Subsection (4): "collateral matters," provides an exception when the writing, recording or photograph "is not closely related to a controlling issue."

Weinstein points out that the exception was commonly found in American jurisdictions. It involves those situations where it is impractical to forbid references to writings by a witness while testifying except upon condition that the original be produced in court. An example cited is the situation where the witness recalls a date because he remembers seeing a report of the event in a newspaper that day. The application of the rule is left to judicial discretion. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1004(4)[01] (Supp. 1983).

Idaho has no comparable statute or rule and no applicable case law has been found.

Adoption of Rule 1004(4) would add a new exception to the Idaho law.

Action Recommended on Idaho Statutes or Rules: Repeal Idaho Code §§ 9-403 and 9-411.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

COMMENT TO RULE 1005

Prior Idaho Statutes or Rules: Idaho Code §§ 9-410, 9-411(3) and (4).

Comparable Federal Rule: Identical to F.R.E. 1005.

Comment: Rule 1005 provides a limited exception to the best evidence rule by permitting the admission of a copy of two kinds of public records: (1) official records and (2) documents which have been either recorded or filed. A copy must meet the same criteria for admissibility as the original; the rule is not an exception to the hearsay rule.

An admissible copy may be proved in two ways: first by being certified in accordance with Rule 902(4) or second by having its faithful reproduction attested to by a witness who has compared the copy to the original. The rule seems to create a preference for certified or compared copies, which is a departure from the general pattern of rejecting the concept of degrees of secondary evidence. There is no preference between certified copies and compared copies.

There is some disagreement among the commentators whether other evidence of the contents of a document may be admitted in the absence of a showing that the original and the preferred copy are unavailable. Weinstein advocates that other evidence of the contents of the document may be given only if the original and a preferred copy "cannot be obtained by the exercise of reasonable diligence." 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1005 [06] at 1001-12 (Supp. 1983). But cf. S. Sattzburg and K. Redden, Federal Rules of Evidence Manual, 745 (3d ed. 1982)(asserts that, when neither a certified nor compared copy can be obtained by the exercise of reasonable diligence, then any other probative evidence is admissible since the "other evidence" clause at the end of the rule "signifies that no heirarchy of preferences is created, an approach that is consistent with Rule 1004 but is a change from the common law").

In Amoco Production Co. v. United States, 619 F.2d 1383, 1390-1391 (10th Cir. 1980), the pivotal issue was whether a 1942 deed contained a reservation of mineral rights. The original was lost; however, it had been manually recorded--a copy typed by county personnel--in the recorder's office. The recorded version which the court admitted contained no reservation. The trial court excluded defendants' proffer of evidence of their routine practice in 1942 to include such clauses and a photocopy of a conformed file copy maintained by them. The trial court relied

upon Weinstein's analysis in so ruling, reasoning that, because a certified (Rule 1005) copy was available, all "other evidence" was barred. The Tenth Circuit reversed, reasoning that the original document was at issue, not the recorded version and that Rule 1005 applies only to the recorded version. If the original document is returned to the parties after it is recorded, it is not a public record as contemplated by Rule 1005. Id. at 1390.

The rule does not prohibit the admission of the original if available, notwithstanding that it may have been recorded, e.g., a deed that has been recorded and returned to the grantee. So also may a duplicate of the original document be admitted. The only exception would be if proof of the document actually recorded or on file were required on an issue, e.g., whether there was constructive notice of a fact resulting from the content of the document actually recorded. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1005[01] (Supp. 1983).

The sufficiency of evidence of "reasonable diligence" will vary with each case and this determination lies within the discretion of the court.

Idaho Code § 9-411(3) provides that secondary evidence is admissible "[w]hen the original is a record or other document in the custody of a public officer." Subsection 9-411(4) permits secondary evidence "[w]hen the original has been recorded, and a certified copy of the record is made evidence by this code or other statutes." Section 9-411 further provides that "a copy of the original or of the record, must be produced." As a consequence, oral testimony of the contents of these documents is not admissible. See Ralston v. Plowman, 1 Idaho 595 (1875). See also McDowell v. Geakon, 73 Idaho 430, 252 P.2d 1056 (1953).

I.R.C.P. 44(a) provides for the admission of a certified copy of an official record or entry therein. Whether the document is from a domestic public officer or a foreign public officer affects only the type of certification required. Although Idaho Code § 9-411(4) does not refer to the Idaho Rules of Civil Procedure, it would seem that the exception would still be applicable since the rules have the force of law with respect to evidence admissible in the courts.

Idaho Code Title 9, chapter 3 contains many applicable statutes with respect to public writings. Section 9-301 grants every citizen the right to inspect and copy any public writing except as provided by statute. Section 9-302 provides that every public officer having custody of a public writing is bound to give the citizen a certified copy of it, "and such copy is admissible as evidence in like cases and with like effect as the original." See also Idaho Code § 9-304 (Proof of Statutes Act);

§ 9-307 (Certified copies of foreign laws and writings); § 9-312 (Authentication of judicial record); § 9-313 (Authentication of judicial record of foreign country); § 9-314 (Compared copy of foreign record); § 9-315 (Proof of other official documents); § 9-321 (Public record of private writing); § 9-323 (Transcript of docket of justice of another state); § 9-325 (Certified copies of writings); § 9-326 (Certificate of purchase or location of lands); §§ 9-328 through 9-333 (certified copies of records of state auditor and state treasurer and copies of records of county officials are made admissible the same as originals).

Idaho Code § 9-410 provides that certified copies of instruments conveying or affecting real property which have been recorded may be read in evidence with like effect as the original, on proof by affidavit that the original is not in the possession or under the control of the party producing the certified copy. See also Oatman v. Hampton, 43 Idaho 675, 256 P. 529 (1927)(held provisions of Idaho Code § 9-410 are mandatory and it is erroneous to admit copy of deed without compliance with its requirements).

The major distinction between Rule 1005 and I.R.C.P. 44(a) appears to be the type of secondary evidence that is admissible. Rule 1005 would expand Idaho law to allow the use of "compared copies" where none now exists and would allow testimony or other evidence of the contents of public records after the proponent has shown an inability to obtain a certified copy through reasonable diligence.

Action Recommended on Idaho Statutes or Rules: Repeal Idaho Code §§ 9-410 and 9-411.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

COMMENT TO RULE 1006

Prior Idaho Statutes and Rules: Idaho Code § 9-411(5).

Comparable Federal Rule: Identical to F.R.E. 1006.

Comment: Rule 1006 continues the common law rule allowing the use in evidence of summaries of voluminous writings and expands the rule to include recordings and photographs. The rule permits the presentation of these materials "in the form of a chart, summary, or calculation" when they "cannot conveniently be presented in court."

The rule does not require that the summaries be prepared or presented by an expert, although practical considerations may dictate the necessity of having a technician, such as an accountant, analyze voluminous material and prepare the exhibit. The accuracy of the summaries is to be considered and decided by the jury. See Rule 1008(c). However, before submitting them to the jury, the court should rule whether there is sufficient factual basis for admitting them and whether possible confusion or prejudice outweighs their usefulness. See Rules 401-403. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1006[01] (Supp. 1983).

Before the chart, summary, or calculation may be admitted, the proponent must lay a proper foundation for the admission of the original or duplicate materials on which the exhibit is based, absent a stipulation to the admissibility of the materials or exhibit. Without the foundation the summaries are inadmissible. Upon admission, the summary is substantive evidence of the contents of the underlying materials and may be relied upon as evidence-in-chief. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1006[02], [03] (Supp. 1983).

Rule 1006 requires, as a condition for the admission of summaries, that the originals or duplicates of the underlying materials be made available for examination or copying or both by all parties at a reasonable time or place and gives the court authority to order that they be produced in court. Implicit in the rule is the requirement that the opponent have a reasonable time to examine, copy and prepare challenges to the materials or exhibits. This production requirement exists independent of any discovery requirements under the Rules of Civil and Criminal Procedure. See Fed. R. Civ. P. 34 and Fed. R. Crim. P. 16.

Rule 1006 does not prohibit the use of summaries when permitted under other rules. Rule 1004 permits the use of

summaries as other evidence of the contents of unavailable originals under limited circumstances. See also Rule 1005 with respect to public records. Where the summary is printed by a computer and reflects data in the computer, the printout may be the original itself. See Rule 1001(3). See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1006[05] (Supp. 1983).

Testimonial summaries have been permitted in the federal courts under Rule 1006. See, e.g., Nichols v. Upjohn Co., 610 F.2d 293 (5th Cir. 1980).

A distinction must be recognized between the use of summaries as evidence under Rule 1006 and the use of summaries, charts or other aids as pedagogical devices to summarize or organize documents which have themselves been admitted in evidence. The latter are not evidence. They are more in the nature of argument. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1006[07] (Supp. 1983).

Idaho Code § 9-411(5) permits the use of summaries as evidence "[w]hen the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

The statute is silent as to whether oral summaries are admissible. In Ashley & Rumelin v. Brady, 41 Idaho 160, 238 P. 314 (1925), the officer of a bank was permitted to testify that a person did not have funds on deposit. See also Driesbach v. Lynch, 74 Idaho 225, 259 P.2d 1039 (1953)(allowed testimony of net loss sustained though records were not produced in court); Picciano v. Miller, 64 Idaho 759, 137 P.2d 788 (1943)(held the existence of trust records did not make report of audit of records inadmissible).

Where some of the records were not available and others could not be identified, the Idaho Court has held that the numerous transaction exception was not applicable. Stolz v. Scott, 28 Idaho 417, 154 P. 982 (1916).

The Idaho Supreme Court has applied the exception to permit admission of a simplified version of official highway maps which were already in evidence. Dawson v. Olson, 97 Idaho 274, 543 P.2d 499 (1975).

The Idaho Committee concluded that adoption of Rule 1006 would not significantly change Idaho law with respect to writings.

Action Recommended on Idaho Statutes or Rules: Repeal Idaho Code § 9-411.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

COMMENT TO RULE 1007

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: Identical to F.R.E. 1007.

Comment: Rule 1007 continues the common law practice of permitting a party to prove the contents of a writing without accounting for the original, by introducing as evidence admissions by an adverse party of the original's contents. However, because there is a substantial risk of inaccuracy by misquoting the adverse party or quoting him out of context and because the exception requires no accounting for the original in contravention of the rule giving preference to originals, Rule 1007 does not authorize the use of oral, extrajudicial admissions for this purpose.

Although oral, extrajudicial admissions may not be used to prove contents of instruments under Rule 1007, they may nevertheless be used as secondary evidence to prove the content of writings, recordings, or photographs pursuant to Rule 1004 or Rule 1005 in place of absent originals where the nonproduction of the originals is accounted for.

Testimonial admissions may include those made in deposition, hearing or trial. The rule does not restrict the application of the rule to testimony given in the same case nor does it define the type of proceeding in which acceptable "testimony" must be given. The commentators advocate that the term "testimony" should be given its broadest construction to include that given in any type of proceeding, including grand jury testimony, regardless of whether it is given in the same case. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1007 [01] and [02] (Supp. 1983).

Written admissions may include an adverse party's admissions made in response to written interrogatories (Fed. R. Civ. P. 33) and requests for admissions (Fed. R. Civ. P. 36), as well as any other document signed by the adverse party.

Admissions made by an agent of the adverse party have been used to prove contents. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1007 [04] (Supp. 1983).

Idaho has no comparable statute or rule and no Idaho decision addressing this particular exception has been located.

While it does not appear that the Idaho Court has addressed the issue of admissions in the best evidence context, it would seem that the rationale for allowing admissions as an exception to the hearsay rule would be applicable. In Clarke v. Blackfoot Water Works, Ltd., 39 Idaho 304, 314, 228 P. 326 (1924), the Court expresses the rationale for the admissibility of admissions of a party opponent: "it is highly improbable that a party will admit or state anything against himself, or against his own interest, unless it is true."

In Smith v. Smith, 95 Idaho 477, 511 P.2d 294 (1973), the Idaho Supreme Court held that otherwise inadmissible secondary evidence of content is competent when the adverse party fails to object specifically to admissibility. An objection that evidence was "irrelevant, immaterial and incompetent" was deemed insufficient. It would seem that an admission of content in the form of testimony or in writing would be an even stronger basis for admitting secondary evidence of content. But cf. Russ Ballard & Family Achievement Inst. v. Lava Hot Springs Resort, Inc., 97 Idaho 572, 548 P.2d 72 (1976)(that portion of adverse party's deposition describing an alleged written agreement did not fall within any of the exceptions provided for in Idaho Code § 9-411 and was properly excluded by the trial court).

Adoption of Rule 1007 would add a new exception to the best evidence rule in Idaho.

Action Recommended on Idaho Statutes or Rules: None required.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (a) the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

COMMENT TO RULE 1008

Prior Idaho Statutes or Rules: Idaho Code § 9-102.

Comparable Federal Rule: Identical to F.R.E. 1008.

Comment: Rule 1008 is a specialized statement of the general division of duties between the judge and jury articulated in Rule 104(b). Under Rule 104(b) questions relating to competence of proffered evidence are retained by the court, while decisions as to relevance conditioned on fact are entrusted to the trier of fact.

Under Rules 104 and 1008 the judge must decide all general questions of competence of proffered secondary evidence, e.g., questions as to qualifications of witnesses, constitutional challenges, privileges, or admissibility of evidence such as hearsay, and whether conditions of fact necessary for the admission of hearsay have been established.

Under Rule 1008 the judge must decide whether preliminary questions of fact necessary to admit secondary evidence of contents under one of the four exceptions provided in Rules 1004, 1005, 1006, 1007 have been fulfilled, e.g., whether the original is lost, or is unobtainable, or whether there was a diligent search.

Other questions, however, having to do with the probative force (relevance) of the evidence are the responsibility of the trier of fact. Rule 1008 states three issues that are expressly reserved to the trier: (a) whether the original ever existed, or (b) whether an instrument is the original, or (c) whether the secondary evidence correctly reflects the contents of the original. The list is not all inclusive but, rather is merely illustrative of those issues which will arise frequently in the context of writings, recordings, or photographs. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶1008 [01] (Supp. 1983).

Illustrative of the application of the rule is the situation where the plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. Should the court decide that no such contract was ever executed and exclude the secondary evidence, the issue is removed from the jury and plaintiff would then be denied a trial by jury on the issue whether the contract was ever entered into. The latter portion of the rule is

designed to ensure treatment of these situations as raising jury questions. See Federal Advisory Committee's Note to Rule 1008. See generally 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1008 [01-[05] (Supp. 1983).

The phrase in Rule 1008: ". . . the issue is for the trier of fact to determine as in the case of other issues of fact," should be construed as referring to the special procedure established under Rule 104(b), rather than the treatment accorded to ultimate issues of fact. Thus, secondary evidence of contents may be admitted only after a showing of the conditioning fact sufficient to support a finding by the jury on that question. The decision is not one for the uncontrolled discretion of the jury, but is subject to the control exercised generally by the judge as to what issues may be submitted to the jury through appropriate instructions. See 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1008 [01] at 7 (Supp. 1983).

Idaho has no comparable statute or rule governing judge/jury functions in the best evidence context. However, Idaho Code § 9-102, the general judge/jury statute, applies. It provides in part that all questions of law arising upon the trial, including the admissibility of testimony and the facts preliminary to such admission, are to be decided by the court.

Although there is no statutory provision preserving issues for the jury as in Rule 1008, it appears that the Idaho Supreme Court has adopted the approach to preliminary questions adopted in Rules 104(b) and 1008. See American Surety Co. v. Blake, 54 Idaho 1, 27 P.2d 972 (1933)(admitted carbon copy of letter where adverse party asserted it had never been received, holding that receipt of letter was a jury question).

Action Recommended on Idaho Statutes or Rules: None required.

INTRODUCTORY COMMENT TO ARTICLE XI

MISCELLANEOUS RULES

Like the rules found in Article I, the three rules in Article XI provide criteria for using the rules set forth in Articles II-X, which govern admissibility and exclusion of evidence.

Rule 1101 provides for the effective date of the rules and a mechanism for amendments. Rule 1102 provides that the Rules of Evidence control over conflicting evidentiary statutes and rules. Rule 1103 provides an escape valve in the event that the application of the rules or an amendment thereto, in a case or proceeding pending on the effective date, would prejudice the substantive rights of a party.

Idaho Article XI is similar to Federal Rule 1102. As noted in the Introductory Comment to Article I, matters relating to the title of the rules (F.R.E. 1103) and the courts and proceedings to which the rules apply (F.R.E. 1101) have been dealt with in Idaho Rule 101, rather than at the end of the rules as was the choice of the Federal Advisory Committee

Article XI.

MISCELLANEOUS RULES

Rule 1101. Adoption and Amendments.

(a) **Adoption.** These rules shall take effect on the date stated in the order of adoption.

(b) **Amendments.** These rules may be amended or repealed by order of the Supreme Court effective on the date stated in the order. Any such order shall be published before the effective date as ordered by the Supreme Court, except in cases declared to be an emergency, in which case the order may be declared effective immediately.

COMMENT TO RULE 1101

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: In part, similar in purpose to F.R.E. 1101 and 1102.

Comment: Rule 1101 provides for the effective date of these rules and a mechanism for amending these rules.

Subsection (a) provides for the effective date of these rules by reference to the order of the Supreme Court adopting the same.

Subsection (b) sets forth the procedure for amending or repealing these rules as well as a requirement that orders amending or repealing these rules be published before the effective date of such amendment or repeal. One exception to the prior publishing requirement is recognized where an emergency is declared. Where such an emergency exists, the amendment or repeal is effective immediately. Otherwise, the effective date of any amendment or repeal is as stated in the order.

The language of subsection (b) is taken verbatim from I.R.C.P. 1(b).

Action Recommended on Idaho Statutes or Rules: None.

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Rule 1102. Effect on Evidentiary Statutes and Rules

Statutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect.

COMMENT TO RULE 1102

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: None.

Comment: Rule 1102 provides that the Idaho Rules of Evidence are controlling over conflicting evidentiary statutes and rules.

It is intended to eliminate the type of confusion that existed following the adoption of the Idaho Rules of Civil Procedure during the period of time prior to the repeal of conflicting procedural statutes, as illustrated by Lawrence Warehouse Co. v. Rudio Lumber Co., 89 Idaho 389, 405 P.2d 634 (1965). The language of the rule is patterned after that decision.

The authority of the Idaho Supreme Court in matters of procedure and evidence is discussed in the commentary to Rule 101.

The Supreme Court's inherent authority to make rules governing procedure and, by rule, to make inapplicable procedural statutes which conflict with present court systems is deemed to have been established in State v. Griffith, 97 Idaho 52, 58, 539 P.2d 604 (1975)("The legislature need not repeal statutes made unnecessary by, or found in conflict with, court reorganization and integration. It is well settled in this state, as part of the rule-making power possessed by this Court, that the Court may by rule, . . . make inapplicable procedural statutes which conflict with our present court systems.").

Action Recommended on Idaho Statutes or Rules: None required.

Rule 1103. Application

The trial court shall apply these rules and any amendments to these rules to actions, cases and proceedings pending on the effective date unless it finds that such application would prejudice the substantive rights of any party.

COMMENT TO RULE 1103

Prior Idaho Statutes or Rules: None.

Comparable Federal Rule: None.

Comment: Rule 1103 is intended to make clear that these rules and any amendments to these rules are to be applied in all civil and criminal actions, cases and proceedings, including those that are pending on the effective date of adoption of these rules and any amendments thereto.

It is well established that rules of evidence are matters of procedure and not substantive law and can be made applicable to pending proceedings. See Introductory Comment to Article V. See also State v. Powers, 96 Idaho 833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S.Ct. 881, 47 L.Ed.2d 99 (1976); State v. Griffith, 97 Idaho 52, 539 P.2d 604 (1975).

In recognition of the possibility that these rules or any amendments thereto, which become effective during the middle of a trial could affect the outcome of the trial to the prejudice of a party, the Idaho Committee, borrowing from the language of Section 1 of Pub. L. 93-595 enacting the Federal Rules of Evidence, I.C.R. 59, and I.M.C.R. 18, determined that the trial court should have the power to not apply a new evidentiary rule if it finds that application would prejudice the substantive rights of any party.

In some instances the trial court will be able to minimize and perhaps remove any prejudicial effect by continuing a matter. The Committee considered adding a provision that would require a court to grant a continuance if necessary to avoid prejudice to a party, but rejected that approach. The Committee concluded that it would probably not be feasible to continue a jury trial already in progress when a rule becomes effective and the ends of justice may be better served by applying former evidentiary principles to avoid the prejudicial effect of applying the new rule. The court must determine whether a new evidentiary rule should apply to further proceedings on a case-by-case basis if a question of prejudice is raised by a party.

Action Recommended on Idaho Statutes or Rules: None required.

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THIS INDEX IS NOT PART OF THE OFFICIAL REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE. THIS INDEX IS A COPY OF THE INDEX FOR THE UNIFORM RULES OF EVIDENCE (1974), 13 U.L.A. 731-756 (SUPP. 1984).

THE NUMBERING OF THE IDAHO RULES OF EVIDENCE IS IDENTICAL TO THAT OF THE UNIFORM RULES WITH THE FOLLOWING EXCEPTIONS:

Uniform Rules 101, 1101 & 1102 (Scope, Applicability & Title) are combined in I.R.E. 101.

Uniform Rules do not include:

I.R.E. 412 - Rape Cases; Relevance of Victim's Past Behavior.
413 - Proceedings of Medical Malpractice Screening Panels.
513 - Lawyer May Exercise Claim of Privilege.
514 - Parent-Child; Guardian or Legal Custodian-Ward Privilege.
515 - Accountant-Client Privilege.
516 - School Counselor-Client Privilege.
517 - Licensed Counselor-Client Privilege.
518 - Licensed Social Worker-Client Privilege.
519 - Hospital, In-Hospital Staff Committee and Medical Society Privilege.
520 - Medical Malpractice Screening Panel Privilege

Idaho Rule 1101 covers: Adoption & Amendments.

Idaho Rule 1102 covers: Effect on Evidentiary Statutes and Rules.

Idaho Rule 1103 covers: Application.

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[redacted]

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