
TRIAL EVIDENCE FOR JUDGES
LECTURE SERIES
PARTS 1 THROUGH 3 OF 5

Presented By
D. Craig Lewis, Esq.
University of Idaho College of Law, Retired
Moscow, Idaho
and
Merlyn W. Clark, Esq.
Hawley Troxell Ennis & Hawley LLP
Boise, Idaho

1

PART I

**TRIAL EVIDENCE FOR JUDGES:
MANAGEMENT OF A TRIAL**

Presented By

**D. Craig Lewis, Esq.
Professor Emeritus
University of Idaho College of Law
Moscow, Idaho**

and

**Merlyn W. Clark, Esq.
Hawley Troxell Ennis & Hawley LLP
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**FOR THE
DISTRICT JUDGES' CONFERENCE**

**February 24, 2012
Boise, Idaho**

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PART ONE: MANAGEMENT OF A TRIAL

This is Part One of a continuing series of presentations on Trial Evidence For Judges.

I.	INTRODUCTION.....	1
A.	What Constitutes "Evidence."	1
B.	Policies Underlying Admissibility of Evidence.	1
C.	Evaluating and Ruling on Evidence Questions.	2
D.	Sources of Evidence Law in Idaho.....	2
II.	SCOPE AND APPLICABILITY OF EVIDENCE RULES	3
A.	Rule 101: Scope and Applicability of Idaho Rules of Evidence.....	3
B.	Rule 102: Purpose and Construction of Rules.	5
C.	Judicial Discretion: What is it; When Does it Exist and When is it an Oxymoron.....	5
D.	Conduct of the Trial Judge.	6
E.	Rule 601: Hearings to Determine Competency of Witnesses.	7
III.	EFFECT OF IDAHO RULES OF EVIDENCE ON CONFLICTING EVIDENTIARY STATUTES.....	8
A.	The Court's Power to Adopt Rules Governing Procedure.	8
B.	Rule 1102: Effect of Rules on Conflicting Evidentiary Statutes.	8
C.	Substantive Rules v. Procedural Rules; What's the Difference.....	10
IV.	PRE-TRIAL EVIDENTIARY MATTERS.....	10
A.	Motions to Suppress Evidence.	10

B.	Motions In Limine.....	11
V.	RELEVANCE.....	13
A.	Definition and Admissibility of Relevant Evidence.	13
B.	Relevance Conditioned on Other Facts.....	14
VI.	RULINGS ON EVIDENCE ISSUES	15
A.	Rule 103: Rulings on Evidence Objections and Offers of Proof.	15
B.	Rule 104: Preliminary Questions.	16
C.	Rule 105: Limited Admissibility.....	17
D.	Rule 106: Remainder of Related Writings or Recorded Statements.....	18
E.	Objections to Evidence Beyond Pleadings Issues: Dealing with Amendments.....	18
F.	Ruling on Rule 403 Objections.	19
VII.	ALTERNATIVES TO EVIDENCE ADMISSIONS	20
A.	Judicial Notice.....	20
B.	Judicial Admissions.....	25
C.	View of Premises, Property or Things.	27
VIII.	BURDENS AND PRESUMPTIONS.....	29
A.	Burden of Proof (Persuasion).....	29
B.	Burden of Going Forward With Evidence.	30
C.	Presumptions.	30
IX.	ORDER OF PROOF AND PRESENTATION OF EVIDENCE.....	33
A.	Order of Proof.	33
B.	Presentation of Evidence.....	34
C.	Right to Open and Close--Civil.....	36
D.	Right to Open and Close--Criminal.	37
E.	Reopening Case After Party has Rested--Civil.....	37

F.	Reopening State's Case in Criminal Prosecution After State Rests.	37
G.	Rebuttal and Surrebuttal Evidence.	38
X.	CONCLUSION	39

PART ONE: MANAGEMENT OF A TRIAL

I. INTRODUCTION

A. What Constitutes "Evidence."

According to Blackstone: "Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or the other." Blackstone, Commentaries, 3, 367.

According to the Rules of 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." Rule 401, I.R.E.

B. Policies Underlying Admissibility of Evidence.

1. Need for Evidence

2. Reliability of Evidence

- a. Personal Knowledge
- b. Qualifications
- c. Hearsay
- d. Authentication
- e. Best Evidence
- f. Character Evidence
- g. Unduly Prejudicial Evidence

3. Constitutional Law Exclusions

- a. Right Against Self-Incrimination
- b. Illegally Seized Evidence
- c. Coerced Confessions
- d. Confrontation
- e. Due Process/Fair Trial

4. Public Policy Exclusions

- a. Testimonial Privileges
- b. Remedial Measures
- c. Compromises and Offers
- d. Insurance
- e. Plea Discussions and Withdrawn Pleas
- f. Medical Malpractice Screening Panels
- g. Communications Made in Mediation
- h. Payment of Medical Expenses
- i. Victim's Past Behavior/Rape Cases

5. Judicial Economy

- a. Judicial Notice
- b. Relevancy
- c. Waste of Time/Cumulative
- d. Summaries

C. Evaluating and Ruling on Evidence Questions.

1. The proponent of the evidence has the burden of producing evidence and proving authenticity and relevance required for admissibility. The opponent has the obligation to establish grounds for exclusion. *See, e.g., United States v. Dupee*, 569 F.2d 1061 (9th Cir. 1978) (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.).
2. Evidence that is authentic and relevant is generally admissible unless specific grounds for exclusion exist as provided by the Idaho Rules of Evidence or other rules applicable in the courts of Idaho. Rule 402, I.R.E.
3. When testing the admissibility of evidence, it is helpful to follow the approach to the question of admissibility that is followed by the rules--if the evidence is authentic and relevant, it is generally admissible in the absence of a specific ground for exclusion.
 - a. Is it authentic?
 - b. Is it relevant?
 - c. Should it nevertheless be excluded?
 - (1) Is the witness unqualified? (Rule 601)
 - (2) Is foundation required and lacking? (Rule 901, et seq.)
 - (3) Is it inadmissible hearsay? (Rule 801, et seq.)
 - (4) Is it privileged? (Rule 501, et seq.)
 - (5) Is it excludable as a matter of policy under the Rules of Evidence, Rules of Procedure, statutes, or on constitutional grounds?
 - (6) Does unfair prejudice outweigh probative value? (Rule 403)
 - (7) Is it unduly cumulative? (Rule 403)
 - (8) Does it fail to satisfy the best evidence (original document) rule? (Rule 1001, et seq.)

D. Sources of Evidence Law in Idaho.

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 (1965). Sources of evidence law and policy include:

1. Constitution of Idaho.
2. Constitution of the United States.
3. Idaho Rules of Evidence.
4. Idaho Rules of Civil Procedure and Idaho Rules of Criminal Procedure.
5. Idaho statutes, if not rendered ineffective by Idaho Rules of Evidence.
6. Idaho case law.
7. Report of the Idaho State Bar Evidence Committee (1985).
8. Lewis, IDAHO TRIAL HANDBOOK (2d ed. 2005).
9. Bell, HANDBOOK OF EVIDENCE FOR THE IDAHO LAWYER (3d ed. 1987).
10. Decisions of Federal Courts applying comparable rules of evidence and Federal Advisory Committee Notes (U.S. Supreme Court decisions interpreting the Federal Rules of Evidence are not binding on Idaho State courts).
11. Federal Reference Manual on Scientific Evidence, 2nd ed. (Federal Judicial Center 2000).
12. Decisions of sister states applying comparable state rules of evidence (reports of decisions interpreting the Uniform Rules of Evidence, reported in Uniform Laws Annotated is helpful).
13. Legal treatises and encyclopedias on evidence law.

II. SCOPE AND APPLICABILITY OF EVIDENCE RULES

A. Rule 101: Scope and Applicability of Idaho Rules of Evidence.

1. **Rule 101(b):** The rules govern all actions, cases and proceedings in the courts of the state of Idaho.
2. **Rule 101(c):** Rules of privilege apply at all stages of all actions, cases and proceedings.
3. **Rule 101(d):** The rules apply in the following proceedings subject to enumerated exceptions cited in the rules:
 - a. **Preliminary hearings.** This provision gives effect to the special evidentiary provisions in I.C.R. 5.1(b) relating to the preliminary hearing--probable cause hearing procedures.

- b. **Juvenile Corrections Act proceedings.** The rules apply in proceedings under the Juvenile Corrections Act except as modified by the Idaho Juvenile Rules. The rules of evidence in a J.C.A. evidentiary hearing are the same as rules that apply in a criminal proceeding. I.J.R. 15(f).
 - c. **Master's proceedings.** The rules apply in master's proceedings unless the appointing district court directs otherwise as empowered under Rule 53(c), I.R.C.P.
 - d. **Uniform Post-Conviction Procedure Act.** Gives effect to I.C. § 19-4907, to the extent it allows the court to admit proof by affidavits or depositions.
 - e. **Driver's License Supervision.** Gives effect to the provision in Misdemeanor Criminal Rule 9.2(b), which allows proof of refusal to submit to evidentiary tests for alcohol by affidavit of a peace officer.
 - f. **Paternity Act proceedings.** Gives effect to I.R.C.P. 6(c)(7), which provides procedures for admitting results of blood tests in paternity actions.
4. **Rule 101(e)** specifies the situations, other than those respecting privileges, where the rules are made inapplicable.
- a. **Preliminary questions of fact.** The court is not bound by the rules of evidence, except the rules of privilege, when determining questions of fact preliminary to ruling on the admissibility of evidence when the issue is to be decided by the court under Rule 104(a).
 - b. **Special Inquiry Judge proceedings.**
 - c. **Miscellaneous proceedings:** Extradition or rendition; sentencing, or granting or revoking probation (*State v. Tracy*, 119 Idaho 1027, 812 P.2d 741 (1991)); issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise.
 - d. **Contempt proceedings,** when the court may act summarily.
 - e. **Small claims proceedings.**
 - f. **Child Protective Act proceedings.** All hearings conducted pursuant to the provisions of the Child Protective Act, I. C. § 16-1601 et seq., except that the Rules of Evidence shall apply to adjudicatory hearings conducted pursuant to I.C. §16-1619 and termination of parental rights proceedings pursuant to I.C. §16-1624.

g. **Emergency medical treatment.** Informal hearings for emergency medical treatment pursuant to I.C. § 16-1627.

h. **Judicial Authorization for Abortion.** All hearings conducted pursuant to I.C. § 18-609A regarding a request for judicial authorization for performance of an abortion on a minor.

B. Rule 102: Purpose and Construction of Rules.

1. **Rule 102 provides:** "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."
2. **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.

C. Judicial Discretion: What is it; When Does it Exist and When is it an Oxymoron.

1. **Inherent Powers.** Among the inherent powers of the court is authority to protect and maintain the dignity and integrity of the courtroom and to achieve an orderly and expeditious disposition of cases. *See Talbot v. Ames Construction*, 127 Idaho 648, 904 P.2d 560 (1995).
2. **Plain Meaning Rule of Statutory Construction.** It is not intended that Rule 102 be construed to permit the clear language of other rules to be ignored. *See, e.g., United States v. Salerno*, 505 U.S. 317, 112 S.Ct. 2503 (1992) (Relying on the plain meaning rule of statutory construction, the Court held it has no authority to override the plain meaning of a rule by applying notions of adversarial fairness; "we must enforce the words that [Congress] enacted."). *See also, Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987); *Huddleston v. Unites States*, 485 U.S. 681 108 S.Ct. 1496 (1988); *United States v. Owens*, 484 U.S. 554 108 S.Ct. 838 (1988); *United States v. Zolin*, 491 U.S. 554 109 S.Ct. 2619 (1989).
3. **Discretionary Authority is Limited.** The Idaho Rules of Evidence "are not mere prefatory guides to discretion; they are standards controlling the outcome of evidentiary questions. A trial judge possesses no 'discretionary' authority to alter or to disregard specific standards-- particularly in criminal trials, where these standards impart real meaning

to an accused's right to a fair trial." **"Discretion is properly exercised only when a rule of evidence calls for it."** *State v. Maylett*, 108 Idaho 671, 674, 701 P.2d 291, 294 (Ct.App.1985). *See also State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993)(the determination of the relevance of evidence is a legal question, not a matter within the discretion of the trial judge).

4. **Degrees of Discretionary Authority.** The power to exercise judicial discretion is conferred by the rules in language which may affect the degree of discretion allowed.
 - a. Discretion is implied in the phrase **"the court may"** do something under the rules, e.g., the court may order witnesses excluded as under Rule 615(a), I.R.E.
 - b. Discretion is found implicit in the text of rules that authorize the court **"for good cause"** to order an act done or forborne, e.g., if admitted, statements in learned treatises may be read into evidence but may not be received as exhibits, except upon motion and order for good cause shown. Rule 803(18), I.R.E. Other rules declare that the court **"in the interest of justice"** may make certain orders, e.g., a court may order disclosure of materials reviewed to refresh memory before testifying if the court in its discretion determines that the interest of justice so require under Rule 612(b), I.R.E.
 - c. Still other rules expressly state that the court **"may, in the exercise of discretion,"** make certain orders, e.g., the court may, in the exercise of discretion, permit inquiry into additional matters on cross-examination as if on direct examination under Rule 611(b), I.R.E.

D. **Conduct of the Trial Judge.**

1. **Comment on Evidence Prohibited.** It is improper for the trial judge to comment on the evidence and make statements of fact in the presence of the jury, or to discuss in their presence the inference and conclusion to be arrived at from certain facts that have been proven, as the jurors are the sole judges of the evidence and of the conclusions to be reached from such evidence. *McKissick v. Oregon Short Line Ry. Co.*, 13 Idaho 195, 89 P.2d 629 (1907).
2. **Comment on Weight of Evidence Prohibited.** It is not proper for the court to enter into a discussion as to the weight of any specific class of evidence or the effect, which should be given to the evidence by the jury as compared with any other class of evidence. *State v. Marren*, 17 Idaho 766, 107 P. 993 (1910).
3. **Ridiculing Counsel Prohibited.** The trial court should avoid remarks tending to give the jury the impression that counsel is asking foolish

questions and trifling with the court, and thus create prejudice. *Nave v. McGrane*, 19 Idaho 111, 113 P. 82 (1910). A court's comments or remarks are prejudicial if they comment on the weight of the evidence, indicate an opinion of the court as to the merits, or tend to ridicule counsel or reflect upon counsel's handling of the case. *State v. Polson*, 81 Idaho 147, 339 P.2d 510 (1959). A court's statements reflecting the court's opinion about the evidence relating to a critical issue in the case may constitute prejudicial error. *See, e.g., State v. White*, 97 Idaho 708, 551 P.2d 1344 (1976), *cert. denied*, 429 U.S. 842, 97 S.Ct. 118 (1976) (instruction to disregard could not cure prejudice from trial judge's remarks about evidence).

4. **Elucidating Matters Authorized.** "Remarks or conduct of the court are not improper if they are intended only to make points clear or elucidate the matter under consideration. *State v. Polson*, 81 Idaho 147, 339 P.2d 510 (1959). For example, it is not an improper comment on the evidence or expression of disbelief for the trial court to question, in front of the jury, the sufficiency of the foundation for an expert's proposed opinions; under these circumstances, the court is merely expressing a legal opinion. *Harmston v. Agro-West*, 111 Idaho 814, 727 P.2d 1242 (Ct. App. 1986)." Lewis, IDAHO TRIAL HANDBOOK, 30 (2d ed. 2005). *See also, State v. Boman*, 123 Idaho 947, 854 P.2d 290 (1993)(court's statement as to why a robbery charge was dismissed was permissible clarifying explanation).

"While a court must be impartial and refrain from engaging in prosecutorial acts, it is not improper for the court to call to the prosecutor's attention a material omission in the state's proof that could be corrected with a simple question. Bringing the omission to light furthers justice by clarifying the evidence and completing the record. *State v. Sandoval-Tena*, 138 Idaho 908, 71 P.3d 1055 (2003)." Lewis, IDAHO TRIAL HANDBOOK, 30 (2d ed. 2005).

E. **Rule 601: Hearings to Determine Competency of Witnesses.**

1. **Competency Presumed.** Rule 601 states that every person is competent to be a witness except persons whom the court finds to be incompetent, persons making claims against decedent's estates in certain limited circumstances, and as otherwise provided in the rules. There is no affirmative duty on a proponent of a witness to lay a foundation of general competence for a witness.
2. **Challenging Competence.** If a witness demonstrates a deficiency in one of the testimonial capacities, the opponent may move at or before the time the person is sworn to challenge competence on voir dire.
3. **Procedure for Challenge.** Rule 601 provides a mechanism to challenge or test the ability of a witness to appreciate the oath or affirmation and to

testify competently, i.e., to perceive, recollect and communicate that perception, before testimony is given.

4. **Focus of Challenge.** 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 618, 682 P.2d 571 (1984); *State v. Fenley*, 103 Idaho 199, 646 P.2d 441 (Ct. App. 1982).
5. **Competency Distinguished from Reliability.** The inability to perceive and communicate perceptions may not render a witness incompetent to testify, but rather go to the weight and credibility of the testimony. *See, e.g., State v. Ross*, 92 Idaho 709, 449 P.2d 369 (1968)(overruled in part on other grounds in *State v. Hall*, 95 Idaho 110, 504 P.2d 383 (1972)(questions about reliability of testimony of five and six year old children goes to weight). *See also State v. McKenney*, 101 Idaho 149, 609 P.2d 1140 (1980)(indecisiveness of nine year old went to weight as opposed to competence).

III. EFFECT OF IDAHO RULES OF EVIDENCE ON CONFLICTING EVIDENTIARY STATUTES

A. The Court's Power to Adopt Rules Governing Procedure.

It is well established that the Idaho Supreme Court has the inherent power to make rules governing procedure in the courts of Idaho. *See Idaho Code* § 1-212; *In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614 (1995)(rehearing denied),(upholding the Court's inherent rule making authority); *Talbot v. Ames Construction*, 127 Idaho 648, 904 P.2d 560 (1995) ("It is well established that the Idaho Supreme Court is uniquely empowered with certain inherent powers. The Court has the inherent power to make rules governing the procedure in all of Idaho's courts."); *State v. Knee*, 101 Idaho 484, 616 P.2d 263 (1980) (matters of evidence are matters of procedure).

B. Rule 1102: Effect of Rules on Conflicting Evidentiary Statutes.

1. **Conflicting Evidentiary Statutes Ineffective.** Evidentiary Statutes that are in conflict with the Idaho Rules of Evidence are of no force or effect. Rule 1102, I.R.E.; *In re SRBA Case No. 39676*, 126 Idaho 246, 912 P.2d 64 (1995) (rehearing denied), (evidence rules render ineffective the statutes providing for admissibility of state water reports); *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994) (admissibility of testimony by common-law wife is governed by Rules of Evidence, not statute),(Rule 601 clearly takes precedence over I.C. § 19-3002 by virtue of Rule 1102); *State v. Durst*, 126 Idaho 140, 879 P.2d 603 (Ct. App. 1994) (admissibility of testimony of wife is governed by rules of evidence); *State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993) (Section 9-202, which provides that children under ten cannot be witnesses if they appear incapable of receiving just impressions of the facts or of relating them truly, is invalid to the extent that it attempts to prescribe admissibility of hearsay and is in

conflict with the rules of evidence); *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992) (it was error to admit hearsay statements of child pursuant to statute).

2. **Evidentiary Presumptions.** Evidentiary presumptions may be created by statute and they are given effect by the rules of evidence. *See* I.R.E. 301; *In re SRBA Case No. 39576*, 126 Idaho 246, 912 P.2d 64 (1995) (*rehearing denied*).
3. **Legislative Authority to Enact Procedural Statutes.** Where conflict exists between procedural statutes and the Idaho Rules of Civil Procedure the statutes are of no force and effect. *See R.E.W. Const. Co. v. District Court of Third Jud. Dist.*, 88 Idaho 426, 400 P.2d 390 (1965) (ten day time limitation on right to demand jury trial established by Rule 38, I.R.C.P. is controlling over I.C. § 10-301). However, the legislature may enact procedural statutes when such statutes are "necessary" because of changing circumstances or the absence of a procedural rule from the Supreme Court. *See In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 64 (1995)(*rehearing denied*).
4. **Statutory Criminal Provisions Superseded.** Where conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matters of procedure, the rules will prevail. *See State v. Currington*, 108 Idaho 539, 700 P.2d 942 (1985) (I.C.R. 46(b) supersedes I.C. § 19-2905 regarding fixing of bail and release from custody); *But, see State v. Jones*, 127 Idaho 477, 903 P.2d 67 *reh'g denied*, (1995) (I.C. § 19-2406, which enumerates permissible grounds for new trial, is substantive law and therefore trumps I.C.R. 34).
5. **Evidence Rules Govern.** To the extent that a rule of evidence places greater strictures upon the use of evidence than does a statute, the rule must govern. *See, e.g., State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992) (Evidence Rule 804(b)(1) governs over I.C. § 9-336 with respect to the admissibility of prior testimony of an absent witness.).
6. **Substantive Rules Not Superseded.** The forty-two day time limitation on filing a claim of illegal death sentence imposed by Idaho Code § 19-2719 is a substantive rule, not a procedural rule, and does not supersede I.C.R. 35, which allows the court to correct an illegal sentence at any time. *State v. Lankford*, 115 Idaho 796, 770 P.2d 805 (1989); *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1992), *cert. denied* 106 S.Ct. 2260, 476 U.S. 1153, *habeas corpus denied*, *Beam v. Paskett*, 744 F. Supp. 958 (D. Idaho 1990), *aff'd in part, rev'd in part*, 966 F.2d 1563 (9th Cir.(Idaho) 1992), *as am., cert. granted, vac. Arrave v. Beam*, 113 S.Ct. 1837, *on remand*, 3 F.3d 1301, *as am., and as am. on denial of reh., and suggestion for reh'g. en banc rejected, cert. denied* 114 S.Ct. 1631, *post conviction relief dismiss.* 121 Idaho 862, 828 P.2d 891 (1992).

C. Substantive Rules v. Procedural Rules; What's the Difference.

“Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.” *State v. Currington*, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985).

IV. PRE-TRIAL EVIDENTIARY MATTERS

A. Motions to Suppress Evidence.

1. **Purpose of Motion.** The motion to suppress is usually reserved for evidence that has been illegally obtained or is otherwise constitutionally inadmissible.
2. **Timing of Motion.** The motion to suppress evidence on the ground that it was illegally obtained must be raised prior to trial. *See Idaho Criminal Rule 12(b)(3)*. *See also, State v. Alanis*, 109 Idaho 884, 712 P.2d 585 (1985) (trial court abused discretion in considering motion to suppress which was not timely filed when neither "good cause" nor "excusable neglect" was shown); *State v. Severns*, 47 Idaho 246, 273 P. 940 (1929).
3. **When Filing at Trial Allowed.** When the defendant first learns about the unlawful search and seizure at the trial, he may make a motion to suppress the evidence at the trial. *See BELL, HANDBOOK OF EVIDENCE FOR THE IDAHO LAWYER*, 103 (3d ed. 1987)(citing, *State v. Arnold*, 52 Idaho 349, 15 P.2d 396 (1932)).
4. **Excluding Evidence at Preliminary Hearing.** "Motions to suppress must be made in a trial court as provided in ICR 12; provided, if at the preliminary hearing the evidence shows facts which ultimately require the suppression of evidence sought to be used against the defendant, such evidence shall be excluded and shall not be considered by the magistrate in his determining probable cause. ..." Idaho Criminal Rule 5.1(b).
5. **Label Immaterial.** A motion styled as a motion in limine, but based on arguments that the evidence has been unconstitutionally obtained will be regarded as a suppression motion. *State v. Yeates*, 112 Idaho 377, 732 P.2d 346 (Ct. App. 1987).
6. **Parental Invocation of Child's Right.** A parent may invoke the right to counsel on behalf of a minor child, *State v. Adamcik*, 2012 Ida. LEXIS 32 (January 25, 2012), but the request must be clear and unambiguous. *State v. Doe*, 137 Idaho 519, 50 P.3d 1014 (2002). A parent may also waive the child's *Miranda* rights but the child himself will still have to agree to such a waiver. *State v. Adamcik*, 2012 Ida. LEXIS 32 at 54. In determining whether a defendant has voluntarily, knowingly and intelligently waived his *Miranda* rights, the court must consider the totality of the

circumstances. The factors the court must consider include: "(1) whether *Miranda* warnings were given; (2) the youth of the accused; (3) the accused's level of education or low intelligence; (4) the length of detention; (5) the repeated and prolonged nature of the questioning; and (6) deprivation of food or sleep. *Doe*, 137 Idaho at 523, 50 P.3d at 1018.

B. Motions In Limine.

1. **Purpose of Motion.** "A motion in limine is a request for a ruling on the admissibility of evidence, made in advance of the offer of the evidence and outside of the presence of the jury." Lewis, IDAHO TRIAL HANDBOOK, 46 (2d ed. 2005).
2. **Importance of Motion.** The Idaho courts have recognized the importance of the motion. "It enables a judge to rule on evidence without first exposing it to the jury. It avoids juror bias occasionally generated by objections to evidence during trial. The court's ruling on the motion enables counsel on both sides to make strategic decisions before trial concerning the content and order of evidence to be presented." *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781, (Ct. App. 1986), *modified on other grounds*, 114 Idaho 107, 753 P.2d 1253 (1987).
3. **Authority for Motion in Limine.** No statute or rule expressly authorizes motions in limine. No express authority is necessary. Motions in limine are a proper extension of the trial judge's authority to rule on the evidence and to administer the conduct of a trial. Authority under the Rules of Evidence may be found in Rules 103(c), 104(c), and 611(a), in rules on pretrial conference and other pretrial proceedings, and in the general inherent power of the courts to control proceedings before them.
4. **Judge Exercises Power under Rule 104.** The judge performs the function of ruling on the admissibility of evidence pursuant to Evidence Rule 104. In making its determination the judge is not bound by the rules of evidence except those with respect to privileges. I.R.E. 104(a).
5. **Prospective Application.** The Idaho Court of Appeals has held that a motion in limine applies only prospectively. Consequently, a motion in limine which was made after the admission of evidence without objection was not an effective remedy. *State v. Wallmuller*, 125 Idaho 196, 868 P.2d 524 (Ct. App. 1994).
6. **Problems Inherent in Motions in Limine.** The Idaho Supreme Court has stated that "motions in limine seeking advance rulings on the admissibility of evidence are fraught with problems because they are necessarily based upon an alleged set of facts rather than the actual testimony which the trial court would have before it at trial in order to make its ruling. The trial judge, in the exercise of his discretion, may decide that it is inappropriate to rule in advance on the admissibility of evidence based on a motion in limine, but may defer his ruling until the case unfolds and there is a better

record upon which to make his decision." *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).

"A generally worded motion in limine may be insufficient where only a particular kind of evidence presents problems. *See, e.g., State v. Christiansen*, 2006 WL 1506551 (Ct. App. 2006), *review filed*, (June 22, 2006) (motion to require establishment of foundation for any expert testimony outside presence of jury insufficient to raise challenge to improper foundation testimony of police officer claiming to be expert in detection of deception)." Lewis, IDAHO TRIAL HANDBOOK, Supp. 1 (2d ed. 2005).

7. **Deferring Ruling.** Where the court is requested to rule on the admissibility of factual evidence, exercising the discretion to defer a ruling until the case unfolds and the evidence is offered may be appropriate. However, in *Johnson v. Emerson*, 103 Idaho 350, 647 P.2d 806 (Ct. App. 1982), the Court of Appeals stated that it appreciated the judge's dilemma in having to rule on matters not yet presented to the court, but held that it was error to refuse to rule on the merits of the motion in limine in that case, recommending that the facts be supplied in an offer of proof.
8. **Affect of "Gatekeeper" Function.** Where the court is faced with a proffer of expert opinion evidence, the court may not have the discretion to refuse to perform its "gatekeeper" function prior to trial or prior to ruling on the merits of a motion for summary judgment. *See Ryan v. Beisner*, 123 Idaho 42, 844 P.2d at 24 (Ct. App. 1992) (for expert opinion to be admissible, trial court must make factual determinations that expert is qualified and that evidence will be of assistance to trier of fact); *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 1995 WL 124628 (7th Cir. 1995)(court committed reversible error in declining to determine at the outset whether the methodology or reasoning satisfy Daubert and permitting expert to testify).
9. **Preserving the Objection for Appeal.** "If a motion in limine has been made and granted or denied, counsel need not renew an objection to the trial court's ruling during trial in order to preserve the issue for appeal." *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988). *See also, Davidson v. Beco Corp.*, 112 Idaho 560, 733 781 (Ct. App. 1986), *modified on other grounds*, 114 Idaho 107, 753 P.2d 1253 (1987)(where judge denied motion, failure to renew objection at trial will not ordinarily constitute waiver of challenge to evidence on appeal; motion serves as continuing objection unless counsel plainly abandons it by subsequent words or conduct, or unless evidence is offered at trial for a purpose the motion did not seek to foreclose).
10. **When Offer of Proof Required.** If the motion in limine is granted to exclude evidence, Rule 103 requires that the proponent of the evidence make a record of the evidence that the trial court excluded by an offer of

proof at trial. The offer must include evidence of all the specific facts which the proffered evidence tends to establish; mere argumentative conclusions will not suffice. *State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1988).

11. **When Further Objection at Trial Required.** "If the trial court defers a ruling on the motion a party must reassert an objection at the time of the offer in order to preserve the issue. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988). In addition, objections to the evidence on grounds other than those raised in the motion in limine will be lost if not made during the trial. *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992) (motion in limine objecting to expert's testimony as invading province of jury did not preserve objection that testimony was improper character evidence)." Lewis, IDAHO TRIAL HANDBOOK, 48 (2d ed. 2005).
12. **Imposing Conditions on Reference to Evidence.** "Where a trial court defers a ruling on evidence the disclosure of which would result in prejudice, the court should consider imposing conditions on the manner in which counsel or witnesses may address the evidence in question, if necessary to avoid prejudice by its mention in front of the jury. *See I.R.E.* 103(c). *See also Ross v. Coleman Co.*, 114 Idaho 817, 761 P.2d 1169 (1988)(order in limine prohibiting mention of settlement agreement without first making off-the-record offer of proof showing need to disclose agreement).
13. **Interlocutory Nature of Ruling in Limine.** A ruling on a motion in limine is interlocutory in nature and may be reconsidered by the court at any time prior to entry of the final judgment, unless prejudice from a changed ruling can be demonstrated. *See generally, Luce v. United States*, 569 U.S. 38, 41-42 (1984).

V. RELEVANCE

A. Definition and Admissibility of Relevant Evidence.

1. **Definition.** Rule 401 defines "relevant evidence" to mean "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."
2. **Determination Not Discretionary.** The determination of relevance is a legal question, not a matter of discretion. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 569 (1993). Whether evidence is relevant under Rule 401 is an issue of law which an appellate court will review de novo. *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (2009).
3. **Presumptive Admissibility.** "The evidence rules give presumptive admissibility to relevant evidence. IRE 402 provides that 'all relevant evidence is admissible except as otherwise provided by these rules or by

other rules applicable in the courts of this state.' The effect of this approach is to place on the party opposing the admission of relevant evidence the burden of justifying its exclusion, rather than requiring the proponent to justify admission." Lewis, IDAHO TRIAL HANDBOOK, 219 (2d ed. 2005).

4. **Minimal Probative Value Required.** 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.
5. **Indirectly Consequential Evidence.** Evidence may be indirectly consequential and therefore relevant when offered to attack or support the credibility of a witness, to explain or aid the factfinder in understanding other evidence, or to lay foundation for testimony or the admission of other evidence. *See, e.g., State v. Walker*, 121 Idaho 18, 822 P.2d 537 (Ct. App. 1991)(background for a witness's narrative to give it context).
6. **Remoteness.** Remoteness of the proffered evidence from the issue being proved may be considered in determining probative value under the rule. At some point the remoteness of the evidence may render it irrelevant. *See, e.g., Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988), *rev. denied*, 1988 Ida. LEXIS 79 (Idaho)(observations of driving 3 or 4 hours prior to accident offered to show condition of driver at time of accident was too remote); *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007) (in defendant's rape and drug case, the court erred by admitting evidence that defendant has supplied two minors methamphetamine, more than one year prior to the incidents he was charged with, because there was no evidence "linking" the alleged delivery of the drugs in the instant charges; the prior act was a distinct and "self-contained" incident). *See also State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991)(threatening letters sent to victim months or years after attack which threatened harm if victim reported the attack were not too remote and were relevant to show knowledge).

B. Relevance Conditioned on Other Facts.

1. **Proof of Foundation.** "The quality of proof needed to establish a foundation of relevance is addressed in IRE 104(b)--'Relevance conditioned on fact.' The rule states that where relevance depends on fulfillment of a condition of fact the foundational proof must be 'sufficient to support a finding of the fulfillment of the condition.'" Lewis, IDAHO TRIAL HANDBOOK, 220 (2d ed. 2005).
2. **Court's Screening Function.** "The effect of the rule in a jury trial is to assign to the court a screening function: the court should not determine admissibility based on whether the court is persuaded by the foundational

proof; rather, it should admit the evidence if a jury could reasonably believe the foundational facts." *Id.*

3. **Preponderance Standard Governs.** "In most situations, including evidence offered by the prosecution in criminal trial, the 'preponderance' standard governs determination of foundational facts; evidence is sufficient to fulfill a foundational condition if it is sufficient to permit a finding that the foundational fact is more likely true than not. *See, e.g., State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992)(prosecution not required to prove conclusively that bruises shown in photograph of rape victim were inflicted by defendant; victim's testimony that defendant inflicted bruises was sufficient foundation)." *Id.*
4. **Standard in Criminal Cases.** "However, in a criminal prosecution, when the evidence in question constitutes the proof of an element of the charged crime the foundational proof ultimately must satisfy the 'beyond a reasonable doubt' standard." *Id.*

VI. RULINGS ON EVIDENCE ISSUES

A. Rule 103: Rulings on Evidence Objections and Offers of Proof.

1. **Conditions for Asserting Error in Rulings.** Error may not be predicated on a ruling which admits or excludes evidence unless a substantial right of a party is affected and
 - a. if the ruling is one admitting evidence, a timely objection or motion to strike was made, stating the specific ground of objection, if the specific ground is not obvious; or
 - b. if the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or it was apparent from questions asked. I.R.E. 103.
2. **Irrelevant Evidence.** Failure to object may render otherwise inadmissible evidence admissible but does not make irrelevant evidence relevant and findings cannot be based on irrelevant evidence even when it was admitted without objection. *See, e.g., Hirsch v. Immigration and Naturalization Service*, 308 F.2d 562, 567 (9th Cir. 1962).
3. **Power of Court to Strike or Disregard Evidence.** There is no authority in Idaho that requires a motion to strike or an objection before a trial court may exclude or not consider evidence offered by a party. However, absent plain or fundamental error, some form of objection is ordinarily necessary to preserve the right to challenge on appeal the admission or consideration of evidence. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 839 P.2d 1192 (1992).

4. **Augmenting the Offer of Proof.** The court may add to the record to show the character of the evidence, the form in which it was offered, the objection made and the ruling. The court can direct an offer be made in question and answer form. In a nonjury case where a party requests it, the court may be required to take and report evidence in full unless clearly inadmissible or privileged.
5. **Avoiding Jury Prejudice.** In jury cases, proceedings are to be conducted to the extent practicable to prevent the jury from hearing inadmissible evidence. If a ruling is made "off the record," counsel should be allowed to place into the record any adverse ruling to preserve it for appeal.

"In preserving a record in the trial court, we caution counsel not to rely on discussions, arguments or rulings taking place in chambers, hallways or at the side bar. Once back on the record, counsel should remember to place into the record any adverse ruling in order to properly preserve it for appeal." *McKay Construction Co. v. Ada County*, 126 Idaho 923, 925 n.1, 894 P.2d 156 (Ct. App. 1995)(review denied).

6. **In Cases of Unobjected to Fundamental Error.** (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (In most instances) that it must have affected the outcome of the trial proceedings. If there is insufficient evidence in the appellate record to show clear error, the matter would be better handled in post-conviction proceedings. Placing the burden of demonstrating harm on the defendant will encourage the making of timely objections that could result in the error being prevented or the harm being alleviated. *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010).

See D. Craig Lewis, IDAHO TRIAL HANDBOOK 2D, § 26:9 (Supp. 2011) for citations to cases that have applied the *Perry* test.

B. Rule 104: Preliminary Questions.

1. **Rule 104(a): Questions of admissibility.** The court must decide preliminary questions concerning the qualifications of a witness, existence of privilege, or admissibility of evidence. In determining these preliminary questions, the court is not bound by the rules of evidence, except those with respect to privileges.
2. **Rule 104(b): Relevance conditioned on fact.** Under Rule 104(b), when the admissibility of one fact depends upon proof of another fact, the court shall admit evidence of the ultimate fact conditioned upon connecting up or proof of the foundation fact. The rule 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, it reflects what remains for the jury--once the judge decides that evidence, if credited, is relevant and not excluded under some other rule, it is for the jury to decide what weight to ascribe that evidence.

3. **Reserving Rulings is Condemned.** Often foundation evidence is required to establish the relevancy of the other facts before the other facts can be admitted. However, admitting "conditional evidence" is not the same as reserving rulings on objections which is condemned. *See Fidelity Acceptance Corporation v. Erickson*, 62 Idaho 152, 108 P.2d 1031 (1941); *Seeley v. Security Nat'l Bank of Fairfield*, 40 Idaho 574, 235 P.2d 976 (1925).
4. **Avoiding Mistrial or Reversal.** Beware of admitting conditional evidence in jury cases if the failure to connect up or prove the foundational evidence would result in a mistrial or grounds for reversal.
5. **Hearing of jury.** Hearings on the admissibility of confessions in criminal cases must be conducted outside the hearing of the jury. Other preliminary matters should also be so conducted if it promotes the interest of justice.
6. **Testimony by Accused.** By testifying on a preliminary matter, the accused does not subject himself to cross-examination as to other issues in the case.

C. Rule 105: Limited Admissibility.

1. **Obligation of Court to Restrict Use of Evidence and Instruct.** When evidence is admissible against one party or for one purpose but not another, upon request, the court must restrict the evidence to its proper scope and instruct the jury accordingly. The obligation is on a party to request the instruction unless it would adversely affect a fundamental right of a party in which case it may be the obligation of the court to raise the point *sua sponte*.

The trial court should have granted defendant a limiting instruction for the comments by a police officer during a videotaped confession, wherein the officer stated he was an expert in deception, as the officer's comments that defendant was lying were admissible for the purpose of giving context to defendant's answers, but inadmissible for the purpose of proving the truth of the matter asserted—in this case, defendant's truthfulness. *State v. Cordova*, 137 Idaho 635, 51 P.3d 449 (Ct. App. 2002).

2. **Timing and Specificity of Requested Instruction.** The request for a limiting instruction should be timely and specific. *State v. Vaughn*, 124

Idaho 576, 861 P.2d 1241 (Ct. App. 1993)(Review denied),(Where the state put defendant on notice that it would seek to admit videotaped testimony of victim's prior inconsistent statements as evidence, and not just for the purpose of impeachment, and where defendant failed to object to the testimony or to request a limiting instruction at that time, defendant's later requested limiting instruction was neither timely nor specific.).

D. Rule 106: Remainder of Related Writings or Recorded Statements.

1. **Rule of Completeness.** The rule of completeness embodied in Rule 106 is essentially a rule of fairness. If a party introduces a writing or recording out of context, the adverse party may be allowed to introduce the part omitted contemporaneously at that time if fairness dictates, rather than wait until it is time for the adverse party to put on its evidence.
2. **Impact of Rule 106.** Generally, any evidence offered under Rule 106 must itself be admissible. Rule 106 affects only the time at which evidence may be admitted; it does not modify the rules of admissibility.
3. **Application as a Rule of Admissibility.** In *State v. Bingham*, 124 Idaho 698, 864 P.2d 144 (1993), the Court held it was appropriate to analyze the admissibility of a videotape offered by the prosecution under Rule 106 because the essence of the prosecutor's reason for seeking admission of the tape was to demonstrate, by providing context, that the allegedly inconsistent statements introduced on cross-examination of the victim were actually not inconsistent. The Court apparently treated Rule 106 as a rule of admissibility in that case.
4. **Limiting Use of the Rule.** The request for immediate admission of the remainder of or related writings or recorded statements should be limited to those portions which are relevant to explain, qualify or put in context the writing or recorded statement that was introduced by the adverse party. *State v. Fain*, 116 Idaho 82, 774 P.2d 252, *cert. denied*, 493 U.S. 917, 110 S.Ct. 277 (1989); 504 U.S. 987, 112 S.Ct. 2970 (1992)(Where at trial, officer testified as to statements defendant made during a taped police interview, the trial court committed no error in refusing to admit the full transcript of the taped interview or the tapes themselves, since defendant did not limit his request to those portions of the transcript which explained, qualified or were relevant to that part of the conversation regarding which the officer testified.).

E. Objections to Evidence Beyond Pleaded Issues: Dealing with Amendments.

1. **Amendments to Conform to Prospective Evidence.** "When a party timely objects that evidence goes to issues beyond the scope of the pleading there will be no implied consent to trial of the issues. Nonetheless, in that situation I.R.C.P. 15(b) provides that the court may allow amendment of the pleading to raise the new issue and states that the

court 'shall do so freely when the presentation of the merits of action will be subserved thereby and the objecting party fails to satisfy the court that the admission of the evidence would prejudice the party in maintaining the party's action or defense upon the merits.'" Lewis, IDAHO TRIAL HANDBOOK, 49 (2d ed. 2005).

2. **Continuance May be Appropriate.** "The rule further advises that the court may grant a continuance to enable the objecting party to meet the new evidence. *See, e.g., Resource Eng'g v. Nancy Lee Mines*, 110 Idaho 136, 714 P.2d 526 (Ct. App. 1985) (trial court abused discretion by refusing to permit amendment of amount claimed where no specific, unfair disadvantage or genuine surprise was shown by objecting party); *See also P.N. Cedar, Inc. v. D & G Shake Co.*, 110 Idaho 561, 716 P.2d 1333 (Ct. App. 1986)(allowance of amendment proper where objecting party failed to move for continuance)." Lewis, IDAHO TRIAL HANDBOOK, 49-50 (2d ed. 2005).
3. **Motion to Amend Must be Timely.** "However, delay in making a motion to amend the pleading to assert new issues may justify denial of the motion where it results in an inadequate opportunity by the opponent to respond to the issues. *See O'Dell v. Basabe*, 119 Idaho 796, 810 P.2d 1082, 124 Lab. Cas. (CCH) □ 57297 (1991)(motion made at time of jury instruction conference)." Lewis, IDAHO TRIAL HANDBOOK, 50 (2d ed. 2005).

F. Ruling on Rule 403 Objections.

1. **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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.
2. **Rule 403 applies to all forms of evidence.** The rule 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. It applies to all forms of evidence.
3. **Evidence must be unfairly prejudicial to be excluded.** Unless the prejudice is unfair, it affords no basis to exclude the evidence. *See State v. Fenley*, 103 Idaho 187, 646 P.2d 441 (Ct. App. 1982).

For example, in plaintiff's action to recover damages for personal injuries following a car accident, the district court correctly determined that evidence of Medicare write-offs was inadmissible. By treating a Medicare write-off as a collateral source, the danger of prejudice contemplated in

Rule 403 is avoided, and the jury will not be influenced by the existence of Medicare. *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003).

4. **The court should state its reasoning on the record.** Where the trial court entered a written order containing a conclusory statement, the failure of the trial court to state its reasoning for its ruling upon the Rule 403 objection was held to be an abuse of its discretion in making the ruling. *Dabestani v. Bellus*, 131 Idaho 542, 961 P.2d 633 (1998). *See also*, *United States v. Long*, 574 F.2d 761 (3d Cir. 1978).
5. **Alternate Perpetrator Evidence.** This rule is the controlling authority for the admissibility of alternate perpetrator evidence, subject to the relevancy and hearsay standards of the rules of evidence. *State v. Meister*, 148 Idaho 236, 220 P.3d 1055 (2009).
6. **Applicability.** Although evidence of prior acts were admissible under Rule 404(b), where the evidence carried a potential for unfair prejudice, it was necessary for the trial court to evaluate whether the danger of unfair prejudice from this evidence substantially outweighed its probative value, for purposes of Rule 403. *State v. Hoak*, 147 Idaho 919, 216 P.3d 1291 (2009). *See also*, *State v. Ruiz*, ___ Idaho ___, 248 P.3d 720 (2010) (when defendant's accomplice testified against him at trial, the district court erred by excluding evidence that the witness avoided a mandatory three-year prison sentence by testifying against defendant; the evidence was relevant to the witness's credibility and the district court should have weighed the factors set forth in Rule 403 before ruling on the admissibility of the evidence).
7. **Child Sex Crime Cases.** Idaho Rules of Evidence require that trial courts treat the admission of evidence of uncharged misconduct in child sex crimes no differently than the admission of such evidence in other cases; where defendant was charged with sexually abusing his live-in girlfriend's daughter, the trial court erred in admitting evidence that defendant had similarly abused his ex-wife's daughter because it incorrectly determined that the proffered evidence was governed by a body of law unique to sexual abuse cases. *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2009).

VII. ALTERNATIVES TO EVIDENCE ADMISSIONS

A. Judicial Notice.

Judicial notice refers to a procedure by which the judge may allow into evidence certain facts which have not been offered into evidence.

1. Rule 201: Judicial Notice of Adjudicative Facts.

- a. **Rule 201** authorizes the court to take judicial notice of adjudicative facts and defines the scope of the facts and procedural rules related to

such notice.

- b. **Adjudicative facts** are those necessary to resolve issues that relate only to the particular case. The rule does not cover notice of law (IRCP 44(d) and I.C. § 9-101) nor legislative facts, i.e., those which have relevance to legal reasoning and the lawmaking process.
- c. **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.

- d. **When discretionary.** A court may take judicial notice, whether requested or not.

- e. **When mandatory.** If requested by a party and supplied with the proper information, the court must take notice of relevant facts.

For example, the trial court was required to instruct the jury as to judicially-noticed mortality figures where it had taken judicial notice of such figures admitted into evidence and contained in the testimony and reports of a life care planner and economist. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000).

- f. **Opportunity to be heard.** If requested, a party is entitled to be heard on the propriety of taking notice and the tenor of the matter noticed.

- g. **Time of taking notice.** Notice may be taken at any stage of the proceedings, including at the appellate level.

- h. **Instructing the jury.**

- (1) In a civil action, the court must instruct the jury that it must accept the fact noticed as conclusive.

- (2) In a criminal case, the jury is instructed that "it may, but is not required to, accept as conclusive any fact judicially noticed."

- i. **Commentary.**

- (1) The facts generally known in the trial jurisdiction, must be generally known, not merely known by the judge. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

- (2) The proponent of evidence consisting of facts which are capable of ready and certain verification by reference to authoritative sources must provide the court with the authoritative source. Typical facts in this category include geographical facts, historical facts, calendar facts, and scientific facts not open to dispute. The opponent of this evidence has the opportunity to be heard on the propriety of judicial notice, including the opportunity to produce contrary authoritative sources.
- (3) Where the court is provided with authoritative sources which prove the fact, judicial notice, on request, is mandatory.

j. **Examples.**

- (1) Official reports of the federal government, including reports by the Bureau of Labor Statistics. *Trautman v. Hill*, 116 Idaho 337, 775 P.2d 651 (Ct. App. 1989).
- (2) The general scientific acceptance of a testing process, in determining the reliability and admissibility of test results. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).
- (3) Ownership of liquor licenses, when the court was presented copies thereof and the opponent registered no objection. *State, Dept of Law Enforcement v. Engberg*, 109 Idaho 530, 708 P.2d 935 (Ct. App. 1985).
- (4) Court Clerk's record of child support payments in a suit for delinquent support. *Hunsaker v. Hunsaker*, 117 Idaho 192, 786 P.2d 583 (Ct. App. 1990)
- (5) Public and private official acts of the executive department; traffic accident analysis. *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988).
- (6) The general reliability of radar traffic devices as means of measuring speed. *State v. Kane*, 122 Idaho 623, 836 P.2d 569 (Ct. App. 1992). Also, the general reliability of laser speed detection devices as a means of measuring the speed of vehicles. *State v. Williamson*, 144 Idaho 597, 166 P.3d 387 (Ct. App. 2007).
- (7) "The Intoximeter 3000 as a breath testing method generally accepted within the appropriate scientific community. *State v. Hartwig*, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987). However, the reliability and performance of any given

machine, and of the process utilized in a given case, may always be challenged. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991)." Lewis, IDAHO TRIAL HANDBOOK, 192 (2d ed. 2005). Since *Hartwig*, I.C. 18-8004(4) was amended to alleviate need for expert testimony as to the reliability of the test procedures. *State v. Howell*, 122 Idaho 209, 832 P.2d114 (Ct. App. 1992).

(8) "The record of other proceedings in Idaho courts. *Knopp v. Nelson*, 116 Idaho 343, 775 P.2d 657 (Ct. App. 1989); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785." Lewis, IDAHO TRIAL HANDBOOK, 192 (2d ed. 2005).

k. **Judicial notice improper.** A court cannot properly take judicial notice of a fact which, though plausible, is not beyond dispute in every case. For example, it was improper for the magistrate to judicially notice the fact that it costs more to raise children who are ages 14 and 12 and that a child's needs are more expensive at those ages than for children who are only six and eight. *Brazier v. Brazier*, 111 Idaho 692, 726 P.2d 1143 (Ct. App. 1986), *overruled on other grounds*, *Swope v. Swope*, 112 Idaho 974, 739 P.2d 273 (1987).

l. **Municipal ordinances and regulations.** "The law in Idaho concerning judicial notice of municipal ordinances and regulations is unclear. *Compare, Marcher v. Butler*, 113 Idaho 867, 749 P.2d 486 (1988) (*overruled in part on other grounds by Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321)(court may not take judicial notice of municipal ordinances or codes adopted under them; such matters must be proved in evidence), with *City of Lewiston v. Frary*, 91 Idaho 322, 420 P.2d 805 (1966) (court may judicially notice municipal ordinance)." Lewis, IDAHO TRIAL HANDBOOK, 193 (2d ed. 2005). *See also, Doe v. Doe*, 146 Idaho 386, 195 P.3d 745 (Ct. App. 2008) (court held I.R.E. 201(b) controls and approved judicial notice of a local ordinance in a juvenile proceeding relating to the alleged violation of a curfew).

2. Notice Pursuant to Statute.

a. **Idaho Code § 9-101.** Additional authority for Idaho courts to take judicial notice of adjudicative facts is provided in Idaho Code § 9-101. Although section 9-101 appears quite limiting on its face, it has been held that it is not exclusive. *City of Lewiston v. Frary*, 91 Idaho 322, 420 P.2d 805 (1966).

b. **Facts judicially noticed** under section 9-101 include:

- (1) The true significance of all English words and phrases, and of legal expressions.
- (2) Whatever is established by law.
- (3) Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.
- (4) The seals of all the courts.
- (5) The accession to office and the official signatures and seals of office.
- (6) The existence, title, national flag, and seal of every state.
- (7) The seals of courts.
- (8) The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference.

3. Notice Pursuant to I.R.C.P. 44(d).

- a. **Notice of facts.** Rule 44(d) provides that "The court shall take judicial notice as provided by law. When judicial notice is taken of an adjudicative fact, the court shall instruct the jury as provided in Rule 201 of the Idaho Rules of Evidence. ..."
- b. **Notice of Foreign Law.** I.R.C.P. 44(d) provides that when a party "intends to request the court to take judicial notice of the statutes or laws of a foreign state, a brief or memorandum citing such foreign law shall be submitted to the court and opposing counsel at least ten (10) days prior to trial or hearing. Opposing counsel may reply thereto within five (5) days following service of such brief. Failure to submit such brief may in the discretion of the court constitute a waiver of the request."
- c. **Application of Rule 44(d).** "The rule clearly is not intended to govern the citation of decisions or statutory law of other states when offered to support arguments as to what Idaho law is or should be. Instead, it addresses circumstances where, because of the location of the events involved, the law of another jurisdiction controls determination of an issue in an action brought in Idaho." Lewis, IDAHO TRIAL HANDBOOK, 194 (2d ed. 2005).
- d. **Application of Idaho Law.** "In *Salazar v. Tilley*, 110 Idaho 584, 716 P.2d 1356 (Ct. App. 1986), no brief was filed pursuant to the rule, nor was foreign law pleaded. The Court of Appeals noted the general rule that in the absence of proof to the contrary, the law of a foreign jurisdiction, where pertinent, is presumed to be the same as the law of the forum, and held that the trial court was required to apply Idaho law to a loan transaction which had taken place in Utah." Lewis, IDAHO TRIAL HANDBOOK, 194 (2d ed. 2005).

4. **Judicial Notice of Jurisdictional Facts--Criminal Cases.**

- a. **Notice Prohibited.** "The occurrence of an element of a crime in Idaho is a jurisdictional fact which must be proved by the prosecution beyond a reasonable doubt. ... Idaho Code § 19-301." Lewis, IDAHO TRIAL HANDBOOK, 195 (2d ed. 2005).
- b. **Application After Return of Verdict.** "A questionable decision by the Court of Appeals holds that such facts may be supplied by judicial notice taken after return of verdict. In *State v. Smith*, 124 Idaho 671, 862 P.2d 1093 (Ct. App. 1993) the court reversed a trial court's dismissal of charges for failure of the prosecution to prove jurisdiction, following a jury verdict of conviction. The defendant was an Indian charged with driving under the influence on a highway within an Indian Reservation. By virtue of Idaho Code § 67-5101 the state's jurisdiction depended on a showing that the involved portion of highway was maintained by the state or a political subdivision thereof, but no evidence was offered at trial on that issue. Relying on statutory provisions and the 'Official Highway Map,' the Court of Appeals held that there was a presumption that the state maintained the highway in question, which the defendant had failed to rebut, and that therefore the case had properly been submitted to the jury." *Id.*
- c. "Because they are an element of the crime, the jurisdictional facts clearly would be 'adjudicative facts' within the scope of IRE 201. As Judge Swanstrom noted in dissent in *Smith*, IRE 201(g) precludes conclusive judicial notice of adjudicative facts in a criminal case and requires that noticed facts be submitted to the jury for the jury's determination; notice taken after the return of verdict would violate that requirement. In addition, the Court of Appeals' reliance on a 'presumption' of jurisdiction is contrary to the principle, recognized in IRE 303, that presumptions cannot supply the necessary proof on an element of a crime. Moreover, taking notice of jurisdictional facts without submitting them to the jury would appear to be unconstitutional. See *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) (mandatory presumption of element of crime unconstitutional)." *Id.*

B. **Judicial Admissions.**

1. **Admissions by Counsel.** "A formal admission of fact made by an attorney at trial is a judicial admission, binding on the client in the proceedings in which it is made; it limits the issues on which the cause is to be tried and obviates the necessity for proof of facts within the scope of a distinct and unequivocal admission so made. *McLean v. Spirit Lake*, 91 Idaho 779, 430 P.2d 670 (1967)." Lewis, IDAHO TRIAL HANDBOOK, 187 (2d ed. 2005).

2. **Admissions by Parties.** "Under older Idaho authority, statements contained in the testimony of a party are informal judicial admissions which must be taken as true when adverse to the party, unless shown to be the result of mistake or misapprehension. *See, e.g., Crenshaw v. Crenshaw*, 68 Idaho 470, 199 P.2d 264 (1948); *Van Meter v. Zumwalt*, 35 Idaho 235, 206 P. 507 (1922)." *Id.*
3. **Stipulations as Judicial Admissions.** "A stipulation is a form of judicial admission and has the same effect. *Perry v. Schaumann*, 110 Idaho 596, 716 P.2d 1368 (Ct. App. 1986). A stipulation cannot bind parties not joining in the stipulation." *Id.*
4. **Statements in Pleadings as Judicial Admissions.** "Facts admitted by a party's answer to a pleading are taken as true for purposes of the action and need not be proved." *Pendlebury v. Western Casualty & Sur. Co.*, 89 Idaho 456, 406 P.2d 129 (1965); *Burleson v. Tucker*, 78 Idaho 262, 300 P.2d 816 (1956)." "This principle extends to statements in affirmative pleadings as well as responsive ones. *See, e.g., Cloughley v. Orange Transp. Co.*, 80 Idaho 226, 327 P.2d 369 (1958). *See also Yribar v. Fitzpatrick*, 91 Idaho 105, 416 P.2d 164 (1966)(plaintiff may be cross-examined as to basis for allegations of complaint; answers that contradict allegations are informal judicial admissions which must be taken as true for purposes of action)." *Id.*

See also Strouse v. K-Tek, Inc., 129 Idaho 616, 930 P.2d 1361 (Ct. App. 1997), in which the court held that in an action for unpaid commissions, allegations in the complaint of amounts already received were binding judicial admissions, absent amendment and the trial court can not make contrary findings based on plaintiff's testimony at trial.

5. **"Guilty Plea As Judicial Admission.** "In a criminal prosecution, a defendant's knowing and voluntary guilty plea is a judicial admission of all facts charged by the indictment or information. *State v. Coffin*, 104 Idaho 543, 661 P.2d 328 (1983), *related proceeding*, 122 Idaho 392, 834 P.2d 909 (Ct. App.)" Lewis, IDAHO TRIAL HANDBOOK, 187 (2d ed. 2005).
6. **Admissibility of Plea in Subsequent Civil Action.** "A guilty plea to a criminal charge is admissible as an admission of a party-opponent in a subsequent civil action involving the defendant where the same underlying issues are involved. *Mattson v. Bryan*, 92 Idaho 587, 448 P.2d 201 (1968)." *Id.* *See also, Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995)(plea of guilty to traffic infraction is admissible in subsequent civil action but is not conclusive on the issue of negligence). Moreover, the payment of a traffic infraction fine by mail without entry of a guilty plea is not admissible in a subsequent civil action. *Kuhn v. Proctor*, 141 Idaho 459, 111 P.3d 144 (2005) (abrogating *LaRue v. Archer*, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997)).

7. **Admissions in Discovery.** "I.R.C.P. 36(b) provides that admissions pursuant to I.R.C.P. 36 conclusively establish the matter admitted, for purposes of the pending action only, unless the court on motion permits withdrawal or amendment of the admission." "There is no similar provision governing the admissions of parties made in responses to interrogatories or document requests or during depositions, and such admissions are not conclusive. They are, however, admissions of a party opponent excluded from the operation of the hearsay rule (*see* IRE 801(d)(2)) and therefore admissible as substantive evidence if not otherwise inadmissible." Lewis, IDAHO TRIAL HANDBOOK, 1187 (2d ed. 2005).
- a. "Such admissions need to be proved of record, which will require the authentication and introduction of the document evidencing the admission. *See Crollard v. Crollard*, 104 Idaho 189, 657 P.2d 486 (Ct. App. 1983)(answers to interrogatories, even though filed with the court, are not evidence unless offered and admitted at trial, and do not become evidence merely by allusion, indirect reference, or physical presence before court during examination of a witness)." *Id.*
- b. "Similarly, materials submitted to the court in pretrial proceedings are not evidence until properly introduced at trial. *Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (Ct. App. 1984)(requirement of offer and proof apply to pretrial lists of property and debts submitted to court in pretrial proceedings)." *Id.*
8. **Admissions in Pretrial Order or Stipulation.** "I.R.C.P. 16 specifies procedures for a pretrial conference and order, or pretrial stipulation of the parties in lieu of a conference. Among the items to be addressed at a conference or in a pretrial stipulation are possible admissions and stipulations of fact and limitation of the issues to be tried. *See* I.R.C.P. 16(d)(1), (3); I.R.C.P. 16(e)(6)(C),(E),(F)." "An order entered following a conference or stipulation controls the subsequent course of the action, unless modified at trial to prevent manifest injustice. I.R.C.P. 16(d)." *Id.*

C. **View of Premises, Property or Things.**

1. **Generally.** "The view is a procedure by which the trier of fact is taken from the courtroom to observe physical evidence relevant to the issues in the case. Commonly the view is utilized to permit the trier to observe a site where events took place, although as discussed below it may also be used to permit inspection of physical objects." Lewis, IDAHO TRIAL HANDBOOK, 448 (2d ed. 2005).
2. **Conduct of the View in Civil Cases.** "The conduct of the view is addressed, for civil cases, in I.R.C.P. 43(f), and for criminal cases, in Idaho Code § 19-2124. The civil rule is broadly worded to permit a view

of (1) the property which is the subject of the action, (2) a place in which any material fact occurred or in which any material thing is located, or (3) any other item, thing or circumstance relevant to the action." *Id.*

3. **Conduct of View in Criminal Cases.** "The statute [I.C. § 19-2124] governing criminal cases is significantly narrower, applying only to a view of 'the place in which the offense is charged to have been committed, or in which any other material fact occurred.' Although the language of the statute does not provide for the viewing of objects involved in the action, the court has inherent authority to permit such a view when helpful to the jury's understanding. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960) (view, in prosecution for negligent homicide, of automobiles involved in accident)." *Id.*
4. **Judicial Discretion.** "The decision whether to conduct a view is within the sound discretion of the trial court." *Hudelson v. Delta International Machinery Corp.*, 124 Idaho 244, 127 P.3d 3147 (2005); *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984)." *Id.* See also I.R.C.P. 43(f) ("During a trial, the court, in its discretion, may order that the court or jury shall have a view...").
5. **Presence of Trial Judge and Parties.**
 - a. **Presence of Trial Judge.** "Neither the civil rule nor the criminal statute addresses whether the court should be present during a view by a jury. In an older decision, the Supreme Court stated its view that it is 'advisable in all criminal case for the trial judge to accompany the jury and the defendant upon a view.' *State v. Louie Moon*, 20 Idaho 202, 117 P. 757 (1911)." Lewis, IDAHO TRIAL NOTEBOOK, 449 (2d ed. 2005).
 - b. **Attendance of Judge Recommended.** "Although perhaps not required in civil actions, it would seem admissible for the court to be present during a view, when practicable, to assist in insuring proper conduct of the view and in later determination of any allegations that the view was conducted improperly. See, e.g., *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931)(allegations of improper conduct during view contradicted by jurors' and officers' affidavits)." *Id.*
 - c. **Presence of Counsel and Parties.** "I.R.C.P. 43(f) specifically grants counsel the right to be present during a view in a civil action. The rule is silent about the right of a party to be present during a civil trial." *Id.*
6. **Timing the View.**
 - a. **During a Trial.** Rule 43(f) authorizes a view "during a trial." There is no authority or case law expressly authorizing or prohibiting a view prior to trial.

- b. **After the Submission to Jury Improper.** "It is improper to conduct a view after submission of the case to the jury. *State v. Baker*, 28 Idaho 727, 156 P. 103 (1916) (error may be waived by defendant's consent); *see also* I.R.C.P. 43(f)(authorizing view 'during trial')." *Id.*
7. **Communications During View Prohibited.** Rule 43(f) provides that "while the jury is conducting such a view, no person shall be permitted to speak with them on any subject connected with the trial of the action, except as authorized by the court, and only the appointed officer shall communicate with them in conducting the view pursuant to order of the court." *See also* Idaho Code § 19-2124.
8. **No Probative Value as Substantive Evidence.** "A view of premises by a trier of fact cannot supply a want of evidence, is not itself evidence upon which a verdict may be based, and may only be used in evaluating the weight and applicability of evidence introduced at trial. *Tyson Creekk R. Co. v. Empire Mill Co.*, 31 Idaho 580, 174 P. 1004 (1918); *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931)." Lewis, IDAHO TRIAL HANDBOOK, 451 (2d ed. 2005).
9. **View by Court When Action Tried to Court.** "A court trying a case as trier of fact may properly conduct a view of matter involved in the action, when necessary to an understanding and application of the evidence, I.R.C.P. 43(f), and, in an appropriate case, may do so when considering a motion to dismiss the plaintiff's case. *Highbarger v. Thornock*, 94 Idaho 829, 498 P.2d 1302 (1972). However, the court must provide notice of an intention to conduct such a view to the parties and an opportunity to be present at the time of inspection. I.R.C.P. 43(f)" *Id.*

VIII. BURDENS AND PRESUMPTIONS

A. Burden of Proof (Persuasion).

1. **Risk of Nonpersuasion.** The burden of proof is sometimes called the risk of nonpersuasion of the jury. The party who has the burden of proof (usually the party alleging the claim or asserting the affirmative on an issue) must produce a sufficient quantity of evidence to satisfy the standard or quantum of proof required to establish all of the essential elements of the claim or issue asserted. The judge or jury will rule against the party that has failed to satisfy its burden of proof.
2. **Varying Weights.** The burden of proof comes in three weights, varying with the nature of the case and the issue:
- a. **Preponderance.** As to most issues in civil cases the burden is said to be "by a fair preponderance of the evidence." This means more probable than not probable.

b. **Clear and Convincing.** As to a few issues in civil cases, the burden is said to be "by clear and convincing evidence." This means be sure or almost certain.

c. **Beyond Reasonable Doubt.** As to most issues in criminal cases, the burden is said to be "beyond a reasonable doubt." This means to be very sure and certain.

3. **Allocation of Burden.** The burden of proof is allocated at the beginning of trial (usually the plaintiff has the burden of proof on all elements necessary to establish its claim and the defendant has the burden of proof on all elements of its affirmative defenses). Under the Rules of Evidence, the burden does not shift from one party to another during the trial; it stays with the party to whom it is originally allocated. *Bonjiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986).

B. Burden of Going Forward With Evidence.

1. **Prima Facie Case.** As with every issue in every lawsuit, there are two burdens: a burden of proof and a burden of going forward with the evidence. The party with the burden of proof has the duty or burden to go forward with the evidence and to produce enough evidence in support of its claim that the trier of fact can find that the burden of proof on the issue has been satisfied when that party rests its case, i.e., the party with the burden of proof has made a prima facie case. *See Miller v. Belknap*, 75 Idaho 46, 266 P.2d 662 (1954).
2. **Failure of Proof.** If the party with the burden of proof on the issue has not made a prima facie case on that issue, its claim may be dismissed. *See Bonjiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986).
3. **Burden of Going Forward.** If the party with the burden of proof makes a prima facie case on the issue, the opponent then has the burden of going forward with the evidence to rebut the evidence of the party with the burden of proof. The defendant also has the duty or burden to go forward with its evidence to prove any affirmative defenses or counterclaims the defendant has asserted. If the defendant's evidence is sufficient to rebut but not overcome the evidence of the plaintiff, the issue to be decided by the judge or jury based, on the evidence, is whether the plaintiff satisfied its burden of proof on the issue. *Id.*

C. Presumptions.

1. **Rebuttable Presumptions.** By statutes and by case law certain rules have evolved which are called rebuttable presumptions. In essence, if certain basic facts are proved, the law will presume the existence of a fact that is by law deemed to be the logical inference that may be drawn from the basic fact.

- a. **An example of mailing and presumed delivery.** Evidence that a letter was mailed postage prepaid and properly addressed to the addressee results in the presumption created by case law that the addressee received the mail. The presumed fact of receipt may be rebutted by evidence that it was not received. *Airstream, Inc. v. CIT Financial Services, Inc.*, 723 P.2d 851, 111 Idaho 307, appeal after remand, 115 Idaho 569, 768 P.2d 1302 (1988).
- b. **An example of undue influence from relationship of donor-donee.** Evidence that the grantee of a gift deed had a close personal relationship with the grantor and participated in the making of the deed gives rise to the presumption that the deed was obtained by the exercise of undue influence on the grantor, which would warrant setting aside the deed. The grantee can rebut or overcome that presumed fact only by clear and convincing evidence that the grantor intended to make the gift and that no undue influence was used to get it. If the grantee or beneficiary cannot produce the requisite quantum of evidence to rebut the basic fact or the presumed fact, the jury will be instructed that the deed was obtained by undue influence. If the grantee satisfies the quantum of proof and proves by clear and convincing evidence that the basic facts do not exist or that a gift was intended and no undue influence was used, then the jury is to decide the issue based on the evidence and the jury is not told anything about a presumption. *Bonjiovi v. Jamison*, 110 Idaho 734, 718 P.1172 (1986). See also *Matter of Estate of Ashe v. Hurt*, 114 Idaho 70, 753 P.2d 281 (Ct. App. 1988), *aff'd*, 117 Idaho 266, 787 P.2d 252 (1990)(survivorship in joint bank accounts and evidence required to create presumption of gift at death).
- c. **Purpose of the Presumption.** In each of the examples cited above, the function of the rebuttable presumption is to shift the burden of going forward with the evidence to the party against whom the presumption operates. The burden of proof never shifts. Only the burden of going forward with the presentation of evidence shifts back and forth between the parties under Rule 301, I.R.E.

2. Rule 301 Governs the Use of Presumptions in Civil Actions.

- a. “**Idaho R. Evid. 301** provides that, unless otherwise provided by statute, by Idaho appellate decisions, or by the evidence rules, a presumption does not shift the burden of persuasion and requires only that the party opposing the presumption come forward with evidence to rebut or meet the presumption. If the opponent produces substantial evidence in rebuttal, the presumption disappears and the fact in question is resolved on the conflicting evidence. *Idaho County Nursing Home v. Idaho Dept. of Health and Welfare* 120 Idaho 933, 821 P.2d 988 (1991).” Lewis, IDAHO TRIAL HANDBOOK, 206 (2d ed. 2005).

- b. **Instructing the jury on presumptions.** I.R.E. 301(a) gives explicit instruction on how a presumption operates, and I.R.E. 301(b) explicitly states that a jury shall not be instructed by use of the term "presumption."
- c. **Effect of presumptions on burdens.** "The practical consequence of the inclusion of Idaho appellate decisions in the exceptions to the application of Rule 301 is to give effect to judicially-created presumptions, past and future, that operate to shift the burden of persuasion or impose heightened proof requirements." Lewis, IDAHO TRIAL HANDBOOK, 206 (2d ed. 2005).

"I.R.E. 301 still provides the direction for the operation of nonstatutory presumptions when the judicial decisions recognizing the presumption do not provide otherwise." *Id.*

- d. **Effect of Presumptions in Civil Cases.** A presumption under this rule relieves the party in whose favor the presumption operates from having to adduce further evidence of the presumed fact until the opponent introduces substantial evidence of the nonexistence of the fact. *See Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986); *Krebs v. Krebs*, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988).
- e. **Instructing the Jury in Civil Cases.** The jury is never instructed in terms of the presumption. A presumption is not evidence. If a fact is presumed to exist, the jury is instructed the fact has been established, thus avoiding the use of the word "presumption." *Smith v. Angell*, 122 Idaho 25, 830 P.2d 1163 (1992).

3. Presumptions in Criminal Cases.

- a. **I.R.E. 303.** Rule 303 governs the use of presumptions in criminal cases.
- b. **Submission to Jury in Criminal Cases.** Rule 303(b) provides that 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 in Criminal Cases.** Under Rule 303(c), whenever, the existence of a presumed fact against the accused is submitted to the jury, the court in instructing the jury cannot charge in terms of a presumption. The charge must 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. *See State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982) (jury may be instructed only in terms of permissive inference and not by reference to presumptions); *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979)(burden of proof cannot be shifted to accused on any essential element of the offense charged by presumption and jury cannot be directed to find a presumed or inferred fact).

IX. ORDER OF PROOF AND PRESENTATION OF EVIDENCE

A. Order of Proof.

1. **Judicial Discretion.** "In both civil and criminal cases, the order of trial and of the presentation of evidence are within the sound discretion of the trial court, and error may not be predicated on a variation from usual procedures in the absence of demonstrated prejudice. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963); *State v. Smoot*, 99 Idaho 855, 590 P.2d 1001 (1987)(criticized on other grounds by *State v. LePage*, 102 Idaho 387, 630 P.2d 674)." Lewis, IDAHO TRIAL HANDBOOK, 162 (2d ed. 2005).
2. **Statutes on Order of Proof in Criminal Cases Superseded.** "Idaho Code §§ 19-2101 and 2102 purport to direct the order of trial and proof in criminal prosecutions. It should be noted, however, that for these procedural matters the statutes presumably are superseded by the court's general control over trial set forth in the Idaho Rules of Evidence." *Id.* At 163

B. Presentation of Evidence.

1. **Control by Court.** IRE 611(a) provides that "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."
2. **Obligations Imposed and Purpose of Rule 611(a).** Rule 611(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 the judge's common sense and fairness in view of the particular circumstances.
3. **Obligation to Control Witnesses.**
 - a. **Voluntary statements.** 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. *Giffen v. City of Lewiston*, 6 Idaho 231, 55 P. 545 (1898).
 - b. **Unresponsive answers.** The right to have an unresponsive answer of a witness stricken out is right of the party examining the witness, and not a right of the party adverse to the examiner; "**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.**" *State ex rel. Rich v. Bair*, 83 Idaho 475, 365 P.2d 216 (1961).
 - c. **Authority to Control Witnesses.** In addition to its inherent power, **Rule 611(a)** authorizes the court to control witnesses who would otherwise make voluntary statements or provide unresponsive answers.
4. **Juror Notes and Notebooks.**
 - a. **I.R.C.P. 47(o)(1): Notes by jurors.** Rule 47(o)(1) permits jurors to take or make written notes during trial and take them into their deliberations. The court is required to give the jury appropriate instruction on how to exercise the right to take notes. At the conclusion of the proceedings, the court is required to take custody of

the notes and provide for their destruction.

- b. **I.R.C.P. 47(o)(2): Juror notebooks.** Rule 47(o)(2) provides that, in the discretion of the court, jurors may be provided notebooks containing documents for use by the jurors during trial to aid them in performing their duties. The notebooks may contain, but are not required to have or be limited to:

- (1) a copy of all jury instructions;
- (2) juror notes;
- (3) the names of witnesses, including photographs and biographies;
- (4) copies of exhibits, including an index thereto, but excepting depositions; and
- (5) a glossary of technical terms.

5. Documents and Exhibits Allowed in Jury Room

- a. **I.R.C.P. 47(p): Taking documents and exhibits to jury room.** Rule 47(p) provides that “[u]pon retiring for deliberation the jury shall, if practical, take with them all written jury instructions and exhibits which have been admitted as evidence in the trial, except depositions.”
- b. **Pleadings should be excluded.** Rule 47 makes no provision for pleadings in the jury room. However, in an early decision, the Idaho court stated that pleadings should not be delivered to the jury and the practice of so doing is not to be commended; but taking pleadings into the jury room is not reversible error, unless prejudice is shown. *Walton v. Mays*, 33 Idaho 339, 194 P. 354 (1920).

6. Questions by Jurors.

- a. **I.R.C.P. 47(q): Juror questioning of witnesses.** Rule 47(q) permits jurors to submit written questions, in the discretion of the court. Procedures for reading questions permitted by the court, the making of objections by parties or counsel, and follow-up questions are specified in the Rule. The Rule provides:

In the discretion of the court, jurors may be instructed that they are individually permitted to submit to the court a written question directed to any witness. If questions are submitted, the parties or counsel shall be given the opportunity to object to such questions outside the presence of the jury. If the questions are not objectionable, the court shall read the question to the witness. The parties or counsel may then be given the opportunity to ask follow-up questions as necessary.

- b. **Procedure for objections.** The judge should review the questions with counsel who should be given an opportunity to object outside the hearing of the jury.

7. **Voir Dire in Aid of Objection.**

- a. **Authority for Voir Dire.** Cross-examination in aid of preliminary facts, commonly known as "examination in aid of objection" or "voir dire in aid of objection" is not specifically addressed in the Idaho Rules of Evidence. It is recognized by long-standing practice and is implicit in the procedures described in the Rule 104 for determinations of preliminary questions concerning admissibility. The examination should not exceed the scope of examination that is required to challenge the admissibility of the evidence.

b. **Examples of voir dire in aid of objection:**

- (1) Examination of expert witness prior to statement of opinion. *Sidwell v. William Prym, Inc.*, 112 Idaho 76, 730 P.2d 996 (1986).
- (2) Examination on existence of lawyer-client privilege and possible waiver. *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984).
- (3) Examination of foundation witness as to condition and relevance of offered item of evidence. *State v. Sanchez*, 94 Idaho 125, 483 P.2d 173 (1971).
- (4) Examination by court whether witness violated sequestration order. *State v. Christensen*, 100 Idaho 631, 603 P.2d 586 (1979).

C. **Right to Open and Close--Civil.**

- 1. **May Depend on Assignment of Burden of Proof.** "Idaho courts have recognized the principle that, while the plaintiff ordinarily has the right to open and close the proof and arguments, where under the facts of the case the burden of proof on the disputed issues lies with the defendant, the defendant should have the right. *See Grisinger v. Hubbard*, 21 Idaho 469, 122 P. 853 (1912)(*dictum*); *American Sur. Co. v. Blake*, 54 Idaho 1, 27 P.2d 972, 91 A.L.R. 153 (1933)." Lewis, IDAHO TRIAL HANDBOOK, 163-164 (2d ed. 2005).
- 2. **Judicial Discretion.** "However, while that principle states the better procedure, a failure to so allow is not reversible error where harm is not shown. *State ex rel. Rich v. McGill*, 79 Idaho 467, 321 P.2d 595, 73 A.L.R.2d 613 (1958) (in condemnation proceeding where only issue is damages, on which defendant landowner has burden, better procedure is to permit landowner to open and close)." *Id.* At 164.

D. Right to Open and Close--Criminal.

1. **Prosecution Must Open and Close.** "Idaho Code § 19-2101 provides that in criminal prosecutions the prosecution must open the cause and offer the evidence in support of the charges, and the defendant may then offer evidence in support of the defense, followed by respective offers of rebutting evidence by each party. As a practical matter, that order of proof would be dictated in the absence of statute or rule by the placement of the burden of proof on the prosecution." *Id.* at 96-97.

E. Reopening Case After Party has Rested--Civil.

1. **Judicial Discretion.** "In a civil case, the trial court has discretion to permit or refuse to permit a party to reopen its case and present additional evidence after the party has rested. *Gano v. Air Idaho, Inc.*, 99 Idaho 720, 587 P.2d 1255, 86 Lab. Cas. (CCH) □ 55203 (1978)." *Id.*
2. **Some "Cause" Required.** "Before such permission is granted [in a civil case], some reasonable excuse such as oversight, inability to produce or ignorance of the existence of additional evidence must be shown. *Robert V. DeShazo & Assocs. v. Farm Management Servs.*, 101 Idaho 154, 610 P.2d 109 (1980) (reopening proper to permit party to introduce exhibit it had failed to offer through oversight); *Bank of Idaho v. Colley*, 103 Idaho 320, 647 P.2d 776 (Ct. App. 1982)(reopening proper while motion to dismiss is pending); *Allen v. Burggraf Constr. Co.*, 106 Idaho 451, 680 P.2d 873 (Ct. App. 1984)(criticized on other grounds by *Staggie v. Idaho Falls Consol. Hosps.*, 110 Idaho 349, 715 P.2d 1019 (Ct. App.)) (refusal to permit reopening proper where no showing that evidence was unavailable during trial)." *Id.* At 164-165.
3. **Refusal May be Reversible Error.** "However, when a reasonable excuse is shown and the evidence is material, a refusal to permit reopening may be reversible error. *Smith v. Smith*, 95 Idaho 477, 511 P.2d 294 (1973)(refusal to permit reopening reversible error where fact that evidence was unknown was uncontradicted)." *Id.*
4. **Where Court is Trier of Fact.** "In an action tried to the court, the court may reopen the trial and take additional evidence on its own motion. *County of Bonner v. Dyer*, 92 Idaho 699, 448 P.2d 986 (1968)." *Id.*

F. Reopening State's Case in Criminal Prosecution After State Rests.

1. **Judicial Discretion.** "It is within the discretion of the trial court to permit the state to reopen its case and present additional evidence after the state has rested, and while a defendant's motion to dismiss is pending. *State v. Cutler*, 94 Idaho 295, 486 P.2d 1008 (1971)." *Id.*

2. **Reasonable Excuse Required.** "Before such permission is granted [in a criminal case], some reasonable excuse such as oversight, inability to produce or ignorance of the existence of additional evidence must be shown. *State v. Huggins*, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982), *aff'd in part and modified on other grounds in part*, 105 Idaho 43, 665 P.2d 1053." *Id.* at 164.
3. **Amendment of Charge Improper.** Although the court may permit the prosecution to reopen after it has rested, as discussed above, it may not permit an amendment of the indictment or information at that time. *See* ICR 7(e); *State v. Gauna*, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989)." *Id.*

G. **Rebuttal and Surrebuttal Evidence.**

1. **Rebuttal Evidence.** "Rebuttal evidence is evidence which explains, repels, counteracts, or disproves evidence which has been introduced by or on behalf of the adverse party. *State v. Olsen*, 103 Idaho 278, 647 P.2d 734 (1982)." Lewis, IDAHO TRIAL HANDBOOK, 166 (2d ed. 2005).
2. **Impact if Admissible in Case-in-Chief.** "The fact that rebuttal evidence may also have been admissible in a party's case-in-chief does not make it any less a rebuttal. *Id.*; *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)." *Id.*
3. **Admissibility in Criminal Case.** "In a criminal case, the state may offer evidence to rebut testimony presented by the defendant on cross-examination as well as that presented by the defendant during direct examination. *State v. Sorrell*, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989)." *Id.*
4. **Cumulative Evidence Improper.** "However, evidence which is merely cumulative of evidence offered in a party's case-in-chief is not proper rebuttal. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).
5. **Judicial Discretion.** "The trial court has broad discretion in decisions whether to admit evidence in rebuttal. Even where evidence admitted in rebuttal is not strictly rebuttal in nature, its admission is within the sound discretion of the trial court, provided that the party against whom the evidence is admitted had the opportunity to meet the evidence. *State v. Sorrell*, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989)." *Id.*
6. **Surrebuttal.** "Surrebuttal is evidence directed at evidence offered by an opponent during rebuttal. Surrebuttal should be permitted when necessary to allow a party to meet new matter raised during rebuttal. *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956)(trial court improperly denied surrebuttal where necessary to address matter raised during opponent's surrebuttal)." *Id.*

X. CONCLUSION

Parts two through five of the series on evidence law for judges will be offered in future seminars.

**LEWIS AND CLARK
ON A JOURNEY OF DISCOVERY
OF THE RULES OF EVIDENCE**

**SELECTED
PROBLEMS**

**SELECTED PROBLEMS
LEWIS AND CLARK ON A JOURNEY OF DISCOVERY
OF THE RULES OF EVIDENCE**

PART I - MANAGEMENT OF A TRIAL

PROBLEM NO. 1

Adams and Baker were both killed when their cars collided head-on on the highway between Arco and Blackfoot. Adams was driving a Ford Aerostar van heading east toward Blackfoot. Baker was driving a black Eagle Talon coupe west toward Arco. There were no eyewitnesses to the accident.

Adams' survivors have brought a wrongful death suit against Baker's estate, alleging that the accident was caused by Baker's negligence. At trial the plaintiffs call Charlie to testify. The defense objects on the ground of relevance and prejudice. Plaintiffs' offer of proof indicates that, if permitted, Charlie will testify that he was traveling westerly on the highway toward Arco some time prior to the accident, and at a point approximately 40 miles from the accident scene he was passed by a black Eagle Talon coupe that was going "at least 85 or 90 miles an hour."

Should the evidence be admitted?

NOTES

PROBLEM NO. 2.

Dan Defendant is prosecuted for the murder of Vinnie Victim. Victim was killed by a shotgun blast at close range. There are no eyewitnesses to the murder, but the prosecution has evidence that there was bad blood between Defendant and Victim, and that Defendant had said a month prior to the murder that he was "going to get Victim."

At the trial the prosecution calls Officer Jones. If permitted, Officer Jones will testify that he participated in the arrest of Defendant at Defendant's home two weeks after the murder, and that in a search incident to the arrest, he discovered a 20-gauge shotgun in Defendant's closet. The defense objects on the ground of relevance.

Is Officer Jones' testimony admissible?

NOTES

PROBLEM NO. 3.

John Doe was killed when his Ford pickup left the highway and struck a bridge abutment. There were no eyewitnesses to the accident. Doe's survivors bring a wrongful death action against Ford, alleging that Doe's death was caused by a defective power steering mechanism.

Plaintiffs offer the testimony of Ima X Pert, a mechanical engineer. Pert testifies that she has examined the Ford pickup and its steering mechanism. If permitted, she will testify that in her opinion the steering mechanism was defectively manufactured, and that the defect could result in loss of steering control. Defendant objects to this evidence on the ground that there is an inadequate foundation to establish that the mechanism was in substantially the same condition when examined by Pert as it was at the time of the accident. Defendant indicates that it has an expert who will testify that the crash caused the defect which Pert observed.

On further examination, Pert states that in her opinion the crash did not cause the defect she observed. Out of the presence of the jury, the judge takes the testimony of the defense expert. The judge finds the defense expert's testimony more persuasive than Pert's and believes that the crash probably caused the defect in the steering.

Should Pert be allowed to testify to her opinion concerning the defect?

NOTES

PROBLEM NO. 4.

Plaintiff sues Defendant claiming Defendant violated the Age Discrimination in Employment Act by refusing to hire Plaintiff when Defendant learned that Plaintiff was over 50 years old. Defendant contends that Plaintiff was not hired because of Plaintiff's questionable history of honesty in previous employment.

Plaintiff introduces a portion of a memorandum Defendant sent to one of Defendant's business partners. That portion states: "I have interviewed Plaintiff and have reviewed his resume. It is very impressive, and I think Plaintiff is the best person for this job."

Following the introduction of this evidence, Defendant demands that Plaintiff read the next sentence in the memorandum which states: "However, I have heard rumors that Plaintiff was let go at his previous job because he was padding his expense account." Plaintiff objects stating: "This is Defendant's own self-serving hearsay when he offers it, and in addition, it is prejudicial innuendo and rumor."

Should the court require that the additional sentence be read by Plaintiff?

NOTES

PROBLEM NO. 5.

Smith and Jones are both injured in an altercation in prison, Jones with near-fatal stab wounds. Smith is charged with assault to commit murder. The prosecution's case against Smith consists of the testimony of Jones and two other inmates. That testimony indicates that Smith and McDuffie, another inmate, attacked Jones in his cell with scissors. McDuffie was initially charged along with Smith, but charges were dropped when a court-appointed psychiatrist found McDuffie incompetent to stand trial and criminally insane. McDuffie is now an inmate in a mental hospital.

At the trial Smith testifies that he was passing Jones' cell when he saw Jones fighting with McDuffie and that Smith was injured by McDuffie when he tried to pull McDuffie off of Jones. Another inmate corroborates Smith's testimony. Smith calls McDuffie in his defense. If permitted to testify, McDuffie will say that he alone attacked Jones. The prosecution objects, contending that McDuffie is not competent to testify.

Should McDuffie be allowed to testify?

NOTES

PROBLEM NO. 6.

Defendant is charged with assault, and the case goes to trial in Boise. At trial, the victim and two witnesses identify Defendant as the perpetrator. They describe the events as having taken place "on Main Street in Boise, in front of Pengilly's Saloon." However, no witness testifies concerning the county or state in which the events happened.

When the prosecution rests the defense moves for a judgment of acquittal for failure of the prosecution to prove venue and jurisdiction. The prosecution asks the court to take judicial notice that the witnesses were describing events in Ada County, Idaho, and to so instruct the jury. Should the court do so?

The court has denied the request for judicial notice. The prosecution then requests leave to reopen its case and to recall the witnesses to testify about the location of the events. Should the motion be granted?

NOTES

PROBLEM NO. 7.

At a trial for driving under the influence the prosecution offers evidence of the blood alcohol reading obtained from an Intoximeter 3000 machine. The prosecution then asks the court to take judicial notice that the Intoximeter 3000 is a breath testing device that is accepted within the relevant scientific community, and that the reading is an accurate indication of the defendant's blood alcohol level, and to instruct the jury accordingly. Defendant objects.

How should the court rule?

NOTES

PROBLEM NO. 8.

During a defendant's opening statement to the jury, counsel says:

“Now, we expect the prosecution is going to call a witness, a Mr. Brown, to testify that he saw the defendant steal the car. However, the evidence is going to show that Mr. Brown has had a long-standing grudge against the defendant, and that Mr. Brown has been convicted of fraudulent use of credit cards, and that . . .”

At this point, the prosecution interrupts objecting that defense counsel is arguing the case.

Should the objection be sustained?

NOTES

PROBLEM NO. 9.

During the prosecution's closing argument to the jury, the prosecutor makes the following remarks:

A. "This defendant is a menace to society and to this community. It is time for you to convict this man so he can't go on committing crimes like this."

B. You all are aware that street crimes and muggings are becoming almost commonplace in this community. Convict this man and get him off the streets."

C. You all heard the defendant get up here and tell his story. I don't believe his story, too many slips and slides around the facts."

D. "Don't be afraid to tell the defendant that he is guilty, because he is."

Are any of these remarks improper?

NOTES

PROBLEM NO. 10.

Widow has sued Insurance Company to collect on a life insurance policy insuring Husband. Widow testifies that Husband left on a hunting trip five and one-half years earlier, and that neither she nor any family members have heard from him since. Husband was reported to the police as missing, but neither he nor his remains have been found. Widow relies on I.C. § 15-1-107(c) to prove Husband's death. That provides:

"(c) A person who is absent for a continuous period of five years, during which he has not been heard from and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead."

Company calls one of Husband's former coworkers who testifies that two years before trial he received a telephone call from a person whose voice he thought he recognized as Husband's. The caller did not identify himself but asked about the welfare of other people at work, then hung up. Company contends the presumption of death has been rebutted.

On these facts, what should the court do with the presumption?

NOTES

PROBLEM NO. 11.

Defendant is accused of robbing a bank. At the trial the prosecution puts a detective on the stand to lay the foundation for the admission of pictures of the accused taken during the robbery by an on-site camera. The detective testifies that he was given the camera by a bank employee who told him it was the on-site camera, that it was operating during the robbery and that it contained film with pictures taken of the robber during the robbery. The detective testified that he had the film developed and obtained photographs depicting defendant holding a gun in the bank that was robbed. The prosecution offers the pictures to prove that defendant is the robber.

Defendant objects that the detective lacks personal knowledge to authenticate the photographs, and that his testimony is inadmissible hearsay, and moves to strike the testimony. The prosecutor counters that the detective's testimony is offered only to establish foundation for the admissibility of the photographs and that in making its determination whether the photographs are admissible, the court is not bound by the rules of evidence except as to privileges.

How should the court rule?

NOTES

PROBLEM NO. 12.

Building owner sued electrical contractor for fire loss alleging that the contractor negligently installed a fuse box in owner's building. Owner had the fuse box examined by an expert and intends to offer the expert's testimony that the fuse box was negligently wired by contractor. Contractor's lawyer requested production of the fuse box so it could be examined by contractor's expert. Contractor moves *in limine* to exclude the testimony of building owner's expert on the ground of spoliation of evidence and moved for dismissal of the action.

How should the court rule?

What if this were a criminal case in which the defendant is accused of arson by tampering with the fuse box to cause it to short out and burn owner's building. At trial the prosecution offers an expert who testifies that he examined the fuse box and it showed that it had been tampered with to cause it to short out and burn owner's building. On cross-examination the expert testifies that following his examination of the fuse box it was returned to the prosecutor. The prosecutor informs the court that the fuse box has been lost or inadvertently destroyed. The defendant moves to strike the testimony of the prosecution's expert and moves for dismissal on the grounds of spoliation of evidence, asserting that he is prejudiced by the loss or destruction of the fuse box.

How should the court rule?

NOTES

PROBLEM NO. 13.

Defendant is accused of driving under the influence. Defendant refused the breathalyzer test. At the trial, defendant offers the testimony of an expert who will testify that he calculated the blood alcohol concentration (BAC) at the time of the arrest and that he is of the opinion that the defendant's BAC was less than .10 at the time of the arrest, and that defendant was therefore not under the influence at the time of the arrest.

The state objects to the expert opinion on the ground that it is irrelevant and on the ground that defendant should not be allowed to introduce evidence of BAC when the defendant refused the breathalyzer test.

How should the court rule?

NOTES

PROBLEM NO. 14.

During the divorce trial, on the witness stand the husband repeatedly volunteers unresponsive answers to questions from his attorney. The attorney for wife objects that the testimony is unresponsive and moves that the unresponsive testimony be stricken.

Attorney for husband argues that the right to have an unresponsive answer of a witness stricken out is the right of the party examining the witness, and not a right of the party adverse to the examiner.

How should the court rule?

NOTES

PROBLEM NO. 15.

During the trial in a civil case, a juror requests permission to question a witness. How do you respond?

Would it make any difference if it was a criminal trial?

NOTES

PART II - WITNESSES AND EXAMINATION OF WITNESSES

PROBLEM NO. 1.

Defendant is charged with sexually abusing the two children of his girlfriend. The children were 3 and 6 at the time of the alleged incidents. By the time the defendant is arrested and the case gets to trial, the children are 5 and 8. The prosecutor notifies the court and defense counsel that the five year-old is emotionally unable to testify in the courtroom and he plans to present the testimony of the five year-old by means of two way closed-circuit television. Defendant challenges the competency of the children to testify at all. At the trial defendant offers evidence that children of the age of these victims typically have no logical concept of time and space and are often incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Further, defendant presents evidence that the children's version of the events has varied during the past year depending on whom they were talking to.

How should the judge proceed to determine competency of the children to testify and what steps should be taken to protect the children if summoned as witnesses?

NOTES

PROBLEM NO. 2.

Plaintiff sued for personal injuries sustained in an automobile accident. Defendant asserts the accident was unavoidable. At trial during the direct examination of the police officer who investigated the accident plaintiff's counsel asks the officer whether he issued a citation to the defendant for inattentive driving. Defense counsel objects that the evidence is irrelevant and inadmissible lay opinion.

How should the court rule?

Defendant puts an eyewitness on the stand and has her describe what she saw, then asks whether it appeared to her that the accident was unavoidable. Plaintiff objects that it is inadmissible lay opinion.

How should the court rule?

NOTES

PROBLEM NO. 3.

In a civil jury trial for personal injuries sustained in an automobile accident, the defense calls Ima X. Pert, to testify to a reconstruction of the accident. Defendant lays a foundation that includes Pert's undergraduate engineering degree, attendance at several workshops on accident reconstruction, and her expert testimony in other cases. The court has heard Pert testify in other cases and has always found her testimony extremely unconvincing.

Must the court allow Pert to testify as an expert if the court believes a jury might choose to believe her?

NOTES

PROBLEM NO. 4.

Plaintiff suffered cervical neck strain in an automobile accident when his vehicle was rear-ended. Plaintiff is treated for the injury. Two months after the accident Plaintiff awakens one morning and cannot rotate his head to the left without severe pain. When conservative treatment fails to cure the pain, Plaintiff has surgery on his neck. The surgeon finds an engorged venous complex which is causing pressure on a nerve and repairs it. Following surgery Plaintiff can turn his head without pain. Plaintiff plans to present his attending physician at trial to testify that the accident was the cause of the engorged venous complex. The attending physician has no literature, controlled tests, or other scientific evidence that trauma of the type suffered by Plaintiff causes an engorged venous complex. Defendant's experts are prepared to testify that there is no known cause for an engorged venous complex and that the condition has not been associated with trauma. The medical literature supports the views of Defendant's experts. Defendant moves in limine to exclude the Plaintiff's expert opinion on causation as not complying with Daubert standards.

How should the court rule?

Should the court allow the Plaintiff to testify that the accident caused the engorged venous complex?

NOTES

PROBLEM NO. 5:

Motorist who was injured in a collision brought an action against Defendant City alleging City was negligent in the design of the intersection at which the collision occurred. Plaintiff has disclosed an expert who would opine that the intersection was designed in a negligent manner. The expert bases her opinion, in part, upon several reports of accidents at that intersection within the past three years. The reports were produced from the records of Defendant City. Defendant City has filed a motion *in limine* to exclude the opinion evidence on the ground that it is based upon inadmissible hearsay evidence.

How should the court rule?

At the hearing on the motion *in limine*, the expert testifies that her opinion is based, in part, upon the fact that there have been several accidents at that intersection in the last three years. Defendant City objects to this testimony as being inadmissible hearsay and moves to strike it.

How should the court rule?

Defendant City also objects that the other accidents were not probative of any issue in this case because none involved a movement identical to that attempted by Plaintiff in this case.

Assuming this is factually correct, how should the court rule?

NOTES

PROBLEM NO. 6.

In a divorce action trial, wife offers her own testimony about the fair market value of the community real estate. Husband objects that the wife is not qualified to testify and give her opinion of the value of the community real estate.

How should the court rule?

Wife also offers the testimony of a local realtor who has been in the business in the area for 20 years and knows the value of real estate in the area. The realtor has studied comparable sales in the area and is prepared to testify to the value of the property based on the comparable sales. Husband objects that the realtor is not qualified to testify and give his opinion of the value of real estate unless he is a licensed real estate appraiser under the Idaho Real Estate Appraiser's Act, I.C. 54-4101, which was enacted in 1990. Husband informs the court that the Act provides that no person can "give an opinion of the value of real estate" for a fee, unless licensed or certified by the Idaho Real Estate Appraiser Board as provided in the Act.

How should the court rule?

NOTES

PROBLEM NO. 7.

In a divorce action, one issue is the value of the family business property. Wife has employed an expert licensed appraiser to appraise the property but decided not to call the expert to testify at trial. Husband has subpoenaed the expert to trial and has put the expert on the stand. Wife objects to any examination of her expert. Husband argues that the expert has knowledge about the property and that the court has a right to every man's evidence, except for those persons protected by a privilege; and that the court is entitled to the expert's knowledge about the property.

How should the court rule?

Assume you allow the examination to proceed and Husband elicits testimony about the expert's qualifications and knowledge about property. Assume Husband then asks the expert his opinion of the value of the property. Wife objects that it's her expert and it's not fair that Husband can examine her expert.

How should the court rule?

What if the expert also objects, that he can't be compelled to testify or to express his expert opinion without compensation. Husband moves to compel the testimony.

How should the court rule?

NOTES

PROBLEM NO. 8.

In a civil jury trial for personal injuries sustained in an automobile accident, plaintiff's counsel calls the defendant's girlfriend, who was riding with defendant at the time of the accident, for direct examination. Counsel commences the examination with leading questions, and defense counsel objects.

How should the court rule?

During the direct examination of the plaintiff, counsel asks plaintiff the following question: "Did you have any conversation with the defendant at the scene of the accident concerning mechanical problems with his vehicle? Defense counsel objects to the question as leading.

How should the court rule?

NOTES

PROBLEM NO. 9.

Plaintiffs sued for personal injuries suffered when their vehicle was struck head-on by Defendant's vehicle on a detour road. During their case-in-chief, Plaintiffs put in evidence describing the condition of the detour road through the testimony of two detour construction workers. The Defendant put in testimony about the condition of the detour road through other witnesses and their description of the road conflicted with the testimony of the construction workers. On rebuttal, Plaintiffs offered to put on two witnesses who had not previously testified to testify that they had used the road on the date of the accident and to describe the road on that date. Defendant objects that it is improper rebuttal.

How should the court rule?

Assume you ruled that their testimony is proper rebuttal and the Defendant then objects that the Plaintiff's witnesses had not been disclosed in the pretrial disclosures as required under Rule 16(J), which requires the disclosure of all witnesses which each party may call to testify at the trial, except impeachment witnesses. Plaintiff argues that Rule 16 excludes impeachment witnesses from pretrial disclosure and that these witnesses are excluded from disclosure under Rule 16.

How should the court rule?

Assume Plaintiff had been asked on cross-examination whether he had been involved in a prior head-on collision where he had fallen asleep at the wheel and Plaintiff answered "NO." During Defendant's case in chief, Defendant has put a witness on the stand to testify that he has personal knowledge that Plaintiff had been involved in a prior head-on collision where Plaintiff had fallen asleep at the wheel. Plaintiff objects.

How should the court rule?

NOTES

PROBLEM No. 10.

During the defendant's direct examination, the defendant has trouble remembering when and where the vehicles were moved following the collision. Defense counsel asks whether it would help the defendant to read his girlfriend's written statement concerning the accident and the defendant says it might. Plaintiff's counsel objects that the writing is inadmissible hearsay and was not prepared by the witness.

How should the court rule?

NOTES

PROBLEM NO. 11.

During cross-examination, the witness states that he needs to explain or correct an answer given to an earlier question by the cross-examiner. The cross-examiner objects.

How should the court rule?

What if, during cross-examination, the witness said he needed to explain or correct answer given to a question on direct examination?

How should the court rule?

What if the court allows the witness to explain or correct his answer, and the witness starts on a long narrative, about his view of the case and how the court should decide it.

Should you object? Should the court interrupt the witness or wait for an objection?

What if the examiner does not object, but the opposing party does?

How should the court rule?

NOTES

PROBLEM NO. 12.

During the defense case the defendant testifies on direct that his brakes failed, causing him to rear-end the plaintiff's vehicle. On cross-examination the defendant testifies that he had no warning the brakes would fail. When the cross-examiner finishes, the court conducts the following additional examination of the defendant:

Court: "Had you ever had problems with your brakes before?"

Defendant: "I had some a month or so before the accident, but I thought the problem was fixed."

Court: "But you were aware then that there might be a problem with your brakes?"

Defendant: "Well, I guess I knew that they could go bad but like I said, I thought it was fixed."

Court: "But knowing that they could go bad, you drove the car on the date of the accident anyway."

Defendant: "Well, I guess so."

Was the examination by the court proper?

NOTES

PROBLEM NO. 13.

Defendant Corporation has been charged with violation of Idaho environmental laws. The Corporation designates its president, plant manager and assistant plant manager as its representatives at trial. It also informs the court that its pollution expert is essential to its defense and is needed to sit at counsel table with the president. All representatives and the expert will be witnesses for the Corporation. The State moves to exclude all witnesses who have not testified.

How should the court rule? Who stays and who goes?

If this proceeding was a preliminary hearing, should the ruling be different?

NOTES

PROBLEM NO. 14.

At trial in which the Corporation is charged with violations of environmental laws, assume the court has excluded the plant manager and assistant plant manager from the trial and admonished them not to discuss their testimony with any other persons, including the attorney for the Defendant Corporation. Before they testify, the Prosecutor informs the court that he observed the two witnesses discussing their testimony with counsel for the Corporation and between themselves, and moves to exclude their testimony.

How should the court rule?

What, if any, sanctions may the court impose?

NOTES

PROBLEM NO 15.

At commencement of the trial in which defendant is accused of rape, the prosecution informs the court that the victim will be needed at counsel table to assist with the presentation of the state's case and the examination of witnesses for the defense. Defendant objects.

How should the court rule.

NOTES

PROBLEM NO. 16.

On the second day of the trial for robbery, the defendant fails to show. He was there the first day. He has been released on his own recognizance.

What should the court do?

NOTES

PROBLEM NO. 17.

Defendant is on trial for using a telephone to harass another person. At the commencement of the trial, defendant moved pursuant to Rule 615 to exclude witnesses and it was granted. The victim remained in the courtroom and was subsequently allowed to testify over the objection of Defendant that it was Defendant's voice on the phone.

Should the court allow the victim to testify?

Assume the victim testifies, and on direct examination, in response to a question whether the phone calls frightened him, the victim volunteers that he was scared because he had know the defendant to carry a gun in the past and also knew, from discussions with defendant's wife, that defendant was emotionally unstable. Over objections and motions to strike from Defendant and requests that the judge admonish the witness to stop, the victim repeatedly referred to the phone calls as threats, volunteered that they created fear in the victim and in the victim's family, volunteered that the calls were made by defendant, and that others were also getting calls and were afraid of defendant.

Should the court admonish the witness to stop characterizing the calls as threats and direct the witness to limit his testimony to the questions propounded to him.

NOTES

PROBLEM NO. 18.

Plaintiff in a negligence action calls a witness who originally gave plaintiff a written statement that the witness had observed defendant drive through a red light at the time of the accident. The witness also gave a written statement to defendant that the witness had not seen the color of the light. The parties have exchanged the statements. Plaintiff intends to put the witness on the stand and if necessary offer the original statement to impeach the witness.

Should the trial judge allow this?

NOTES

PROBLEM NO. 19.

The plaintiff has been impeached with statements made by the plaintiff during the taking of his deposition. Counsel for Plaintiff seeks to rehabilitate the Plaintiff by eliciting his testimony that the Plaintiff was suffering extreme stress during the taking of the deposition and that he was distracted during the deposition.

Should the trial judge allow the testimony?

What if the plaintiff brought in a psychologist to testify that the plaintiff was suffering posttraumatic stress syndrome at the time of the deposition which caused him to make inaccurate statements during the deposition; and that tests administered to plaintiff after he recovered showed him to be intelligent, perceptive, and capable of accurate recall?

NOTES

PROBLEM NO. 20.

The criminal defendant is charged with robbery. During trial the prosecutor notifies defense counsel that if defendant testifies he intends to impeach the defendant with evidence of 3 misdemeanor convictions (petty larceny, assault and battery, and possession of marijuana) and 1 felony conviction for burglary, all within the last year. Defendant moves in limine to exclude the evidence as not relevant to credibility, not offered in compliance with IRE 609, and unduly prejudicial. Prosecutor counters that the pattern of crime demonstrates a lack of credibility because it shows a pattern of disrespect for law and lawful authority suggesting that the defendant may not take the oath seriously.

How should the court rule?

NOTES

PROBLEM NO. 21.

XYZ Corporation pled guilty and was convicted of criminal tax fraud, a felony. The company has been sued for employment discrimination and the president of the company is on the witness stand testifying that the company did not commit the discriminatory acts of which it has been accused. Plaintiff's counsel wants to impeach the president by putting in proof of the felony conviction against the company.

Should the Plaintiff be allowed to use the felony conviction against the company to impeach the president?

Would it make any difference whether the President was involved in the tax fraud?

NOTES

PROBLEM NO. 22.

In a criminal prosecution of defendant for drug possession defendant takes the stand and denies he knew the drugs were in his car. Defendant has a prior misdemeanor conviction, four years old, for making a false statement on an application for a chauffeur's license. On cross-examination the prosecutor intends to ask, "In 1993, didn't you swear falsely that you had never had your driver's license suspended, in an effort to get a chauffeur's license?" If the defendant denies, the prosecutor intends to offer the record of defendant's conviction.

Should the court allow this?

NOTES

PROBLEM NO. 23.

Expert testifies on direct for Defense. On cross-examination plaintiff's counsel asks Expert whether she gave false testimony in an unrelated case three years earlier. Defense counsel objects that this is "improper impeachment on collateral matters."

How should the court rule?

NOTES

PROBLEM NO. 24.

In a criminal prosecution of defendant for drug possession defendant takes the stand and denies he knew the drugs were in his car. During defendant's cross-examination the prosecutor asks, "The truth is that you knew those drugs were in your car because you were intending to sell them to Johnny Smith, isn't that right?" Defense counsel objects that the question violates the defendant's Fifth Amendment privilege, pointing out that defendant has been charged with simple possession, not possession with intent to deliver. In a bench conference the court asks the defendant whether his answer might show that he was intending to sell drugs, and the defendant says it would not.

Should the Defendant be compelled to answer?

NOTES

**PART III - EXHIBITS, DEMONSTRATIVE EVIDENCE
AND ILLUSTRATIVE AIDS, TESTS, ANALYSES
AND EXPERIMENTS,**

PROBLEM NO. 1.

In a prosecution for manufacturing a controlled substance the state presents the testimony of investigating officer deputy Brown that during a search of defendant's barn he found 235 potted plants which appeared to be marijuana. Brown testifies that he placed the plants in a police van and drove them to the sheriff's office, where he delivered them to the evidence custodian, deputy Green. Deputy Green testifies that she placed the plants in an evidence locker and then delivered them to deputy White for transport to the State crime lab for analysis. Mr. Smith of the crime lab testifies that he received 235 potted plants from a person who identified himself as deputy White, and then analyzed them for presence of controlled substances. The defense objects to any testimony about the test results on the ground of relevance, contending that there is a break in the chain of custody because of the failure of deputy White to testify, thus precluding a finding that the plants tested were the ones found in defendant's barn.

Should the test results be admitted?

NOTES

PROBLEM NO. 2.

In a prosecution for felony injury to a child, the State offers evidence that an eleven-month old child was left in the defendant's care, and that when the mother returned the child was bleeding badly from a ruptured anus. The state also offered evidence that in conversations with the authorities the defendant denied responsibility for the injuries but admitted that he might have "wiped the baby's butt too hard." At the close of the evidence the defense demands a *Holder* instruction on proof by circumstantial evidence.

Is a *Holder* instruction required?

NOTES

PROBLEM NO. 3.

Defendant is charged with rape. Defendant served notice under Rule 412 of intent to offer evidence that the alleged victim had made a prior allegation of a sex crime by her father which she later recanted. At the Rule 412 hearing she testified that she had been removed from her home and that she had recanted so she could return home. The victim recanted her recantation, asserting that her father did in fact sexually abuse her.

The State has objected to the evidence under Rules 402, 403 and 412. Defendant contends it is relevant to the victim's credibility.

How should the court rule on Defendant's offer of this evidence?

NOTES

PROBLEM NO. 4.

The Defendant is charged with lewd conduct with a child. The court admitted evidence offered by the State that Defendant had failed to keep an appointment to meet with the police detective during the investigation of the allegations, and had moved to Oregon prior to the date of the scheduled police interview. Defendant objected on the ground that the evidence was irrelevant and unduly prejudicial. When admitted, the Defendant was allowed to explain his reasons for moving to Oregon.

Was the evidence of the move to Oregon admissible?

NOTES

PROBLEM NO. 5.

In the movie *The Verdict* Paul Newman represents a plaintiff who suffered severe injuries when she choked on vomit while under anesthesia. Paul finds a surprise witness, an operating room nurse who testifies that after the operation she was instructed by the surgeon to alter the pre-op report, changing the information concerning how recently the patient had eaten a meal from "1 hour" to "10 hours." However, the nurse testifies she secretly made a copy of the report before she altered it. When Paul offers the nurse's claimed photocopy the defense objects on Best Evidence grounds and the objection is sustained.

Was the ruling correct?

NOTES

PROBLEM NO. 6.

In a prosecution for trafficking in cocaine Officer Smith, an undercover agent, testifies that he met with the defendant to discuss defendant's possible sale of cocaine to the agent. Defense counsel objects to the officer's testimony describing the conversations that took place at the meeting. On *voir dire* in aid of objection the officer testifies that his conversation with the defendant was tape recorded through a bug the officer was wearing. Defense counsel insists that the tape is the best evidence and must be introduced to prove the contents of the conversation.

Is the defense objection well-taken?

NOTES

PROBLEM NO. 7.

In a breach of contract action Albert, the plaintiff, offers Exhibit A, which Albert testifies is an exact photocopy of the contract between the parties. Betty, the defendant, testifies on *voir dire* in aid of objection that while the document is similar to the agreement signed by the parties, it contains provisions that were not in the original agreement. Betty objects to the introduction of the photocopy. Albert's lawyer responds that Betty's argument goes to the weight to be given the evidence, not its admissibility.

Should the photocopy be admitted?

NOTES

PROBLEM NO. 8.

Adams has sued Baker claiming that Baker negligently performed repairs to Adams' roof, causing the roof to leak. At trial Baker seeks to introduce an allegation contained in Adams' original complaint which alleged that the roof leak was caused by inferior materials supplied by Cox, then a named defendant. Cox has since been dropped from the case and the allegation in question was deleted in an amendment to the complaint authorized by the court.

Should the evidence be admitted?

NOTES

PROBLEM NO. 9.

At trial on the issue of the value of the land being condemned, the landowner's appraisal expert testified to her opinion of the value of the land taken. The landowner also had the expert authenticate her written report containing her evaluation of the comparable sales she analyzed and the basis for her opinion of value. The landowner offered the report into evidence.

Is it admissible?

NOTES

PROBLEM NO. 10.

In an action for personal injuries from a motor vehicle accident the defense put their medical doctor who had conducted the individual medical examination on the stand to refute the Plaintiff's claims of injuries. The doctor testified that he had examined the medical records of the Plaintiff and conducted the I.M.E. He testified that he based his opinion on his evaluation of the medical records and his examination of the Plaintiff, and that in his opinion, to a reasonable degree of medical certainty, Plaintiff's alleged neck injuries did not result from the accident. The doctor testified that he relied on the contents of the medical records of Plaintiff to form his opinion, which contained medical history in which Plaintiff was reported to have told prior medical caregivers that she had complaints of similar neck pain and injuries prior to the accident. Defendant offered the medical reports into evidence and Plaintiff objected that they are hearsay.

Are they admissible?

NOTES

PROBLEM NO. 11.

Plaintiff has sued the adjoining land owner for contaminating Plaintiff's property with fuel residue. Plaintiff alleges that Defendant allowed fuel tanks on his farm to leak and that ground water has transported the fuel to Plaintiff's land and reduced the value of Plaintiff's property. Plaintiff has a computer-generated model that illustrates how the fuel leaked from the tank and into the ground and was transported to Plaintiff's property which Plaintiff offers in evidence.

What foundation should be required to admit the evidence?

NOTES

PROBLEM NO. 12.

Plaintiff was injured in a one-car Isuzu Trooper rollover. Plaintiff intends to offer:

1. A computer simulation of the Isuzu rollover.
2. Computer-generated bookkeeping records.
3. E-mail messages between Isuzu employees.
4. Computer-generated summaries of the Plaintiff's damages claims.

What foundation is required to admit each of the types of computer-generated evidence?

What objections should you anticipate?

NOTES

PROBLEM NO. 13.

In an action for the wrongful death of a child, Defendant has a video that she wants to show the jury to demonstrate how the accident occurred when the child darted in front of the vehicle from between two cars. Defendant has purportedly reconstructed the accident scene and the accident.

What foundation is required to admit a video reconstruction of an accident?

NOTES

PROBLEM NO. 14.

In a criminal action for sexual abuse, the state notifies the court and counsel that it intends to offer DNA evidence that links the accused to the crime. The evidence consists of the results of the analysis by a state crime lab of semen purportedly obtained from the panties of the victim and compared to bodily fluids purportedly obtained from the accused.

The Defendant also serves notice that it too has and intends to offer evidence of the results of the analysis of semen purportedly obtained from the panties of the victim and compared to bodily fluids purportedly obtained from the accused which will prove a mismatch.

What foundation is required for admissibility of either or both tests results?

NOTES

PROBLEM NO. 15.

Defendant is charged with shoplifting, I.C. § 18-4626. At the request of the prosecutor, the court instructs the jury, in the language of the statute, that "Goods, wares or merchandise found concealed upon the person shall be prima facie evidence of a willful concealment."

Has the court acted properly?

PART IV - THE EXCLUSIONARY RULES

QUESTION NO. 1.

Dan Defendant is charged with misdemeanor theft (shoplifting), pleads not guilty and demands jury trial. At trial Defendant testifies, claiming he had purchased the items found in his pocket earlier in the day at another store. The prosecution seeks to introduce evidence that Defendant has been caught shoplifting three times in the previous six months.

Defendant objects. How should the court rule?

NOTES

QUESTION NO. 2.

Same prosecution. Dan Defendant testifies, claiming that he had placed the items in his pocket while shopping, to free his hands while he checked out a camera, and had then forgotten they were there when he exited the store.

On rebuttal the prosecution seeks to introduce evidence that Dan has been caught shoplifting three times in the previous six months. This includes evidence of one prior conviction for shoplifting and the testimony of two clerks from other stores that they observed Dan conceal items in his pockets. Charges were not pressed in those two instances.

Defendant objects. How should the court rule?

NOTES

QUESTION NO. 3.

Defendant is charged with lewd conduct with a minor. The prosecution's case rests on the testimony of A.B., a fourteen-year-old girl, who says Defendant fondled her genitals while she was babysitting at his home.

In its case in chief the prosecution seeks to introduce the testimony of C.D., a fifteen-year-old girl, that two years before Defendant tried to fondle her while she was babysitting at Defendant's home, but she successfully resisted.

Defendant objects. How should the court rule?

NOTES

QUESTION NO. 4.

Plaintiff's mother was given a stress test and after the test she complained of chest pain. The doctor sent her home where she suffered a fatal heart attack. Daughter sued for malpractice. The Defendant doctor plans to testify that over the last 10 years he has had 8 - 10 patients who complained of chest pain following the stress test and each time he put them on an EKG. He claims it was his "habit" to administer a medical test to reevaluate every patient who complained of pain after a stress test. Plaintiff objects that the evidence is irrelevant to prove conduct at the time of the incident of which she complained.

How should the court rule?

NOTES

QUESTION NO. 5.

Plaintiff has sued Defendant Landlord for injuries suffered when Plaintiff slipped and fell on a stairway at Landlord's apartment building. Plaintiff seeks to introduce evidence that one week after Plaintiff's fall Landlord replaced the stairway carpeting on all of the other stairways in the building, but not the one where Plaintiff fell.

Defendant objects. How should the court rule?

NOTES

QUESTION NO. 6.

Plaintiff, a job foreman for Defendant contractor, has sued Defendant for wrongful termination. Plaintiff contends that Defendant terminated Plaintiff because Plaintiff had refused to inflate a bill to a customer. Defendant has maintained that Plaintiff was terminated for poor job performance.

(A) At trial Plaintiff seeks to testify that during a settlement conference Defendant stated to Plaintiff: "If you hadn't been so self-righteous, you'd still be working for me." Defendant objects, citing I.R.E. 408.

How should the court rule?

(B) Plaintiff seeks to introduce Exhibit A, a copy of a memorandum from Defendant to another foreman praising Plaintiff's work on the project. Plaintiff secretly copied the memorandum during a recess in the settlement conference after Defendant had shown it to Plaintiff, in response to an assertion by Plaintiff that his work was not appreciated by Defendant. Defendant objects, citing I.R.E. 408.

How should the court rule?

NOTES

QUESTION NO. 7.

Wife is granted a divorce from Husband. The court awarded Wife one-half of the assets of the marital community. Wife learns that Husband has liquidated assets of the marital community, withdrawn all funds from their bank accounts and disappeared. Wife serves attorney for Husband with interrogatories demanding to know the whereabouts of Husband. Attorney refuses to answer interrogatories other than to assert protection of the attorney-client privilege. Wife seeks order to compel disclosure of whereabouts of Husband.

How should the court rule?

NOTES

QUESTION NO. 8.

Plaintiff has sued XYZ Corporation, an Idaho corporation, for wrongful termination. The attorney for XYZ Corporation has interviewed a former employee of XYZ Corporation in the State of Illinois and learned facts which are detrimental to the case against XYZ Corporation. Plaintiff has served interrogatories on XYZ Corporation requesting disclosure of the interview with the former employee in Illinois. XYZ Corporation has refused to answer the interrogatories asserting that the communications between XYZ Corporation and the former employee are privileged under the attorney-client privilege rule. Plaintiff has filed a motion to compel disclosure, asserting that the Idaho attorney-client privilege rule does not apply to former employees of XYZ Corporation. XYZ Corporation asserts that Illinois law protects former employees under the Illinois attorney-client privilege.

How should the court rule?

QUESTION NO. 9.

Hospital hired a respiratory therapist. Unknown to the hospital, the employee had been terminated from his prior hospital employment in another city for sexual molestation of a patient. The therapist treated a young boy in the hospital and developed a personal relationship with the young boy following his discharge as a patient. The therapist was caught encouraging underage employees to consume alcohol and was referred to the Employee Assistance Counselor. The therapist revealed his sexual propensities to the Licensed Counselor, an employee of the hospital who told no one, although concerned about the welfare of patients in the hospital after learning of the therapist's propensities.

Was the communication privileged? Did the counselor have a duty to disclose or report?

NOTES

QUESTION NO. 10.

Wife sued Husband for divorce. Husband answered and counterclaimed. Wife submitted interrogatories relevant to fixing an appropriate level of child support, requesting education, training, skills and work history for "last 5 years." He refused to answer, asserting Fifth Amendment rights.

How should the court rule if Wife moves to compel and seeks sanctions?

What showing of danger of criminal prosecution is required for Fifth Amendment protection?

NOTES

QUESTION NO. 11.

Decedent worked for ABC Partnership and was one of three partners. Following his death, the surviving partners learned that Decedent had been embezzling funds from the Partnership. ABC Partnership sued the Estate of Decedent to recover the funds. The Estate of Decedent defended the claims, asserting that Decedent was entitled to the funds under a bonus program that had been promised to Decedent by the surviving partners. At trial, the surviving partners intend to testify about the terms of the oral agreements among the partners relating to their compensation plan, bonus plan and profit sharing plan, and that no such bonus program was promised to Decedent.

The Estate has filed a Motion in Limine to bar all testimony of the surviving partners relating to any statements made by Decedent on those topics.

How should the court rule?

NOTES

QUESTION NO. 12.

Attorney interviews a former employee of XYZ Company in Montana and learns facts which are detrimental to the case against XYZ which attorney is defending in Idaho, where XYZ is headquartered. Communications between attorney for XYZ and the former employee are not protected by the Idaho attorney-client privilege, Rule 502. However, communications between counsel for the company and former employees of the company are protected under the Montana rule.

If XYZ Company refuses to disclose the communications in the Idaho proceeding and the court is required to rule on a motion to compel disclosure.

How should the court rule?

NOTES

PART V- HEARSAY RULES

PROBLEM NO. 1.

P sued D for defamation of credit. To prove that P was already a bad credit risk, D offers a document from MegaBank consisting of a loan application signed by P, which is marked "rejected" and signed by Smith, the former MegaBank loan officer. Smith has since died. P objects to this evidence as hearsay.

How should the court rule?

NOTES

PROBLEM NO. 2.

P sues Defendant Company and its Employee for injuries suffered by P when Employee drove Defendant Company's truck into the rear end of P's vehicle. Defendant Company has denied liability on the ground that Employee was not acting within the scope of his employment at the time of the collision. To prove Employee was not acting within the scope of employment when he hit P with his truck, Defendant Company calls Witness, who will testify that the day before the accident she heard Employee's supervisor say to Employee, "You are no longer authorized to use Company vehicles." P makes a hearsay objection.

How should the court rule?

NOTES

PROBLEM NO. 3.

Lewis and Clark are involved in a collision at an intersection in Boise. Lewis sued Clark for negligent operation of his motor vehicle. In Lewis's action against Clark, Lewis calls Officer Krupke, who arrived on the scene within 3 minutes of the accident. If permitted, Officer Krupke will testify that she immediately questioned Trout, who was a bystander, and that Trout described how Clark had entered the intersection on a red light, at high speed, while talking on a cell phone. Clark objects on the ground of hearsay.

How should the court rule?

NOTES

PROBLEM NO. 4.

Lewis is on trial for the murder of Clark. Clark was found dead in a campground on the Lochsa river. The prosecution has evidence of Lewis's motive and some circumstantial evidence linking Lewis to the murder, but no eyewitness to place Lewis at the scene. The prosecution calls Scalia, who if permitted will testify that the day before Clark was killed, Clark told Scalia, "I'm going fishing tomorrow on the Lochsa with Lewis." Lewis makes a hearsay objection to this testimony.

How should the court rule?

NOTES

PROBLEM NO. 5.

Lewis has sued Clark for intentional infliction of emotional distress following an incident in which Clark publicly humiliated Lewis regarding his inadequate knowledge of the law of evidence. Lewis calls Dr. Feelgood, a psychiatrist who has been treating Lewis since the incident. Lewis asks Dr. Feelgood to describe Lewis's statements to the doctor concerning the onset and nature of the emotional problems Lewis was having. Clark makes a hearsay objection.

How should the court rule?

NOTES

PROBLEM NO. 6.

Clark has sued Lewis for copyright infringement, claiming Lewis has been plagiarizing Clark's writings on evidence. Clark offers in evidence Exhibit "A", a report by the disciplinary committee of the Idaho State Bar which investigated a complaint by Clark against Lewis. The report concluded that Lewis had on at least twenty occasions used Clark's writings as his own. Lewis makes a hearsay objection.

How should the court rule?

NOTES

PROBLEM NO. 7.

Lewis is on trial for the burglary of a law office. The prosecution calls Walters, who states in answer to the request that he state his name for the record, "I've decided that I don't want to testify." In a voir dire out of the presence of the jury, Walters states that he is afraid of reprisal from Lewis if he testifies and that he will answer no questions. The prosecution then offers the transcript of testimony of Walters from the preliminary hearing, at which he stated he saw Lewis leaving the law office in question at 3 a.m., carrying a suitcase.

How should the court rule?

NOTES

PROBLEM NO. 8.

In the same trial, the prosecution has recorded a confession of Clark, who is being tried separately from Lewis and who has claimed the Fifth Amendment privilege when called as a witness by the prosecution. In the confession Clark describes how he and Lewis obtained duplicate keys to the law office and entered it at night to steal records. Lewis objects to an offer of Clark's confession in Lewis's trial.

What should the court rule?

NOTES

PROBLEM NO. 9.

Rightly or wrongly, the court allows the introduction of Clark's confession in support of the charge against Lewis. . In his defense, Lewis calls Kidwell, who will testify that Clark told Kidwell that Clark had burglarized the law office with Schroeder. The prosecution makes a hearsay objection.

How should the court rule?

NOTES

PROBLEM NO. 10.

Local Company has sued Foreign Software for fraud in the inducement to purchase and install a software computer program that was represented to be the answer for all of Local Company's inventory and sales records problems. One of the reasons Local Company bought the program was because Foreign Software's Sales Manager told Local Company's purchasing agent that the program had been installed and tested by other customers of Foreign Software and they were satisfied customers. Sales Rep for Foreign Software was assigned to the account and worked with Local Company for a year trying to make the program work.

Having lost hope, Local Company wrote a letter to Sales Rep rescinding the contract of purchase and demanding a refund of the purchase price. Sales Rep then wrote a letter to Sales Manager of Foreign Software in which she enclosed the rescission letter of Local Company and added some statements that the program did not work, that she was frustrated that the program would not work, that Local Company representatives had been very patient and tried very hard to make it work, that she knew the software program was brand new when it was sold to Local Company and that there were no other "satisfied customers" because she had been told that by Sales Manager. Sales Rep quit her job with Foreign Software 30 days after she wrote the letter. Local Company obtained a copy of the letter in discovery and has offered it at trial. Foreign Software objects that it is hearsay and that it contains hearsay within hearsay.

How should the court rule?

NOTES

2

PART II

**TRIAL EVIDENCE FOR JUDGES:
WITNESSES AND TESTIMONY OF WITNESSES**

Presented By

**D. Craig Lewis, Esq.
Professor Emeritus of Law,
University of Idaho College of Law
Moscow, Idaho**

and

**Merlyn W. Clark, Esq.
Hawley Troxell Ennis & Hawley LLP
Boise, Idaho**

FOR THE

**2012 IDAHO JUDICIAL CONFERENCE
September 26, 2012
Boise, Idaho**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
A. Applicable Rules of Evidence.....	1
B. Examination of Witnesses, Generally.....	1
II. QUALIFICATION OF WITNESSES.....	1
A. General Rule of Competency. (IRE 601).....	1
B. Child Witnesses. (IRE 601).....	3
C. Lay Opinion. (IRE 701).....	4
D. Expert Witness Testimony. (IRE 702).....	6
E. Oath Requirements. (IRE 603).....	18
III. FORM OF EXAMINATION.....	19
A. Control by the Court.....	19
B. Use of Leading Questions - On Direct. (IRE 611(c)).....	19
C. Scope of Cross-examination. (IRE 611(b)).....	21
D. Scope of Redirect Examination. (IRCP 43(b)(5)).....	23
E. Refreshing Witness's Recollection. (IRE 612).....	23
F. Non-responsive Answers: Who Can Object?.....	24
G. Examination of Witnesses by the Court. (IRE 614(b)).....	25
IV. MANAGEMENT OF WITNESSES.....	25
A. Sequestration: Exclusion of Witnesses from the Courtroom. (IRE 615).....	25
B. Witnesses at Counsel Table.....	26
C. Presence of Criminal Defendant: When Required. (ICR 43).....	27
D. Reexamination and Recalling of Witnesses.....	28
E. Admonishing Witnesses.....	29

F.	Non-appearing Witnesses: Subpoena & Contempt Powers.....	29
V.	IMPEACHMENT OF WITNESSES	30
A.	Impeachment, Generally.....	30
B.	Prior Statements. (IRE 613).....	32
C.	Impeachment by Conviction of Crime. (IRE 609).....	33
D.	Impeachment with Suppressed Evidence--Criminal.....	36
E.	Impeachment by Evidence of Untruthful Acts. (IRE 608(b)).....	37
F.	Character for Truthfulness: Opinion and Reputation. (IRE 608(a))	38
G.	Bias and Interest.....	38
H.	Impeachment Concerning Capacity or Undue Influence.....	40
I.	Impeachment on Collateral Matters.....	40
VI.	TESTIMONIAL PRIVILEGE AGAINST SELF-INCRIMINATION.....	41
A.	Testimonial Privilege, Generally.....	41
B.	Twofold Nature of the Privilege.....	43
C.	Waiver of the Privilege.....	43
D.	Use of Defendant's Silence for Prosecution.....	44
VII.	CONFRONTATION CLAUSE DECISIONS.....	46
A.	United States Supreme Court Decisions	46
B.	Idaho Decisions	52
C.	Does the Confrontation Clause Apply at Preliminary Hearings?	54

TRIAL EVIDENCE FOR JUDGES

By

D. Craig Lewis, Esq.
Merlyn W. Clark, Esq.

PART TWO: WITNESSES AND EXAMINATION OF WITNESSES¹

I. INTRODUCTION

- A. **Applicable Rules of Evidence.** Witnesses and the examination of witnesses are governed by rules of evidence which are contained in Articles VI and VII of the Idaho Rules of Evidence. Rules 601-606 deal with witness competency. Rules 607-610 cover impeachment of witnesses. Rule 612 deals with writings or objects used to refresh memory and Rule 613 deals with use of prior statements of witnesses.

Rule 611 places the mode and order of witness interrogation within the discretion of the trial court, Rule 614 concerns calling and interrogation of witnesses by the court, and Rule 615 deals with the exclusion of witnesses from the courtroom.

Rules 701-706 govern the admissibility of opinions and expert testimony.

- B. **Examination of Witnesses, Generally.** “In both civil and criminal cases, the order of trial and of the presentation of evidence are within the sound discretion of the trial court, and error may not be predicated on a variation from usual procedures in the absence of demonstrated prejudice. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963); *State v. Smoot*, 99 Idaho 855, 590 P.2d 1001 (1978)(criticized on other grounds by *State v. Le Page*, 102 Idaho 387, 630 P.2d 674). *See also* IRE 611 (control of interrogation and presentation of evidence by court).” D. Craig Lewis, IDAHO TRIAL HANDBOOK, § 17.1, p. 323 (2d ed. 2005).

II. QUALIFICATION OF WITNESSES

A. **General Rule of Competency. (IRE 601)**

1. **Incompetency Determined by Court.** Rule 601(a) provides that every person is competent to be a witness except “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.” The rule is intended to

¹ This is the second of a five-part series on the law of evidence to be presented to the Judges of Idaho. The first part focused on the management of a trial. This part focuses on witnesses and the examination of witnesses. Future seminars will focus on tangible evidence and exhibits, the exclusionary rules, and hearsay.

eliminate all grounds of incompetency not specifically recognized in the Rules of Evidence, e.g., witnesses of unsound mind and children under ten years of age as provided in I. C. § 9-202.

Section 9-202 provides that witnesses of unsound mind and children under ten years of age may not be a witness. However, in *State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993), the Idaho Supreme Court, citing Evidence Rule 1102, held that section 9-202 is invalid and ineffective to bar the testimony of a child under ten because it conflicts with the Idaho Rules of Evidence.

Idaho Code § 19-3001 provides that the rules for determining the competency of witnesses in civil actions apply to criminal actions and proceedings, except as otherwise provided.

2. **Claims Against Estate: The Idaho Deadman Rule.** IRE 601(b) provides that persons prosecuting claims against the estate of a deceased person are incompetent to testify as to any communication or agreement, not in writing, occurring before the death of the decedent. The rule retains as law, the Idaho Deadman provisions of I. C. § 9-202(3).

Rule 601(b) only prohibits testimony concerning oral communications or agreements; it does not otherwise prohibit testimony concerning a state of affairs or matters of fact occurring before a decedent's death. *Argyle v. Slemaker*, 99 Idaho 544, 585 P.2d 954 (1978).

The rule only disqualifies parties, assignors, and real parties in interest from testifying; not nonparties even though the nonparty has a familial interest in favor of a party to the action. *Quayle v. Mackert*, 92 Idaho 563, 447 P.2d 679 (1968) (brother of claimant).

However, the personal representative of an estate was treated as a party prosecuting an action against the estate in an action by the heirs against the personal representative for misappropriation of estate funds. *Kolouch v. First Security Bank (In re Estate of Kolouch)*, 128 Idaho 186, 911 p.2d 779 (Ct. App. 1996), *reh'g denied*, 1996 Idaho App. LEXIS 28 (Idaho Ct. App. 1996).

Rule 601(b) does not apply to testimony offered to defend against a counterclaim. *Lunders v. Snyder*, 131 Idaho 689, 963 P.2d 372 (1998); *Lowry v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989).

3. **Other Disqualifications. (IRE 601(c)).** Rule 906 prohibits testimony by a presiding judge and Rule 606(a) prohibits testimony by a juror.
4. **Foundation for Witness's Testimony.** For the ordinary witness, the only foundation normally required is a showing that the witness is

testifying from personal knowledge. See Idaho Rule of Evidence 602. The role of the court in assessing the adequacy of a foundation showing personal knowledge is not to determine whether the witness actually has personal knowledge but whether the trier of fact could reasonably believe the witness has it. *State v. Gutierrez*, 143 Idaho 289, 141 P.3d 1158 (Ct. App. 2006).

B. Child Witnesses. (IRE 601)

Competency. There is no presumptive age at which a child qualifies to testify. The controlling questions are whether the child understands the obligation to tell the truth and whether the child can effectively communicate, and effectively be cross-examined.

1. **Protecting the Child.** The court can take reasonable measures to assist a child in testifying. *State v. Cliff*, 116 Idaho 921, 782 P.2d 44 (Ct. App. 1989) (child permitted to hold doll while testifying). Idaho Code § 19-3023 states that a support person shall be allowed to be with a child witness at the witness stand, unless the court finds in writing that the defendant's right to a fair trial will be prejudiced.

IRE 615(c) provides that 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.

2. **Closed-Circuit Television.** Idaho Code § 19-3024A provides for taking testimony of a child witness in a sex crime prosecution by two-way closed-circuit television, when found necessary to obtain the child's testimony. The statute contains lengthy protocols, to address the constitutional standard set forth in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990). *But, cf. Crawford v. Washington*, 541 U.S. 36 (2004), and subsequent decisions in *Davis v. Washington* and its companion case, *Hammon v. Indiana*, 126 S. Ct. 2266 (2006) upholding criminal defendant's Sixth Amendment right to confront witnesses face-to-face.
4. **"Alternative Method" Authorized for Child Witness Under Age 13.** Idaho Code §§ 9-1801 to 1808, Uniform Child Witness Testimony by Alternative Methods Act of 2003, authorize, in specified circumstances, the taking of testimony by a witness under age 13 in criminal or juvenile proceedings by an "alternative method," which does not include one or more of the following: (1) having the child present in person in an open forum; (2) having the child testify in the presence and full view of the fact-finder and presiding officer, or (3) allowing all the parties to be

present, to participate and to view and be viewed by the child. I.C. § 9-1805.

The U. S. Supreme Court has grappled with the tension between protecting children and protecting a criminal defendant's Sixth Amendment right to confrontation. In *Coy v. Iowa*, 487 U.S. 1012 (1988), the Court invalidated a procedure that permitted a screen to be placed between the defendant child and the child witness. The majority opinion emphasized the necessity for a face-to-face encounter. Two years later, in *Maryland v. Craig*, 497 U.S. 836 (1990), the U. S. Supreme Court authorized the potential use of televised testimony of minors when necessary and when accompanied by appropriate procedural safeguards. The Court allowed a conviction to stand based on a child's testimony obtained via a one-way closed-circuit television. The Court held the defendant's confrontation rights were otherwise protected by the establishment of the child's competence, the opportunity for cross-examination, the securing of testimony under oath and the judge's, jury's and defendant's ability to observe the witness's demeanor.

However, this procedure has been called into question by the Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and its subsequent decisions in *Davis v. Washington* and its companion case, *Hammon v. Indiana*, 126 S. Ct. 2266 (2006). In overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), the *Crawford* court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes; confrontation." Testimonial out-of-court statements are no longer admissible unless the witness takes the stand or the defendant has had a prior opportunity to cross-examine the witness.

C. Lay Opinion. (IRE 701)

1. **Rule 701.** As amended effective July 1, 2002, IRE 701 provides that lay witnesses' "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, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." Subpart (c) was added to Rule 701 to prevent the admission of expert opinion under the guise of lay opinion.
2. **Property Owners.** Property owners are presumed competent to testify to the value of their property, even though they lack special training or experience relating to property values, because "the owner is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales." *McFarland v. Joint Sch. Dist.*, 108 Idaho 519, 700 P.2d 141

(Ct. App. 1985. *See also, Powell v. Sellers*, 130 Idaho 122, 937 P.2d 434 (Ct. App. 1997); *Pocatello Auto Color v. Akzo Coatings*, 127 Idaho 41, 896 P.2d 949 (1995), *reh.g. denied*; *Howes v. Curtis*, 104 Idaho 563, 661 P.2d 729 (1983).

3. **Lay Opinion, Generally.** In general, lay witnesses can testify to an opinion when rationally based on their perceptions and helpful to the jury. The list of permissible subjects includes:
- (a) Whether another person was intoxicated or under the influence of drugs. *State v. Enyeart*, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993).
 - (b) The speed of a vehicle. *Smith v. Praegitzer*, 113 Idaho 887, 749 P.2d 1012 (Ct. App. 1988), *reh'g. denied*.
 - (c) Another person's emotional state or state of mind. *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)(victim's fear).
 - (d) Identity by voice recognition. *State v. Fenley*, 103 Idaho 199, 646 P.2d 441 (Ct. App. 1982).
 - (e) Identity by handwriting recognition. *See* IRE 901(b)(2).
 - (f) Identity of a person on surveillance video upon showing the witness would be in a better position than jury to recognize the person. *State v. Barnes*, 2009 WL 1651617 (Idaho Ct. App. 2009).
4. **Limits on Lay Opinion.** A lay witness cannot properly offer an opinion on a question of law. This includes police officers. *Hawkins v. Chandler*, 88 Idaho 20, 396 P.2d 123 (1964) (officer improperly testified law did not require placement of flares to mark vehicle); *Martin v. Hackworth*, 127 Idaho 68, 896 P.2d 976 (1995) (fact that officer wrote citation is inadmissible lay opinion that driver violated law).

In *State v. Turner*, 136 Idaho 629, 38 P.3d 1285 (Ct. App. 2002), the Court of Appeals held a lay witness' opinion testimony that defendant's shooting of the victim was accidental was inadmissible. Citing Rule 701, the Court stated a trial court may allow a lay witness to state an opinion about a matter of fact within his or her knowledge, so long as two conditions are met: first, the witness's opinion must be based on his or her perception; and second, the opinion must be helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. However, lay opinions are subject to the restriction that when the question is one, which can be decided by persons of ordinary experience and knowledge, it is for

the trier of fact to decide and the lay witness may not provide his or her opinion.

In *Dodge-Farrar v. American Cleaning Services Company*, 137 Idaho 838, 54 P.3d 954 (App. Ct. 2002), the Court held that I.R.E. 701 allows a lay witness to testify to the causation of medical symptoms or of injuries where such causation is within the usual and ordinary experience of the average person, but upheld exclusion of the testimony of Dodge-Farrar regarding the causation of her ankle deformity because its cause cannot be deemed to be within the usual and ordinary experience of a layperson.

D. Expert Witness Testimony. (IRE 702)

1. **Rule 702.** IRE 702 provides that “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.” 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. See, Report of the Idaho State Bar Evidence Committee, C 702 p. 1 (1985).
2. **Admissibility of Expert Opinion, Generally.** In order for expert opinion testimony to be admissible the court must make the factual determination (1) that the witness is qualified, (2) that the evidence will assist the fact finder, (3) that the facts upon which the opinion is based are of the type other experts in the field would reasonably rely on [**if the expert is relying upon facts that are inadmissible, e.g., inadmissible hearsay**], and (4) that the probative value of the evidence is not substantially outweighed by its prejudicial effect.” *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992).

This statement by the *Ryan* court is not completely accurate. If the expert is relying upon facts that have been admitted or are admissible in evidence, or hypothetical facts, they need not be “of the type other experts in the field would reasonably rely on. That condition applies only if the expert is relying on inadmissible facts as permitted under Rule 703, in which case the expert must be relying on facts of the type reasonably relied upon by other experts in the field.

“Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible as evidence under Rule 702.” *Ryan v. Beisner*, 123 Idaho 42, 46, 844 P.2d 24 (Ct. App. 1992). See also, *Ramos v. Dixon*, 144 Idaho 32, 156 P.3d 533 (2007) (a conclusory affidavit from an expert stating that the expert is familiar with the local standard of care

is insufficient to withstand a motion for summary judgment); *Fragnella v. Petrovich*, 281 P.3d 103, 2012 Ida LEXIS 156 (June 21, 2012), *reh. den.* 2012 Ida LEXIS 181 (August 1, 2012)(focus of trial court's inquiry in determining the admissibility of an expert's opinion is on the principles and methodology used and not the conclusions they general; trial court correctly struck the affidavit that is nothing more than an unsupported conclusion and is devoid of any scientific principles or methodologies to formulate such a conclusion.)

In *State v. Estes*, 148 Idaho 345, 223 P.3d 287 (Ct. App. 2009), *rev. den.* (2010), the Court held that a speeding conviction based on a police officer's estimation of speed was improper where there was insufficient evidence of the officer's accuracy rate and circumstances of observation.

"Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded." *Bromeley v. Gary*, 132 Idaho 807, 979 P.2d 1165 (1999) (excluding testimony of shotgun repair expert concerning possible causes of misfiring where expert never performed an internal examination of weapon and only speculated about possible causes was not error).

The Idaho Supreme Court has rejected any requirement that the scientific methods used in the production of evidence be shown to have general acceptance in the scientific community. Instead, the proper approach to a determination of admissibility of scientifically derived evidence is the test of Rule 702, which permits evidence of scientific, technical, or specialized knowledge when it "will assist the trier of fact to understand the evidence or determine a fact in issue." *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991).

In *State v. Varie*, 135 Idaho 848, 26 P.3d 31 (2001), the Court held the trial court did not abuse its discretion in refusing to permit a defense expert to testify concerning a diagnosis of battered spouse syndrome based on the trial court's view that it would not assist the jury. The trial court had permitted extensive testimony about the psychological responses of victims of abuse.

Appropriate factors to consider in determining whether such evidence will be helpful are the degree to which the methods are utilized in the scientific community, the inherent understandability of the evidence, the qualifications of the expert who is providing the evidence and the risks that the jury will be over-impressed by the aura of reliability of the evidence or confused by overly complex concepts. *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991).

Expert opinion, otherwise qualified, is not objectionable solely on the ground that it invades the province of the jury by addressing ultimate issues. I.R.E. 704. *See also, Sidwell v. William Prym, Inc.*, 112 Idaho 76, 730 P.2d 996 (1986); *State v. Pearce*, 146 Idaho 241, 192 P3d 1065, 2007 WL 1544152 (Idaho Ct. App. 2007).

3. **Qualification of Experts.** An expert witness may be qualified by “knowledge, skill, experience, training or education.” The expert need not have complete knowledge about the field in question and need not be certain; the expert need only be able to aid the jury to resolve a relevant issue. *IHC Hosps. v. Board of Comm’rs.*, 108 Idaho 136, 697 P.2d 1150 (1985)(overruled in part on other grounds by *International Health Care v. Board of County Comm’rs.*, 108 Idaho 757, 702 P.2d 795 (1985)).

The expert must demonstrate competence with regard to the issues as to which testimony will be offered. *IHC Hosps. v. Board of Comm’rs., Id.*

Formal training or education is not essential to qualify a witness as an expert. Practical experience will suffice. *Bean v. Diamond Alkali Co.*, 93 Idaho 32, 454 P.2d 69 (1969).

Rule 702 does not require licensing in any particular discipline as a condition of qualification as an expert. *Jones v. Jones*, 117 Idaho 621, 790 P.2d 914 (1990). The Idaho Real Estate Appraisers Act does not prohibit persons not licensed as real estate appraisers from giving an opinion as to the value of property. *Boel v. Stewart Title Guaranty Co.*, 137 Idaho 9, 43 P.3d 768 (2002). Moreover, there is no requirement that a real estate appraiser be shown to have prior experience in Idaho. *Lunders v. Snyder*, 131 Idaho 689, 963 P.2d 372 (1998).

An expert is not unqualified merely because the expert cannot recite from memory all matters relating to the subject of his or her testimony. *See, e.g., State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998)(expert was not deemed incompetent to conduct tests to identify methamphetamine simply because he was unable to recite the chemical composition of methamphetamine).

In *Dabestani v. Bellus*, 131 Idaho 542, 961 P.2d 633 (1998), an accident reconstructionist was deemed unqualified to render an opinion on the likely effect of alcohol on the driver.

4. **Discretion of the Court.** Sufficiency of qualifications to state an opinion is a matter within the sound discretion of the judge and exercise thereof will not be disturbed absent an abuse of discretion. *Lawton v. City of Pocatello*, 126 Idaho 454, 886 P.2d 330 (1994). *See also, State v.*

Raudebaugh, 124 Idaho 758, 864 P.2d 596 (1993); *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996).

5. Expert Testimony Is Not Always Appropriate or Necessary.

In *Rockefeller v. Grabow*, 136 Idaho 637, 39 P.3d 577 (2001), reh'g denied (2002), the Court upheld exclusion of proposed expert testimony on the standard of care of an agent (real estate developer) because the standard is clearly established by prior case law and the jury can apply facts to the standard without assistance from an expert.

In *Warren v. Sharp*, 139 Idaho 599, 83 P.3d 773 (2003), the Court held that expert testimony whether an auto accident could have been avoided by one of the parties was not needed by the jury who could decide for themselves whether or not the party could have avoided the accident; that testimony was more suited to a closing argument than expert testimony.

In *White v. Mock*, 140 Idaho 882, 104 P.3d 356 (2004), the Court held the trial court did not abuse its discretion in barring the testimony of the opposing party's expert because the policy underlying I.R.C.P. 26(b)(4)(A) does not allow for depositions of a party's expert who is not expected to be called as a witness at trial and it follows that the expert cannot be called by the opposing party during trial unless a proper showing of exceptional circumstances is made.

In *State v. Christiansen*, 144 Idaho 463, 163 P.3d 1175 (2007), the Court held the proffer of a police officer's opinion of a witness's veracity based on the officer's experience and training in interviewing and interrogation was clearly an improper invasion of the jury's role.

In *State v. Ellington*, 151 Idaho 53, 253 P.3d 727 (2011), the Court held that an opinion by an accident reconstructionist that the incident was not an accident was improper because the jury is equally capable of making that determination.

6. Opinions on Credibility of Another Witness. Generally, testimony giving one witness's opinion as to the truthfulness of another witness is an invasion of the province of the jurors, who are the judges of the credibility of witnesses. *State v. Perry*, 139 Idaho 520, 81 P.3d 1230 (2003).

However, evidence that reasonably casts doubt upon the accuracy or reliability of a witness's testimony on material matters is ordinarily relevant. *State v. Critchfield*, (Idaho Ct. App. 2012 Opinion No. 44, August 27, 2012) citing, e.g., *State v. Wright*, 147 Idaho 736, 202 P.3d 1282 (Ct. App. 2009); *State v. Farlow*, 144 Idaho 444, 163 P.3d 233 (Ct. App. 2007) (finding trial court improperly excluded expert's testimony that officers interviewing child victims regarding alleged lewd conduct

and sexual abuse used improper and suggestive techniques to elicit their statements which would taint their testimony). *See also State v. Almaraz*, 2012 Ida. LEXIS 145 (Idaho May 31, 2012) (finding error in excluding expert testimony where trial court allowed the defense to present expert testimony from a cognitive psychologist about the types of suggestive photo line-up procedures that can render an eyewitness identification unreliable, but precluded the expert from testifying about the suggestiveness of the photo identification procedure used during the police interview of an eyewitness on the ground that such testimony invaded the province of the jury).

6. **Limiting the Number of Expert Witnesses.** Trial courts have an affirmative obligation to limit the number of expert witnesses prior to the conduct of discovery when an oppressive number of expert witnesses has been disclosed. *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006).
7. **Roles of Judge and Jury Under Rule 104.** The judge, under Rule 104(a), has authority and the duty to determine the sufficiency of the qualifications of the expert and the admissibility of expert testimony. However, in a jury case, the weight to be afforded the expert testimony is for the jury to decide. *Earl v. Cryovac*, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989), *reh'g denied*, 1989 Idaho App. LEXIS 119 (Ct. App. 1989).
8. **Rule 702 in the Federal Courts.** The U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed 469 (1993), ruled that in federal courts the trial judge must make a preliminary assessment of whether the expert's underlying reasoning or methodology is scientifically valid (reliable) and properly can be applied to the facts at issue (relevant) when testifying about scientific evidence. In effect, the Court made the judge the "gatekeeper" of expert testimony with the responsibility to ascertain whether the testimony is helpful to the trier of fact, i.e., whether it rests on a reliable foundation and is relevant to the facts of the case. The Court in *Daubert* established five nonexclusive tests or standards that may be used to establish the reliability of scientific evidence.

The United States Supreme Court has also held that the reliability standards established in *Daubert* are applicable in all instances where expert testimony is offered, and not just when scientific evidence is involved. *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). Further, the Court in *Kumho*, held the gatekeeper function of the trial judge applies to all expert testimony, whether that testimony is based on scientific tests and methods, or is based on technical or other specialized knowledge.

In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the United States Supreme Court held if there is “too great an analytical gap between the data and the opinion proffered,” the court can exclude the testimony. The Court noted that nothing in *Daubert* or the Federal Rules of Evidence requires a judge to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. That is, the testimony does not get admitted solely on the expert’s bare assertion.

9. **Rule 702 in Idaho State Courts.** The question has been raised whether the federal *Daubert* standards are applicable in applying Rule 702 in Idaho state courts. In *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996), the Idaho Court of Appeals expressly adopted the guidelines for applying Rule 702 that are enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 469 (1993). However, the Idaho Supreme Court has rejected the notion that the Idaho Court has adopted the *Daubert* standards for admissibility of an expert’s testimony, stating the appropriate test for measuring the reliability of evidence in Idaho is I.R.E. 702. *Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180 (2007) (“The Court has not adopted the *Daubert* standard for admissibility of an expert’s testimony but has used some of *Daubert*’s standards in assessing whether the basis of an expert’s opinion is scientifically valid.”). See also *Swallow v. Emergency Med. Of Idaho*, 138 Idaho 589, 595 n.1, 67 P.3d 68, 74 (2003); *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 48 P.3d 651 (2002), citing *Walker v. Cyanamid*, 130 Idaho 824, 832 P.2d 1123 (1997); *State v. Hawkins*, 131 Idaho 396, 958 P.2d 22, *rev. den.*, (1998); *State v. Merwin*, 131 Idaho 642, 962 P.2d 1026 (1998); *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991); *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992); *State v. Faught*, 127 Idaho 873, 908 P.2d 566 (1995).

In *State v. Perry*, 140 Idaho 720, 103 P.3d 93 (2003), the Idaho Court cited *Daubert* and quoted with approval from *Daubert* in a case in which the Court held that polygraph results are inadmissible because they do not help the trier of fact to find facts or to understand the evidence as required by I.R.E.702. The Court stated:

The inquiry under I.R.E. 702 is whether the expert will testify to scientific knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue, “not whether the information upon which the expert’s opinion is based is commonly agreed upon.” *State v. Merwin*, 131 Idaho 642, 646, 962 P.2d 1026, 1030 (1998). “This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or

methodology properly can be applied to the fact in issue.” *Daubert*, 509 U.S. at 592-93. This Court in *State v. Trevino*, 132 Idaho 888, 893-94, 980 P.2d 552, 557-58 (1999), held with regard to scientific evidence:

In *Daubert*, the Supreme Court held that the ‘general acceptance in the scientific community’ standard for determining the admissibility of scientific evidence had been replaced by the Federal Rules of Evidence, in particular F.R.E. 702. The *Daubert* court held that pursuant to Rule 702, the trial judge is assigned the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. *Daubert*, at 598-00, 113 S. Ct. at 2799, 125 L.Ed.2d at 485-86. In other words, for scientific evidence to be admitted, it must be supported by appropriate validation, establishing a standard of evidentiary reliability, and must assist the trier of fact to understand the evidence or to determine a fact in issue. *Id.* At 590-91, 113 S.Ct. at 2795, 125 L.Ed.2d at 480-81. The decision to admit or deny the evidence, therefore, is within the discretion of the trial judge in individual jurisdictions which may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. (Citation omitted).

More recently, in *Coombs v. Curnow*, 148 Idaho, 219 P.3d 453 (2009), a medical malpractice case, the Idaho Supreme Court described and explained the rules governing the admissibility of expert opinion testimony in Idaho courts. The Court stated:

Under the rules, expert opinion testimony is only admissible when “the expert is a qualified expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect. (Citing *Ryan v. Beisner* and I.R.E. 702, 703 and 403). Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible.” (Citing *Ryan v. Beisner* and I.R.E. 702.) Testimony is speculative when it “theoriz[es] about a matter as to which evidence is not sufficient for certain knowledge.” *Karlson v. Harris*, 140 Idaho 561, 565, 97 P.3d 428, 432 (2004). Conversely, expert testimony will

assist the trier of fact when the reasoning or methodology underlying the opinion is scientifically sound and based upon a 'reasonable degree of medical probability'" –mere possibility is insufficient. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 846-47, 934 P.2d 17 (1997)(quoting *Roberts v. Kit Mfg. Co.*, 124 Idaho 946, 948, 866 P.2d 969, 971 (1993)).

In determining whether expert testimony is admissible, a court must evaluate "the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion." *Ryan*, 123 Idaho at 46, 844 P.2d at 28. Admissibility, therefore, depends on the validity of the expert's reasoning and methodology, rather than his or her ultimate conclusion. (Citation omitted.) So long as the principles and methodology behind a theory are valid and reliable, the theory need not be commonly agreed upon or generally accepted. (Citation omitted.) While the court must "distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs," it may not "substitute its judgment for that of the relevant scientific community." *Ryan*, 123 Idaho at 46, 844 P.2d at 28.

Relevant considerations in determining whether the basis of an expert's opinion is scientifically valid include "whether the theory can be tested and whether it has been subjected to peer review and publication." *Weeks*, 143 Idaho at 838, 153 P.3d at 1184; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 ... (1993). Other indicia of reliability include, "the close oversight and observation of the test subjects, the prospectivity and goal of the studies, ... the presence of safeguards in the technique, ... analogy to other scientific techniques whose results are admissible, ... the nature and breadth of inferences drawn, ... the extent to which the basic data are verifiable by the court and jury, ... [the] availability of other experts to test and evaluate the technique, [and] the probative significance of the evidence in the circumstances of the case." *State v. Konechy*, 134 Idaho 410, 417-18, 3 P.3d 535, 542-43 (Ct. App. 2000); *see also Daubert*,... (noting also the potential rate of error and general acceptance of the theory).

Coombs, 148 Idaho at 464-465.

In *Swallow v. Emergency Med. Of Idaho*, 138 Idaho 589, 67 P.3d 68, (2003), the Court held the trial court did not abuse its discretion in excluding from evidence affidavits of experts containing opinion testimony that an overdose of Cipro caused the decedent's heart attack when the opinion was based on FDA Adverse Incident Reports that people taking Cipro had suffered heart attacks and PDR reports that in less than one percent of the cases, a person administered Cipro had a heart attack because neither source establish that an overdose of Cipro causes a heart attack. The temporal relationship is inadequate to establish the necessary scientific basis for the opinion. The court found such evidence inadmissible both under the *Daubert* test and under I.R.E. 702.

10. **Guidelines for Applying Rules.** Guidelines for applying Rules 702, 703 and 403 to determine the admissibility of expert testimony are provided in *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992). *See also West v. Sonke*, 132 Idaho 133, 968 P.2d 228, *reh.den.*, (1998). In *Ryan*, the Court of Appeals stated that “[the admissibility of expert opinion testimony depends] on the expert’s ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion. Thus, the key to admission of the opinion is the validity of the expert’s reasoning and methodology. In resolving these issues, the trial court should not substitute its judgment for that of the relevant scientific community. The court’s function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs.”
11. **Factors to Consider.** Appropriate factors to consider in determining whether such evidence will be helpful are the degree to which the methods are utilized in the scientific community, the inherent understandability of the evidence, the qualifications of the expert who is providing the evidence, and the risks that the jury might be over-impressed by the aura of reliability of the evidence or confused by overly complex concepts. *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991).
12. **Opinions Based on Inferences.** Opinions of experts may be based on inferences from facts known to the expert. *See, e.g., Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180 (2007), *citing, Sheridan v. St. Luke’s Reg’l Med. Ctr.*, 135 Idaho 775, 785, 25 P.3d 88, 98 (2001), in which the Court held that proximate cause can be shown by a “chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.
13. **Basis of Expert Opinion. (Rule 703).** As amended in 2002, Rule 703 provides that “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 the expert 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." The last sentence was added in 2002 to stop the misapplication of Rule 703 to admit inadmissible hearsay, which an expert can consider when forming an opinion. As amended, the Idaho Rule is identical to Federal Rule 703. The Advisory Committee Note to the federal amendment indicates that if the underlying facts or data are admitted under this balancing test, a limiting instruction is required if requested. Lewis, IDAHO TRIAL HANDBOOK, § 16.9, p. 312 (2d ed. 2005).

The amendment to Rule 703 should make it more difficult to permit disclosure, during direct examination of the witness, of the otherwise inadmissible facts or data on which the opinion is based. Decisions, such as *Stewart v. Rice*, 120 Idaho 504, 817 P.2d 170 (1991); *Doty v. Bishara*, 123 Idaho 329, 848 P.2d 387 (1992); and *Long v. Hendricks*, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985) should not be relied upon as authority for admitting otherwise inadmissible facts or data on which the opinion of the expert is based.

"Properly applied, this rule allows the expert to state an opinion based on inadmissible evidence and to indicate the general nature of the sources on which the expert has relied, but not to disclose, directly or indirectly, the contents of the sources on direct examination unless they are otherwise admissible. Although this may in some circumstances tend to weaken the apparent validity of the opinion it will also serve to encourage parties to base their expert's opinions, to the extent feasible, on otherwise admissible data." Lewis, IDAHO TRIAL HANDBOOK, § 16.9, p. 312 (2d ed. 2005).

In *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P. 34 (2004), the Court upheld the admissibility of an expert's affidavit in which the opinions were based on inadmissible evidence of a type reasonably relied upon by experts in the particular field. The Court said a trial judge has discretion to allow an expert to render an opinion based on inadmissible evidence so long as the opinion of the expert is reached through independent judgment and it is irrelevant whether the underlying evidence upon which the expert relied is inadmissible under I.R.E. 401 because of not being relevant.

14. **Expert Testimony in Child Abuse Cases.** A qualified expert with adequate personal knowledge of the circumstances may testify that a child has been sexually abused. *State v. Hester*, 114 Idaho 688, 760 P.2d

27 (1988). However, “the Court of Appeals has held that an expert’s opinion concerning whether a child has been sexually abused must rest on a foundation showing more than just general education and experience in mental health counseling. In *State v. Konechny*, 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000), the court found reversible error in the admission of such opinions from two counselors who were shown to have master’s degrees, advanced training in the treatment of sexual abuse, and experience as child sexual abuse counselors. The court noted that while the record showed expertise in counseling and treatment, it did not document expertise in identifying or diagnosing children who have been subject to sexual abuse. Moreover, no foundation had been laid to show that in forming their opinions the counselors had employed a methodology that could distinguish children who have been abused from those who have not with reasonable accuracy. *See also State v. Eytchison*, 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001) (licensed counselor with fifteen years of counseling experience and master’s degree in counseling not shown to be qualified to express diagnosis that child had been sexually abused.” Lewis, IDAHO TRIAL HANDBOOK, § 16.11, p. 314 (2d ed. 2005).

In *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996), the Court of Appeals held an expert’s testimony concerning the incidence of false accusations of sexual abuse is inadmissible, absent a showing of adequate scientific methodology to support the testimony. *See also State v. Willard*, 129 Idaho 827, 933 P.2d 116 (Ct. App. 1997).

“A qualified expert may testify to the common reactions of children to sexual abuse, including the tendency to give inconsistent accounts of the events, *State v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993); delays in reporting abuse, *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986); and the consistency between the behavior of the alleged victim and the behavior of other children who have been sexually abused, *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988).” Lewis, IDAHO TRIAL HANDBOOK, § 16.11, pp. 313-14 (2d ed. 2005).

“A qualified witness may testify concerning the dissociation of child abuse victims from the abuse, and explain why victims may not immediately report the abuse, why the children often report that the abuse ‘was like a dream,’ and why the children maintain contact with their abusers. *State v. Ransom*, 124 Idaho 703, 864 P.2d 149 (1993), cert. denied, 127 L. Ed 2d 571, 114 S. Ct. 1227 (U.S.).” *Id.*

“However, an expert is not permitted to testify as to whether a child is telling the truth about having been abused, or otherwise to pass upon the credibility of witnesses, those being matters which the jury is equally

capable of judging. *State v. Allen*, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993).” *Id.* at p. 189.

Factors trial courts should look for were described in *State v. Eytchison*, 136 Idaho 210, 213 P.3d, 988, 99(Ct. App. 2001), *citing Konechny*, 134 Idaho 410, 3P.3d 535 (Ct. App. 2000):

“The following factors suggest the scope of the qualifications which trial courts should look for when a litigant offers an expert opinion as a diagnostician of sexual abuse: (1) whether the expert possessed specialized knowledge of child development, individual and family dynamics related to sexual abuse, patterns of child sexual abuse, the effects of sexual abuse on a child, the disclosure process, the use and limits of psychological tests, and the significance of developmentally inappropriate sexual knowledge; (2) whether the expert is trained in the interpretation of medical reports or laboratory tests, in the art of interviewing children, and in the diagnostic evaluation of both children and adults; (3) whether the expert is familiar with the literature on child abuse and on coached and fabricated allegations of abuse; and (4) whether the expert has clinical experience with sexually abused children.”

- 15. Expert Testimony in Medical Malpractice Actions.** Idaho Code § 6-1012 requires that a plaintiff claiming medical malpractice must prove, by direct expert testimony, that the defendant failed to meet the applicable standard of health care practice of the community in which the care was provided, as it existed at the time and place of the alleged negligence.

Section 6-1013 requires that the standard and the defendant’s breach thereof must be proved by the testimony of a knowledgeable, competent expert witness, to a reasonable medical certainty. The witness must have actual knowledge of the applicable community standard of care, which may be gained by a nonresident expert through adequate familiarization with the local standard.

Section 6-1012 is both site and time specific. The required knowledge is knowledge of the community standard of care as it existed at the time the care in question was provided. *See Gubler v. Boe*, 120 Idaho 294, 815 P.2d 1034 (1991). The expert’s knowledge of the local standard of care must exist at the time the expert testifies. *Kunz v. Miciak*, 118 Idaho 130, 795 P.2d 24 (Ct. App. 1990).

In summary judgment proceedings, Rule 56(e) of the Idaho Rules of Civil Procedure imposes additional requirements regarding laying the foundation for the admission of expert testimony as to the applicable

standard of care. In *Ramos v. Dixon*, 144 Idaho 32, 156 P.3d 533 (2007), the Court upheld the exclusion of the affidavit of an expert in a med mal case because it contained only conclusory statements that the expert knew the local community standard of care and failed to lay adequate foundation showing that the expert had actual knowledge of the standard of care of doctors in the community in which the care was provided at the time that the care was provided. Citing, *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P.3d 816 (2002), the Court stated that the party offering such evidence must show that it is based on the witness' personal knowledge and that it sets forth facts as would be admissible in evidence.

If an out-of-area expert consults with an Idaho physician to learn the applicable standard of care, there must be evidence showing that the Idaho physician knows the applicable standard of care. The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. *Id.*

Consulting with local physicians is not the only way one can gain familiarity with the local standard of care. In *Newberry v. Martens*, 142 Idaho 867, 136 P.3d 338 (2006), the Court held an ophthalmologist had requisite familiarity with the standard of family practitioners where he had practiced alongside family practice physicians in the community, had provided and obtained referrals from them, and had discussed patient care with them. In *Grover v. Smith*, 137 Idaho 247, 46 P.3d 1105 (2002), the Court held that an out-of-state expert can become familiar with the local standard of care by inquiring of a local specialist or by reviewing a deposition stating that the local standard does not vary from the national standard coupled with the expert's personal knowledge of the national standard.

An expert's review of the defendant physician's deposition provided an insufficient basis for knowledge of the local standard of care where the defendant's deposition did not describe a standard of care for the drug alleged to have caused the injuries in issue. *Suhadolnik v. Pressman*, 254 P.3d 11 (Idaho 2011).

E. Oath Requirements. (IRE 603)

- 1. Mandatory Condition for Testifying.** IRE 603 provides that "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."
- 2. Child Witnesses.** Child witnesses are not excused from the mandate of Rule 603. However, in a prosecution for sexual molestation, the court's failure to administer a formal oath was not considered fundamental error

where, after a thorough inquiry of the witness, the trial judge reasonably could conclude that the child was competent to perceive, recall and accurately retell past events, and the mere lack of a formal oath did not destroy the fairness of the trial, because the court's lengthy qualifying inquiry adequately impressed upon the child the importance of telling the truth. *State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993).

3. **Raising of the Hand.** A defendant may refuse to raise his hand when making his affirmation without losing his right to testify, but he should make his objection clear to the court. *State v. Hardman*, 120 Idaho 667, 818 P.2d 782 (Ct. App. 1991).

III. FORM OF EXAMINATION

A. Control by the Court.

1. **Rule 611(a).** IRE 611(a) provides that 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.
2. **Judicial Duty and Discretion.** Rule 611(a) imposes a duty on the trial judge to exercise control over the conduct of the trial and confers broad discretion to do so. Common sense and fairness should provide guidance in application of the Rule. *See* Report of the Idaho State Bar Evidence Committee, C 611, pp. 1-3.
3. **Scope of Rule.** Rule 611(a) governs such questions as to whether testimony may be in narrative form, the order of proof, when exhibits may be introduced, the use of demonstrative evidence, whether to allow re-direct or re-cross, whether witnesses may be recalled, and the scope of rebuttal and surrebuttal.
4. **Examination of Witnesses by Jurors.** IRCP 47(q) and ICR 30.1 provide that in the discretion of the court, jurors may be advised that they are permitted to submit written questions to be directed to a witness. If such questions are submitted, the parties must be given the opportunity to object outside the presence of the jury. If the questions are put to the witness, the parties may put follow-up questions as necessary.

B. Use of Leading Questions - On Direct. (IRE 611(c))

1. **Rule 611(c).** IRE 611(c) provides that leading questions should not be permitted on the direct examination of a witness "except as may be necessary to develop his testimony." *See, e.g., State v. Herr*, 97 Idaho

783, 554 P.2d 961 (1976); *State v. Gerhardt*, 97 Idaho 603, 549 P.2d 262 (1976).

Rule 611(c) also provides that interrogation may be by leading questions when a party calls:

- a hostile witness,
 - an adverse party, or
 - a witness identified with an adverse party.
2. **Common Law.** Under common law, leading questions are also generally permissible on direct examination for introductory questions or where necessary to elicit testimony from the reluctant, embarrassed or frightened witness. *McLean v. Lewiston*, 8 Idaho 472, 69 P. 478 (1902). *See also, State v. Larsen*, 42 Idaho 517, 246 P. 313 (1926)(young unsophisticated prosecutrix); *State v. Gibbs*, 45 Idaho 760, 265 P. 24 (1928)(child witness).
3. **Definition of “Leading Question.”** The Rules of Evidence do not define a “leading question.” It was defined under former IRCP 43(b)(2), which governed the form of direct examination prior to adoption of the IRE, as “a question which suggests to the witness the answer which the examining party desires.” *See also, Killinger v. Iest*, 91 Idaho 571, 428 P.2d 490 (1967); *Hemminger v. Tri-State Lumber Co.*, 57 Idaho 697, 68 P.2d 54 (1937).

“A question which suggests to the witness the topic which counsel wishes to discuss is not leading unless it also suggests the content of the witness’s desired answer.” Lewis, IDAHO TRIAL HANDBOOK, § 17.2, p. 194 (1995).

In *Viehweg v. Thompson*, 103 Idaho 265, 647 P.2d 311 (Ct. App. 1982), it was held that the trial court erroneously sustained an objection that the question, “Do you recall out at the scene of the accident any conversation with [plaintiff] that related to his reason for traveling at the speed that he indicated that he was traveling?” was leading, because although the question “signaled the type of information counsel was seeking, it contained no impermissible suggestion concerning the facts themselves.” But compare this question, “Do you recall any conversation with [plaintiff] concerning a problem with Bucyrus-Erie and their garbage contract with that company?” which the Court of Appeals found leading because it “suggested the specific factual information that counsel sought to elicit from the witness.”

C. Scope of Cross-examination. (IRE 611(b))

1. **Rule 611(b).** IRE 611(b) provides that 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.

The permissible scope of cross-examination includes examination on facts tending to explain, modify, or qualify the inference resulting from facts stated in the direct examination. *Rosenberg v. Toetly*, 94 Idaho 413, 489 P.2d 446 (1971).

2. **Control in Discretion of Judge.** The control of cross-examination is committed to the sound discretion of the trial judge, and absent a showing of prejudice, a limitation on cross-examination will not be overturned on appeal. *State v. Brown*, 109 Idaho 981, 712 P.2d 682 (Ct. App. 1985).

However, while the scope of cross-examination is largely within the discretion of the trial judge, wide latitude should be allowed the parties. *State ex rel. Rich v. Bair*, 83 Idaho 475, 365 P.2d 216 (1961)(refusal to permit relevant cross-examination was reversible error). *See also, Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480 (1988)(restricting cross-examination into matter clearly relevant to the credibility of a prosecution witness violated right of confrontation).

The trial court may reasonably limit cross-examination which is harassing, confusing, repetitive, or only marginally relevant. *See e.g., State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993).

In *State v. Folk*, 2011 WL 2568011 (Idaho 2011), the Court held that prohibiting a pro se defendant from personally cross-examining an alleged child molestation victim violated the defendant's right of confrontation in the absence of evidence supporting the trial court's conclusion that examination would be traumatic to the child.

3. **Cross-examination of Criminal Defendant.** A defendant in a criminal case who testifies at trial may be cross-examined about and impeached with certain kinds of evidence which otherwise would be inadmissible.

Rule 104(d) provides that the accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case. This 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. *See* Report of the Idaho State Bar Evidence Committee, C 104 p. 3 (1985).

“A testifying defendant’s credibility is subject to attack on cross-examination with respect to matters which relate to the substantive issues. *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989), post-conviction proceeding, 119 Idaho 105, 803 P.2d 1011 (Ct. App. 1991)(defendant who denied intent to deliver controlled substances was subject to cross-examination which asked him to explain nature of circumstantial evidence against him, and which exposed his knowledge of marijuana values and delivery techniques).”

“Although IRE 611(b) permits, in the court’s discretion, cross-examination beyond the scope of direct as if on direct, in the case of a criminal defendant this should not be allowed since the state could not call the defendant as its own witness for direct examination. *See State v. Larkins*, 5 Idaho 200, 47 P. 945 (1897)(overruled in part on other grounds by *State v. White*, 93 Idaho 153, 456 P.2d 797)(on rehearing)(under statutory predecessor to IRE 611, which similarly permitted cross-examination beyond scope of direct conducted as if on direct examination, accused could be cross-examined only as to facts stated in direct examination, or connected therewith).” Lewis, *IDAHO TRIAL HANDBOOK*, § 17.4, p. 326 (2d ed. 2005).

4. **Waiver of Self-Incrimination Privilege by Testimony on Direct.** Rule 611(b) is silent on the extent to which the privilege against self-incrimination limits the permissible scope of cross-examination. “A defendant who testifies at trial waives the privilege against self-incrimination and submits to cross-examination and impeachment reasonably related to the subject matter of the testimony on direct examination, like any other witness. *See United States v. Havens*, 446 U.S. 620, 100 S. Ct. 1912 (1980); *State v. Hargraves*, 62 Idaho 8, 107 P.2d 854 (1940); *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984)(later proceeding, 110 Idaho 156, 715 P.2d 369 (Ct. App.)).”

“However, a testifying defendant cannot be cross-examined about an earlier assertion of the privilege against self-incrimination. *State v. Haggard*, 94 Idaho 249, 486 P.2d 260 (1971)(cross-examination of defendant at trial about failure to testify to alibi at preliminary hearing was fundamental error which would be reviewed despite lack of objection).”

“Unlike other witnesses, a criminal defendant’s constitutional privilege against self-incrimination would appear to preclude cross-examination by the prosecution on matters not reasonably related to the truth or reliability of what the defendant voluntarily discloses on direct examination. *See Harrison v. United States*, 392 U.S. 219, 88 S. Ct. 2008 (1968)(testifying

defendant “waives his privilege against compulsory self-incrimination with respect to the testimony he gives”); *Fitzpatrick v. United States*, 178 U.S. 304, 20 S. Ct. 944 (1900)(testifying defendant waived privilege as to all matters bearing on events to which he testified; however cross-examination on matters not pertinent to direct testimony would improperly compel defendant to furnish original evidence against himself)(dictum).”

“Moreover, a criminal defendant may avoid waiver of the self-incrimination privilege by testifying only to matters concerning the credibility of other witnesses. See IRE 608(c): ‘The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege of the witness against self-incrimination when examined with respect to matters which related only to credibility.’” Lewis, IDAHO TRIAL HANDBOOK, § 17.5, pp. 326-27 (2d ed. 2005).

D. Scope of Redirect Examination. (IRCP 43(b)(5))

1. **Civil Rule 43(b)(5).** IRCP 43(b)(5), which was not rescinded on the adoption of the Idaho Rules of Evidence, provides that a witness once examined cannot be reexamined as to the same matter without leave of the court, but the witness may be reexamined as to any new matter upon which the witness has been examined by the adverse party.

The civil rule is made applicable in criminal proceedings by I.C. § 19-2110, which provides that the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in the code.

2. **Judicial Discretion.** The court has broad discretion in the application of this limitation on redirect examination, in order to achieve the paramount objective of arriving at the truth and doing justice. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951)(under predecessor statute)(no error to permit redirect of prosecutrix as to when and to whom she had made complaint of rape, following cross-examination which addressed only whether she had complained of rape immediately following the alleged assault).

E. Refreshing Witness’s Recollection. (IRE 612)

1. **Refreshing Recollection While Testifying.** A witness can use any writing or object to refresh memory while testifying. *See generally*, Lewis, IDAHO TRIAL HANDBOOK, § 17.9, pp. 329-30 (2d ed. 2005); Report of the Idaho State Bar Evidence Committee, C 612, pp. 1-4 (1985).
2. **Adverse Party’s Right to Production if Used While Testifying. (IRE 612(a)).** Rule 612(a) provides that if, while testifying, a witness uses a

writing or object to refresh 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. *See Thomson v. Olsen*, 147 Idaho 99, 205 P.3d 1235 (2009)(email used to refresh memory of witness could be introduced by opponent, not proponent).

3. **Adverse Party's Right to Production if Used Before Testifying. (IRE 612(b)).** Under Rule 612(b), when, prior to testifying in a trial, hearing or deposition, a witness has used a writing or object to refresh the witness's memory for the purpose of testifying, an adverse party has the right of production, if the court determines that justice so requires and if the item is not privileged or work product that is protected from disclosure under IRCP 26 or ICR 16.
4. **Terms and Conditions of Production and Use. (IRE 612(c)).** Rule 612(c) provides that when production of a writing or object to an adverse party is required, the adverse party is entitled to inspect it, cross-examine the witness thereon, and introduce portions that are relevant to the witness' testimony in evidence. The Rule also provides for procedures and sanctions when production is impracticable, resisted by the proponent, or refused by the proponent.

F. Non-responsive Answers: Who Can Object?

1. **General Rule.** "As a general rule, an objection and motion to strike a witness's answer as non-responsive is available only to the party conducting the examination. *State ex rel. Rich v. Bair*, 83 Idaho 475, 365 P. 2d 216 (1961). This is to avoid unnecessary interruptions by opposing counsel and to allow examining counsel to control the interrogation; it is subject to the courts inherent power to control the progress of trial. Of course, the non-examining counsel may object to a witness's non-responsive answer on the ground that it is otherwise violative of the rules of evidence." Lewis, IDAHO TRIAL HANDBOOK, § 17.11, pp. 330-31 (2d ed. 2005).
2. **Proper Procedure & Effect of Striking Non-responsive Testimony.** The proper procedure when a witness's answer is non-responsive to the question asked is for examining counsel to object after the answer, ask that the answer be stricken from the record, and request an instruction to the jury to disregard. *State v. Major*, 105 Idaho 4, 665 P.2d 703 (1983).

When counsel has moved to strike a witness's non-responsive answer, the matter included therein is not opened up for later cross or redirect examination by the opponent. *State v. Trowbridge*, 97 Idaho 93, 540 P.2d 278 (1975); *Kelly v. Troy Laundry Co.*, 46 Idaho 214, 267 P. 222 (1928).

G. Examination of Witnesses by the Court. (IRE 614(b))

1. **Rule 614(b).** IRE 614(b) authorizes the court to examine witnesses, whether called by itself or by a party. This may be particularly appropriate in bench trials. See *Wolfe v. State*, 117 Idaho 645, 791 P.2d 26 (Ct. App. 1990)(where court is fact finder, it is vital that court be allowed to ask questions for clarification and to gather information).
2. **Questioning Should Demonstrate Neutrality.** In jury trials care should be taken to ensure there is no indication of bias or opinion, or apparent comment on the evidence in the questions. See *State v. Freitag*, 53 Idaho 726, 27 P.2d 68 (1933); *State v. Larsen*, 123 Idaho 456, 849 P.2d 129 (Ct. App. 1993)(questioning a child witness found appropriate in a criminal jury trial where questioning did not exhibit an opinion, bias, or prejudice, or indicate the court believed the child's testimony).

IV. MANAGEMENT OF WITNESSES

A. Sequestration: Exclusion of Witnesses from the Courtroom. (IRE 615)

1. **General Rule.** Rule 615(a) permits the court, at the request of a party or on its own motion, to order witnesses excluded so that they cannot hear the testimony of other witnesses. However, the court cannot exclude:
 - (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.

The rule is silent whether more than one "representative" may be designated.

The State qualifies as a party for purposes of subpart (b) and may designate an investigating agent as its representative under the rule. *State v. Ralls*, 111 Idaho 485, 725 P.2d 190 (Ct. App. 1986).

Subpart (c) "is commonly applied where the witness in question is an expert whose presence may be necessary to assist counsel in understanding and cross-examining an opposing expert's testimony. It reasonably might be applied as well to an eyewitness during the testimony of another eyewitness called by the opposing party, to permit the witness to advise counsel as to factual inconsistencies in the opposing witness's testimony." Lewis, IDAHO TRIAL HANDBOOK, § 14.11, pp. 259-260 (2d ed. 2005).

2. **Judicial Discretion and Enforcement.** The trial judge has discretion whether to sequester witnesses and the remedies to impose for a breach. There are four recognized methods of enforcing an exclusion order: (1) citing the witness for contempt; (2) permitting comment on the witness's noncompliance with the order; (3) refusing to let the witness testify; and (4) striking the witness's testimony. *State v. Slawson*, 124 Idaho 753, 864 P.2d 199 (Ct. App. 1993)(trial court acted properly in denying a mistrial and ordering instead that defense counsel would be permitted to examine witnesses who breached the court's sequestration order and order not to converse with other witnesses, about their breach of the order and to comment in closing argument on the breach). *See also, State v. Christensen*, 100 Idaho 631, 603 P.2d 586 (1979)(no abuse of discretion to permit testimony by expert who had read transcript of testimony by another expert where witness stated his testimony was not influenced thereby); *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987); *Paine v. Strom*, 51 Idaho 532, 6 P.2d 849 (1931)(exclusion of witness is wholly within discretion of court).
3. **Preliminary Hearing.** Notwithstanding Rule 615(a), Rule 615(b) requires the magistrate to exclude from a preliminary hearing all non-party witnesses who have not been examined, if requested by either party.
4. **Child Witnesses.** Rule 615(c) grants the court discretion, when a child is a witness, to permit a parent, counselor, friend, or other person having a supportive relationship with the child to remain in the courtroom during the child's testimony.
5. **I.R.C.P. 77(b).** The civil rules defer to the evidence rules with respect to the exclusion of witnesses. Civil Rule 77(b) provides that "All trials upon the merits of every court of justice shall be conducted in open court and so far as convenient in a regular courtroom; except 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 exclude witnesses as provided in the Idaho Rules of Evidence."

B. Witnesses at Counsel Table.

1. **In Criminal Trials.** In a criminal trial witnesses, other than the defendant, should not be seated at counsel table unless shown to be necessary to aid counsel. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

2. **In Civil Trials.** In civil cases it is common practice to allow an expert witness, whose presence is deemed by a party to be essential to the presentation of his cause, to be seated at counsel table.

C. **Presence of Criminal Defendant: When Required.** (ICR 43)

1. **Presence Required - ICR 43.** Idaho Criminal Rule 43 provides that a defendant shall be present at the arraignment, at the time of the plea, and at every stage of the trial including the impaneling of the jury and return of the verdict, and at the imposition of sentence, except where a defendant, initially present, is voluntarily absent after the trial has commenced; or, notwithstanding a prior warning, the defendant's conduct substantially impedes the orderly conduct of the trial.

When the defendant acts in a manner so disorderly, disruptive and disrespectful as to substantially impede or makes impossible orderly conduct of the trial, the court may:

- A. Bind and gag the defendant.
 - B. Cite the defendant for contempt.
 - C. Remove the defendant from the courtroom until he/she agrees to act properly.
 - D. Take other appropriate action.
2. **Nonappearance at Outset vs. Absence During Trial.** "In *Crosby v. United States*, 506 U.S. 255, 113 S. Ct. 748 (1993), the Court held that FRCP 43 (which is substantially identical to ICR 43 in this regard) prohibited trial of a defendant in absentia where the defendant, with apparent full notice of the trial date, failed to appear at the outset of trial, distinguishing defendants who absent themselves after trial has begun from those absent at the outset." Lewis, IDAHO TRIAL HANDBOOK, § 4.09, p. 82 (2d ed. 2005).
 3. **Voluntary Absence.** "A defendant who failed to return to the courtroom on the second day of trial was not involuntarily absent, where he claimed that his absence was forced by the unfairness of the trial judge. The proper course of action would have been for the defendant to raise the issue of unfairness with the trial court, and if necessary, through judicial review. *State v. Elliott*, 126 Idaho 323, 882 P.2d 978 (Ct. App. 1994)(also discussing proper procedure for determination of whether trial should proceed when defendant is absent)." *Ibid*.
 4. **Presence At Subsequent Stages of Sentencing.** Defendant must be present for imposition of a corrected sentence. *Lopez v. State*, 108 Idaho

394, 700 P.2d 16 (1985). However, where a court has retained jurisdiction and withheld the imposition of sentence, neither a hearing nor presence of defendant is required when the court relinquishes jurisdiction and actuates the sentence. *State v. Ditmars*, 98 Idaho 472, 567 P.2d 17 (1977), *cert. denied*, *Ditmars v. Idaho*, 438 U.S. 1088, 98 S. Ct. 1284 (1978).

5. **Presence Not Required.** ICR 43(c) provides that, unless otherwise ordered by the court, a criminal defendant need not be present in the following situations:
 - (a) A corporation may appear by counsel.
 - (b) In misdemeanors the defendant may appear by counsel or the court, with written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence without the defendant being physically present.
 - (c) At a conference or argument upon a question of law.
 - (d) At a reduction of sentence under Rule 35.
6. **Electronic Audio Visual Appearance.** ICR 43.1 permits use of electronic audio visual devices for a first or subsequent appearance, bail hearing, arraignment and plea in a misdemeanor case, or arraignment and plea of not guilty in a felony case. Additional hearings by audio visual devices require consent of defendant.
7. **Telephonic Proceedings.** ICR 43.2 permits proceedings by telephone conference calls on oral stipulation of the defendant, and defendant's attorney if defendant has counsel, and the prosecution, for the first or subsequent appearance, bail hearing, or appointment of counsel hearing. The court must record the stipulation and the proceeding, and cause minutes to be made and filed in the action.

D. Reexamination and Recalling of Witnesses.

1. **Civil Rule 43(b)(5).** IRCP 43(b)(5) provides that a witness once examined cannot be reexamined as to the same matter without leave of court, but the witness may be reexamined as to any new matter upon which the witness has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled by the same party without leave of court.

However, the rule does not preclude the adverse party from calling such witness as that party's own witness for direct examination.

2. **Judicial Discretion.** Leave is to be granted or withheld by the court in the exercise of sound discretion. *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981)(it was not error to permit recall solely for the purpose of laying a foundation for impeachment).
3. **Criminal Cases.** “There is no comparable criminal rule. The civil rule is consistent with the limitations imposed by a predecessor statute which applied to both civil and criminal proceedings. *See* Idaho Code § 9-1208 (repealed).” Lewis, IDAHO TRIAL HANDBOOK, § 17.8, p. 329 (2d ed. 2005).

Idaho Code § 19-2110 makes civil rules applicable to criminal actions, except when otherwise provided.

E. **Admonishing Witnesses.**

1. **Controlling Witnesses. (Rule 611(a)).** IRE 611(a) provides that the court shall exercise reasonable control over the mode and order of interrogating witnesses.
2. **Trial Court’s Discretion.** The decision whether to admonish a witness is within the trial court’s discretion, as manager of the trial. *State v. Danson*, 113 Idaho 746, 747 P.2d 768 (Ct. App. 1987)(witness who volunteered potentially inflammatory evidence).
3. **Permitting Explanations by Witnesses.** “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.” *Giffen v. Lewiston*, 6 Idaho 231, 55 P. 545 (1898).

F. **Non-appearing Witnesses: Subpoena & Contempt Powers.**

1. **Civil Rule 45: Clerk or Attorney May Issue Subpoena.** IRCP 45(a) authorizes the clerk of the court or an attorney licensed in Idaho to issue and sign a subpoena for the attendance of a witness at a civil trial, deposition or hearing.

IRCP 45(f) provides that failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of the court from which the subpoena issued, in addition to the penalties provided by law.

2. **Criminal Rule 17: Clerk May Issue Subpoena.** ICR 17(a) authorizes the clerk of the court to issue a subpoena for the attendance of witnesses at a criminal hearing or trial, and under ICR 17(e) for the taking of a deposition when ordered by the district court.

ICR 17(f) provides that failure by any person to obey a subpoena may be deemed in contempt of the court.

3. **Enforcement by Warrant - Idaho Code § 9-709.** Section 9-709 authorizes the court to issue a warrant directing the sheriff to arrest the witness and bring him before the court where the attendance is required, upon proof of service of the subpoena.
4. **Civil Penalties - Idaho Code § 9-708.** Section 9-708 provides that a witness disobeying a subpoena, in addition to penalties that may be inflicted pursuant to the contempt powers of the court, also forfeits to the party aggrieved the sum of \$100 and all damages which he may sustain by the failure of a witness to attend, which forfeiture and damages may be recovered in a civil action.
5. **Service Within Idaho.** IRCP 45(e) and ICR 17(d) provide that a subpoena for a hearing or trial in a district court or magistrates division may be served at any place within the state of Idaho.
6. **Service Outside of Idaho.** witness who resides out of state is not obliged to attend a hearing or trial in Idaho unless ordered to attend by a court of the state where the witness resides, but if ordered to attend in Idaho, the witness is entitled to fees and mileage for the distance actually traveled within the state in going to the place of trial. *State v. Baird*, 13 Idaho 126, 89 P. 298 (1907)

ICR 17(d) provides that a subpoena directed to a witness outside the state of Idaho shall be issued under the circumstances and in the manner and be served as provided by law. The controlling statutes are Idaho Code §§ 19-3005, 19-3012, and 19-3018-20.

V. IMPEACHMENT OF WITNESSES

A. Impeachment, Generally.

1. **Who May Impeach. (IRE 607).** Rule 607 provides that the credibility of a witness may be attacked by any party including the party calling him. The rule eliminates the common law voucher principle.
2. **Methods of Impeachment.** A witness's credibility may be attacked in a number of ways:

- (a) By evidence which contradicts the witness's testimony, *see, e.g., State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989), post-conviction proceeding, 119 Idaho 105, 803 P.2d 1011 (Ct. App. 1991)(criminal defendant who denied possession of marijuana with intent to deliver could be cross-examined concerning his knowledge of drug transactions, and asked to explain circumstantial evidence against him);
- (b) By evidence that the witness has made contradictory statements on other occasions;
- (c) By evidence that the witness has a bias or motive to testify falsely;
- (d) By evidence attacking the witness's capacity to testify truthfully or indicating that the witness has been subjected to undue influence concerning the testimony;
- (e) By evidence that the witness is of untruthful character;
- (f) By evidence that the witness has committed untruthful acts; or
- (g) By evidence that the witness has been convicted of a felony.

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. Lewis, IDAHO TRIAL HANDBOOK, § 18.1, pp. 336-38 (2d ed. 2005).

3. Impeachment with Evidence Otherwise Inadmissible. In some instances the rules permit impeachment through the use of evidence which is otherwise inadmissible. For example:

- (a) *State v. Babbitt*, 120 Idaho 337, 815 P.2d 1077 (Ct. App. 1991) upheld evidence of defendant's involvement in fist fights and history as a boxer, otherwise inadmissible character evidence under IRE 404, to rebut his testimony that he used a gun to defend himself because was unable to fight.
- (b) *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991) held evidence of other crimes or wrongs, which may not qualify for admissibility under Rule 404(b), is admissible for impeachment.

(c) *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987) held evidence of statements during settlement negotiations, otherwise inadmissible under Rule 408, is admissible for impeachment.

4. **Calling Witness Solely to Impeach.** A party may be permitted to call a witness solely for the purpose of laying foundation for impeachment of that witness. *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981)(prosecutor permitted to recall defendant's wife as a witness on rebuttal solely to set her up for impeachment under prior IRCP 43(b)(8) by showing prior inconsistent statement).

However, the procedure should not be allowed to be used for the purpose of bringing inadmissible statements to the jury's substantive attention. *State v. Stewart*, 100 Idaho 185, 595 P.2d 719 (1979)(questions concerning inculpatory written statement of co-defendant); *Watson v. Navistar Int'l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992)(if it appears party is seeking introduction of evidence of subsequent remedial measures to imply culpability under the guise of impeachment, evidence should be disallowed).

5. **Constitutional Considerations.** "In a criminal case, a defendant's right of confrontation is violated by a restriction which precludes inquiry into matter clearly relevant to impeachment of a prosecution witness. *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480 (1988)." Lewis, IDAHO TRIAL HANDBOOK, § 18.1, p. 338 (2d ed. 2005).

B. Prior Statements. (IRE 613)

1. **Rule 613, Generally.** IRE 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. In fairness, the rule gives the witness an opportunity to explain.
2. **Examining Witness Concerning Prior Statement - Rule 613(a).** IRE 613(a) provides that 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 must be shown or disclosed to opposing counsel.
3. **Extrinsic Evidence of Prior Inconsistent Statement - Rule 613(b).** IRE 613(b) provides that 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 requirement applies only to statements of non-party witnesses; it does not apply to admissions of a party opponent as defined in Rule 801(d)(2).

4. **Obligation to “Afford” Opportunity to Deny or Explain.** 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 during trial.

“The practical effect of this requirement is that impeaching counsel must either confront the witness with the actual statement during the examination, or, if counsel chooses instead to offer the statement after the examination is completed, must make sure that the witness will be available for recall after the statement has been introduced to provide the required opportunities.” Lewis, *IDAHO TRIAL HANDBOOK*, § 18.3, pp. 339-40 (2d ed. 2005).

5. **Obligation to Prove Inconsistent Statement.** The Court of Appeals has held that when a witness has been asked about a prior inconsistent statement and has denied making it, proof of the statement should be made to avoid unfair impeachment by innuendo unsupported by evidence. *Preuss v. Thomson*, 112 Idaho 169, 730 P.2d 1089 (Ct. App. 1986).
6. **Exclusion of Irrelevant or Prejudicial Prior Statement.** Evidence of the prior statement may be excluded if minimal relevance is outweighed by risks of prejudice. *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 903 P.2d 730 (1995)(statements made by plaintiffs in earlier tort claim notices, offered as inconsistent statements excluded because minimal relevance outweighed by risks of prejudice).
7. **Impeaching Statements Are Not Substantive Proof.** Unless they qualify for a hearsay exception and are otherwise relevant, inconsistent statements are admissible only for impeachment purposes and not as substantive proof of the truth of the matters stated therein. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976). *See also, State v. Warden*, 100 Idaho 21, 592 P.2d 836 (1979). An instruction to this effect must be requested or it is waived. *See Gayhart v. Schwabe*, 80 Idaho 354, 330 P.2d 327 (1958).

C. **Impeachment by Conviction of Crime. (IRE 609).**

1. **General Rule. (IRE 609(a)).** Rule 609(a) authorizes impeachment of the credibility of a witness, when permitted by the court after a hearing, by

evidence elicited from the witness on cross-examination or established by public record, that the witness has been convicted of a felony. The evidence may consist of the fact of conviction alone, or disclosure of the nature of the conviction, or both the fact and nature, but evidence of the circumstances of conviction is inadmissible. If the fact of conviction but not the nature of it is introduced by the proponent, the defendant has the right to present the nature of the conviction, but not the circumstances thereof.

Limiting impeachment evidence to proof of the fact of conviction alone may be fully warranted when risks of jury propensity to misuse the evidence of the nature of the conviction are great. *See, e.g., State v. Rodgers*, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990), *rev. granted*, 1990 Ida. LEXIS 184 (Idaho) *and aff'd on other grounds*, 119 Idaho 1047, 812 P.2d 1208 (1991)(in prosecution for murder, trial court properly limited proof of prior murder conviction to fact of felony conviction).

2. **Ten Year Time Limit and Procedure. (IRE 609(b)).** Rule 609(b) provides that any conviction more than ten years old is inadmissible for impeachment unless the court determines, following advance notice by the proponent and hearing, that the probative value exceeds its prejudicial effect.
3. **Procedure and Weighing Process.** Before evidence of a conviction can be admitted, the court must conduct a hearing outside of the presence of the jury and the court must determine that the fact of the prior conviction or the nature thereof, or both, are relevant to the credibility of the witness, and that the probative value of admitting the evidence outweighs its prejudicial effect to the party offering the witness.
4. **Relevance of Crimes.** In *State v. Allen*, 113 Idaho 676, 747 P.2d 85 (Ct. App. 1987)(reversible error to admit fact of conviction for incest), the Court of Appeals has categorized the potential relevance of various kinds of crimes to credibility for purposes of IRE 609:
 - (a) crimes such as perjury which have a self-evident bearing on credibility because they deal directly with honesty and veracity;
 - (b) crimes such as burglary or robbery which do not deal directly with veracity and have only a general relationship with honesty, which may nonetheless be relevant if they show a pattern of disrespect for law and lawful authority suggesting that the defendant may not take the oath seriously; and
 - (c) crimes of violence or passion, which as products of emotional impulse usually have little or no bearing on honesty or veracity.

However, in *State v. Rodgers*, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990), *rev. granted*, 1990 Ida. LEXIS 184 (Idaho 1990) and *aff'd on other grounds*, 119 Idaho 1047, 812 P.2d 1208 (1991), involving a second degree murder conviction, the court held that crimes of violence may have credibility relevance where they reflect deliberate killing rather than uncontrolled passion or emotional impulse. But compare, *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999), where the Court of Appeals held the trial court properly excluded evidence of the victim's prior conviction for aggravated assault on the ground it was a crime of violence and not relevant to credibility.

The standard for relevance may be viewed differently when crimes against children are involved. In *State v. Bush*, 131 Idaho 22, 951 P.2d 1249 (1997), the Supreme Court held that no abuse of discretion occurred when the trial court, in a prosecution for lewd conduct with a minor, ruled it would admit evidence of a prior conviction for immoral acts with a child for impeachment if the defendant testified. In this decision "the Supreme Court adopted an approach which may have opened a wide door for the use of prior sex crime convictions for impeachment. There the court considered the admissibility of a felony conviction for immoral acts with a child, finding the crime to be a 'middle category' crime usable for impeachment. The court held that '[s]ince Bush had no compunction against engaging in immoral acts with a minor, there is no reason to believe that he would hesitate to gain an advantage for himself in this case by giving false testimony.' This reasoning could, of course, be applied to almost any prior conviction involving intentional conduct." Lewis, IDAHO TRIAL HANDBOOK, § 18.10, p. 349 (2d ed. 2005).

In *State v. Muraco*, 132 Idaho 130, 968 P.2d 225 (1998), the defendant was charged with lewd conduct with a minor, the same crime charged against Bush. The trial court permitted impeachment of the defendant with evidence that he had a prior Nevada conviction for lewdness with a minor. The court of appeals held that the trial court must assess whether the prior offense is a crime relevant to the credibility of the defendant. The court of appeals concluded that:

Lewdness with a minor is not such an offense . While it is a criminal act that society does not tolerate, it, like incest falls within the third of those categories defined in Ybarra and Allen, which encompasses crimes of passion and crimes of unpremeditated violence having little or no implications regarding the defendant's honesty or veracity.

However, on review of the Court of Appeals' *Muraco* decision, the Supreme Court reversed on this point, holding that the prior Nevada conviction was not a crime of violence under Nevada law,

and therefore was admissible for impeachment. *State v. Muraco*, 132 Idaho 130, 968 P.2d 225 (1998).

State v. Thompson, 132 Idaho 628, 977 P.2d 890 (1999), involved a prosecution for sexual battery of a minor. The trial court permitted evidence that the defendant had been convicted of a felony but prohibited evidence of the nature of the felony, lewd and lascivious conduct, on the ground that the nature of the felony would not add to the probative value of the conviction on the issue of credibility and would raise substantial potential for prejudice. The court rejected the argument that the conviction was inadmissible as a crime of violence and relied on *Bush* and *Muraco* to hold that the conviction was relevant to credibility.

5. **Withheld or Vacated Judgments; Pardon for Innocence. (IRE 609(c)).** Rule 609(c) prohibits the use of withheld or vacated judgments, and convictions which have been pardoned or annulled based on a finding of innocence.
6. **Pardon or Annulment Not Based on Innocence. (IRE 609(d)).** Rule 609(d) permits use of convictions which were the subject of a pardon, annulment or certificate of rehabilitation not based on a finding of innocence. Those circumstances are to be considered in determining the admissibility of the conviction, i.e., its relevance to credibility. If the conviction is admitted, the pardon, annulment or certificate may be admitted.
7. **Trial Court Record.** The trial court must make a record of its assessment of the relevance of a conviction to credibility and the court's balancing of the risks of prejudice. Failure to do so may result in vacation of the judgment of conviction. See *State v. Franco*, 128 Idaho 815, 919 P.2d 1344 (Ct. App. 1996)

D. Impeachment with Suppressed Evidence--Criminal.

1. **Impeachment Allowed.** The impeachment of a testifying defendant may include examination about or introduction of some kinds of evidence which otherwise would be subject to suppression as violative of the defendant's constitutional rights. For example:
 - (a) *Raffel v. United States*, 271 U.S. 494, 46 S. Ct. 566 (1926) held defendant who testifies at retrial is subject to impeachment with failure to testify at first trial.
 - (b) *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124 (1980) held testifying defendant is subject to impeachment with pre-arrest silence.

2. **Impeachment Not Allowed.** The testifying defendant does not open the door to certain other kinds of impeachment. For example:

- (a) *Agnello v. United States*, 269 U.S. 20, 46 S. Ct. 4 (1925)(overruled in part on other grounds by *United States v. Haven*, 100 S. Ct. 1912), held impeachment by illegally seized evidence improper where cross-examination questions did not relate to testimony during direct examination.
- (b) *State v. White*, 97 Idaho 708, 551 P.2d 1344 (1976), *cert. denied*, *White v. Idaho*, 429 U.S. 842, 97 S. Ct. 118 (1976), held defendant's testimony on direct concerning post-arrest statements made prior to assertion of right to silence did not open door to impeachment by silence after assertion of right; prosecutor's questioning concerning silence was fundamental error.
- (c) *State v. Haggard*, 94 Idaho 249, 486 P.2d 260 (1971) held prosecutor's cross-examination of defendant concerning his failure to testify and present alibi at preliminary hearing was fundamental error.

See generally, Lewis, IDAHO TRIAL HANDBOOK, § 18.11, pp. 350-51 (2d ed. 2005).

E. Impeachment by Evidence of Untruthful Acts. (IRE 608(b))

- 1. **Evidence of Specific Instances of Conduct.** Rule 608(b) permits, in the discretion of the court, cross-examination of a witness with questions concerning specific truthful or untruthful acts of the witness or other another witness as to whose character the witness has testified.
- 2. **Extrinsic Evidence Inadmissible.** No extrinsic evidence of the particular acts is permitted. *State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993)(trial court did not abuse discretion by prohibiting cross-examination of informant concerning alleged perjury in another trial; offer to prove perjury through another witness properly rejected as impermissible extrinsic proof). *See generally State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988)(concurring opinion, Burnett, J.)(extensive discussion of limitations on impeachment under IRE 608(b)). Lewis, IDAHO TRIAL HANDBOOK, § 18.9, pp. 345-46 (2d ed. 2005).
- 3. **Remoteness of Acts.** The proximity in time or remoteness of the acts in question are properly considered on the question whether the acts bear on credibility. *State v. Downing*, 128 Idaho 149, 911 P.2d 145 (Ct. App. 1996)(in child sex abuse prosecution, court properly disallowed

questioning of fifteen-year old witness concerning false allegations of abuse she made when six years old as too remote to be relevant).

F. Character for Truthfulness: Opinion and Reputation. (IRE 608(a))

- 1. Opinion and Reputation Evidence - Rule 608(a).** IRE 608(a) provides that the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (a) the evidence may refer only to character for truthfulness or untruthfulness; and (b) 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.

The term “otherwise” recognizes that a witness’s character for truthfulness might be attacked through questions or evidence ostensibly directed at an issue in the case, but having the real effect of impugning the witness’s character. *Pierson v Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989)(evidence of corrupt misconduct by witness, even if germane to an issue in case, may be treated as attack on character for truthfulness).

- 2. Methods of Proving Character - Rule 405(a).** “IRE 405(a) states how character concerning truthfulness may be proved under IRE 608(a). It permits proof by testimony as to the witness’s reputation for truthfulness. A witness may waive the privilege of refusing to testify on the ground that answers may incriminate him by answering questions without objection. *State v. McClurg*, 50 Idaho 762, 300 P. 898, overruled on other grounds in *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937). The scope of the waiver by answering is as broad as permissible cross-examination. *Brown v. U.S.*, 356 U.S. 148 (1958).

“IRE 405(a) and 608 (b) do, however, permit cross-examination of a character witness about relevant specific instances of conduct to impeach the credibility of the witness’s character testimony, but the rules do not authorize extrinsic proof of the impeaching specific conduct and the examiner must therefore take the answers provided. *See State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988).” Lewis, IDAHO TRIAL HANDBOOK, § 18.8, p. 345 (2d ed. 2005).

“Truthfulness” and “honesty” were treated as synonymous for purposes of impeachment by opinion under Rule 608(a) in *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331(1989),post-conviction proceeding, 124 Idaho 49, 855 P.2d 886 (Ct. App. 1993).

G. Bias and Interest.

- 1. Always Relevant.** “Although the Idaho Rules of Evidence do not specifically address impeachment of witnesses by evidence of bias, the

right to do so is unquestionable. The bias, prejudice, or motive of a witness to lie concerning issues presented in a trial is always material and relevant to effective cross-examination. *State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993).”

2. **Extrinsic Evidence Allowed.** Denial of bias by a witness does not preclude inquiry into the issue. In *State v. Gomez*, 136 Idaho 480, 36 P.3d 832 (2002), the Supreme Court held the trial court improperly prohibited questioning of the prosecution witness concerning the witness’s possession of marijuana for which the witness had not been charged, where the witness denied any arrangement for her testimony. The Court said the jury could have inferred an agreement existed even though the witness denied it. It was also deemed improper to preclude examination of another prosecution witness concerning past involvement with police in sting operations and past instances of informing on people in return for lenient treatment. The Court reasoned that the extent to which the witness had cooperated with police in the past may make further cooperation more likely.
3. **Extrinsic Evidence Allowed.** “In a criminal case, the right of effective confrontation requires that the defendant be permitted to do more than merely ask whether a witness is biased, and must be permitted to show why the witness might be biased by presenting the facts necessary to allow the jurors to form inferences regarding the witness’s impartiality. *Id.* See also *State v. Guinn*, 114 Idaho 30, 752 P.2d 632 (Ct. App. 1988) (on sufficient foundation to show relevance to bias and motivation, defendant entitled to impeach informant by extrinsic evidence of informant’s drug-related activities).” Lewis, IDAHO TRIAL HANDBOOK, § 18.6, p. 342 (2d ed. 2005).
4. **Case-Specific Test.** “The Court of Appeals has adopted a “case-specific” test for determining whether a defendant should be allowed to show a mandatory minimum sentence a prosecution witness has avoided by agreeing to testify against the defendant, where the disclosure would also inform the jury of the minimum sentence the defendant would face if convicted. In *State v. Ruiz*, 150 Idaho 469, 248 P.3d 720, 2009 WL 400438 (Idaho Ct. App. 2009), the court found no error in a refusal to permit the disclosure, under circumstances where the court saw no incentive for the witness to falsely accuse the defendant, and where the mandatory minimum sentence, three years, was not particularly harsh. The court cautioned, however, that in the future the issue could be resolved by permitting disclosure of the mandatory minimum sentence the witness avoided, but not the particular charge which carried the sentence.” Lewis, IDAHO TRIAL HANDBOOK §18.6, p. 342 (2d ed. 2005) (Supp. 2011-12, p. 42).

5. **Settlement Facts.** Although, evidence of settlement or settlement negotiations is not admissible under Rule 408, it may be relevant and admissible when the nature of the settlement would reflect on the witness's motives in testifying. *See, e.g., Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986); *Soria v. Sierra Pac. Airlines*, 111 Idaho 594, 726 P.2d 706 (1986).

H. Impeachment Concerning Capacity or Undue Influence.

1. **Matter Affecting Capacity.** "Although not specifically addressed in the evidence rules, matters affecting the capacity of a witness to testify truthfully are clearly appropriate subjects of impeaching examination or proof. They could include, for example, a witness's intoxication at the time of the events observed, a witness's physical limitations which may have affected the accuracy of the witness's observations, or a witness's memory defect which could influence the accuracy of the witness's present testimony." Lewis, IDAHO TRIAL HANDBOOK, § 18.7, p. 343 (2d ed. 2005).
2. **Undue Suggestion or Influence.** The tainting of a witness's testimony through undue suggestion or influence may render the witness incompetent under IRE 601. *See State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993)(tainting of alleged child abuse victim's testimony by suggestions during interview posed question of competency); *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984)(possibility of undue suggestion during hypnosis of witness raised question of competency). Where influence or suggestion is insufficient to render a witness's testimony incompetent, the potential effect of the influence on the witness's testimony is nonetheless a proper subject for impeachment. *See* Lewis, IDAHO TRIAL HANDBOOK, § 18.7, pp. 343-44 (2d ed. 2005).

I. Impeachment on Collateral Matters.

1. **Impeachment on Collateral Matters Forbidden.** There is a recognized but unwritten evidence doctrine which permits the court to forbid impeachment on "collateral matters."
2. **Meaning of "Collateral Matter."** Matter is "collateral" under this doctrine if it is not relevant to the issue on trial. *See, e.g., State v. Araiza*, 124 Idaho 82, 856 P.2d 872 (1993)(question asking prosecution witness whether he lied in another unrelated trial was impeachment on collateral matter; court did not abuse discretion in disallowing question).
3. **Rationale and Authority for Exclusion.** The rationale for this restriction is that impeachment on points irrelevant to the controlling issue may confuse the jury as to the issues and would waste time by side-

tracking the trial into irrelevant disputes. Rule 403 provides authority for the exclusion.

4. **Permitting Limited Inquiry.** Complete prohibition of such impeachment may be unwarranted, and a less severe restriction permits limited impeachment examination, but forbids impeachment by the use of extrinsic evidence, i.e., evidence other than the witness's answers during examination. This limitation is expressly incorporated into IRE 608(b), regarding impeachment by evidence of untruthful acts. *See* Lewis, IDAHO TRIAL HANDBOOK, § 18.2, pp. 338-39 (2d ed. 2005).

VI. TESTIMONIAL PRIVILEGE AGAINST SELF-INCRIMINATION

A. Testimonial Privilege, Generally.

1. **Fifth Amendment Right.** The United States Constitution, amend V. provides that no person "shall be compelled in any criminal case to be a witness against himself." The privilege against self-incrimination guaranteed by the Fifth Amendment to the federal constitution is available to the witness in state proceedings. *Malloy v. Hogan*, 378 U.S. 1 (1964).
2. **Idaho Law.** The Idaho Constitution contains an identically-worded guaranty in Idaho Constitution, Article I, § 13. The privilege is codified in Idaho Code §§ 9-1302, 19-3003 and 19-108. IRE 501 expressly retains in effect the constitutional privileges and statutes which implement the constitutional right.
3. **Scope of Proceedings.** The privilege is not limited to testimony in criminal prosecutions. It also protects a person from compulsory testimony in any other proceeding, civil or criminal, formal or informal, judicial or administrative, where the answers might be incriminating in future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 94 S. Ct. 316 (1973).

The privilege applies at sentencing as well as at trial. *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006), petition for cert. filed 75 U.S.LW. 3586 (Apr. 20, 2007)(defendant ordered to submit to psychosexual evaluation for sentencing had Fifth Amendment privilege; attorney's failure to advise defendant of privilege was ineffective assistance of counsel).

4. **Limitation to Persons.** The protection of the privilege is limited to natural persons. It does not protect corporations or other entities. *Hale v. Henkel*, 201 U.S. 43 (1906); *U.S. v. White*, 322 U.S. 694 (1944); *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931)(the privilege is personal to the individual witness).

5. **Limitation to Testimony.** The privilege is limited to testimony against self-incrimination. It does not apply to documents or “real” evidence. *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958)(evidence of refusal to submit to blood test in involuntary manslaughter case); *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951)(photographs of defendant showing scratches on face in a rape case); *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949)(results of blood-alcohol test); *State v. Ruybal*, 102 Idaho 885, 643 P.2d 835 (Ct. App. 1982)(tattoo markings on defendant when issue was identification).
6. **Scope of the Privilege.** The privilege covers answers that would in themselves support a conviction and answers that would furnish a link in the chain of evidence needed to prosecute. The witness claiming the privilege need not prove the hazard to him because this would destroy the protection of the amendment. To deny the privilege it must be clear from a careful consideration of all circumstances in the case, that the witness claiming the privilege is mistaken, and that the answer cannot possibly have such tendency to incriminate. *Hoffman v. U.S.*, 341 U.S. 479 (1951).

The United States Supreme Court has affirmed in a *per curiam* decision, *Ohio v. Reiner*, 532 U.S. 17 (2001), that a witness can claim innocence and nonetheless assert the privilege, so long as there is reasonable cause to apprehend danger of prosecution from the answers.

A criminal defendant who raises an issue of mental condition as a defense can be compelled to submit to a psychological evaluation by State experts, see Idaho Code § 18-207(4), and such an evaluation does not violate the defendant’s privilege against self-incrimination. *State v. Santistevan*, 143 Idaho 527, 148 P.3d 1273 (Ct. App. 2006).

7. **Incrimination of Witness Required.** One cannot invoke the privilege against self-incrimination where the inquiry incriminates only a co-defendant. *State v. Jesser*, 95 Idaho 43, 501 P.2d 727 (1972).
8. **Totality of the Circumstances Test.** In determining whether a defendant has voluntarily, knowingly and intelligently waived his Miranda rights, a court must consider the totality of the circumstances. The factors the court must consider include: (1) whether Miranda warnings were given; (2) the youth of the accused; (3) the accused’s level of education or low intelligence; (4) the length of detention; (5) the repeated and prolonged nature of the questioning; and (6) deprivation of food or sleep. Any knowing waiver of Miranda warnings must be knowing, intelligent, and voluntary. *State v. Adamchik*, 272 P.3d 417, 2012 Ida. LEXIS 32 (2012).

B. Twofold Nature of the Privilege.

1. **Right to Remain Silent.** The defendant in a criminal action or proceeding may refuse to be a witness against himself and the prosecution is prohibited from making direct or indirect comment upon the defendant's failure to testify. Idaho Code § 19-3003. *See also, Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229 (1965); *State v. White*, 97 Idaho 708, 551 P.2d 1344 (1976); *State v. Hodges*, 105 Idaho 588, 671 P.2d 1051 (1983).

The accused may not be cross-examined at trial about his failure to testify at the preliminary hearing; that is a denial of due process. *State v. Haggard*, 94 Idaho 249, 486 P.2d 269 (1971).

The prosecuting attorney may not even inferentially refer to the defendant's failure to testify. *State v. Hodges*, 105 Idaho 588, 671 P.2d 1051 (1983).

2. **Protection Afforded Witnesses.** The privilege protects witnesses from compulsory self-incriminating testimony, regardless of whether the witness is a party in the criminal or civil proceeding in which the testimony is requested. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *McCarty v. Arndstein*, 266 U.S. 34 (1923); *Spevack v. Klein*, 385 U.S. 511 (1967).

A witness who is not a defendant in a criminal prosecution must take the stand, be sworn and then claim the privilege as to any incriminating question. *Brown v. U.S.*, 356 U.S. 148 (1958). *See also, State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931) overruled on other grounds in *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937)(privilege is not self-executing; witness must claim privilege at time question is asked).

C. Waiver of the Privilege.

1. **Waiver by Taking Stand and Testifying.** When a defendant voluntarily chooses to take the stand and testify in defense of the charges, the defendant waives the privilege against self-incrimination on the same terms as other witnesses with respect to permissible cross-examination. *State v. Jesser*, 95 Idaho 43, 501 P.2d 727 (1972); *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926); *State v. Larkins*, 5 Idaho 200, 47 P. 945 (1897).

The accused who voluntarily testifies in his own behalf may be impeached the same as any other witness including a showing of a prior inconsistent statement. *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

Where a defendant testified on direct and cross-examination that the authorities did not attempt to get his version of the events, the prosecution properly rebutted with testimony that after being given *Miranda* warnings, defendant was asked if he wished to talk about the charges, and declined. *State v. Dougherty*, 142 Idaho 1, 121 P.3d 416 (Ct. App. 2005).

Defendant who wished to testify he did not admit in the presence of jailer that he had shot the officer during a struggle, for the purpose to impeach the jailer's testimony that he had done so, would open the door to cross-examination about the events during the struggle. *State v. Rauch*, 144 Idaho 682, 168 P.3d 1029 (Ct. App. 2007).

2. **Waiver by Answering Questions Without Objecting.** A witness may waive the privilege of refusing to testify on the ground that answers may incriminate him by answering questions without objection. *State v. McClurg*, 50 Idaho 762, 300 P. 898, overruled on other grounds in *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937). The scope of the waiver by answering is as broad as permissible cross-examination. *Brown v. U.S.*, 356 U.S. 148 (1958).

D. Use of Defendant's Silence for Prosecution.

1. **To Raise an Inference of Guilt.** A defendant's decision to exercise his or her right to remain silent, whether before or after arrest and *Miranda* warnings, cannot be used for the purpose of inferring guilt. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106, 110 (1965); *State v. Strouse*, 133 Idaho 709, 713-14, 992 P.2d 158, 162-63 (1999); *State v. Moore*, 131 Idaho 814, 820, 965 P.2d 174, 180 (1998); *State v. Hodges*, 105 Idaho 588, 592, 671 P.2d 1051, 1055 (1983); *State v. White*, 97 Idaho 708, 715, 551 P.2d 1344, 1351 (1976); *State v. Stefani*, 142 Idaho 698, 132 P.3d 455 (Ct. App. 2005); *State v. Lopez*, 141 Idaho 575, 577, 114 P.3d 133, 135 (Ct. App. 2005); *State v. Kerchusky*, 138 Idaho 671, 677, 67 P.3d 1283, 1289 (Ct. App. 2003).
2. **For Impeachment Purposes.**
 - a. **Post-Miranda Silence.** The general rule is that use of a defendant's post-Miranda silence to impeach the defendant's trial testimony violates due process. *State v. Strouse*, 133 Idaho 709 (1999), citing *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240 (1976). An exception to this rule allows the prosecution to present evidence of the defendant's post-arrest silence to contradict a defendant who has testified to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the

defendant's testimony as to his behavior following arrest. *State v. Wolverton*, 120 Idaho 559, 817 P. 2d 1083 (Ct App. 1991).

In *State v. Strouse*, defendant was convicted of aggravated battery. Defendant asserted the shotgun blast was an accident. Defendant contacted an attorney who advised him to turn himself in to the police but remain silent and that his silence could not be used against him. At trial, Defendant's counsel made the following statement: "And then Jeff goes home. Jeff doesn't hide. Jeff waits to be contacted. The next day Jeff still isn't contacted. He goes down, and he says [to the police], 'Look, are you guys looking for me? Let me tell you what happened.' Then he's arrested." He does not tell the jury that defendant refused to talk to the police about what happened.

The prosecutor in *Strouse*, thinking that the opponent's statement opened the door, questioned Strouse extensively about his post-*Miranda* silence. Defense counsel made no objection. During cross-examination of defendant, the prosecutor developed the fact that defendant had hidden the gun. In final argument, the prosecutor asserted, "If he was innocent, if this was an accident, why didn't he tell the cop that when he turned himself in? Doesn't make sense. Nothing he's told you make sense. Not a thing that he has told you makes sense."

The Supreme Court in *Strouse* held that it was reversible error to allow the State to rebut an opening statement through the use of defendant's post-*Miranda* silence because an opening statement is not evidence. The court said the prosecutor cannot justify the examination that took place on the limited statement made by counsel in opening and he went far beyond use of the post-*Miranda* silence for any legitimate purpose by seeking to use the post-arrest silence to obtain a conviction.

b. Pre-*Miranda* Silence. Evidence of a defendant's pre-*Miranda* silence can be used more broadly, not just to directly contradict a defendant's testimony that he spoke to police, but more generally to impeach a story the defendant has told on the witness stand. That is, when a defendant testifies about an exculpatory version of events, the State can use evidence of his pre-*Miranda* silence to impeach the defendant's credibility by suggesting that if this version of events were true, the defendant would have told it to police. *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124 (1980); *State v. Stefani*, 142 Idaho 698, 132 P.3d 455 (Ct. App. 2005). In order for the prosecution to use evidence of a defendant's silence for impeachment purposes, the defendant must actually take the stand and testify. *State v. Martinez*, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995).

3. **Use of Silence for Purposes Other than Impeachment or to Imply Guilt.** Evidence of a defendant's silence may also be admitted for purposes other than impeachment. For example, in *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998), evidence of the defendant's flight to avoid a police interview was admissible, not for the purpose of implying defendant's guilt, but to show that defendant fled the jurisdiction when he became aware of an investigation into the alleged crime. *Cf. State v. Kerchusky*, 138 Idaho 671, 167 P.3d 1283 (Ct. App. 2003), where the State argued that the evidence of the pre-*Miranda* silence was not admitted to imply the defendant's guilt, but only to show that he was not surprised at the reference to the crime and therefore had prior knowledge of it. The Court of Appeals rejected the State's contention as an unpersuasive exercise in semantics because the only reason for the State to show that the defendant had prior knowledge of the robbery would be to thereby imply that he must have been the robber.

VII. CONFRONTATION CLAUSE DECISIONS

A. UNITES STATES SUPREME COURT DECISIONS.

1. ***Crawford v. Washington.*** The United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) set a new direction for Confrontation Clause jurisprudence. It held that the Confrontation Clause precludes admission at trial of a witness's out-of-court "testimonial" statements unless the accused had an opportunity to cross-examine the witness when the statement was made and the witness is unavailable to testify at trial. *Id.* at 53-54. Before *Crawford*, the Clause had been interpreted to allow admission of an unavailable witness's out-of-court statement if it was accompanied by adequate indicia of reliability--that is, if it fell within a firmly rooted hearsay exception or possessed other particularized guarantees of trustworthiness. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The *Crawford* Court rejected the *Roberts* analysis as incompatible with the framers' vision and intent. *Crawford*, 541 U.S. at 59-68.

Since *Crawford*, the threshold question in Confrontation Clause analysis is whether the out-of-court statement was "testimonial." *Crawford* tells us that testimonial hearsay encompasses more than just prior in-court testimony. The Court did not offer a comprehensive definition of testimonial hearsay, but held that statements made in response to police interrogations "qualify under any definition." *Id.* at 52.

2. ***Davis v. Washington.*** In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006), and a companion case, *Hammon v. Indiana*, which was consolidated with *Davis*, the Supreme Court built upon the *Crawford* analysis and addressed more precisely the type of police interrogations that produce "testimonial" hearsay. The Court held in *Davis* that a domestic violence victim's 911 call for help and her responses to the emergency operator's questions were non-

testimonial, whereas in *Hammon*, a police interview of the victim conducted at her home when police responded to a report of a domestic disturbance did produce testimonial statements subject to the Confrontation Clause. The Court differentiated the hearsay in *Davis* from that in *Crawford* and *Hammon* by distinguishing between law enforcement officers' dual roles as emergency responders and as criminal investigators:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

126 S. Ct. at 2273-74.

Davis also answered a question that *Crawford* left open--whether the Confrontation Clause still bars non-testimonial statements if they do not satisfy the "indicia of reliability" test of *Roberts*, 448 U.S. at 66. See *Crawford*, 541 U.S. at 61. In *Davis*, the Supreme Court held that *only* testimonial hearsay is subject to the Confrontation Clause, stating, "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." 126 S. Ct. at 2273. Subsequently, in *Whorton v. Bockting*, 595 U.S. 406, 127 S. Ct. 1173, 1183 (2007), the Supreme Court explicitly said that the Confrontation Clause has no application to non-testimonial out-of-court statements.

3. *Melendez-Diaz v. Massachusetts*. Another question that was left unresolved by *Crawford*--whether lab reports and the like prepared for law enforcement are "testimonial" and therefore subject to the Confrontation Clause--was recently answered by the United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). There, in a drug trafficking prosecution the Court admitted into evidence three "certificates of analysis" showing the results of forensic analysis performed on the seized substances. The certificates were sworn before a notary public by analysts at the laboratory. The Supreme Court held that the introduction of these certificates was barred by the Confrontation Clause because the reports were testimonial. The Court said:

The "certificates" are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.

Here, moreover, not only were the affidavits made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, but under Massachusetts law the sole purpose of the affidavits was to provide prima facie evidence of the composition, quality and the net weight of the analyzed substance. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose

In short, under our decision in *Crawford*, the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment.

Id. at 2532 (internal quotations marks and citations omitted).

The Court also rejected an argument that it should find no Confrontation Clause violation because the defendant had the ability to subpoena the analysts. *Id.* at 2540.

4. ***Giles v. California.*** The U.S. Supreme Court held in *Giles v. California*, 128 S. Ct. 2678 (2008), that a murder defendant does not forfeit his right to keep the victim's prior testimonial statements out of evidence unless the defendant killed the victim for the purpose of preventing trial testimony. In a four-justice plurality opinion by Justice Antonin Scalia, the Court held that for a statement to be inadmissible, the defendant must have prevented the witness's availability with the intent of keeping him or her from testifying. Scalia wrote, historically, "the terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying."

The State Court of Appeal had concluded that the Confrontation Clause permitted the trial court to admit into evidence the un-confronted testimony of the murder victim under a doctrine of forfeiture by wrongdoing. It concluded that Giles had committed the murder for which he was on trial—an intentional criminal act that made the victim unavailable to testify. The California Supreme Court affirmed. The U.S. Supreme Court held that the California Supreme Court's theory of forfeiture by wrongdoing is not an exception to the Sixth Amendment's confrontation requirement because it was not an exception established at the founding. Pp 3-2; 22-24.

The Giles rule of forfeiture of the right of confrontation mirrors the Idaho rule regarding forfeiture of the right to exclude hearsay when the declarant is unavailable. See I.R.E. 804(b)(5), which provides that a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and

did, procure the unavailability of the declarant as a witness is not excluded by the rule against hearsay.

5. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). At respondent Bryant's trial, the court admitted statements that the victim, Anthony Covington, made to police officers who discovered him mortally wounded in a gas station parking lot. A jury convicted Bryant of, inter alia, second-degree murder. On appeal, the Supreme Court of Michigan held that the Sixth Amendment's Confrontation Clause, as explained in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), rendered Covington's statements inadmissible testimonial hearsay, and the court reversed Bryant's conviction. The U. S. Supreme Court granted the State's petition for a writ of certiorari to consider whether the Confrontation Clause barred the admission at trial of Covington's statements to the police. The Court held that the circumstances of the interaction between Covington and the police objectively indicate that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S., at 822, 126 S.Ct. 2266. Therefore, Covington's identification and description of the shooter and the location of the shooting were not testimonial statements, and their admission at Bryant's trial did not violate the Confrontation Clause. The Court vacated the judgment of the Supreme Court of Michigan and remanded.

6. *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). In this case, petitioner Bullcoming was arrested on charges of driving while intoxicated (DWI). Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analysis who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was "testimonial," the Confrontation Clause did not require the certifying analyst's in-court testimony. Instead, New Mexico's high court held, live testimony of another analyst satisfied the constitutional requirements.

The question presented was whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification--made for the purpose of proving a particular fact--through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. The Court held that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial to cross-examine that particular scientist.

The Court noted that the certification reported more than a machine-generated number. It represented that the analyst received Bullcoming's blood sample intact with the seal unbroken; that he checked to make sure that the forensic report number and the same number corresponded; that he performed a particular test on Bullcoming's sample, adhering to a precise protocol; and that he left the report's remarks section blank, indicating that no circumstance or condition affected the sample's integrity or the analysis' validity. These representations relating to past events and human actions not revealed in raw, machine-produced data, are meat for cross-examination.

7. *Hardy v. Cross*, 132 S. Ct. 490, (2011). Per Curiam. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254, "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. ___, 131 S. Ct. 1305 (2011) (*per curiam*) (slip op., at 4). In this case, the Court held that the Court of Appeals had departed from this standard and thus reversed the Appellate Court decision.

Irving Cross was tried for kidnaping and sexually assaulting A.S. at knifepoint. Cross claimed that A.S. had consented to sex in exchange for money and drugs. Despite her avowed fear of taking the stand, A.S. testified as the State's primary witness at Cross' trial in November 1999 and was cross-examined by Cross' attorney. According to the trial judge, A.S.'s testimony was halting. The jury found Cross not guilty of kidnaping but was unable to reach a verdict on the sexual assault charges, and the trial judge declared a mistrial. The State decided to retry Cross on those counts, and the retrial was scheduled for March 29, 2000.

On March 20, 2000, the prosecutor informed the trial judge that A.S. could not be located. A week later, on March 28, the State moved to have A.S. declared unavailable and to introduce her prior testimony at the second trial. The State represented that A.S. had said after the first trial that she was willing to testify at the retrial. The State said that it had remained in "constant contact" with A.S. and her mother and that "[e]very indication" had been that A.S., "though extremely frightened, would be willing to again come to court and testify." On March 3, however, A.S.'s mother and brother told the State's investigator that they did not know where she was, and A.S.'s mother reported that A.S. was "very fearful and very concerned" about testifying again. On March 9 or 10, the investigator interviewed A.S.'s father, who also had "no idea where [A.S.] was." The father referred the investigator back to the mother.

On March 10, the State learned from A.S.'s mother that A.S. had run away from home the day before and had not returned. Thereafter, the State's Attorney's Office and law enforcement personnel attempted to locate A.S. The efforts included constant personal visits to the home of A.S. and her mother, at all hours of the day and night; personal visits to the home of the father; personal conversations with the victim's mother, father, and other family members;

telephone calls to the family members; checks at local hospitals, the Medical Examiner's Office, the Department of Corrections, the victim's school, the family of an old boyfriend, the Secretary of State's Office, and the Department of Public Aid. They also inquired at the Department of Public Health, the morgue, the county jail, the Immigration Department and the post office. A.S. was not located. On March 28, the mother informed the detective that A.S. had called two weeks earlier and had said that she did not want to testify and would not return to Chicago. The mother did not know where A.S. was located or how to contact her.

The trial court granted the State's motion and admitted A.S.'s earlier testimony. The trial court concluded the State's efforts went way beyond due diligence. Cross was found guilty of criminal sexual assault. On appeal, the Illinois Court of Appeals agreed that A.S. was unavailable because "[i]t is clear from her telephone conversation with the mother that she was not in the city" and "also evident that she was in hiding and did not want to be located." The Court found that the State had conducted a good-faith, diligent search to locate A.S. and that the trial court had properly allowed the introduction of A.S.'s cross-examined testimony from the first trial.

Cross' petition for habeas relief was denied in the U.S. District Court for the Northern District of Illinois but the Seventh Circuit Court of Appeals reversed the district court decision, finding that the Illinois Court of Appeals was unreasonable in holding that the State had made a sufficient effort to secure her presence at the retrial because: (1) the State failed to contact A.S.'s current boyfriend or any of her other friends in the Chicago area; (2) the State failed to inquire at the cosmetology school where A.S. had once been enrolled; and (3) the State neglected to serve her with a subpoena after she expressed fear about testifying at the retrial. The Supreme Court reversed the Seventh Circuit.

In *Barber v. Page*, 390 U.S. 719 (1968), the Court held that a witness is not unavailable for purposes of the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial. In *Barber* the Court held the witness was not unavailable because the prosecutor made no effort to obtain the witness' presence when it was known that the witness was in a federal prison. The Court again addressed the question of witness unavailability in *Ohio v. Roberts*, 448 U.S. 56 (1980). In that case, the Court held that the State had discharged its duty of good-faith effort where the prosecutor had contacted the witness' mother who reported she had no knowledge of her daughter's whereabouts and knew of no way to reach her even in an emergency. The State had also served five subpoena's in the witness' name prior to trial. The Court declared in *Ohio v. Roberts* that "[t]he lengths to which the prosecution must go to produce a witness," "is a question of reasonableness." The Court, in *Roberts*, acknowledged that there were some additional steps that the prosecutor might have taken in an effort to find the witness, but that "[o]ne, in hindsight, may always think of other things" and it was improbable that such efforts would have resulted in locating the witness.

In *Hardy v. Cross*, the Court applied its rationale in *Roberts*, observing that when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising. Moreover, the deferential standard of review set out under AEDPA, does not permit a federal court to overturn a state court's decision on the question of unavailability where the state-court's decision was reasonable. The state-court's decision on the question of unavailability was held to be reasonable. The Seventh Circuit decision was reversed.

8. *Williams v. Illinois*, 132 S. Ct. 2221 (June 18, 2012) held the admission of expert testimony about the results of DNA testing that was performed by non-testifying analysts did not violate the Confrontation Clause. Justice Alito, joined by the Chief Justice, Justice Kennedy and Justice Breyer, concurring, and Justice Thomas concurring in judgment, formed the majority.

At petitioner's bench trial for rape, a forensic specialist at the Illinois State Police lab, testified that she matched a DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of petitioner's blood. She testified that Cellmark was an accredited laboratory and that business records showed that vaginal swabs taken from the victim, were sent to Cellmark and returned. She offered no other statement for the purpose of identifying the sample used for Cellmark's profile or establishing how Cellmark handled or tested the sample. Nor did she vouch for the accuracy of Cellmark's profile. The defense moved to exclude, on Confrontation Clause grounds, the forensic specialist's testimony insofar as it implicated events at Cellmark, but the prosecution said that petitioner's confrontation rights were satisfied because he had the opportunity to cross-examine the expert who had testified as to the match. The prosecutor argued that Illinois Rule of Evidence 703 permitted an expert to disclose facts on which the expert's opinion is based even if the expert is not competent to testify to those underlying facts, and that any deficiency went to the weight of the evidence, not its admissibility. The trial court admitted the evidence and found petitioner guilty. Both the Illinois Court of Appeals and the State Supreme Court affirmed, concluding that the specialist's testimony did not violate the petitioner's confrontation rights because Cellmark's report was not offered into evidence to prove the truth of the matter asserted. The Supreme Court affirmed.

B. IDAHO DECISIONS.

1. *State v. Hooper*. The Idaho Supreme Court applied the *Davis* analysis to a question of the admissibility of a videotaped interview of a child sexual abuse victim in *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (2007). A six-year-old girl who was suspected of having been molested by her father was interviewed by a sexual abuse trauma nurse. The interview was conducted at the request of police and was videotaped. The Court employed a totality of the circumstances

analysis and concluded that the child's videotaped statements were testimonial in nature. The Court pointed out that the videotaped examination was arranged by police detectives and was conducted by a forensically trained nurse. The Court noted that such interviews can have a two-fold purpose, for both medical treatment and forensic use, but that the factors in this case indicated that the interview was geared toward gathering evidence rather than providing medical treatment. The Court noted that toward the end of the interview the nurse consulted the detective to determine if there were anymore questions he wanted her to ask. The totality of the circumstances indicated that the primary purpose of the interview was to establish or prove past events potentially relevant to later criminal prosecution, as opposed to meeting the child's medical needs, and the interrogation was not under circumstances where its primary purpose was to enable police assistance to meet an ongoing emergency. Therefore, the statements were testimonial under *Crawford* and *Davis*. Because Hooper had no prior opportunity to cross-examine the child, the Court held that admission of the videotape evidence violated the Confrontation Clause.

2. ***State v. Shackelford.*** In *State v. Shackelford*, 2010 WL 2163361, 210 Idaho LEXIS 122 (Idaho 2010), the Defendant who was charged with two first-degree murders of his ex-wife and her boyfriend, challenged out-of court statements that were made by Defendant's ex-wife concerning her fears that he would harm her. Six witnesses were allowed to testify to the victim's statements under the hearsay exception for then existing mental, emotional or physical condition. I. R. E. 803(3). The Supreme Court held that certain of the statements that were made to non-law enforcement officers were irrelevant and inadmissible, but the error was harmless because it did not affect Shackelford's substantial rights.

Shackelford objected to the admission of the victim's statements to law enforcement officers on the grounds they were testimonial and violated his Sixth Amendment right to confront witnesses. The statements had been made to a detective in a phone conversation. The Court, employing a totality of the circumstances test, held the statements were non-testimonial in nature because they were not offered for the truth of the matter asserted.

3. ***State v. Mantz.*** In *State v. Mantz*, 148 Idaho 303, 222 P.3d 471 (Idaho App. 2009), the Idaho Court of Appeals held that Defendant's confrontation rights were not violated under *Crawford* when the victim's audio-recorded preliminary hearing testimony was admitted at trial, when the victim was unavailable. The Court held that Defendant was afforded an adequate opportunity to cross-examine the victim during the preliminary hearing. The Court noted that Defendant was represented by capable counsel who engaged in extensive cross-examination of the victim as to his truthfulness, bias, memory, and motive, and Defendant made no showing of any new and significantly material line of cross-examination that would have been developed at trial that was not touched upon in prior cross-examination.

4. *State v. Folk*. In *State v Folk*, 256 P.3d 735, 2011 Ida. LEXIS (2011), the Supreme Court found error where the trial court entered an order specifying that the child would testify by closed-circuit television pursuant to the Uniform Child Witness Testimony by Alternative Methods Act, I.C. § § 9-1801 to 9-1808, that defendant was not to speak during the child's testimony, and that standby counsel would voice any objections and cross-examine the child. On review, the Court held that, because the child was the only person who could testify to the alleged sexual abuse, requiring defendant to write out questions to be asked by someone else in order to cross-examine the child was a significant impairment of the right to confrontation. Where there was no evidence that testifying in defendant's presence or being cross-examined by defendant would have a devastating emotional effect upon the child or that defendant, if permitted to conduct the cross-examination, would seek to intimidate the child or otherwise abuse the right of cross-examination, the trial court violated defendant's confrontation right and likewise infringed upon his right of self-representation in precluding the defendant from cross-examining the complainant himself. The judgment of conviction was vacated.

5. *State v. Kramer*. In *State v. Kramer*, 278 P.3d 431, 2012 Ida. App. LEXIS 30 (2012), the Court held the Intoxilyzer 5000 certificates were admitted as proof that the instrument was properly working and not direct proof of driving under the influence under Idaho Code Ann. § 18-8004; thus there was no violation of the Sixth Amendment Confrontation Clause because the certificates were not testimonial.

C. DOES THE CONFRONTATION CLAUSE APPLY AT PRELIMINARY HEARINGS?

Prepared by Idaho Court of Appeals law clerk, Dara Labrum, and reprinted with permission of Idaho Court of Appeals Judge, Karen Lansing.

By Statute, at a preliminary hearing the accused has the right to cross-examine adverse witnesses. Idaho Code § 19-808; *State v. Edmonson*, 113 Idaho 230, 232, 743 P.2d 459, 461 (1987). Whether the Sixth Amendment's Confrontation Clause also applies at the preliminary hearing stage has never been addressed by Idaho appellate courts.

The United States Supreme Court has not directly decided that issue, but several of its decisions imply that the Confrontation Clause does not apply to preliminary hearings. In *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318 (1968), the Court said that the "right to confrontation is basically a trial right." The Court has also stated that "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930 (1970). See also *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798 (1988) ("the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of

fact”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S.Ct. 989 (1987)(plurality decision)(“[t]he opinions of this Court show that the right to confrontation is a trial right”); *Gerstein v. Pugh*, 429 U.S. 103, 95 S.Ct. 854 (1975) (noting that confrontation and cross examination are not required in “probable cause” hearing). In *Goldsby v. United States*, 16 S.Ct. 216, 160 U.S. 70 (1895), the Court said, “The contention at bar, that, because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guaranty to be confronted by the witnesses, by mere statement demonstrates its error.” The meaning of this statement is less than clear. Ten years later, one state court interpreted it as “consistent with the theory that the constitutional right of the accused to meet the witnesses against him face to face, and to have compulsory process served for obtaining witnesses in his behalf, does not apply to a preliminary examination.” *Farnham v. Coleman*, 103 N.W. 161 (S.D. 1905).

Based on these United States Supreme Court decisions, the general consensus in other jurisdictions is that the Confrontation Clause does not apply at the preliminary hearing state. *See e.g. State v. Conner*, 453 N.W.2d 617 (S.D. 1990) (confrontation rights sufficiently protected at trial, so Confrontation Clause not applicable at preliminary hearing); *Sheriff v. Witzenburg*, 145 P.3d 1002 (Nev. 2006) (no Sixth Amendment confrontation right at a preliminary examination); *State v. Martinez*, 874 P.2d 617 (Kan. 1994) (no constitutional right to allow the accused to confront witnesses against him at the preliminary hearing); *State v. Sherry*, 667 P.2d 367 (Kan. 1983) (same).

A minority of states have concluded, however, that an adversarial probable cause hearing is a critical stage in the prosecution of the accused at which the full panoply of Sixth Amendment rights must apply. *See Mascarenas v. State*, 80 N.M. 537, 539-41, 458 P.2d 789 (1969); *Com. v. Verbonitz*, 525 Pa. 413, 417-19, 581 A.2d 172 (1990).

See also, State v. Davis, 273 P.3d 693, 2011 Ida. App. LEXIS 104 (Ct. App. 2011) (court refused to decide whether right of confrontation applies in preliminary hearing, finding no violation in any event because accused had adequate opportunity to cross-examine the declarant).

END OF OUTLINE

**TRIAL EVIDENCE FOR JUDGES:
WITNESSES AND EXAMINATION OF WITNESSES**

**PROBLEMS FOR 2012 IDAHO JUDICIAL CONFERENCE
SEPTEMBER 26, 2012**

PROBLEM # 1: Defendant is charged with sexually abusing the two children of his girlfriend. The children were 3 and 6 at the time of the alleged incidents. By the time the defendant is arrested and the case gets to trial, the children are 5 and 8. The prosecutor notifies the court and defense counsel that the five year-old is emotionally unable to testify in the courtroom and he plans to present the testimony of the five year-old by means of two way closed-circuit television. Defendant challenges the competency of the children to testify at all and objects to testimony by means of two-way closed circuit television. At the trial defendant offers evidence that children of the age of these victims typically have no logical concept of time and space and are often incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Further, defendant presents evidence that the children's version of the events has varied during the past year depending on whom they were talking to.

How should the judge proceed to determine competency of the children to testify and what steps should be taken to protect the children if summoned as witnesses?

PROBLEM #2: Plaintiff sued for personal injuries sustained in an automobile accident. Defendant asserts the accident was unavoidable. At trial:

1. During the direct examination of the police officer who investigated the accident plaintiff's counsel asks the officer whether he issued a citation to the defendant for inattentive driving. Defense counsel objects that the evidence is irrelevant and inadmissible lay opinion. How do you rule?
2. Defendant puts an eyewitness on the stand and has her describe what she saw, then asks whether it appeared to her that the accident was unavoidable. Plaintiff objects that it is inadmissible lay opinion. How do you rule?

PROBLEM #3: In a civil jury trial for personal injuries sustained in an automobile accident, the defense calls Ima X. Pert, to testify to a reconstruction of the accident. Defendant lays a foundation that includes Pert's undergraduate engineering degree, attendance at several workshops on accident reconstruction, and her expert testimony in other cases. The court has heard Pert testify in other cases and has always found her testimony extremely unconvincing.

Must the court allow Pert to testify as an expert if the court believes a jury might choose to believe her?

PROBLEM #4: Plaintiff suffered cervical neck strain in an automobile accident when his vehicle was rear-ended. Plaintiff is treated for the injury. Two months after the accident Plaintiff awakens one morning and cannot rotate his head to the left without severe pain. When conservative treatment fails to cure the pain, Plaintiff has surgery on his neck. The surgeon finds an engorged venous complex which is causing pressure on a nerve and repairs it. Following surgery Plaintiff can turn his head without pain. Plaintiff plans to present his attending physician at trial to testify that the accident was the cause of the engorged venous complex. The attending physician has no literature, controlled tests, or other scientific evidence that trauma of the type suffered by Plaintiff causes an engorged venous complex. Defendant's experts are prepared to testify that there is no known cause for an engorged venous complex and that the condition has not been associated with trauma. The medical literature supports the views of Defendant's experts. Defendant moves in limine to exclude the Plaintiff's expert opinion on causation as not complying with Daubert standards.

How do you rule?

Would you allow the Plaintiff to testify that the accident caused the engorged venous complex?

PROBLEM #5: Motorist who was injured in a collision brought an action against Defendant City alleging City was negligent in the design of the intersection at which the collision occurred. Plaintiff has disclosed an expert who would opine that the intersection was designed in a negligent manner. The expert bases her opinion, in part, upon several reports of accidents at that intersection within the past three years. The reports were produced from the records of Defendant City. Defendant City has filed a motion *in limine* to exclude the opinion evidence on the ground that it is based upon inadmissible hearsay evidence. How do you rule?

At the hearing on the motion *in limine*, the expert testifies that her opinion is based, in part, upon the fact that there have been several accidents at that intersection in the last three years. Defendant City objects to this testimony as being inadmissible hearsay and moves to strike it. How do you rule?

Defendant City also objects that the other accidents were not probative of any issue in this case because none involved a movement identical to that attempted by Plaintiff in this case. Assuming this is factually correct, how do you rule?

PROBLEM #6: In a divorce trial, wife offers her own testimony about the fair market value of the community real estate. Husband objects that the wife is not qualified to testify and give her opinion of the value of the community real estate.

How do you rule?

Wife also offers the testimony of a local realtor who has been in the business in the area for 20 years and knows the value of real estate in the area. The realtor has studied comparable sales in the area and is prepared to testify to the value of the property based on the comparable sales. Husband objects that the realtor is not qualified to testify and give his opinion of the value of real estate unless he is a licensed real estate appraiser under the Idaho Real Estate Appraiser's Act, I.C. 54-4101, which was enacted in 1990. Husband informs the court that the Act provides that no person can "give an opinion of the value of real estate" for a fee, unless licensed or certified by the Idaho Real Estate Appraiser Board as provided in the Act.

How do you rule?

PROBLEM #7: In a divorce action, one issue is the value of the family business property. Wife has employed an expert licensed appraiser to appraise the property but decided not to call the expert to testify at trial. Husband has subpoenaed the expert to trial and has put the expert on the stand. Wife objects to any examination of her expert. Husband argues that the expert has knowledge about the property and that the court has a right to every man's evidence, except for those persons protected by a privilege; and that the court is entitled to the expert's knowledge about the property.

How do you rule?

Assume you allow the examination to proceed and Husband elicits testimony about the expert's qualifications and knowledge about property. Assume Husband then asks the expert his opinion of the value of the property. Wife objects that it's her expert and it's not fair that Husband can examine her expert.

How do you rule?

What if the expert also objects, that he can't be compelled to testify or to express his expert opinion without compensation. Husband moves to compel the testimony.

How do you rule?

PROBLEM #8: In a civil jury trial for personal injuries sustained in an automobile accident, plaintiff's counsel calls the defendant's girlfriend, who was riding with defendant at the time of the accident, for direct examination. Counsel commences the examination with leading questions, and defense counsel objects.

How do you rule?

During the direct examination of the plaintiff, counsel asks plaintiff the following question: "Did you have any conversation with the defendant at the scene of the accident concerning mechanical problems with his vehicle? Defense counsel objects to the question as leading.

How do you rule?

PROBLEM #9: Plaintiffs sued for personal injuries suffered when their vehicle was struck head-on by Defendant's vehicle on a detour road. During their case-in-chief, Plaintiffs put in evidence describing the condition of the detour road through the testimony of two detour construction workers. The Defendant put in testimony about the condition of the detour road through other witnesses and their description of the road conflicted with the testimony of the construction workers. On rebuttal, Plaintiffs offered to put on two witnesses who had not previously testified to testify that they had used the road on the date of the accident and to describe the road on that date. Defendant objects that it is improper rebuttal.

How do you rule?

Assume you ruled that their testimony is proper rebuttal and the Defendant then objects that the Plaintiff's witnesses had not been disclosed in the pretrial disclosures as required under Rule 16(J), which requires the disclosure of all witnesses which each party may call to testify at the trial, except impeachment witnesses. Plaintiff argues that Rule 16 excludes impeachment witnesses from pretrial disclosure and that these witnesses are excluded from disclosure under Rule 16.

How do you rule?

Assume Plaintiff had been asked on cross-examination whether he had been involved in a prior head-on collision where he had fallen asleep at the wheel and Plaintiff answered "NO." During Defendant's case in chief, Defendant has put a witness on the stand to testify that he has personal knowledge that Plaintiff had been involved in a prior head-on collision where Plaintiff had fallen asleep at the wheel. Plaintiff objects.

How do you rule?

PROBLEM #10: During the defendant's direct examination, the defendant has trouble remembering when and where the vehicles were moved following the collision. Defense counsel asks whether it would help the defendant to read his girlfriend's written statement concerning the accident and the defendant says it might. Plaintiff's counsel objects that the writing is inadmissible hearsay and was not prepared by the witness.

How do you rule?

PROBLEM #11: During cross-examination, the witness states that he needs to explain or correct an answer given to an earlier question by the cross-examiner. The cross-examiner objects.

How do you rule?

What if, during cross-examination, the witness said he needed to explain or correct an answer given to a question on direct examination?

How do you rule?

What if, you allow the witness to explain or correct his answer, and the witness starts on a long narrative, about his view of the case and how the court should decide it.

Do you interrupt the witness or do you wait for an objection?

What if the examiner does not object, but the opposing party does?

How do you rule?

PROBLEM #12: During the defense case the defendant testifies on direct that his brakes failed, causing him to rear-end the plaintiff's vehicle. On cross-examination the defendant testifies that he had no warning the brakes would fail. When the cross-examiner finishes the court conducts the following additional examination of the defendant:

Court: "Had you ever had problems with your brakes before?"

Defendant: "I had some a month or so before the accident, but I thought the problem was fixed."

Court: "But you were aware then that there might be a problem with your brakes?"

Defendant: "Well, I guess I knew that they could go bad but like I said, I thought it was fixed."

Court: "But knowing that they could go bad, you drove the car on the date of the accident anyway."

Defendant: "Well, I guess so."

Was the examination by the court proper?

PROBLEM #13: Defendant Corporation has been charged with violation of Idaho environmental laws. The Corporation designates its president, plant manager and assistant plant manager as its representatives at trial. It also informs the court that its pollution expert is essential to its defense and is needed to sit at counsel table with the president. All representatives and the expert will be witnesses for the Corporation. The State moves to exclude all witnesses who have not testified.

How do you rule? Who stays and who goes?

PROBLEM #14: At trial in which the Corporation is charged with violations of environmental laws, assume the court has excluded the plant manager and assistant plant manager from the trial and admonished them not to discuss their testimony with any other persons, including the attorney for the Defendant Corporation. Before they testify, the Prosecutor informs the court that he observed the two witnesses discussing their testimony with counsel for the Corporation and between themselves, and moves to exclude their testimony.

How do you rule? What, if any, sanctions would you impose?

PROBLEM #15: At commencement of the trial in which defendant is accused of rape, the prosecution informs the court that the victim will be needed at counsel table to assist with the presentation of the state's case and the examination of witnesses for the defense. Defendant objects.

How do you rule.

PROBLEM #16: On the second day of the trial for robbery, the defendant fails to show. He was there the first day. He has been released on his own recognizance.

What should the court do?

PROBLEM #17: Defendant is on trial for using a telephone to harass another person. At the commencement of the trial, defendant moved pursuant to Rule 615 to exclude witnesses and it was granted. The victim remained in the courtroom and was subsequently allowed to testify over the objection of Defendant that it was Defendant's voice on the phone.

Would you allow the victim to testify?

Assume the victim testifies, and on direct examination, in response to a question whether the phone calls frightened him, the victim volunteers that he was scared because he had known the defendant to carry a gun in the past and also knew, from discussions with defendant's wife, that defendant was emotionally unstable. Over objections and motions to strike from Defendant and requests that the judge admonish the witness to stop, the victim repeatedly referred to the phone calls as threats, volunteered that they created fear in the victim and in the victim's family, volunteered that the calls were made by defendant, and that others were also getting calls and were afraid of defendant.

Would you admonish the witness to stop characterizing the calls as threats and direct the witness to limit his testimony to the questions propounded to him.

PROBLEM #18: Plaintiff in a negligence action calls a witness who originally gave plaintiff a written statement that the witness had observed defendant drive through a red light at the time of the accident. The witness also gave a written statement to defendant that the witness had not seen the color of the light. The parties have exchanged the statements. Plaintiff intends to put the witness on the stand and if necessary offer the original statement to impeach the witness.

Should the trial judge allow this?

PROBLEM #19: The plaintiff has been impeached with statements made by the plaintiff during the taking of his deposition. Counsel for Plaintiff seeks to rehabilitate the Plaintiff by eliciting his testimony that the Plaintiff was suffering extreme stress during the taking of the deposition and that he was distracted during the deposition.

Should the trial judge allow the testimony?

What if the plaintiff brought in a psychologist to testify that the plaintiff was suffering posttraumatic stress syndrome at the time of the deposition which caused him to make inaccurate statements during the deposition; and that tests administered to plaintiff after he recovered showed him to be intelligent, perceptive, and capable of accurate recall?

PROBLEM #20: The criminal defendant is charged with robbery. During trial the prosecutor notifies defense counsel that if defendant testifies he intends to impeach the defendant with evidence of 3 misdemeanor convictions (petty larceny, assault and battery, and possession of marijuana) and 1 felony conviction for burglary, all within the last year. Defendant moves in limine to exclude the evidence as not relevant to credibility, not offered in compliance with IRE 609, and unduly prejudicial. Prosecutor counters that the pattern of crime demonstrates a lack of credibility because it shows a pattern of disrespect for law and lawful authority suggesting that the defendant may not take the oath seriously.

How would you rule?

PROBLEM #21: XYZ Corporation pled guilty and was convicted of criminal tax fraud, a felony. The company has been sued for employment discrimination and the president of the company is on the witness stand testifying that the company did not commit the discriminatory acts of which it has been accused. Plaintiff's counsel wants to impeach the president by putting in proof of the felony conviction against the company.

Would you let Plaintiff use the felony conviction against the company to impeach the president?

Would it make any difference whether the President was involved in the tax fraud?

PROBLEM #22: In a criminal prosecution of defendant for drug possession defendant takes the stand and denies he knew the drugs were in his car. Defendant has a prior misdemeanor conviction, four years old, for making a false statement on an application for a chauffeur's license. On cross-examination the prosecutor intends to ask, "In 1993, didn't you swear falsely that you had never had your driver's license suspended, in an effort to get a chauffeur's license?" If the defendant denies, the prosecutor intends to offer the record of defendant's conviction.

Would you allow this?

PROBLEM #23: Expert testifies on direct for Defense. On cross-examination plaintiff's counsel asks Expert whether she gave false testimony in an unrelated case three years earlier. Defense counsel objects that this is "improper impeachment on collateral matters."

How do you rule?

PROBLEM #24: In a criminal prosecution of defendant for drug possession defendant takes the stand and denies he knew the drugs were in his car. During defendant's cross-examination the prosecutor asks, "The truth is that you knew those drugs were in your car because you were intending to sell them to Johnny Smith, isn't that right?" Defense counsel objects that the question violates the defendant's Fifth Amendment privilege, pointing out that defendant has been charged with simple possession, not possession with intent to deliver. In a bench conference the court asks the defendant whether his answer might show that he was intending to sell drugs, and the defendant says it would not.

Would you compel Defendant to answer?

3

PART III

**TRIAL EVIDENCE FOR JUDGES:
EXHIBITS, DEMONSTRATIVE EVIDENCE
AND ILLUSTRATIVE AIDS, TESTS,
ANALYSES AND EXPERIMENTS**

Presented By

**D. Craig Lewis, Esq.
University of Idaho College of Law, Retired
Moscow, Idaho**

and

**Merlyn W. Clark, Esq.
Hawley Troxell Ennis & Hawley LLP
Boise, Idaho**

**FOR THE
2013 IDAHO JUDICIAL CONFERENCE
September 25, 2013
Post Falls, Idaho**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. RELEVANCE THEORY.....	1
A. General Rules of Relevance. (IRE 401 & 402).....	1
1. Relevance Defined.....	1
2. General Admissibility.....	1
3. "Minimal Relevance.....	2
4. Indirectly Consequential Evidence.....	2
5. Remoteness.....	2
6. Determination Not Discretionary.....	2
7. Presumptive Admissibility.....	3
8. Materiality.....	3
B. Relevance Conditioned on Other Facts.....	3
1. Proof of Foundation.....	3
2. Court's Screening Function.....	3
3. Preponderance Standard Governs.....	3
4. Standard in Criminal Cases.....	4
C. Circumstantial Evidence.....	4
1. Definition and Treatment.....	4
2. Criminal Cases.....	4
D. Probative But Prejudicial Evidence. (IRE 403).....	4
1. Balancing Test.....	4
2. Powers to Minimize Prejudice.....	5
III. EXHIBITS.....	5
A. Real Evidence.....	5
1. Real Evidence Defined.....	5
2. Foundation Required.....	5
3. Chain of Custody.....	5
4. Authentication of Evidence. (IRE 901).....	6
5. Risks of Unfair Prejudice.....	7
B. Documentary Evidence. (IRE 901).....	7
1. Authentication.....	7
2. Authentication of Computerized Data.....	8

3.	Self-authentication. (IRE 902)	9
4.	Self-Authentication of "Penitentiary Packets"-- <i>State v. Marsh</i>	9
5.	Certified Records of Regularly Conducted Activity. (IRE 902(11)).....	10
6.	Authentication of Foreign Judgments-- <i>State v. Howard</i>	10
7.	Authentication of Tests and Test Results. (IRE 904).....	10
8.	Altered Documents.....	11
9.	Required Introduction of Related Portions	11
10.	Summaries of Voluminous Documents	11
11.	Necessity of Offering Document into Evidence.....	12
C.	"Best Evidence" Requirements.....	12
1.	"Best Evidence" Rule. (IRE 1001).....	12
2.	Observer's Testimony.....	13
3.	Duplicates.....	13
4.	Photographs.....	13
5.	Computer-stored Data	13
6.	Fact Questions	13
7.	Form of Secondary Evidence	13
D.	Role of Judge and Jury on Authentication Questions. (IRE 104).....	14
1.	Preliminary Questions of Admissibility.....	14
2.	Questions of Fact.....	14
3.	Relevancy Conditioned on Fact	14
E.	Evidentiary Use of Pleadings and Discovery Materials.	14
1.	Judicial Admissions	14
2.	Plea of Guilty	14
3.	Requests for Admissions.....	15
4.	Answers to Interrogatories	15
5.	Deposition Testimony of a Party.....	15
6.	Deposition Testimony of a Non-party.....	15
F.	Reports of Experts.	15
1.	Inadmissible Hearsay	15
2.	As Basis for Expert's Opinion.....	15
3.	IRE 703 Has Been Amended	15
IV.	DEMONSTRATIVE EVIDENCE AND ILLUSTRATIVE AIDS	16
A.	Demonstrative Evidence Generally	16
1.	Purpose to Assist Testimony.....	16
2.	Distinguished from Evidence of Independent Probative Value	17
B.	Admissibility of Demonstrative Evidence or Illustrative Aids.....	17
1.	Foundational Requirements	17
2.	Appropriate Test.....	17

3.	Applicability of Hearsay Objection.....	17
4.	Inscriptions on Illustrative Aids	17
5.	Display of Personal Injuries to Jury	18
6.	In-Court Demonstrations.....	18
C.	Computer-generated Evidence and Video Evidence	18
1.	Computer-generated Scientific Data	18
2.	Computer-generated Re-creations, Animations and Simulations	18
3.	Proposed Use of Computer-generated Evidence Affects Admissibility ...	19
4.	Video Re-enactments	20
V.	TESTS, ANALYSES AND EXPERIMENTS	21
A.	Evidence of Tests, Analyses and Experiments, Generally	21
1.	Rule 702	21
2.	Rule 901	21
3.	Foundational Requirements	21
4.	Conducting Experiment During Closing is Inappropriate.....	22
B.	Required Proof of Reliability of Scientific Evidence	22
1.	Rule 702 is Controlling Authority in Idaho	22
2.	Rule 702 in Idaho State Courts	23
3.	Judicial Notice.....	26
4.	Guidelines for Applying Rules.....	26
5.	Factors to Consider	27
6.	The Daubert Standard	27
C.	Disclosure of Tests and Analyses in Criminal Cases	28
1.	Disclosure by Prosecutor.....	28
2.	Disclosure by Defendant	29
3.	Scope of "Scientific Test or Experiment."	29
D.	Disclosure of Tests and Analyses in Civil Cases.....	29
1.	IRCP 26(b)(4)(A).....	29
2.	Exclusion of Scientific Analysis	30
E.	Self-authentication of Alcohol-Concentration Tests	30
1.	Idaho Code § 18-8004(4)	30
2.	Judicial Notice of Regulations	30
F.	Intoximeter 3000; Intoxilyzer 5000; Test Results; Blood Alcohol Tests	30
1.	Intoximeter 3000	30
2.	Intoxilyzer 5000	31
3.	Blood Alcohol Tests.....	32

G.	Horizontal Gaze Nystagmus Test	32
1.	Reliability	32
2.	Testimony by the Officer	32
H.	Polygraph and "Truth Serum" Examinations.....	32
1.	Polygraph Results.....	32
2.	Child Protective Act Proceedings	33
3.	Federal Courts	33
4.	"Truth Serum" Results	33
I.	Hypnotically-refreshed Memory.....	34
1.	Significant Dangers	34
2.	Hearsay Statements are Inadmissible	34
J.	Tests in Paternity Actions	34
1.	Blood Tests Under Idaho Code §§ 7-1115 through 7-1119	34
2.	Human Leukocyte Antigen Tissue Typing Tests	34
K.	Neutron Activation Analysis	35
1.	Defined.....	35
2.	Idaho Law.....	35
L.	DNA "Fingerprint" Evidence.....	35
1.	Defined.....	35
2.	Admissibility in Idaho	35
M.	Blood Spatter Analysis	36
1.	Admissibility in Idaho.....	36
2.	Qualifications of Witness.....	36
N.	GPS Tracking	36
1.	Defined.....	36
2.	Admissibility in Idaho.....	36
VI.	SPOILIATION OF EVIDENCE.....	36
A.	General Rules	36
1.	Adverse Inference	36
2.	Intentional or Reckless Loss or Destruction Under Circumstances Manifesting Bad Faith is Required.....	37
3.	Application is Discretionary.....	37
4.	Application is Limited to Offending Party.....	37

TRIAL EVIDENCE FOR JUDGES

By

D. Craig Lewis, Esq.
Merlyn W. Clark, Esq.

PART THREE: EXHIBITS, DEMONSTRATIVE EVIDENCE AND ILLUSTRATIVE AIDS, TESTS, ANALYSES AND EXPERIMENTS

I. INTRODUCTION

This is the third of a five-part series on the law of evidence being presented to the judges of Idaho. The first part focused on the management of a trial and the second part focused on witnesses and the examination of witnesses. This part focuses on the admissibility of exhibits, demonstrative evidence and illustrative aids, and tests, analyses and experiments. Part four focuses on the exclusionary rules and part five focuses on the hearsay rules.

Evidence is not confined to oral testimony. It includes tangible objects which are presented for an examination by the court and jury. Such tangible evidence has been called real evidence, demonstrative evidence, documentary evidence, and exhibits. It is of value because through direct self-perception the trier of the facts obtains evidence which may be used in the impeachment of a witness or to prove or disprove some issue in the case.

Its admissibility presents three basic problems: (1) relevancy, or the value of the real evidence in assisting the trier of facts in determining any of the issues, (2) authenticity or identification that it is what the proponent of the evidence represents it to be, and (3) unfair prejudice, or the possibility that, because of the nature of the real evidence, it may be misused by the jury to such an extent as to outweigh the value of the evidence as probative of the issues in the case.

II. RELEVANCE THEORY

A. General Rules of Relevance. (IRE 401 & 402)

- 1. Relevance Defined.** "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.
- 2. General Admissibility.** All relevant evidence is admissible except as otherwise provided by the Rules of Evidence or other rules applicable in the courts of Idaho. Evidence which is not relevant is not admissible.

3. **"Minimal Relevance."** The evidence rules apply the concept of "minimal relevance." IRE 401 considers evidence relevant if it has "any tendency" to make a fact of consequence more or less probable. *State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989). In many cases probative value is incremental: "A brick is not a wall." Each item of evidence need not alone have probative value if the cumulative effect is probative. *See, e.g., State v. Hocker*, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989).
4. **Indirectly Consequential Evidence.** Evidence may be indirectly consequential and therefore relevant when offered to attack or support the credibility of a witness, to explain or aid the fact finder in understanding other evidence, or to lay foundation for testimony or the admission of other evidence. *See, e.g., State v. Rothwell*, ___ Idaho ___, 294 P.3d 1137 (2013), rev. den., ___ Idaho ___, 2013 Ida. LEXIS 72 (Idaho Feb. 28, 2013) (in trial for lewd conduct with six-year old, character witnesses should have been allowed to testify regarding defendant's interactions with children and his trustworthiness with preteens; so long as specific incidents were not described, witnesses' opinions were pertinent); *State v. Karpach*, 146 Idaho 736, 202 P.3d 1282 (2009) (store manager's testimony with regard to camera coverage in the store was material and relevant; it would have challenged the store loss prevention investigator's credibility and could have had exculpatory value); *State v. Walker*, 121 Idaho 18, 822 P.2d 537 (Ct. App. 1991)(background for a witness's narrative to give it context).
5. **Remoteness.** Remoteness of the proffered evidence from the issue being proved may be considered in determining probative value under the rule. At some point the remoteness of the evidence may render it irrelevant. *See, e.g., Lehmkuhl v. Bolland*, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988), rev. denied, 1988 Ida. LEXIS 79 (Idaho)(observations of driving 3 or 4 hours prior to accident offered to show condition of driver at time of accident was too remote); *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct. App. 2007) (in defendant's rape and drug case, the court erred by admitting evidence that defendant has supplied two minors methamphetamine, more than one year prior to the incidents he was charged with, because there was no evidence "linking" the alleged delivery of the drugs in the instant charges; the prior act was a distinct and "self-contained" incident). *See also State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991)(threatening letters sent to victim months or years after attack which threatened harm if victim reported the attack were not too remote and were relevant to show knowledge).
6. **Determination Not Discretionary.** The determination of relevance is a legal question, not a matter of discretion. *State v. Raudebaugh*, 124 Idaho

758, 864 P.2d 569 (1993). Whether evidence is relevant under Rule 401 is an issue of law which an appellate court will review de novo. *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (2009).

7. **Presumptive Admissibility.** "The evidence rules give presumptive admissibility to relevant evidence. IRE 402 provides that 'all relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state.' The effect of this approach is to place on the party opposing the admission of relevant evidence the burden of justifying its exclusion, rather than requiring the proponent to justify admission." Lewis, IDAHO TRIAL HANDBOOK, 219 (2d ed. 2005).
8. **Materiality.** The rules do not refer to "materiality." The concept is combined with relevance in IRE 401, in the reference to a fact "of consequence to the determination of the action." A fact is relevant if it tends to prove a point. It is material if the point is legally significant to the outcome.

B. Relevance Conditioned on Other Facts.

1. **Proof of Foundation.** "The quality of proof needed to establish a foundation of relevance is addressed in IRE 104(b)--'Relevance conditioned on fact.' The rule states that where relevance depends on fulfillment of a condition of fact the foundational proof must be 'sufficient to support a finding of the fulfillment of the condition.' "Lewis, IDAHO TRIAL HANDBOOK, 220 (2d ed. 2005).

In *State v. Rothwell*, ___ Idaho ___, 294 P.3d 1137 (2013), rev. den., ___ Idaho ___, 2013 Ida. LEXIS 72 (Idaho Feb. 28, 2013), the Supreme Court held that the district court may allow a foundation to be established outside the presence of the jury as to witnesses' opinions that defendant did not have the character of a child molester.

2. **Court's Screening Function.** "The effect of the rule in a jury trial is to assign to the court a screening function: the court should not determine admissibility based on whether the court is persuaded by the foundational proof; rather, it should admit the evidence if a jury could reasonably believe the foundational facts." *Id.*
3. **Preponderance Standard Governs.** "In most situations, including evidence offered by the prosecution in criminal trial, the 'preponderance' standard governs determination of foundational facts; evidence is sufficient to fulfill a foundational condition if it is sufficient to permit a

finding that the foundational fact is more likely true than not. *See, e.g., State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992)(prosecution not required to prove conclusively that bruises shown in photograph of rape victim were inflicted by defendant; victim's testimony that defendant inflicted bruises was sufficient foundation)." *Id.*

4. **Standard in Criminal Cases.** "However, in a criminal prosecution, when the evidence in question constitutes the proof of an element of the charged crime the foundational proof ultimately must satisfy the 'beyond a reasonable doubt' standard." *Id.*

C. Circumstantial Evidence.

1. **Definition and Treatment.** Circumstantial evidence is that which proves the fact of consequence through inference. The rules give no special treatment to circumstantial evidence, recognizing that circumstantial evidence can be as powerful as direct evidence.
2. **Criminal Cases.** In criminal cases no special instruction on circumstantial evidence should be given. In *State v. Humphrey's*, 134 Idaho 657, 8 P.3d 652 (2000) (*overruled State v. Holder*, 100 Idaho 129, 594 P.2d 639 (1979)), the Idaho Supreme Court held that if the jury is properly instructed on reasonable doubt the defendant is not entitled to any additional instruction on circumstantial evidence.

D. Probative But Prejudicial Evidence. (IRE 403)

1. **Balancing Test.** Rule 403 provides a balancing test for the exclusion of otherwise relevant, admissible evidence on the grounds of confusion, prejudice or waste of time. "Prejudice" in this context means *unfair* prejudice - the tendency of evidence to lead the trier of fact astray. The IRE 403 balancing test is weighted *in favor of admission*, directing exclusion only where the prejudicial potential *substantially outweighs* the probative value.

See, e.g., State v. Salazar, ___ Idaho ___, 278 P.3d 426 (2012), rev. den., ___ Idaho ___, 2012 Ida. LEXIS 151 (June 11, 2012) (court did not err in allowing detective to testify the detective believed the person in a photograph to be defendant in a trial for aggravated battery; defendant's claim of lack of probative value was without merit and defendant identified no unfair prejudice); *State v. Jones*, ___ Idaho ___, ___ P. ___, 2011 Ida. App. LEXIS 76 (Sept. 12, 2011) (in rape case, court erred by admitting prior acts evidence because an assertion, and defendant's admission, that he had sexual intercourse with a prior complainant while she was sleeping, that that was a "bad thing" that he had done and that he

was on felony probation for such an act was a classic example of evidence which posed the danger that it would stir the passion of the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial).

2. **Powers to Minimize Prejudice.** When evidence with prejudicial potential is admitted the court has broad powers to attempt to minimize prejudice through limitations on the proof, or cautionary or limiting instructions. *See* IRE 105.

See, e.g., State v. Stevens, 146 Idaho 139, 191 P.3d 217 (2008) (in murder prosecution, court properly admitted video of computer generated objects falling down stairs as it was relevant to illustrate state expert's testimony that it was impossible for deceased infant to have sustained his injuries as a result of falling down stairs, as defendant claimed; the probative value of the video was not outweighed by its prejudicial effect, particularly in light of limiting instructions issued by the court).

III. EXHIBITS

A. Real Evidence.

1. **Real Evidence Defined.** "Real evidence" refers to evidence offered as proof of matter actually involved in the events in issue, for example, a weapon allegedly used in a shooting, photographs of a crime scene as it allegedly appeared following the crime, or a bag of cocaine alleged to have been in the defendant's possession.
2. **Foundation Required.** The foundation required for real evidence is a function of relevance. The evidence must be shown to be substantially similar, in the respects important to the case, to its condition at the time in question. Changes in condition do not necessarily disqualify the evidence if the changes can be satisfactorily accounted for and explained to the jury.
3. **Chain of Custody.** A chain of custody is one way of establishing that an item is genuine. It is essential only when there is some substantial risk that the item may have been switched or altered in a material way. Gaps in the chain do not necessarily disqualify the evidence if, under the circumstances, the gaps do not present a substantial risk of substitution or alteration. Thus, the more easily switched (i.e. generic) or altered (e.g. fragile) the relevant characteristics, the more complete the chain of custody should be.

"The chain of custody needed to establish the authenticity of an item of real evidence offered by the prosecution in a criminal case need not

exclude all possibility of tampering; it is sufficient if it establishes a reasonable probability that the article has not changed in any material respect. See *State v. La Mere*, 103 Idaho 839, 655 P.2d 46 (1982)." Lewis, IDAHO TRIAL HANDBOOK, p. 255 (1995).

The fact that an item has changed between the time of the events in issue and the time it is offered does not preclude its admission if the changes can be accounted for and will not render the proof potentially misleading. See *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971).

"However, admission of an item of physical evidence whose connection with the case is only speculative can constitute reversible error. In *State v. Seitter*, 127 Idaho 356, 900 P.2d 1367 (1995), a prosecution for possession of a controlled substance with intent to deliver, the Supreme Court held that admission of two baggies containing an unidentified white powdery substance was error. Because the substance in the baggies was unidentified, the evidence was irrelevant." Lewis, IDAHO TRIAL HANDBOOK, Supp. at 57 (1998).

The Court of Appeals has held that establishing a chain of custody is a permissible means of authenticating relevant evidence, but is not itself a separate prerequisite for admissibility. *State v. Lopez*, 107 Idaho 726, 692 P.2d 370 (Ct. App. 1984).

The Idaho Court of Appeals has held in a criminal action, that physical evidence which consisted of panties of a sexually abused child which tested positive for semen, must be shown to be in substantially the same condition when offered as they were when the crime was committed, citing *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971) and *State v. Kodesh*, 122 Idaho 756, 838 P.2d 885 (Ct. App. 1992). The court explained that the article need not be in precisely the same condition at the time of trial as at the time when it played a role in the occurrence of the alleged offense, but if its condition has changed, the change must not have been made for unjustifiable purposes and it must not be of sufficient magnitude that the exhibit will mislead. The court continued: "It is not necessary that the party offering the exhibit exclude all possibility of tampering. Rather, the standard for admission of the evidence is whether the trial court is satisfied that, in all reasonable probability, the exhibit has not been changed in any material respect." *State v. Brown*, 131 Idaho 61, 951 P.2d 1288 (Ct. App. 1998). The determination falls within the sound discretion of the trial court. *Id.*

4. **Authentication of Evidence. (IRE 901)** Rule 901 provides that 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. IRE 901(b)(4), which provides for authentication by distinctive characteristics and the like, offers perhaps the most common method of authentication of real evidence.

5. **Risks of Unfair Prejudice.** Real evidence can present risks of unfair prejudice addressed by IRE 403. For example, gruesome autopsy or crime scene photographs can raise risk of inflaming a jury's anger toward a defendant. Here the court must balance the need for and relevance of the evidence against the possible unfair prejudice.

In *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (Ct. App. 2009), a marcher by torture prosecution, the Court of Appeals held it was not error to admit 28 photographs of the child victim's injuries and autopsy where the victim suffered more than 60 bruises plus fractures, cuts, abrasions, internal injuries, and brain injury, requiring multiple photographs to properly portray the extent of the injuries.

See also *State v. Reid*, 151 Idaho 80, 253 P.3d 754 (Ct. App. 2011), rev. den., (May 23, 2011), in which the Court of Appeals held that gruesome photographs were properly admitted to prove the elements of the prosecution's case despite the defendant's offer to stipulate to the fact and manner of death.

"In applying the balancing test of IRE 403 to evidence which has prejudicial aspects, a court should not simply balance the probative value of the offered evidence as a whole against its potential for prejudice. Where a witness's testimony will relate prejudicial matter of minimal relevance as well as probative facts, the court should consider how the statement might be modified in order to avoid undue prejudice while preserving the probative value. *State v. Bingham*, 124 Idaho 698, 864 P.2d 144 (1993)." Lewis, IDAHO TRIAL HANDBOOK, p. 136 (1995).

B. Documentary Evidence. (IRE 901)

1. **Authentication.** IRE 901 offers a variety of ways of authenticating documentary evidence: testimony of a witness familiar with the document, IRE 901(1); lay witness identification of handwriting, 901(2); comparison of handwriting with exemplars by an expert or by the jury, 901(3); in appropriate cases, distinctive characteristics or contents (e.g., the "reply letter" doctrine), 901(b)(4); and for public records, the testimony of a witness who obtained the document that it came from the public office where such records are kept, 901(b)(7).

"IRE 901(b)(7) permits authentication by evidence that a writing authorized to be recorded in a public office is from the office where such records are kept. This provision applies to private writings as well as public records where the public office is under an official duty to receive and maintain the private writings. *State v. Silverson*, 130 Idaho 283, 939 P.2d 859, 1997 WL 299521 (Ct. App. 1997)(IRE 901(b)(7) applied to records of invoices sent to Department of Health and Welfare where invoices formed part of Department's payment procedures)." Lewis, IDAHO TRIAL HANDBOOK, Supp. at 55 (1998).

"The Court of Appeals has recognized a means of authentication not specifically listed in IRE 901(b) but clearly within the scope of IRE 901(a), evidence that the party against whom a document is offered has admitted its authenticity. *State v. Silverson*, 130 Idaho 283, 939 P.2d 859, 1997 WL 299521 (Ct. App. 1997)(defendant's admission in interview that he signed document was sufficient authentication under IRE 901(a)." *Id.*

I.R.E. 901(b)(10) makes clear that any method of authentication or identification that is 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. See, e.g., I.R.E. 803(8) Public records and reports; (9) Records of vital statistics; (10) Absence of public record or entry; (11) Records of religious organizations; (12) Marriage, baptismal, and similar certificates; (14) Records of documents affecting an interest in property; and (15) Statements in ancient documents. See also, I.R.C.P. 44(c).

2. **Authentication of Computerized Data.** The evidence rules do not have a specific provision addressing the authentication requirements for computer-generated or stored documents. However, IRE 901(b)(9) would seem to address most issues that might arise. It provides that matter can be authenticated by "describing a process or system used to produce a result and showing that the process or system produces an accurate result."

Computer generated scientific data should be treated like other scientific tests: admissibility is conditioned upon a sufficient showing that (1) the computer is functioning properly, (2) the underlying data is sufficiently accurate and complete, and (3) the program is accepted by the appropriate community of scientists. See, e.g., *Commercial Union Insurance Co. v. Boston Edison Co.*, 591 N.E.2d 165 (Mass. 1992)(foundation that computer program for measuring heat usage in a building was generally accepted by the appropriate community of scientists was sufficient

foundation and proponent need not prove exactly how the program operates).

A dispute may arise over the accuracy of the means employed to input data into the computer, which may be subject to human error, be based on inadmissible hearsay information, or be untrustworthy. *See, e.g., City of Idaho Falls v. Beco Constr. Co.*, 123 Idaho 516, 850 P.2d 165 (1993) (descriptions of proof authenticating computer printouts and underlying record-keeping system).

3. **Self-authentication. (IRE 902)** IRE 902 provides a number of ways by which a document can "self-authenticate" - i.e., be admissible without the need for an authenticating witness. Perhaps the most common method is 902(8), by acknowledgement. In addition, 902(1), (2) and (4) provide for authentication through various kinds of officers' certificates.
4. **Self-Authentication of "Penitentiary Packets"--*State v. Marsh*.** Rule 902(4) provides that a certified copy of a public record is self-authenticating if it is "authorized by law to be recorded or filed and is actually recorded or filed in a public office . . . [and is] certified as correct by the custodian or other person authorized to make the certification." During the persistent violator segment of a felony trial, the district court admitted into evidence a "penitentiary packet" which contained photocopies of certified copies of judgments of conviction for Marsh's previous felony convictions. Affixed to the front of the packet was a certificate of authenticity from the records department of the Idaho Department of Correction, which stated that the signatories were in legal custody of Marsh's original files, that they had compared the copies in the packet to the originals, and that the packet contained true and correct copies of the originals. Marsh objected to admission of the penitentiary packet on the ground the judgments were not properly authenticated because there were no original certifications of the judgments by the court clerk. The Idaho Court of Appeals held the packet was properly admitted. *State v. Marsh*, 153 Idaho 360, 283 P.3d 107 (Ct. App. 2011).

The Court of Appeals stated that Idaho Rule of Evidence 902(4) provides that a certified copy of a public record is self-authenticating if it is "authorized by law to be recorded or filed and is actually recorded or filed in a public office . . . [and is] certified as correct by the custodian or other person authorized to make the certification." The Court noted that Idaho Code § 19-2519(b) provides that after entry of a judgment of conviction, the clerk of the court must deliver a certified copy of the judgment to the Idaho Department of Correction. IDOC is required to retain a complete record of every prisoner, I.C. § 20-226, which must include a certified

copy of any judgments of conviction. I.C. § 20-237. Thus, although the court clerk is the only official custodian of the *original* judgment, IDOC was an official custodian of properly certified copies of the original judgments, and it could therefore certify photocopies of the certified copies of the judgments. The Court held that the two tiers of certification work together to ensure the authenticity of the penitentiary packet, and it therefore was admissible.

5. **Certified Records of Regularly Conducted Activity. (IRE 902(11))** Rule 902(11) was added in 2005. It appears to be an effort to provide for satisfaction of hearsay admissibility conditions as well as authentication requirements for business records, through a sworn statement that the IRE 803(6) hearsay exception conditions are met. Under IRE 104(a) the court can consider such an affidavit in deciding whether the factual prerequisites for the business records exception are met.
6. **Authentication of Foreign Judgments--*State v. Howard*.** To prove enhancement of a DUI charge from a misdemeanor to a felony, the State sought to introduce the defendant's prior DUI convictions, one of which was from California. The district court held that although the certified copy of the California judgment satisfied the authentication requirements of I.R.E. 902(4), it was not admissible because the document did not comply with Idaho Code § 9-312 and 28 U.S.C. § 1738. The State acknowledged that the foreign judgment did not comply with the state and federal statutes, both of which required a certificate from a judge, but contended that if the document satisfies the Idaho Rule of Evidence regarding authentication, it need not also comply with the statutes. The Idaho Supreme Court agreed with the State. In *State v. Howard*, 150 Idaho 471, 248 P.3d 722 (2011), the Court held that the California judgment was admissible. The Court said that Idaho Code § 9-312 may be read as merely providing an alternate way of admitting and proving judicial records, that 28 U.S.C. § 1738 is not the exclusive means by which out-of-state judgments may be authenticated, and that states can set lesser standards. Therefore, compliance with I.R.E. 902 was sufficient.
7. **Authentication of Tests and Test Results. (IRE 904)** Rule 904 was adopted effective January 1, 2009. It provides for authentication of medical or dental tests and test results for diagnostic or treatment purposes.

Rule 904 provides for authentication of items described in Rule 803(23), also adopted effective January 1, 2009, which creates a hearsay exception for medical or dental tests and test results for diagnostic or treatment purposes. Rule 904(1) states: "Extrinsic evidence of authenticity as a

condition precedent to admissibility is not required for items described in Rule 803(23) if the proposed exhibit identifies the person or entity who conducted or interpreted the test, the name of the patient, and the date when the test was performed, and notice was given in accord with subsection (2) of this rule." The Rule further provides for objection to authenticity or admissibility and that the effect of the Rule does not restrict argument or proof relating to the weight to be accorded evidence submitted under the Rule.

8. **Altered Documents.** Idaho Code 9-601 provides that a party who produces a writing which has been altered or appears to have been altered in a material respect after its execution must account for the alteration. Although the statute has been replaced by the Rules of Evidence, the Idaho Court of Appeals has relied on the authority of the statute to allow admission of altered documents. *Lowry v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (Ct. App. 1989) involved an increase in the amount of a note with consent of the borrower and *Pocatello R. R. Employees Fed. Credit Union v. Galloway*, 117 Idaho 739, 791 P.2d 1318 (Ct. App. 1990) involved the alteration of terms of a note by agreement of the parties. The result should be the same under the Rules of Evidence. See Lewis, IDAHO TRIAL HANDBOOK, p. 242 (1995).

9. **Required Introduction of Related Portions.** Rule 106 provides that when a writing or recorded statement or a part thereof is introduced, an adverse party may require the offeror to introduce at that time "any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

When applicable, this rule may operate as an exception to any hearsay or other objection which might otherwise be directed at the proof.

A request for the admission of related portions of a writing or statement pursuant to Rule 106 must identify those portions of the statement which explain, qualify, or are otherwise relevant to the portions admitted. A request for the admission of the entire remainder of a writing has been held improper. See *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989), cert. denied, 493 U.S. 917 and (criticized on other grounds by *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990)).

10. **Summaries of Voluminous Documents.** Rule 1006 permits proof of the contents of voluminous writings, recordings or photographs to be made through a chart, summary or calculation when the items cannot conveniently be examined in court. The right to do so is conditioned on making the originals or duplicates of the originals available for

examination and/or copying by other parties, at a reasonable time and place, and the court may order that the underlying documents be produced in court. The underlying documents must themselves be shown to be admissible. *See State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987).

11. **Necessity of Offering Document into Evidence.** "Documents do not become evidence until offered and admitted by the court. A claim of error in the exclusion of an exhibit will not be entertained where the trial record does not disclose that the exhibit was ever offered. *Harmston v. Agro-West*, 111 Idaho 814, 727 P.2d 1242 (Ct. App. 1986)." Lewis, IDAHO TRIAL HANDBOOK, p. 250 (1995).

"Allusions or indirect references to the documents by a witness will not make the documents evidence in the case, nor will physical presence of the document before the judge during the questioning of a witness. *Crollard v. Crollard*, 104 Idaho 189, 657 P.2d 486 (Ct. App. 1983) (refusing to treat as evidence answers to interrogatories that had been filed with court prior to trial under then-existing rules of discovery)." *Id.*

"Similarly, pretrial submissions to the court do not become evidence unless offered and admitted at trial, unless so provided in a pretrial order or stipulation. *Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (Ct. App. 1984)." *Id.*

"However, the trial court has the discretion to permit a party to reopen its case after it has rested in order to cure a failure to make a formal offer of evidence. *See, e.g., Robert V. De Shazo & Assocs. v. Farm Management Servs.*, 101 Idaho 154, 610 P.2d 109 (1980)(reopening proper when exhibits had been prepared by witnesses while testifying in front of jury and failure to offer was due to oversight)." *Id.*

C. "Best Evidence" Requirements.

1. **"Best Evidence" Rule. (IRE 1001)** "The term 'best evidence,' although often employed by judges and lawyers, is a misnomer; there is no rule of evidence which requires that a party prove a matter through the 'best' available evidence of the matter. Instead, this set of rules requires only that when a party seeks to prove the contents of a writing, recording or photograph, it must be proved through production of the original unless production of the original is excused under the rules. Accordingly, this might more accurately be called the 'original document' rule." Lewis, IDAHO TRIAL HANDBOOK, p. 244 (1995).

If proof through the original is not available or feasible, Rule 1004 provides for proof by secondary evidence. Secondary evidence is allowed under four circumstances under Rule 1004: (1) when all originals have been lost or destroyed, unless the proponent did so in bad faith; (2) when no original can be obtained by any reasonably practicable, available judicial process or procedure; (3) when an opposing party who possesses the original failed to produce it after having been served with notice that the contents would be the subject of proof at trial; and (4) when the document is "collateral," i.e., not closely related to a controlling issue.

Rule 1005 permits proof of public records by a copy which is certified under Rule 902 or testified to be correct by a witness who compared it with the original public record.

Rule 1007 permits proof of the contents of a document through the testimony at trial or deposition of a party against whom it is offered, or by their written admission of the contents, without accounting for the original.

2. **Observer's Testimony.** When an event has been both observed and recorded, an observer's testimony describing the event is not covered by the "best evidence" rule. Thus, even though a conversation was tape recorded or otherwise documented, a participant could testify to the conversation without violating the rule.
3. **Duplicates.** IRE 1003 provides that "duplicates" (*e.g.*, Xerox copies), are admissible like originals unless there is a genuine question raised as to the authenticity of the original.
4. **Photographs.** For photographs, every print from a negative is an original.
5. **Computer-stored Data.** Rule 1001(3) treats all computer printouts as originals.
6. **Fact Questions.** IRE 1008 addresses how fact questions concerning best evidence issues are divided between judge and jury. In substance it provides that the judge decides whether the prerequisites for use of secondary evidence have been met. However, where the dispute is which of several documents is the original, or whether a copy is accurate, the question is for the jury.
7. **Form of Secondary Evidence.** When secondary evidence is admissible, Rule 1004 draws no distinction among the permissible forms of proof - *e.g.*, through testimony, a copy, or a written summary.

In the case of public records subject to Rule 1005, there is a priority of secondary proof. Rule 1005 requires that proof be by a copy of the record authenticated in accordance with the rule unless such a copy is not reasonably available.

D. Role of Judge and Jury on Authentication Questions. (IRE 104)

1. **Preliminary Questions of Admissibility.** IRE 104 is a basic rule outlining the respective roles of judge and jury on questions of admissibility of evidence.
2. **Questions of Fact.** IRE 104(a) assigns to the judge, with one exception addressed in IRE 104(b), the duty to resolve whatever factual questions underlie the qualification of evidence for admission (*e.g.*, whether the factual predicates for a hearsay exception are met, or whether a communication was made in a context that gives rise to a privilege). In making these determinations the court is bound only by the law of privilege, and can consider any information the court finds useful in deciding the questions.
3. **Relevancy Conditioned on Fact.** IRE 104(b) operates when the question is the sufficiency of foundation for relevance. It limits the role of the judge when the question is whether evidence is relevant and the relevance turns on "the fulfillment of a condition of fact," *e.g.*, whether a particular item is genuine or has been altered. Here the judge performs a "gatekeeper" role, deciding only whether there is enough evidence to allow the jury to find that the condition of fact is satisfied.

E. Evidentiary Use of Pleadings and Discovery Materials.

1. **Judicial Admissions.** Statements of fact in affirmative as well as responsive pleadings are judicial admissions, to be taken as true against the pleader unless withdrawn or amended. Even when withdrawn or amended the statements are non-binding admissions of a party, admissible against the party for their appropriate weight.
2. **Plea of Guilty.** In a criminal prosecution, a defendant's knowing and voluntary guilty plea is a judicial admission of all facts charged by the indictment or information. *State v. Coffin*, 104 Idaho 543, 661 P.2d 328 (1983). A guilty plea to a criminal charge is a judicial admission of all facts charged by the indictment or information, and admissible as an admission of a party opponent in a subsequent civil action involving the same underlying issues. *Mattson v. Bryan*, 92 Idaho 587, 448 P.2d 201 (1968). This is also true for pleas to traffic infractions. *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995).

In *Kuhn v. Proctor*, 141 Idaho 459, 111 P.3d 144 (2005), the Idaho Supreme Court held that payment of a traffic infraction fine by mail without entry of a guilty plea is an admission of liability, admissible in a subsequent civil action, overruling *LaRue v. Archer*, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997).

3. **Requests for Admissions.** Admissions in response to IRCP 36 Requests for Admissions are binding and conclusive unless withdrawal is permitted by the court. *See* IRCP 36(b).
4. **Answers to Interrogatories.** A party's statements in sworn answers to IRCP 33 Written Interrogatories are not conclusive; they are, however, admissible as admissions of a party-opponent. To be properly considered as proof such statements must be introduced into evidence. *See Crollard v. Crollard*, 104 Idaho 189, 657 P.2d 486 (Ct. App. 1983).
5. **Deposition Testimony of a Party.** Statements of a party in a deposition are admissible by the opposing party for any purpose. *See* IRCP 32(a)(2). If offered by the party who made the statement they would, of course, be inadmissible hearsay unless subject to an exception.
6. **Deposition Testimony of a Non-party.** Deposition statements of non-party witnesses are also hearsay. They are potentially admissible (a) to impeach trial testimony, or (b) in lieu of trial testimony if the witness is dead or otherwise unavailable as described in IRCP 32(a)(3). [*See also* IRE 804(b)(1), the Former Testimony hearsay exception]. At least in theory, when deposition testimony is admissible it should only be read to the jury, not admitted through a transcript. Admission of a transcript would give such testimony undue weight over other testimony in the case.

F. **Reports of Experts.**

1. **Inadmissible Hearsay.** Generally the reports of experts contain inadmissible hearsay and, in the absence of some specific exception in Rule 803, are inadmissible.
2. **As Basis for Expert's Opinion.** The contents of reports of experts often form the basis of an expert's opinion, as is permitted under IRE 703. However, Rule 703 does not authorize the admission of the report of otherwise inadmissible underlying data for substantive purposes.
3. **IRE 703 Has Been Amended.** "Decisions of both the Supreme Court and the Court of Appeals have taken the position that former IRE 703 permits disclosure, during direct examination of an expert witness, of the otherwise inadmissible facts or data on which the opinion is based. In *Doty*

v. Bishara, 123 Idaho 329, 848 P.2d 387 (1992), the Supreme Court found no error in an expert's testimony on direct examination to observations made by a non-disclosed expert witness because the testifying expert stated that he relied in part upon those observations in forming his opinions. In *Long v. Hendricks*, 109 Idaho 73, 705 P.2d 78 (Ct. App. 1985), the Court of Appeals found no error in the introduction of a medical expert's testimony which related information from another's doctor's records on which the testifying expert has relied." Lewis, IDAHO TRIAL HANDBOOK, pp. 186-7 (1995).

These decisions have misapplied Rule 703. Nothing in Rule 703 or 705 indicates an intention to create an independent basis for the admission of inadmissible hearsay evidence, other than the provision in Rule 705 that the opponent may require its disclosure on cross-examination.

In 2002, Rule 703 was amended to provide that facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion of inference unless the court determines that the probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

"Properly applied, the rule will allow the expert to state an opinion based on inadmissible evidence and to indicate the general nature of the sources on which the expert has relied, but not to disclose, directly or indirectly, the contents of the sources on direct examination unless they are otherwise admissible. ... In an unusual case where the opinion cannot satisfactorily be presented without some reference to the inadmissible data, the court has discretionary authority to control the scope of the disclosure and to give limiting instructions to avoid misuse of the evidence." *Id.*

IV. DEMONSTRATIVE EVIDENCE AND ILLUSTRATIVE AIDS

A. Demonstrative Evidence Generally.

- 1. Purpose to Assist Testimony.** "Courts interchangeably use the terms 'demonstrative evidence' and 'illustrative evidence' to refer to evidence which is offered to assist the jury in understanding the testimony of a witness or other evidence, such as the use of a diagram, map, model, photograph or chart to which a witness refers while testifying." Lewis, IDAHO TRIAL HANDBOOK, p. 258 (1995).

The general foundational requirement for such evidence is that the evidence be helpful to a clear understanding of the testimony of the witness and not misleading.

2. **Distinguished from Evidence of Independent Probative Value.** Use for demonstrative or illustrative purposes should be distinguished from the offer of diagrams, maps, photographs, or videotapes as evidence of independent probative value on an issue in the litigation, from which the jury might draw its own conclusions or impressions. Examples of independent evidence include photos of a bank robber when offered to prove identity, a diagram or map when offered as an actual, scale representation of a place and objects thereon, or where a photograph or videotape is offered as a true depiction of a relevant place or object. The appropriate foundation for independent evidence should include proof of the accuracy of the exhibit.

B. Admissibility of Demonstrative Evidence or Illustrative Aids.

1. **Foundational Requirements.** "An exhibit is properly admissible for demonstrative purposes when the exhibit supplements the testimony of the witness or assists the jury in obtaining a better understanding of facts in issue. *Masters v. Dewey*, 109 Idaho 576, 709 P.2d 149 (Ct. App. 1985)." Lewis, IDAHO TRIAL HANDBOOK, p. 258 (1995).
2. **Appropriate Test.** "Exhibits are inadmissible for demonstrative purposes when they do not illustrate or make clearer some issue in the case, or where they are of such character as to prejudice the jury. The appropriate test is an IRE 403 balancing of probative value against the dangers of unfair prejudice, distraction, confusion of issues, and waste of time." *Id.*

"A diagram offered for illustrative purposes needs only to be relevant to illustrate a witness's testimony; it does not have to be shown to be precisely accurate or consistent with the testimony of other witnesses. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993)(diagram properly admitted where not to scale and admittedly inconsistent with another witness's testimony." *Id. at 259.*
3. **Applicability of Hearsay Objection.** "An illustrative exhibit based on hearsay evidence may be admissible where the underlying evidence qualifies under a hearsay exception. *See, e.g., Cosgrove v. Merrell Dow Pharmaceuticals*, 117 Idaho 470, 788 P.2d 1293 (1989), modified on other grounds 1990 Ida. LEXIS 42 (Idaho)(illustrative exhibit summarizing records properly admitted where data on which exhibit was based qualified under business records, public records, and market reports hearsay exception)." *Id.*
4. **Inscriptions on Illustrative Aids.** The Supreme Court has held that where diagrams or maps are used by a witness to illustrate during

testimony, "the better practice would appear to be not to permit any writing about which there is dispute upon such exhibits to be considered by the jury." *Kleinschmidt v. Scribner*, 54 Idaho 185, 30 P.2d 362 (1934). The scope of the Court's concern in that case is not clear.

5. **Display of Personal Injuries to Jury.** The admission of a plaintiff's prosthetic leg and photographs of his injuries was proper where they were relevant to demonstrate the nature, extent, and enduring consequences of the injuries suffered. *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983).
6. **In-Court Demonstrations.** In-court demonstrations may be offered to show the feasibility or infeasibility of certain events. Where the demonstration is offered to show a witness's limitations and the purported limitations are within the subjective control of the witness, the court should be cautious about the risk of misleading the jury. *See State v. Sandoval*, 92 Idaho 853, 452 P.2d 350 (1969)(court upheld trial court's refusal to permit a demonstration in which the witness was to attempt to read from a book in order to demonstrate his inability to understand English because the demonstration was under the sole, subjective control of the witness).

Compare *Baker v. Shavers, Inc.*, 117 Idaho 696, 791 P.2d 1275 (1990) (no error to refuse demonstration by slip-and-fall plaintiff of ability to walk in high-heeled shoes she was wearing at time of accident where she had been wearing heels throughout trial; but Supreme Court stated it "cannot see what harm there would have been to allowing her to do so").

C. **Computer-generated Evidence and Video Evidence.**

1. **Computer-generated Scientific Data.** Computer generated scientific data should be treated like other scientific tests: admissibility is conditioned upon a sufficient showing that (1) the computer is functioning properly, (2) the underlying data is sufficiently accurate and complete, and (3) the program is accepted by the appropriate community of scientists. *See e.g., Commercial Union Insurance Co. v. Boston Edison Co.*, 591 N.E.2d 165 (Mass. 1992).
2. **Computer-generated Re-creations, Animations and Simulations.** Computer-generated re-creations and animations generally demonstrate actual events of an incident. They involve technical computer programming of data to demonstrate the events of the incident. Computer-generated re-creations have been used to demonstrate an airline crash or similar event.

Computer simulations use complex scientific and physical principles to "continue" the event beyond re-creation to demonstrate not only what happened, but what could have happened under different circumstances.

3. Proposed Use of Computer-generated Evidence Affects Admissibility. Computer-generated evidence may be used at trial as substantive evidence, demonstrative evidence, or as a basis for expert testimony.

If offered for *substantive purposes* to be accorded independent probative value, the evidence must satisfy the foundational requirements of authenticity and relevance, and avoid exclusion as inadmissible hearsay or unfairly prejudicial. The foundation generally requires proof of:

- (1) The trustworthiness of the original source data, and the calculations and assumptions used in analyzing the data;
- (2) Its input into the computer;
- (3) The operation and capability of the computer and software;
- (4) The output process used for graphics;
- (5) The medium used to reproduce the computer graphics for presentation at trial; and
- (6) The accuracy of the final presentation.

Computer-generated animations may be authenticated in a number of ways. A witness with first-hand knowledge may testify as to the authenticity of the computer output. Rule 901(b)(1). Other methods may be used pursuant to Rule 901(b)(9).

Reliability depends upon (1) the equipment, (2) the program, (3) the data entry process, (4) the presence or absence of application controls over the electronic data processing system, and (5) the presence or absence of system security. Computer hardware is generally considered reliable because the techniques and principles of computer science which are used in computer hardware are generally accepted.

The proponent may be required to establish that the computer operator has the requisite skill to accurately perform his or her duties. The proponent should also be required to show that any assumptions made, as part of the programming, are reliable assumptions, and not entered to reach a predetermined result.

Computer-generated evidence, which consists of input data is an out-of-court statement which is being offered for its truth and may be inadmissible if not within the scope of an exception under the hearsay rules.

If offered as a *demonstrative aid*, i.e., as an illustrative tool, the hearsay problem may be avoided because the evidence is only offered to illustrate testimony of a witness or to help the jury understand other evidence, and not for its truth as evidence of independent probative value. The same is true if offered as a basis for expert opinion under Rule 703.

If offered as a *basis for expert testimony* pursuant to Rule 703, the proponent must establish that the facts or data is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject that is relevant to the proceeding. The proponent must also lay a foundation of evidentiary reliability. To do so, the proponent may be required to establish that the data and the inferences to be drawn therefrom by the expert satisfy the standards of relevance and reliability required by Rule 702.

4. **Video Re-enactments.** The foundational requirements for video re-enactments are similar to that required for photographs, if offered for a similar purpose. The proponent must establish that the video fairly and accurately depicts what it is purported to portray, which usually is what a witness claims to have seen.

Video re-enactments of an auto accident have been characterized not as scientific evidence but more akin to charts or diagrams. As such the courts have held that the applicable standard of admissibility is merely whether the re-enactment "fairly and accurately" reflected the underlying oral testimony and aided the jury's understanding of the issue in question. *See, e.g., People v. McHugh*, 476 N.Y.S.2d 721 (Sup. Ct. 1984). *See generally*, 32 C.J.S. *Evidence*, ¶ 546 (Supp. 1998).

In *Zolber v. Winters*, 109 Idaho 824, 712 P.2d 525 (1985), *reh'g denied* (1986), the court upheld the illustrative use of photographs and videotape evidence taken five years after the auto accident. The evidence was offered during the testimony of a reconstruction expert to illustrate the impact on forward visibility of the motorists of other vehicles in the oncoming lane of traffic. The Court upheld admissibility even though the photos and video were posed and at variance with some of the circumstances existing at the time of the accident because differences between the events depicted and the events observed were explained by the witness and the exhibits were not deemed deceptive.

In *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991), the Court held that the trial court had properly rejected a videotape which was offered to impeach a police officer's testimony that the officer had observed the defendant driving erratically from a certain place, on the

ground that the tape could not show everything visible to a driver on that road and there was inadequate foundation regarding the temporal and climatic conditions under which the tape was made.

V. TESTS, ANALYSES AND EXPERIMENTS

A. Evidence of Tests, Analyses and Experiments, Generally.

1. **Rule 702.** "The admissibility of evidence of the results of experiments and tests is not specifically addressed in the evidence rules. IRE 702 provides that qualified experts may testify to 'scientific, technical, or other specialized knowledge' when it 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" Lewis, IDAHO TRIAL HANDBOOK, p. 261 (1995).
2. **Rule 901.** "The predominant evidentiary requirement for evidence of tests, analyses and experiments is relevance. One provision of the evidence rules pertinent to the admission of tests, analyses and experiments is IRE 901(b)(1), which provides that evidence may be authenticated by 'evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.'" *Id.*
3. **Foundational Requirements.** "The relevance of scientific tests or analyses conducted on an item of tangible evidence involved in the litigation rests on a foundation showing that the item was in a condition when tested substantially similar to its condition at the time of the relevant events, or that any changes in condition and their effects on the test can be accounted for. " *See, e.g., Bourgeois v. Murphy*, 119 Idaho 611, 809 P.2d 472 (1991)(due process rights of prisoner violated by discipline based on testing of urine sample for evidence of marijuana use, where there was no documentation of the chain of custody of the sample to insure that sample was not mishandled)." *Id.*

"In addition, the foundation normally should include a showing that the testing method yields reliable and meaningful results, and that the test was properly performed. In many circumstances this showing will require the testimony of a person qualified to conduct the test who is personally familiar with the test in question." *Id.*

"An extra-judicial experiment requires a foundation showing that the conditions under which the experiment was conducted were substantially similar to those existing at the time of the event which is the subject of the experiment. The determination of sufficient similarity is left to the discretion of the trial judge. *Hansen v. Howard O. Miller, Inc.*, 93 Idaho

314, 460 P.2d 739 (1969); *Stuchbery v. Harper*, 87 Idaho 12, 390 P.2d 303 (1964)." *Id.*

The Idaho Court has held that "where a braking experiment was conducted using an automobile which differed in make, year, weight, and tire size from that involved in the accident in question, the trial court did not error in finding that the differences went to the weight rather than the admissibility of the evidence. *Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314, 460 P.2d 739 (1969)." *Id.*

However, where possible differences in the conditions of an experiment and the events at issue are not adequately accounted for, the Court has recognized that evidence of the experiment may mislead the jury. "In *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975), a pre-trial experiment had been conducted on a tractor to determine whether it would creep with its clutch disengaged. The evidence indicated that the tractor had been in use between the accident in question and the experiment. The Supreme Court directed the trial court on remand to give due consideration to these differences in determining whether to admit the evidence." *Id.*

Additional foundational requirements include that the evidence be shown to be relevant and not misleading, that a person who conducted the experiment or test was properly qualified, and that any scientific principles employed in the experiment or test are reliable and helpful.

4. **Conducting Experiment During Closing is Inappropriate.** Conducting an experiment during closing argument of counsel is an improper introduction of evidence before the jury because the opponent is denied the opportunity for objection to foundation, cross-examination, and rebuttal. *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 707 P.2d 416 (1985)(placement of ice cream on counsel table during argument to show rate of melting was potential ground for mistrial; harmless where matter shown was conceded by opponent).

B. Required Proof of Reliability of Scientific Evidence.

1. **Rule 702 is Controlling Authority in Idaho.** The appropriate test for measuring the scientific reliability of evidence in Idaho state courts is Rule 702. *Coombs v. Curnow*, 148 Idaho 129, 219 P.3d 453 (2009); *State v. Perry*, 140 Idaho 720, 103 P.3d 93 (2003); *Swallow v. Emergency Medicine of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003); *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 48 P.3d 651 (2002); *State v. Merwin*, 131 Idaho 642, 962 P.2d 1026 (1998); *Walker v. American Cyanamid Co.*, 130 Idaho 824, 948 P.2d 1123 (1997); *In Re SRBA Case*

No. 39576, 128 Idaho 246, 912 P.2d 614 (1995) *reh'g denied* (1995); *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992); *Marty v. State*, 122 Idaho 766, 838 P.2d 1384 (1992); *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996); *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992).

"The Idaho Supreme Court has rejected any requirement that the scientific methods used in the production of evidence be shown to have general acceptance in the scientific community. Instead, the proper approach to a determination of admissibility of scientifically derived evidence is the test of IRE 702, which permits evidence of scientific, technical, or specialized knowledge when it 'will assist the trier of fact to understand the evidence or determine a fact in issue.' *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (1991)." Lewis, IDAHO TRIAL HANDBOOK, p. 262 (1995).

2. **Rule 702 in Idaho State Courts.** The question has been raised whether the federal *Daubert* standards are applicable in applying Rule 702 in Idaho state courts. In *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996), the Idaho Court of Appeals expressly adopted the guidelines for applying Rule 702 that are enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 469 (1993). However, the Idaho Supreme Court has rejected the notion that the Idaho Court has adopted the *Daubert* standards for admissibility of an expert's testimony, stating the appropriate test for measuring the reliability of evidence in Idaho is I.R.E. 702. *Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180 (2007) ("The Court has not adopted the *Daubert* standard for admissibility of an expert's testimony but has used some of *Daubert's* standards in assessing whether the basis of an expert's opinion is scientifically valid."). See also *Swallow v. Emergency Med. Of Idaho*, 138 Idaho 589, 595 n.1, 67 P.3d 68, 74 (2003); *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 48 P.3d 651 (2002), citing *Walker v. Cyanamid*, 130 Idaho 824, 832 P.2d 1123 (1997); *State v. Hawkins*, 131 Idaho 396, 958 P.2d 22, *rev. den.*, (1998); *State v. Merwin*, 131 Idaho 642, 962 P.2d 1026 (1998); *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991); *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992); *State v. Faught*, 127 Idaho 873, 908 P.2d 566 (1995).

In *State v. Perry*, 140 Idaho 720, 103 P.3d 93 (2003), the Idaho Supreme Court cited *Daubert* and quoted with approval from *Daubert* in a case in which the Court held that polygraph results are inadmissible because they do not help the trier of fact to find facts or to understand the evidence as required by I.R.E.702. The Court stated:

The inquiry under I.R.E. 702 is whether the expert will testify to scientific knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue, "not whether the information upon which the expert's opinion is based is commonly agreed upon." *State v. Merwin*, 131 Idaho 642, 646, 962 P.2d 1026, 1030 (1998). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the fact in issue." *Daubert*, 509 U.S. at 592-93. This Court in *State v. Trevino*, 132 Idaho 888, 893-94, 980 P.2d 552, 557-58 (1999), held with regard to scientific evidence:

In *Daubert*, the Supreme Court held that the 'general acceptance in the scientific community' standard for determining the admissibility of scientific evidence had been replaced by the Federal Rules of Evidence, in particular F.R.E. 702. The *Daubert* court held that pursuant to Rule 702, the trial judge is assigned the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. *Daubert*, at 598-00, 113 S. Ct. at 2799, 125 L.Ed.2d at 485-86. In other words, for scientific evidence to be admitted, it must be supported by appropriate validation, establishing a standard of evidentiary reliability, and must assist the trier of fact to understand the evidence or to determine a fact in issue. *Id.* At 590-91, 113 S.Ct. at 2795, 125 L.Ed.2d at 480-81. The decision to admit or deny the evidence, therefore, is within the discretion of the trial judge in individual jurisdictions which may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. (Citation omitted).

More recently, in *Coombs v. Curnow*, 148 Idaho, 219 P.3d 453 (2009), a medical malpractice case, the Idaho Supreme Court described and explained the rules governing the admissibility of expert opinion testimony in Idaho courts. The Court stated:

Under the rules, expert opinion testimony is only admissible when "the expert is a qualified expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming

his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect. (Citing *Ryan v. Beisner* and I.R.E. 702, 703 and 403). Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible.” (Citing *Ryan v. Beisner* and I.R.E. 702.) Testimony is speculative when it “theoriz[es] about a matter as to which evidence is not sufficient for certain knowledge.” *Karlson v. Harris*, 140 Idaho 561, 565, 97 P.3d 428, 432 (2004). Conversely, expert testimony will assist the trier of fact when the reasoning or methodology underlying the opinion is scientifically sound and based upon a ‘reasonable degree of medical probability’” –mere possibility is insufficient. *Bloching v. Albertson’s, Inc.*, 129 Idaho 844, 846-47, 934 P.2d 17 (1997)(quoting *Roberts v. Kit Mfg. Co.*, 124 Idaho 946, 948, 866 P.2d 969, 971 (1993)).

In determining whether expert testimony is admissible, a court must evaluate “the expert’s ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion.” *Ryan*, 123 Idaho at 46, 844 P.2d at 28. Admissibility, therefore, depends on the validity of the expert’s reasoning and methodology, rather than his or her ultimate conclusion. (Citation omitted.) So long as the principles and methodology behind a theory are valid and reliable, the theory need not be commonly agreed upon or generally accepted. (Citation omitted.) While the court must “distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs,” it may not “substitute its judgment for that of the relevant scientific community.” *Ryan*, 123 Idaho at 46, 844 P.2d at 28.

Relevant considerations in determining whether the basis of an expert’s opinion is scientifically valid include “whether the theory can be tested and whether it has been subjected to peer review and publication.” *Weeks*, 143 Idaho at 838, 153 P.3d at 1184; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 ... (1993). Other indicia of reliability include, “the close oversight and observation of the test subjects, the prospectivity and goal of the studies,

... the presence of safeguards in the technique, ... analogy to other scientific techniques whose results are admissible, ... the nature and breadth of inferences drawn, ... the extent to which the basic data are verifiable by the court and jury, ... [the] availability of other experts to test and evaluate the technique, [and] the probative significance of the evidence in the circumstances of the case.” *State v. Konechy*, 134 Idaho 410, 417-18, 3 P.3d 535, 542-43 (Ct. App. 2000); *see also Daubert*,... (noting also the potential rate of error and general acceptance of the theory).

Coombs, 148 Idaho at 464-465.

In *Swallow v. Emergency Med. Of Idaho*, 138 Idaho 589, 67 P.3d 68, (2003), the Court held the trial court did not abuse its discretion in excluding from evidence affidavits of experts containing opinion testimony that an overdose of Cipro caused the decedent’s heart attack when the opinion was based on FDA Adverse Incident Reports that people taking Cipro had suffered heart attacks and PDR reports that in less than one percent of the cases, a person administered Cipro had a heart attack because neither source establish that an overdose of Cipro causes a heart attack. The temporal relationship is inadequate to establish the necessary scientific basis for the opinion. The court found such evidence inadmissible both under the *Daubert* test and under I.R.E. 702.

3. **Judicial Notice.** General scientific acceptance of the validity of a scientific method is an appropriate subject for judicial notice. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).
4. **Guidelines for Applying Rules.** Guidelines for applying Rules 702, 703 and 403 to determine the admissibility of expert testimony are provided in *Ryan v. Beisner*, 123 Idaho 42, 844 P.2d 24 (Ct. App. 1992). *See also West v. Sonke*, 132 Idaho 133, 968 P.2d 228, *reh.den.*, (1998). In *Ryan*, the Court of Appeals stated that “[the admissibility of expert opinion testimony depends] on the expert’s ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion. Thus, the key to admission of the opinion is the validity of the expert’s reasoning and methodology. In resolving these issues, the trial court should not substitute its judgment for that of the relevant scientific community. The court’s function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs.”

5. **Factors to Consider.** "Appropriate factors to consider in determining whether such evidence will be helpful are the degree to which the methods are utilized in the scientific community, the inherent understandability of the evidence, the qualifications of the expert who is providing the evidence, and the risks that the jury might be over-impressed by the aura of reliability of the evidence or confused by overly complex concepts. *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991)." Lewis, IDAHO TRIAL HANDBOOK, p.263 (1995).

"There is no requirement that the admissibility of scientific test evidence be based on a showing of 100 percent accuracy. *Crain v. Crain*, 104 Idaho 666, 662 P.2d 538, 37 A.L.R.4th 151 (1983)." *Id.*

6. **The Daubert Standard.** In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), the United States Supreme Court held that the admissibility of scientific evidence in federal courts would henceforth be governed by Federal Evidence Rule 702 rather than the "general acceptance" test that had been applied under the rule established in *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).

The Court stated that the rules, especially Rule 702, place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on reliable foundation and is relevant to the task at hand. Faced with a proffer of expert scientific evidence under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue.

The Court stated that under the rules, the trial judge must ensure that scientific evidence is relevant and reliable and identified several factors that may be considered to establish scientific reliability:

- Whether the theory can be and has been tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether the known or potential rate of error is acceptable and whether standards controlling the technique's operation exist; or
- Whether the theory or technique is "generally accepted" in the relevant scientific community.

The Court said that the inquiry is to be flexible and it must focus on principles and methodology, not on the conclusions that they generate.

However, in *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L.Ed.2d 508 (1997), the Court rejected argument that the trial court should admit a conclusion, regardless of whether it follows from the principles and methodology applied, stating that the trial court must examine the connection between principles and methodology, and the conclusion proffered as part of its gatekeeping function.

On the requirement of relevancy, the *Daubert* Court stated that, Rule 702 further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.' This condition goes primarily to relevance. Scientific tests or testimony which do not relate to any issue in the case are not relevant and ergo, non-helpful. 113 S. Ct. at 2795.

An additional consideration under Rule 702 -- and another aspect of relevancy -- is whether scientific evidence proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. The consideration is described as one of "fit."

The U.S. Supreme Court also explained that other rules may also be applicable. Rule 703 permits expert opinions to be based on otherwise inadmissible hearsay evidence only if the facts or data are of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.

Rule 403 permits the exclusion of relevant scientific evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Scientific evidence which is speculative or conclusory lacks probative value and may be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

The U.S. Supreme Court also has ruled that in the federal courts the *Daubert* factors are applicable in all instances where expert testimony is offered, and not just when scientific evidence is involved. *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). Further, the Court held the gatekeeper function of the trial judge applies to all expert testimony, including testimony based on experience, training and education, rather than scientific methodology.

C. Disclosure of Tests and Analyses in Criminal Cases.

- 1. Disclosure by Prosecutor.** "ICR 16(b)(5) requires the prosecuting attorney, on written request of the defendant, to permit the defendant to inspect and copy or photograph any results or reports of physical or mental

examinations and scientific tests or experiments made in connection with the case, within the possession, custody or control of the prosecutor, the existence of which is known or is available to the prosecuting attorney by the exercise of reasonable diligence." Lewis, IDAHO TRIAL HANDBOOK, p. 264 (1995).

"A prosecutor's provision of test results and conclusions without underlying working papers and graphs was adequate compliance with this rule. *State v. Caswell*, 121 Idaho 801, 828 P.2d 830 (1992)." *Id.* at 265.

The prosecutor need not make pre-trial disclosure of an experiment conducted by the State witness during the course of the trial. *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989), *cert. denied*, 493 U.S. 923 (1989).

2. **Disclosure by Defendant.** "ICR 16(c)(2) requires similar disclosure by the defendant on request of the prosecutor, but only for matter which the defendant intends to introduce at trial, or where the matter was prepared by a witness whom the defense intends to call at trial and relates to the testimony of the witness." Lewis, IDAHO TRIAL HANDBOOK, p. 264 (1995).

"The defendant is obligated by this rule to permit inspection of the described results and reports, but the rule does not authorize the court to order the defense expert to prepare such a report where none has been made or to submit to an interview by the prosecutor. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), *reh'g granted, in part, reh'g denied, in part*, 1991 Ida. LEXIS 58 (Idaho) *and on reh'g*, 1991 Ida. LEXIS 168 (Idaho) *and cert. denied*, 122 L.Ed.2d 119, 113 S. Ct. 962 (U.S.)." *Id.* at 265.

3. **Scope of "Scientific Test or Experiment."** The Idaho Appellate Court has held that a comparison by a police officer of an ignition key for an automobile involved in a crime with a key found in the defendant's possession was not a "scientific test or experiment" within the meaning of the rule. The Court said it was merely an observation of similarity between the two items and disclosure was not required. *State v. Matthews*, 108 Idaho 482, 700 P.2d 104 (Ct. App. 1985), *later proceeding*, 113 Idaho 83, 741 P.2d 370 (Ct. App. 1987).

D. Disclosure of Tests and Analyses in Civil Cases.

1. **IRCP 26(b)(4)(A).** Rule 26(b)(4)(A) "requires disclosure, in response to a discovery request, of the identity of a party's expected trial experts, the subject matter of their expected testimony, and the substance of the facts

and opinions to which the expert is expected to testify." Lewis, IDAHO TRIAL HANDBOOK, p. 265 (1995).

2. **Exclusion of Scientific Analysis.** In *Radmer v. Ford Motor Co.*, 120 Idaho 86, 813 P.2d 897 (1991), the Supreme Court held that a trial court committed reversible error by permitting an expert witness to testify to an opinion based on an accident reconstruction analysis, because in a discovery deposition, the witness had testified only to an opinion based on an allegedly defective part and the party calling the witness had not disclosed the accident reconstruction testimony prior to trial.

"However, in *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 846 P.2d 207 (1993), the Supreme Court upheld the trial court's permission of expert testimony by a witness who had conducted additional tests and formed new opinions since the witness' deposition two weeks prior to trial. The witness had not disclosed the new material to counsel until the night before his trial testimony and therefore counsel had not failed to supplement matter of which they were aware." *Id. at 266.*

E. Self-authentication of Alcohol-Concentration Tests.

1. **Idaho Code § 18-8004(4).** Section 18-8004(4) "provides for the admission, without necessity of a witness, of results of tests for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by, or by a method approved by, the Idaho department of law enforcement." Lewis, IDAHO TRIAL HANDBOOK, p. 266 (1995).

IRE 901(10) provides for authentication by any method of authentication provided by statute. However, the rules do not provide a hearsay exception applicable to evidence covered by this statute, except in preliminary hearings, where, under Evidence Rule 101(d)(1) and ICR 5.1(b), hearsay in the form of reports of results of scientific examinations of evidence by state or federal agencies or official, may be admitted, provided the magistrate determines the source of said evidence to be credible.

2. **Judicial Notice of Regulations.** The Idaho Court of Appeals has held that a court may take judicial notice of rules and regulations adopted by the department of law enforcement toward implementation of this statute. *State v. Howell*, 122 Idaho 209, 832 P.2d 1144 (Ct. App. 1992).

F. Intoximeter 3000; Intoxilyzer 5000; Test Results; Blood Alcohol Tests.

1. **Intoximeter 3000.** The Supreme Court has held that the reliability of the process used in the Intoximeter 3000 is sufficiently established to be a

proper subject of judicial notice, and no witness needs to be called to testify to the reliability of the testing process as a prerequisite to admissibility. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (1991). See also *State v. Winson*, 129 Idaho 298, 923 P.2d 1005 (Ct. App. 1996)(court may take notice of the approval of the Intoxilyzer 5000 for purposes of determining the admissibility of test results); *State v. Ward*, 135 Idaho 400, 17 P.3d 901 (Ct. App. 2001) (trial court erroneously prohibited defendant from attacking accuracy, weight, or reliability of breathalyzer test after statutory foundation for admissibility was established); *State v. Nickerson*, 132 Idaho 406, 973 P.2d 758 (Ct. App. 1999) (evidence of compliance of testing procedure with method approved by Department of Law Enforcement was described in Idaho Code § 18-8004(4), is one means of establishing foundation under Idaho Rules of Evidence).

However, the general admissibility of such test results does not limit the right of an opponent to introduce evidence relevant to the weight and credibility of such evidence, or to attack the reliability of the test's results and the process utilized. *Id.*

2. **Intoxilyzer 5000.** In *Masterson v. Idaho Dept. of Transp.*, 150 Idaho 126, 244 P.3d 625 (Ct. App. 2010), the Court of Appeals held that the evidence was insufficient to determine whether the Intoxilyzer 5000 EN was such a new instrument from the Intoxilyzer 5000 that it required operator recertification.

In *State v. Kramer*, 153 Idaho 29, 278 P.3d 431 (Ct. App. 2012), rev. den., (June 11, 2012), the Court of Appeals held that the Intoxilyzer 5000 certificates of calibration are not testimonial and a defendant does not have the right to confront the makers of the certificates.

In *Bennett v. State, Dept. of Transp.*, 147 Idaho 141, 206 P.3d 505 (Ct. App. 2009), the Court of Appeals held that where there had not been strict compliance with the administrative procedures in administering the test, expert testimony to establish the reliability of the test result cannot merely claim that the result was reliable because the machine worked. The Court said the testimony must establish why the procedural defects did not affect the reliability of the result. In this case the driver testified that the officer conducting the test had left the room twice during the 15 minute monitoring period and that the driver was coughing frequently during the period. This testimony was countered only by a conclusory affidavit from the officer that proper procedures were followed.

But see *State v. Healy*, 151 Idaho 734, 264 P.3d 75 (Ct. App. 2011), where the Court of Appeals held the reliability of the Intoxilyzer 5000EN was

established despite the failure to precisely follow procedures concerning the test solution.

3. **Blood Alcohol Tests.** "A defendant charged with driving under the influence of alcohol was entitled to present competent testimony from an expert witness predicting his blood alcohol level at the time, to support the inference that a breath alcohol reading from an Intoximeter 3000 was inaccurate. *State v. Pressnall*, 119 Idaho 207, 804 P.2d 936 (Ct. App. 1991)(rejection of evidence was reversible error)." Lewis, IDAHO TRIAL HANDBOOK, p. 268 (1995).

"Idaho Code § 18-8004, which addresses the crime of driving under the influence of alcohol or drugs, provides for the measurement of blood alcohol level by analysis of blood, urine or breath. The admissibility of a test result for such a test depends on a foundation which establishes the acceptability, validity, reliability and accuracy of the test and test procedures. *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988). Certain tests and procedures recognized by the Idaho Department of Health and Welfare are presumptively reliable, but admission of the test results still requires a showing that the tests were properly administered. *Id.*" *Ibid.*

G. **Horizontal Gaze Nystagmus Test.**

1. **Reliability.** The Idaho Court has held that "the horizontal gaze nystagmus test (or HGN test), a field sobriety test involving observation of the movement of a subject's eyes as they follow a moving object, is sufficiently reliable to be admissible at trial through the testimony of a qualified witness, as circumstantial evidence of intoxication. It may not, however, be admitted as evidence of any certain degree of blood alcohol content. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991)." Lewis, IDAHO TRIAL HANDBOOK, p. 268-9 (1995).
2. **Testimony by the Officer.** "The arresting officer is permitted to testify that nystagmus may be an indicator of intoxication, not that it is conclusive. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992)." *Id.*

H. **Polygraph and "Truth Serum" Examinations.**

1. **Polygraph Results.** "As a general rule, results of polygraph examinations are inadmissible absent a stipulation by both parties; the physiological and psychological bases for the polygraph examination have not been sufficiently established to assure the validity or reliability of test results. *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989), *cert. denied*, 493 U.S. 917, 107 L. Ed. 2d 258, 110 S. Ct. 277 and (criticized on other grounds by

State v. Paz, 118 Idaho 542, 798 P.2d 1)." Lewis, IDAHO TRIAL HANDBOOK, p. 266 (1995). See also, State v. Fodge, 121 Idaho 192, 824 P.2d 123 (1992), post-conviction proceeding, 125 Idaho 882, 876 P.2d 164 (Ct. App., Rev. denied. 1994).

In *Fain*, the Supreme Court stated that where stipulated polygraph results are offered the trial court has discretion to exclude the evidence if it finds that the examiner was not qualified or the conditions under which the test was administered were unfair. The opposing party must be permitted to cross-examine the examiner as to his or her expertise, the reliability of polygraph examination, the accuracy of the polygraph both in general, and in the particular case. In addition, the jury must be instructed that the examiner's testimony as to the results of the test is not conclusive, but is to be taken only as an expert opinion.

In *Fodge*, "the Supreme Court held that a trial court properly refused, as irrelevant, a defense tender of testimony by a polygraph examiner which would not relate the test results but would be limited to a description of the process and the examiner's observations of the defendant's physiological responses. In addition, the defendant's offer of evidence of statement he made during the examination was properly refused on the ground that it was hearsay." Lewis, IDAHO TRIAL HANDBOOK, p. 267 (1995).

2. **Child Protective Act Proceedings.** In *Matter of X*, 110 Idaho 44, 714 P.2d 13 (1986), the Supreme Court held that polygraph evidence offered by or on behalf of the accused or the victim will be admissible in Child Protective Act proceedings where sexual abuse is alleged and where the evidence of sexual abuse consisted almost entirely of "evidence" received secondhand from counselors and psychologists who had interviewed the alleged victim and who had then formed opinions of sexual abuse. The weight to be given polygraph results is in the discretion of the trial court in such cases.
3. **Federal Courts.** The Ninth Circuit Court of Appeals and other circuit courts have admitted polygraph evidence based on the *Daubert* decision. However, the U.S. Supreme Court has held that a *per se* rule against the admissibility of lie detector tests in federal courts is constitutional. See *U.S. v. Scheffer*, No. 96-1133 (March 31, 1998)(upheld military court's rejection of polygraph evidence offered by accused that the accused had not take drugs as alleged).
4. **"Truth Serum" Results.** "Evidence of statements made while under the influence of sodium amytal, so-called "truth serum," is inadmissible. *State v. Linn*, 93 Idaho 430, 462 P.2d 729 (1969) (inadmissible at least until

showing such tests have gained scientific acceptance); *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)." Lewis, IDAHO TRIAL HANDBOOK, p. 267 (1995).

I. Hypnotically-refreshed Memory.

1. **Significant Dangers.** "In *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984), the Supreme Court recognized significant dangers of tainting a witness's memory by the process of hypnotizing the witness to induce improved recall, and set out guidelines for control over the subsequent testimony at trial of a previously-hypnotized witness." *Id.*

"The Court in *Iwakiri* cautioned that where a previously-hypnotized witness is permitted to testify at trial, the witness should be precluded from mentioning on direct examination the fact of hypnosis; the opposing party may impeach the witness by evidence of the hypnosis or with prehypnosis-inconsistent statements, and each party may then offer proof on the dangers and benefits of hypnosis." *Id.*

2. **Hearsay Statements are Inadmissible.** "It should be noted that *Iwakiri* does not purport to permit admission of evidence of statements the witness may have made while under hypnosis; such statement would be hearsay, subject to special risks of unreliability rather than the kind of enhanced reliability which might justify application of a hearsay exception." *Id.*

J. Tests in Paternity Actions.

1. **Blood Tests Under Idaho Code §§ 7-1115 through 7-1119.** Sections 7-1115 through 7-1119 "provide for the use of blood tests and medical, scientific or genetic evidence of tests performed by experts as evidence in the determination of paternity." *Id.*

Section 7-1116(1) "provides that a blood test with a probability of paternity of 98 percent creates a rebuttable presumption of paternity. This statutory provision applies to blood tests only where they are performed by a court-appointed expert. *State, Department of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992)." *Id.* at 268.

2. **Human Leukocyte Antigen Tissue Typing Tests.** "The use of human leukocyte antigen tissue typing tests as proof of paternity, even where they are not shown to be 100 percent accurate, is permissible. *Crain v. Crain*, 104 Idaho 666, 662 P.2d 538, 37 A.L.R.4th 151 (1983)." *Id.*

K. Neutron Activation Analysis.

1. **Defined.** Neutron activation analysis is a method of identifying substances often applied to minute quantities of material. *See* Lewis, IDAHO TRIAL HANDBOOK, p.269 (1995).
2. **Idaho Law.** No reported Idaho decision has explicitly approved the admissibility of the results of neutron activation analysis, against a challenge to its admission. "However, an implicit approval is found in *State v. Warden*, 100 Idaho 21, 592 P.2d 836 (1979), where the Supreme Court rejected a challenge to the sufficiency of the evidence to convict based in part on the results of a neutron activation analysis test which had been admitted at trial, indicating gunpowder residue on the defendant's hands. *See also State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986)(no error in admitting report of neutron activation analysis over objections that it was hearsay and unduly cumulative)." *Id.*

L. DNA "Fingerprint" Evidence.

1. **Defined.** DNA "fingerprint" evidence involves the identification of individuals through comparison between DNA patterns in human body fluids.
2. **Admissibility in Idaho.** "In *State v. Faught*, 127 Idaho 873, 908 P.2d 566 (1995), the Supreme Court upheld the admission of FBI agent's testimony concerning DNA comparisons conducted in a rape case. The evidence included testimony describing 'a combined match probability of about one in 60,000.' The defense challenged the scientific reliability of the statistical probability testimony, but did not offer evidence to challenge the reliability of the FBI databases." Lewis, IDAHO TRIAL HANDBOOK, Supp. at 60 (1998).

"In *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990), the Supreme Court held that a report of a DNA comparison done by a private laboratory was not a report of medical facts and records which could be admitted in affidavit form during a probable cause hearing pursuant to ICR 5.1(b), and was instead a report of a scientific examination of evidence." *Id.* at 269.

"The Court noted, however in *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991), that the reliability of DNA "fingerprinting" is directly related to the procedures and protocols involved in the test procedure because of the possibility of test sample contamination and confusion." *Id.*

M. Blood Spatter Analysis.

1. **Admissibility in Idaho.** In *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1208 (1991), the Court held that expert interpretation of blood spatter evidence to predict how violent events took place is sufficiently reliable and helpful to be admissible, through the testimony of a qualified witness.
2. **Qualifications of Witness.** In *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993), the Court held that a police officer who had taken a one-week course in blood spatter analysis and had employed the technique on a number of occasions was sufficiently qualified to render a blood spatter analysis opinion.

N. GPS Tracking.

1. **Defined.** A GPS tracking unit is a device that uses the Global Positioning System to determine the precise location of a vehicle, person, or other asset to which it is attached and to record the position of the asset at regular intervals. The recorded location data can be stored within the tracking unit, or it may be transmitted to a central location data base, or internet-connected computer, using a cellular (GPRS or SMS), radio or satellite modem embedded in the unit. This allows the asset's location to be displayed against a map backdrop either in real time or when analyzing the track later, using the GPS tracking software.
2. **Admissibility in Idaho.** In *State v. Danney*, 2010 WL 4366393 (Idaho Ct. App. 2010), reh'g dismissed (Apr. 23, 2012), the Court held that the police officer's admission that he did not know the science behind GPS tracking did not preclude admission where there was substantial evidence of the devices' prior accurate use during testing.

VI. SPOILIATION OF EVIDENCE

A. General Rules.

1. **Adverse Inference.** The evidentiary doctrine of spoliation provides that when a party with a duty to preserve evidence intentionally or recklessly destroys it to avoid the adverse consequences of admission at trial, an inference arises that the missing or destroyed evidence was unfavorable to that party's position. The destruction or concealment of such evidence is deemed to be an admission by conduct. *Courtney v. Big O. Tires, Inc.*, 2003 WL 22998805 Idaho, (2003 Opinion No. 128, Filed December 23, 2003) (citing, *Bromely v. Garey*, 132 Idaho 807, 812, 979 P.2d 1165, 1170 (1999); *Stuart v. State*, 127 Idaho 806, 816, 907 P.2d 783, 793 (1995)).

2. **Intentional or Reckless Loss or Destruction Under Circumstances Manifesting Bad Faith is Required.** Intentional or reckless loss or destruction under circumstances that indicate that the evidence was lost or destroyed because the party responsible for such loss or destruction did not want the evidence available for use by an adverse party in pending or reasonably foreseeable litigation is required for the adverse inference. The merely negligent loss of evidence will not support the inference, nor will the intentional destruction of an item that a party had no reason to believe had any evidentiary significance at the time it was destroyed. *Id.*
3. **Application is Discretionary.** Spoliation is a rule of evidence that is applicable at the discretion of the trial court. *Id.*
4. **Application is Limited to Offending Party.** As an admission, the spoliation doctrine only applies to the party connected to the loss or destruction of the evidence. It is not enough to show that a third person did the acts charged as obstructive. They must be connected to the party, or in the case of a corporation to one of its superior officers, by showing that an officer did the act or authorized it by words or other conduct. *Id.*

END OF OUTLINE

SELECTED PROBLEMS

TRIAL EVIDENCE FOR JUDGES 2013 IDAHO JUDICIAL CONFERENCE

PROBLEM NO. 1.

In a prosecution for manufacturing a controlled substance, the state presents the testimony of investigating officer Deputy Brown that during a search of defendant's barn, he found 235 potted plants which appeared to be marijuana. Brown testifies that he placed the plants in a police van and drove them to the sheriff's office, where he delivered them to the evidence custodian, Deputy Green. Deputy Green testifies that she placed the plants in an evidence locker and then delivered them to Deputy White for transport to the State crime lab for analysis. Mr. Smith of the crime lab testifies that he received 235 potted plants from a person who identified himself as Deputy White, and then analyzed them for presence of controlled substances. The defense objects to any testimony about the test results on the grounds of relevance, contending that there is a break in the chain of custody because of the failure of Deputy White to testify, thus precluding a finding that the plants tested were the ones found in defendant's barn.

Should the test results be admitted?

NOTES

PROBLEM NO. 2.

Defendant is charged with rape. Defendant served notice under Rule 412 of intent to offer evidence that the alleged victim had made a prior allegation of a sex crime by her father which she later recanted. At the Rule 412 hearing, she testified that she had been removed from her home and that she had recanted so she could return home. The victim recanted her recantation, asserting that her father did in fact sexually abuse her.

The State has objected to the evidence under Rules 402, 403, and 412. Defendant contends it is relevant to the victim's credibility.

Should the court rule on Defendant's offer of this evidence?

NOTES

PROBLEM NO. 3.

The Defendant is charged with lewd conduct with a child. The court admitted evidence offered by the State that Defendant had failed to keep an appointment to meet with the police detective during the investigation of the allegations, and had moved to Utah prior to the date of the scheduled police interview. Defendant objected on the ground that the evidence was irrelevant and unduly prejudicial. When admitted, the Defendant was allowed to explain his reasons for moving to Utah.

Was the evidence of the move to Utah admissible?

NOTES

PROBLEM NO. 4.

In the movie *The Verdict*, Paul Newman represents a plaintiff who suffered severe injuries when she choked on vomit while under anesthesia. Paul finds a surprise witness, an operating room nurse who testifies that after the operation, she was instructed by the surgeon to alter the pre-op report, changing the information concerning how recently the patient had eaten a meal from "1 hour" to "10 hours." However, the nurse testifies she secretly made a copy of the report before she altered it. When Paul offers the nurse's claimed photocopy, the defense objects on Best Evidence grounds and the objection is sustained.

Was the ruling correct?

NOTES

PROBLEM NO. 5.

In a prosecution for trafficking in cocaine, Officer Smith, an undercover agent, testifies that he met with the defendant to discuss defendant's possible sale of cocaine to the agent. Defense counsel objects to the officer's testimony, describing the conversations that took place at the meeting. On voir dire in aid of objection, the officer testifies that his conversation with the defendant was tape recorded through a bug the officer was wearing. Defense counsel insists that the tape is the best evidence and must be introduced to prove the contents of the conversation.

Is the defense objection well-taken?

NOTES

PROBLEM NO. 6.

In a breach of contract action, Albert, the plaintiff, offers Exhibit A, which Albert testifies is an exact photocopy of the contract between the parties. Betty, the defendant, testifies on voir dire in aid of objection that while the document is similar to the agreement signed by the parties, it contains provisions that were not in the original agreement. Betty objects to the introduction of the photocopy. Albert's lawyer responds that Betty's argument goes to the weight to be given the evidence, not its admissibility.

Should the photocopy be admitted?

NOTES

PROBLEM NO. 7.

Adams has sued Baker, claiming that Baker negligently performed repairs to Adam's roof, causing the roof to leak. At trial, Baker seeks to introduce an allegation contained in Adams' original complaint which alleged that the roof leak was caused by inferior materials supplied by Cox, then a named defendant. Cox has since been dropped from the case and the allegation in question was deleted in an amendment to the complaint authorized by the Court.

Should the evidence be admitted?

NOTES

PROBLEM NO. 8.

At trial on the issue of the value of the land being condemned, the landowner's appraisal expert testified to her opinion of the value of the land taken. The landowner also had the expert authenticate her written report containing her evaluation of the comparable sales she analyzed and the basis for her opinion of value. The landowner offered the report into evidence.

Is it admissible?

NOTES

PROBLEM NO. 9.

In an action for personal injuries from a motor vehicle accident, the defense put their medical doctor who had conducted the individual medical examination on the stand to refute the Plaintiff's claims of injuries. The doctor testified that he had examined the medical records of the Plaintiff and conducted the I.M.E. He testified that he based his opinion on his evaluation of the medical records and his examination of the Plaintiff, and that in his opinion, to a reasonable degree of medical certainty, Plaintiff's alleged neck injuries did not result from the accident. The doctor testified that he relied on the contents of the medical records of Plaintiff to form his opinion, which contained medical history in which Plaintiff was reported to have told prior medical caregivers that she had complaints of similar neck pain and injuries prior to the accident. Defendant offered the medical reports into evidence and Plaintiff objected that they are hearsay.

Are they admissible?

NOTES

PROBLEM NO. 10.

Plaintiff has sued the adjoining landowner for contaminating Plaintiff's property with fuel residue. Plaintiff alleges that Defendant allowed fuel tanks on his farm to leak, and that ground water has transported the fuel to Plaintiff's land and reduced the value of Plaintiff's property. Plaintiff has a computer-generated model that illustrates how the fuel leaked from the tank and into the ground and was transported to Plaintiff's property which Plaintiff offers in evidence.

What foundation would you require to admit the evidence?

NOTES

PROBLEM NO. 11.

Plaintiff was injured in a one-car Isuzu Trooper rollover. Plaintiff intends to offer:

1. A computer simulation of the Isuzu rollover.
2. Computer-generated bookkeeping records.
3. E-mail messages between Isuzu employees.
4. Computer-generated summaries of the Plaintiff's damages claims.

What foundation is required to admit each of the types of computer-generated evidence?

What objections should you anticipate?

NOTES

PROBLEM NO. 12.

In an action for the wrongful death of a child, Defendant has a video that she wants to show the jury to demonstrate how the accident occurred when the child darted in front of the vehicle from between two cars. Defendant has purportedly reconstructed the accident scene and the accident.

What foundation do you require to admit a video reconstruction of an accident?

NOTES

PROBLEM NO. 13.

In a criminal action for sexual abuse, the state notifies the court and counsel that it intends to offer DNA evidence that links the accused to the crime. The evidence consists of the results of the analysis by a state crime lab of semen purportedly obtained from the panties of the victim and compared to bodily fluids purportedly obtained from the accused.

The Defendant also serves notice that it too has and intends to offer evidence of the results of the analysis of semen purportedly obtained from the panties of the victim and compared to bodily fluids purportedly obtained from the accused which will prove a mismatch.

What foundation do you require for admissibility of either or both test results?

NOTES

PROBLEM NO. 14.

Defendant is charged with shoplifting, I.C. § 18-4626. At the request of the prosecutor, the court instructs the jury, in the language of the statute, that “Goods, wares or merchandise found concealed upon the person shall be prima facie evidence of a willful concealment.”

Has the court acted properly?

NOTES