

**TRIAL EVIDENCE FOR JUDGES**  
**LECTURE SERIES**  
**PARTS 4 THROUGH 5 OF 5**

**Presented By**  
**D. Craig Lewis, Esq.**  
**University of Idaho College of Law, Retired**  
**Moscow, Idaho**  
**and**  
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**Boise, Idaho**

**4**

**PART IV**

**TRIAL EVIDENCE FOR JUDGES:  
THE EXCLUSIONARY RULES**

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September 22, 2009  
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# TABLE OF CONTENTS

	Page
<b>I. INTRODUCTION</b> .....	1
<b>II. EXCLUSION OF RELEVANT EVIDENCE - I.R.E. ARTICLE IV</b> .....	1
<b>A. Exclusion on Grounds of Prejudice, Confusion, or Waste of Time - I.R.E. 403</b> .....	1
1. Rule Favors Admission .....	2
2. Unfair Prejudice Required .....	2
<b>B. The Character Evidence Ban and its Exceptions - I.R.E. 404</b> .....	2
1. Habit Evidence Distinguished .....	2
2. Rationales for Rule.....	3
3. Three Specific Exceptions.....	3
a. “Mercy rule”.....	3
b. Pertinent trait of victim .....	3
c. Character of witness.....	3
4. Past Conduct.....	4
5. Other Bad Acts Evidence In Sex Abuse Cases .....	4
6. Dissimilar Offenses Or Victims.....	5
7. Preparation Or Plan.....	5
8. Examples, Outside Of The Sexual Abuse Context, In Which Other Bad Act Evidence May Be Admissible: .....	5
a. To prove identity by showing a distinctive <i>modus operandi</i> :.....	5
b. To prove intent: .....	6

c. To prove identity by showing defendant had access to a weapon similar to that used in the charged offense. ....	6
d. <i>Res gestae</i> evidence .....	6
e. Caution is advised in admitting evidence of other bad acts under a “common plan or scheme” rationale. ....	6
9. Procedural requirements.....	7
10. Rule 404 and Rule 609 .....	7
11. Multi-Tiered Analysis Required .....	7
12. Three Considerations of Heightened Risk .....	7
C. Character as an Element of Charge, Claim or Defense - I.R.E. 405(b) .....	8
D. Evidence of Habit or Routine Practice - I.R.E. 406 .....	8
1. Prior Similar Occurrences.....	8
2. Absence of Prior Accidents.....	8
3. Prior Acts of Negligence .....	8
E. Subsequent Remedial Measures - I.R.E. 407 .....	8
1. Exceptions to Prohibition .....	9
2. Comparable Federal Rule Modified.....	9
3. Idaho Rule Amended .....	9
F. Evidence of Settlements or Offers to Compromise - I.R.E. 408.....	9
1. Application Limited to Disputed Claims.....	9
2. Effect of Disclosure During Negotiations .....	9
G. Evidence of Payment or Offers to Pay Medical and Similar Expenses - I.R.E. 409 .....	9
H. Evidence of Pleas, Plea Discussions, and Related Statements - I.R.E. 410 .....	9
1. Attorney for Prosecution Must be Involved .....	10

2. Idaho Exception for Impeachment .....	10
3. Prohibition is Strictly Enforced .....	10
4. Payment of Traffic Citation is Admission of Guilt.....	10
5. Nolo Contendere Plea Abolished .....	10
I. Evidence of Liability Insurance - I.R.E. 411.....	10
1. Scope of Prohibition is Limited.....	10
2. Use in Voir Dire .....	11
J. The “Rape Shield” Protection - I.R.E. 412 .....	11
1. Reputation or Opinion Evidence Prohibited .....	11
2. Five Exceptions to Prohibition .....	11
a. When constitutionally required .....	11
b. Proof of past behavior.....	11
c. Past sexual behavior.....	11
d. Prior false allegations.....	11
e. Sexual behavior with persons other than the accused .....	11
3. Alleged Lies of Victim .....	11
4. Procedural Preconditions .....	12
K. Proceedings of Medical Malpractice Screening Panels - I.R.E. 413.....	12
L. Expressions of Condolence or Sympathy – I.R.E. 414.....	12
1. Statement of Fault .....	12
2. Health Care Professional.....	12
3. Unanticipated Outcome .....	12
III. TESTIMONIAL PRIVILEGES - I.R.E. ARTICLE V .....	12
A. Generally: Scope and Burdens of Proof.....	12

1. Restriction to Confidential Communications .....	13
2. What Constitutes a Confidential Communication .....	13
3. The Burden of Proving the Privilege .....	14
4. A Claim of Privilege May be Ineffective .....	15
<b>B. Evidence Rules Control .....</b>	<b>15</b>
1. Qualifications to Testify .....	15
2. Husband-Wife Privilege .....	15
3. Presumptions .....	15
4. Recognizing Conflict .....	15
5. Intent for the Rule .....	15
6. Application of Rule 1102 .....	15
<b>C. Privileges Recognized Only as Provided — I.R.E. 501 .....</b>	<b>16</b>
1. Common Law Privileges Excluded .....	16
2. Qualified Reporter’s Privilege .....	16
3. Constitutional Right Against Self-Incrimination .....	17
4. Work-Product Rule .....	17
<b>D. Communications Made Out of State--Whose Law to Apply .....</b>	<b>17</b>
1. Restatement .....	17
2. Four Factors .....	17
<b>E. Who is Holder of the Privilege .....</b>	<b>18</b>
<b>F. Who May Claim the Privilege .....</b>	<b>18</b>
<b>G. Who May Waive the Privilege .....</b>	<b>18</b>
1. Waiver by Counsel .....	18
2. Failing to Object .....	19

<b>H. Waiver by Voluntary Disclosure - I.R.E. 510 .....</b>	<b>19</b>
<b>1. Intentional Relinquishment of Right Unnecessary .....</b>	<b>19</b>
<b>2. Judicial Discretion Require.....</b>	<b>19</b>
<b>I. Compulsory Disclosure - I.R.E. 511.....</b>	<b>19</b>
<b>1. Erroneous Compulsion .....</b>	<b>19</b>
<b>2. Unintended Disclosure.....</b>	<b>20</b>
<b>J. Comment Upon or Inference from Claim of Privilege - I.R.E. 512.....</b>	<b>20</b>
<b>1. Comment Improper .....</b>	<b>20</b>
<b>2. Forbidden Conduct .....</b>	<b>20</b>
<b>3. Instruction Available.....</b>	<b>20</b>
<b>K. Lawyer-Client Privilege - I.R.E. 502 .....</b>	<b>20</b>
<b>1. Essential Elements.....</b>	<b>21</b>
<b>2. Prospective Lawyer-Client Relationship is Covered.....</b>	<b>21</b>
<b>3. “Client” .....</b>	<b>21</b>
<b>4. “Representative of the Client” .....</b>	<b>21</b>
<b>5. “Lawyer”.....</b>	<b>22</b>
<b>6. “Representative of the Lawyer”.....</b>	<b>22</b>
<b>7. “Confidential Communications” Protected.....</b>	<b>22</b>
<b>8. Scope of Privilege .....</b>	<b>22</b>
<b>9. Protection is Limited.....</b>	<b>23</b>
<b>10. Who May Claim Privilege .....</b>	<b>23</b>
<b>11. Burden of Proof .....</b>	<b>23</b>
<b>12. Exceptions .....</b>	<b>24</b>
<b>a. Crime or fraud.....</b>	<b>24</b>

b. Claims through same deceased client.....	24
c. Breach of duty by lawyer or client.....	24
d. Attested document.....	25
e. Common interest or defense of joint clients.....	25
f. Corporate client.....	25
<b>L. Physician and Psychotherapist-Patient Privilege - I.R.E. 503.....</b>	<b>25</b>
1. Scope of Rule.....	25
2. Rule in Civil Action.....	26
3. Rule in Criminal Action.....	26
4. Who Employs Psychotherapist Immaterial.....	26
5. Who May Claim Privilege.....	27
6. Authority Presumed.....	27
7. “Patient”.....	27
8. “Physician”.....	27
9. “Psychotherapist”.....	27
10. “Confidential Communication”.....	27
11. Exceptions.....	28
a. Guardian or conservator proceedings.....	28
b. Court-ordered examinations.....	28
c. Condition an element of claim or defense.....	28
d. Child related communications.....	29
12. Juvenile Proceeding.....	29
<b>M. Husband-Wife Privilege - I.R.E. 504.....</b>	<b>29</b>
1. Rule Supersedes Statute.....	29

2. Who May Claim Privilege .....	29
3. Scope of Privilege .....	30
4. Communication During Marriage Required.....	30
5. “Confidential Communication” .....	30
6. Exceptions .....	30
a. Child related communications .....	30
b. Criminal conduct of a spouse .....	31
c. Statutory proceedings .....	31
d. Spouse vs. spouse.....	31
e. Guardian or conservator proceedings.....	31
<b>N. Religious Privilege - I.R.E. 505 .....</b>	<b>31</b>
1. Who May Claim the Privilege.....	31
2. “Clergyman” .....	32
3. “Confidential Communication” .....	32
<b>O. Political Vote Privilege - I.R.E. 506 .....</b>	<b>33</b>
1. Exception.....	33
2. Privilege Limited .....	33
<b>P. Conduct of Mediations - I.R.E. 507 .....</b>	<b>33</b>
1. Who May Claim the Privilege.....	33
2. Scope of Privilege .....	34
3. Waiver and Exceptions .....	34
4. Exclusion Based on Need .....	34
5. Application of Rule 507.....	34
<b>Q. Secrets of State and Other Governmental Privileges - Rule 508 .....</b>	<b>35</b>

1. Recognition of Governmental Privileges is Restricted.....	35
2. Idaho Statutory Privilege.....	35
3. Effect of Sustaining Claim.....	35
<b>R. Identity of Informer Privilege - I.R.E. 509.....</b>	<b>36</b>
1. Conferred Only on Public Entity.....	36
2. Scope of Privilege .....	36
3. Who May Claim the Privilege.....	36
4. Exceptions .....	36
a. Voluntary disclosure .....	36
b. Informer as a witness .....	37
5. Testimony on relevant issue .....	38
6. Alternatives to testifying.....	38
7. Procedural requirements.....	38
<b>S. Parent-Child; Guardian or Legal Custodian-Ward Privilege - I.R.E. 514.....</b>	<b>38</b>
1. Who Holds the Privilege .....	38
2. Scope of Privilege .....	38
3. Who May Claim the Privilege.....	39
4. “Confidential Communication” .....	39
5. Exceptions .....	39
a. Civil action .....	39
b. Criminal action.....	39
<b>T. Accountant-Client Privilege - I.R.E. 515.....</b>	<b>39</b>
<b>U. School Counselor-Student Privilege - I.R.E. 516.....</b>	<b>39</b>
1. Who Holds the Privilege .....	39

2. Who May Claim the Privilege .....	40
3. “Student” .....	40
4. “School Counselor” .....	40
5. “Confidential Communication” .....	40
6. Exceptions .....	41
a. Civil action .....	41
b. Guardian or hospitalization .....	41
c. Child related communications .....	41
d. Crime or harmful act .....	41
V. Licensed Counselor-Client Privilege - I.R.E. 517 .....	41
1. “Client” .....	42
2. “Licensed Counselor” .....	42
3. “Confidential Communication” .....	42
4. Who May Claim the Privilege .....	42
5. Exceptions .....	42
a. Civil action .....	42
b. Proceedings for guardianship, conservatorship or hospitalization .....	42
c. Child related communications .....	42
d. Licensing board proceedings .....	43
e. Contemplation of crime or harmful act .....	43
W. Licensed Social Worker-Client Privilege - I.R.E. 518 .....	43
1. “Client” .....	43
2. “Licensed Social Worker” .....	43
3. “Confidential Communication” .....	43

4. Who May Claim the Privilege.....	43
5. Exceptions .....	43
a. Contemplation or execution of crime or harmful act .....	43
b. Charges against licensee .....	44
c. Civil action .....	44
d. Proceedings for guardianship, conservatorship or hospitalization .....	44
e. Child related communications .....	44
<b>X. Hospital, In-Hospital Medical Staff Committee and Medical Society Privilege</b>	
- I.R.E. 519 .....	44
1. Scope of Rule.....	44
2. Who May Claim the Privilege.....	45
3. “Hospital” .....	45
4. “In Hospital Medical Staff Committee” .....	45
5. “Confidential Communication” .....	45
6. Exception.....	46
7. Waiver .....	46
<b>Y. Medical Malpractice Screening Panel Privilege - I.R.E. 520 .....</b>	<b>46</b>
1. Who May Claim the Privilege.....	47
2. “Confidential Communication” .....	47
3. Exceptions .....	47
<b>IV. PRIVILEGE AGAINST SELF-INCRIMINATION.....</b>	<b>47</b>
<b>A. Fifth Amendment Privilege .....</b>	<b>47</b>
1. Right to Remain Silent.....	47
2. Scope of Privilege .....	48

3.	Consequences Required.....	48
4.	Reasonable Cause to Fear Prosecution Required .....	48
5.	Court Must Determine if Silence Justified.....	48
6.	Context Must be Considered.....	48
7.	Proof Required to Establish Right.....	48
8.	Contents of Documents .....	49
9.	Application at Sentencing.....	49
10.	Inapplicability if Defendant Asserts Mental Condition as a Defense.....	49
B.	Waiver of Self-Incrimination Privilege. ....	49
1.	Scope of Waiver .....	49
2.	Testimony on Credibility .....	49
3.	Cross-examination Limited .....	50
C.	Constitutional Right Not to Testify.....	50
1.	Fifth Amendment Right.....	50
2.	Comment Prohibited.....	50
3.	Waiver of Right by Testifying at Pre-trial Hearing .....	50
V.	THE “DEADMAN” RULE — I.R.E. 601(b). ....	50
A.	Generally .....	50
B.	Rule 601(b):.....	50
C.	Scope of Rule Limited .....	51
D.	Scope of Disqualification .....	51
E.	Who May Assert the Exclusion .....	51
F.	Executor May Waive Rule.....	51

<b>VI. PAROL EVIDENCE RULE.....</b>	<b>51</b>
<b>A. Contract Construction Rule .....</b>	<b>51</b>
<b>B. Statement of the Rule.....</b>	<b>51</b>
<b>C. Application of Rule.....</b>	<b>52</b>
<b>D. Who May Assert the Rule.....</b>	<b>52</b>
<b>VII. CONFRONTATION CLAUSE DECISIONS.....</b>	<b>52</b>
<b>A. U.S. SUPREME COURT DECISIONS.....</b>	<b>52</b>
1. <i>Crawford v. Washington</i> .....	52
2. <i>Davis v. Washington</i> .....	53
3. <i>Giles v. California</i> .....	54
4. <i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. ____ (Doc. No. 07-591 2009).....	55
<b>B. IDAHO DECISIONS. ....</b>	<b>55</b>
1. <i>State v. Hooper</i> .....	56
2. <i>State v. Rose</i> .....	56
<b>C. DOES THE CONFRONTATION CLAUSE APPLY AT PRELIMINARY HEARINGS?.....</b>	<b>56</b>

# TRIAL EVIDENCE FOR JUDGES

By  
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## PART FOUR: EXCLUSIONARY RULES

### I. INTRODUCTION

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

The exclusionary rules are found primarily in Articles IV and V of the Idaho Rules of Evidence. Article IV covers the subject of relevancy and the limitations imposed on the admissibility of relevant evidence by various policy considerations inherited from the common law, embodied in statutes or other rules, or articulated definitively in the Rules themselves. Article V contains the rules which govern the exercise of testimonial privileges in Idaho state courts, “except as otherwise provided by constitution, or by statute implementing a constitutional right, or by these or other rules promulgated by the Supreme Court of this State.”

Other rules of law that may operate to exclude evidence include the Fifth Amendment privilege against self-incrimination, the “Deadman” rule, and the parol evidence rule.

### II. EXCLUSION OF RELEVANT EVIDENCE - I.R.E. ARTICLE IV.

- A. Exclusion on Grounds of Prejudice, Confusion, or Waste of Time - I.R.E. 403.** Rule 403 provides a balancing test applicable to all proof at trial (except where a particular rule specifies a different test, e.g. 609(a), (b)). This rule recognizes that although relevant, evidence may impair the search for truth by generating unfair prejudice against a party, misleading or confusing the jury, or wasting time.

1. **Rule Favors Admission.** The Rule 403 test is balanced in favor of admission; it provides for exclusion of evidence only where the negative factors “substantially outweigh” the probative value of the proof.
2. **Unfair Prejudice Required.** The “prejudice” with which the rule is concerned is not merely detriment to a party’s case; all relevant proof is prejudicial to the opponent in that sense. The question instead is whether the evidence is *unfairly* prejudicial, inviting reasoning outside of the evidence or decision based on emotions which are irrelevant to the decision making process. *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994).

*See, e.g., State v. MacDonald*, 131 Idaho 367, 956 P.2d 1364 (Ct. App. 1998), *reh den.*, involving a charge of rape, in which court held that the district court’s ruling under Rule 403, excluding evidence of the victim’s reassertion of prior false (recanted) allegations of a sex crime was not error because admission of the evidence would have opened “a pandora’s box of unfairly prejudicial, confusing and time-consuming issues.”

*See also, State v. Harshbarger*, 139 Idaho 287, 77 P.3d 976 (Ct. App. 2003), *Rev. den.* (2003), involving trial of defendant for lewd and lascivious conduct with defendant’s minor child, where defendant was allowed to present testimony that the child was not a truthful person, the court uphold the exclusion of evidence of alleged recantations of prior accusations of sexual abuse by the child which occurred several years earlier to avoid a mini-trial of the child’s prior allegations.

*See also, 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.

**B. The Character Evidence Ban and its Exceptions - I.R.E. 404.** Rule 404(a) states a general prohibition on evidence of a person’s past conduct (most often misconduct, but it applies as well to evidence of past good conduct) when offered to support the claim that the person is likely to have acted similarly in the circumstances in question — i.e., as evidence of the person’s character.

1. **Habit Evidence Distinguished.** Distinguish habit evidence under IRE 406; character is general, habit specific; a regular, repeated response to particular circumstances.

2. **Rationales for Rule.** There are several rationales underlying the 404(a) prohibition, including concerns that a criminal jury may convict the accused because he has been shown to be a bad person, rather than proven guilty beyond a reasonable doubt; that such evidence may reduce the jury's concern about imposing an erroneous conviction; that a person's character is an unreliable indicator of their conduct at a given moment; and that a jury may convict to punish for past unpunished behavior.
3. **Three Specific Exceptions.** There are three 404(a) exceptions to the character evidence ban:
  - a. **"Mercy rule".** The "Mercy rule": Pertinent trait of the accused offered by the accused (opens door to rebuttal);
  - b. **Pertinent trait of victim.** Pertinent trait of victim offered by the accused; in homicide cases only, the victim's trait of peacefulness offered by the prosecution to rebut evidence that the victim was first aggressor;
  - c. **Character of witness.** Witnesses' character for truthfulness, under 607, 608 and 609.

Character evidence offered under these exceptions is limited to reputation or opinion evidence; evidence of specific instances of conduct is not permitted. *See* Rule 405(a).

For an application of Rule 404(a)(2), *see State v. Arrasmith*, 132 Idaho 33, 966 P.2d 33 (1998), rev. den. (1998), involving charges of first degree murder, in which the court upheld exclusion of evidence that the victims had sexually abused the daughter of the accused, as irrelevant under Rule 402 and not within the scope of Rule 404(a)(2), which permits evidence of character of a victim to prove conduct of the victim, but not when offered to justify conduct of the accused.

*See also, State v. Hauser*, 143 Idaho 603, 150 P.3d. 296 (Ct. App. 2006), in defendant's accessory case, a witness's testimony regarding a drug buy was relevant to explain why she initially gave an untruthful account to the police, and the testimony was thus probative for a purpose other than to show defendant's poor character. In addition, because the witness's credibility was essential to the jury's determination, a rational explanation as to why the witness would alter her story to the police was highly probative; any prejudice to defendant was slight since the witness did not implicate her in the drug purchase.

4. **Past Conduct.** Rule 404(b) precludes the admission of evidence of other crimes, wrongs or acts to prove that the person acted in conformity therewith, but such evidence may be admissible for other purposes. The Rule recognizes that a person's past conduct may have relevance apart from the forbidden propensity inference. The rule lists eight examples, captured by the acronym KIPPOMIA: Knowledge; Intent; Preparation; Plan; Opportunity; Motive; Identity; Absence of mistake or accident. *See, e.g., State v. Waller*, 140 Idaho 764, 101 P.3d 708 (2004).

These examples are not exhaustive; for example, a 1999 Court of Appeals decision recognizes that such evidence may also be relevant for impeachment. The controlling idea is that the evidence of past acts must have relevance that doesn't depend on the idea that the individual is more likely to have acted in a certain way now because he acted a certain way in the past. *See State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (Ct. App. 1999).

5. **Other Bad Acts Evidence In Sex Abuse Cases.** Until the Supreme Court's decision in *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2008), *Reh den.* (2009), in criminal trials for a sex offense against a minor, evidence of similar offenses against the same or similar victims was generally held to be admissible on the ground that the evidence was relevant to corroborate the minor victim's testimony or to show a common plan or scheme to sexually exploit an identifiable group or to show the defendant's lustful disposition. *See, e.g.:*

*State v. Moore*, 120 Idaho 743, 819 P.2d 1143 (1991)

*State v. Tolman*, 121 Idaho 899, 820 P.2d 1304 (1992)

*State v. Phillips*, 123 Idaho 178, 845 P.2d 1211 (1993)

*State v. Brown*, 131 Idaho 61, 951 P.2d 1288 (Ct. App. 1998)

*State v. Byington*, 132 Idaho 589, 977 P.2d 203 (Ct. App. 1998)

*State v. Siegel*, 137 Idaho 538, 50 P.3d 1033 (Ct. App. 2002)

*State v. Law*, 136 Idaho 721, 39 P. 3d 661 (Ct. App. 2002)

The Supreme Court's decisions in *Moore* and *Tolman* and their progeny were interpreted by many, including the Court of Appeals, as creating a more liberal standard for admission of other-bad-acts evidence in sexual abuse cases than in other types of cases, *see State v. Wood*, 126 Idaho 241, 247, 880 P.2d 771, 777 (Ct. App. 1994); D. Craig Lewis, IDAHO TRIAL

HANDBOOK, § 13:1 (2d ed. 2005). However, in *Grist* the Supreme Court to some extent overruled or disavowed *Moore* and *Tolman* and held that the scope of evidence that may properly be admitted under Rule 404(b) is no broader in sex crime cases than in any other type of case. The Court indicated that other misconduct evidence will be admissible “if relevant to prove . . . a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, knowledge, identity, or absence of mistake or accident.” Therefore, trial courts “must carefully examine evidence offered for the purpose of demonstrating the existence of a common scheme or plan in order to determine whether the requisite relationship exists.” In *Grist* the Court also disclaimed the indication in *Moore* that evidence of uncharged misconduct may be admitted for the purposes of “corroboration” when it is actually nothing more than propensity evidence.

Consequently, when considering the admissibility of other misconduct evidence in sex abuse cases, trial courts must be extremely cautious in relying upon any case law that preceded *Grist*, as it appears that tighter standards will now be applied.

6. **Dissimilar Offenses Or Victims.** If the other bad acts involve dissimilar offenses or dissimilar victims, they likely are not admissible under Rule 404(b). See, e.g.:

*State v. Wood*, 126 Idaho 241, 880 P.2d 771 (Ct. App. 1994)

*State v. Roach*, 109 Idaho 973, 712 P.2d 674 (Ct. App. 1985)

7. **Preparation Or Plan.** Acts that are part of the process to groom the victim for sexual abuse (such as giving the victim drugs or alcohol) are probably admissible. This falls under the Rule 404 rubric of “preparation” or “plan.” See, e.g.:

*State v. Alvord*, 47 Idaho 162, 272 P. 1010 (1928)

*State v. Blackstead*, 126 Idaho 14, 878 P.2d 188, *rev. den.* (Ct. App. 1994)

8. **Examples, Outside Of The Sexual Abuse Context, In Which Other Bad Act Evidence May Be Admissible:**

- a. **To prove identity by showing a distinctive *modus operandi*:**

*State v. Hatton*, 95 Idaho 856, 522 P.2d 64 (1974)

*State v. Morris*, 97 Idaho 420, 546 P.2d 375 (1976)

*State v. Bussard*, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988) (evidence of other burglaries not admissible on modus operandi theory because they were not sufficiently similar).

*State v. Nichols*, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993)

*State v. Porter*, 130 Idaho 772, 948 P.2d 127, *reh. den.*, (1997), *cert. den.*, 118 S. Ct. 1813 (1998)

**b. To prove intent:**

*State v. Buzzard*, 110 Idaho 800, 718 P.2d 1238 (Ct. App. 1986)

*State v. Gauna*, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989)

**c. To prove identity by showing defendant had access to a weapon similar to that used in the charged offense.**

*State v. Sharp*, 101 Idaho 498, 616 P.2d 1034 (1980)

**d. *Res gestae* evidence.** Evidence of other bad acts is admissible if the other acts occurred during the commission of or in close temporal proximity to the charged offense and must be described in order to give the jury a complete picture of the crime on trial. This is sometimes referred to as “*res gestae*” or “the complete story principle.”

*State v. Scovell*, 136 Idaho 587, 38 P. 3d 625 (Ct. App. 2001)

*State v. Izatt*, 96 Idaho 667 534 P.2d 707 (1975)

*State v. Blackstead*, 126 Idaho 14, 878 P.2d 188, *reh. den.*, (Ct. App. 1994)

**e. Caution is advised in admitting evidence of other bad acts under a “common plan or scheme” rationale.**

*State v. Bussard*, 114 Idaho 781, 760 P.2d 1197 (1988). (In burglary trial, evidence of uncharged burglaries by the defendant was not admissible where the crimes were connected only in the sense that they shared the common goal of getting money. To be admissible as evidence of a common plan or scheme, the evidence must show a “plan” integrating the charged and uncharged crimes, e.g., evidence of an uncharged car theft may be offered to prove a plan to use the car as a get-away for burglaries.).

9. **Procedural requirements.** An offer of evidence under Rule 404(b) by the prosecution in a criminal case requires prior notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. This generally carries with it a need to apply the Rule 403 balancing test

In *State v. Sheldon*, 145 Idaho 225, 178 P.3d 28, 208 WL 216302 (2008), the Idaho Supreme Court held the State's failure to comply with the notice provisions of the rule of evidence governing past crimes, wrongs or bad acts precluded admission in drug trafficking prosecution of evidence that the defendant stated during an interview with a detective that he had dealt methamphetamine in the past; since the state did not provide timely notice of its intent to use defendant's statements, the trial court could not determine whether the statements were otherwise admissible under the rule.

10. **Rule 404 and Rule 609.** Do not confuse Rule 404 with Rule 609, which allows evidence of the fact a witness has been convicted of a felony for the purpose of attacking the credibility of the witness if the court determines that the fact or nature of the prior conviction, or both, are relevant to the witness's credibility and the probative value outweighs the prejudicial effect.

11. **Multi-Tiered Analysis Required.** When considering a proffer of other crimes, wrongs, or acts evidence, the court must first determine whether there is sufficient evidence to establish that the other crime or wrong occurred. The court must next determine whether the fact of the other crime or wrong would be relevant to a material and disputed issue concerning the crime charged, other than propensity. Lastly, the trial court must engage in a balancing under Rule 403 to determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *State v. Grist*, 147 Idaho 49, 205 P.3d 1185 (2008), (*Reh den.* (2009)).

When evidence of past acts qualifies under 404(b) it is not automatically admissible; such evidence always carries a risk that the jury will draw the forbidden propensity inference. A court must therefore always conduct a Rule 403 balancing of the permissible relevance against the risks of prejudice from misuse of the evidence. A limiting instruction may be in order if the evidence is to be admitted. *See, e.g., State v. Avila*, 137 Idaho 410, 49 P.3d 1260 ( Ct. App. 2002), *Reh den.* (2002).

12. **Three Considerations of Heightened Risk.** Three considerations which suggest heightened risks of prejudice from admission of past misconduct

evidence are: (1) the similarity of the past conduct to the charged crime (as the similarity increases the risks of propensity misuse increase); (2) the distastefulness of the past conduct (the more distasteful, the greater the risk the jury will convict for reasons other than convincing proof of guilt); and (3) past misconduct which went unpunished (increasing the risk the jury may convict to rectify the past).

- C. Character as an Element of Charge, Claim or Defense - I.R.E. 405(b).** Rule 405(b) permits evidence of specific instances of relevant past conduct when character is an element of a charge, claim or defense. This is never the case in a criminal prosecution. It most often surfaces in civil cases of defamation, and in family law matters when a person's fitness as a custodian is in question.
- D. Evidence of Habit or Routine Practice - I.R.E. 406.** Rule 406 provides that evidence of a habit of a person or of the routine practice of an organization is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. The controlling concept here is a foundation to support the conclusion that the conduct in question is an automatic (or perhaps, semi-automatic) response to a specific situation.
- 1. Prior Similar Occurrences.** One kind of evidence not specifically addressed in the evidence rules is evidence of prior accidents or occurrences similar to those at issue, offered to prove that an occurrence happened, that an item or condition was dangerous, or that a defendant had knowledge of a dangerous condition. The admissibility of this kind of evidence is governed by general principles of relevance. Exact identity of circumstances is not essential to a finding that a prior occurrence is relevant; substantial similarity may be enough.
  - 2. Absence of Prior Accidents.** Under similar reasoning, evidence of the absence of prior accidents may be relevant to show that an item or condition was not dangerous, or that a defendant had no notice of danger.
  - 3. Prior Acts of Negligence.** Depending on the facts, this kind of evidence can constitute character evidence within the 404(a) proscription, e.g., evidence of prior acts of negligence offered to show the defendant was negligent on the occasion in question.
- E. Subsequent Remedial Measures - I.R.E. 407.** Rule 407 prohibits evidence of remedial measures taken subsequent to an event at issue when offered to prove negligence or culpable conduct in connection with the event. The rationales for the rule include the encouragement of safety improvements by removing the fear that the improvements will be used as adverse evidence, and the belief that subsequent repairs are unreliable and ambiguous evidence of prior negligence.

1. **Exceptions to Prohibition.** Similar to 404(b), this rule permits evidence of subsequent remedial measures when offered for a purpose other than proving negligence, e.g., for impeachment, or to prove the feasibility of the measures, if controverted.
  2. **Comparable Federal Rule Modified.** The comparable federal rule has been amended to clarify that the “event” referred to in the rule is the one that caused the injury in question. Thus evidence that the design for a product manufactured on Date A was subsequently modified on Date B is admissible in an action for an injury suffered on Date C.
  3. **Idaho Rule Amended.** In 2002, Idaho Rule 407 was similarly amended to make clear that the event is the injury and that the rule also applies to products liability cases. Apparently the rule, which prior to the amendment made reference to “after an event,” resulted in some ambiguity as to whether the event was the act of injury or whether it could refer to the manufacturer of a product.
- F. Evidence of Settlements or Offers to Compromise - I.R.E. 408.** This rule prohibits evidence not only of the settlement or offer to settle, but also evidence of conduct or statements made during the negotiations. Compromise negotiations include mediation. See also, Rule 507, Mediator Privilege.
1. **Application Limited to Disputed Claims.** The rule applies only to disputed claims. An offer to pay or payment of a claim in full is not covered. The rule applies only when the evidence is offered to prove liability for or invalidity of a claim. It does not preclude use of evidence of offers or negotiation statements for another purpose such as impeachment, or evidence of a witness’s settlement to show the witness’s motives in testifying.
  2. **Effect of Disclosure During Negotiations.** A party cannot immunize otherwise discoverable information by presenting it in the course of settlement discussions. While the presentation of the evidence in the discussions would be protected, the evidence itself will be admissible if provable otherwise.
- G. Evidence of Payment or Offers to Pay Medical and Similar Expenses - I.R.E. 409.** Rule 409 encourages payments of medical and similar expenses by insulating them from use as negative proof against the payor. Unlike IRE 408, this rule does not protect conduct or statements made in connection with such payments unless they are an intrinsic part of the payment or offer.
- H. Evidence of Pleas, Plea Discussions, and Related Statements - I.R.E. 410.** Rule 410 encourages plea negotiations in criminal matters by insulating the

discussions, statements made in I.C.R. 11 proceedings concerning a plea, and any guilty plea later withdrawn, from use against the defendant in both civil and criminal proceedings.

1. **Attorney for Prosecution Must be Involved.** The rule covers plea discussions only when they are with an attorney for the prosecuting authority; discussions with other law enforcement officials are not protected.
  2. **Idaho Exception for Impeachment.** The Idaho rule contains an exception not found in the comparable federal rule: a statement made in an I.C.R. 11 proceeding (e.g., a defendant's admission of guilt of the crime charged) is admissible in the same criminal action for impeachment purposes (e.g., if the defendant withdraws the plea and subsequently testifies to innocence).
  3. **Prohibition is Strictly Enforced.** The Idaho Court of Appeals has strictly enforced the prohibition of IRE 410, finding incurable prejudice and reversible error in a witness's unsolicited reference to a defendant's earlier guilty plea, later withdrawn. *State v. Simonson*, 112 Idaho 451, 732 P.2d 689 (Ct. App. 1987).
  4. **Payment of Traffic Citation is Admission of Guilt.** When one of two drivers who collided at an intersection paid a traffic citation, this was an admission of guilt; the trial court erred in not allowing the evidence of the payment to be admitted into evidence in a civil suit brought by the other driver. *Kuhn v. Proctor*, 141 Idaho 459, 111 P.3d 144 (2005).
  5. **Nolo Contendere Plea Abolished.** The Idaho Court of Appeals held the Magistrate properly refused to accept defendant's nolo contendere plea to a charge of vehicular manslaughter because such pleas are no longer accepted in Idaho. *State v. Salisbury*, 143 Idaho 476, 147 P.3d 108 (Ct. App. 2006).
- I. **Evidence of Liability Insurance - I.R.E. 411.** Rule 411 states the familiar ban on evidence that a person was or was not insured. The ban is limited to use of the evidence on the issue whether the person acted negligently or otherwise wrongfully.
1. **Scope of Prohibition is Limited.** There are a considerable number of situations where proof of insurance is relevant for another purpose and thus outside the rule's scope. e.g., to impeach an insurance investigator who testifies at trial by showing the employer's interest, or on a question of ownership by showing that a party purchased insurance on an item.

2. **Use in Voir Dire.** References to insurance also can be appropriate during voir dire examination of prospective jurors, when carefully designed to explore potential sources of bias.
- J. **The “Rape Shield” Protection - I.R.E. 412.** Rule 412, a response to past practices deemed unnecessarily abusive of victims of sex crimes, is designed to protect them from irrelevant inquiry into and exposure of their private sex lives while preserving a defendant’s right to conduct legitimate inquiry into matters potentially relevant to the question of guilt.
1. **Reputation or Opinion Evidence Prohibited.** The rule contains an absolute prohibition of proof of an alleged victim’s past sexual behavior by reputation or opinion evidence. Thus, in those situations where evidence of past sexual behavior is admissible the proof must be by evidence of specific conduct.
  2. **Five Exceptions to Prohibition.** The rule lists five situations in which such evidence is potentially admissible:
    - a. **When constitutionally required** (arguably, whenever such proof is shown to be potentially relevant to a defendant’s possible innocence, constitutional due process requires its admission);
    - b. **Proof of past behavior** with persons other than the accused on the issue whether the accused was the source of semen or injury;
    - c. **Past sexual behavior** with the accused offered on the question of consent;
    - d. **Prior false allegations** of sex crimes; and
    - e. **Sexual behavior with persons other than the accused** at the time of the event giving rise to the crime charged. *But cf., State v. Self*, 139 Idaho 718, 85 P.3d 1117 (Ct. App. 2003) upholding exclusion of evidence of a rape victim’s sexual contact with someone other than the defendant, as the evidence did not establish that someone else was responsible for semen that matched defendant’s genetic markers and that was found on the victim’s quilt.
  3. **Alleged Lies of Victim.** In a child sexual abuse prosecution, the trial court was within its discretion to deny defendant’s request to present evidence that one of his minor victims had lied when she initially reported to her foster mother that defendant refused to stop. The evidence was not relevant either to rebut the foster mother’s statement that the victims had never lied to her about a matter of significance, or to impeach the victims,

and any marginal probative value of that evidence was substantially outweighed by the danger of confusing or misleading the jury with extraneous issues and wasting trial time. *State v. Perry*, 144 Idaho 665, 168 P.3d 49 (Ct. App. 2007).

4. **Procedural Preconditions.** The rule imposes procedural preconditions to the use of such evidence, including advance notice, written offer of proof, and an in camera hearing to determine admissibility.
- K. Proceedings of Medical Malpractice Screening Panels - I.R.E. 413.** Rule 413 provides that evidence of proceedings or of conduct or statements made in proceedings before a hearing panel for prelitigation consideration of medical malpractice claims, or the results, findings or determinations thereof is inadmissible in a civil action or proceeding by, against or between the parties thereto or any witness therein.
- L. Expressions of Condolence or Sympathy – I.R.E. 414.** Adopted effective July 1, 2007, and identical to Idaho Code § 9-207, Rule 414 provides that evidence of expressions of condolence or sympathy are inadmissible to prove liability or damages in a civil action brought by or on behalf of a patient who experiences an unanticipated outcome of medical care, or in any arbitration proceeding related to, or in lieu of, such civil action, if made by a health care professional or an employee of a health care professional to a patient or family member or friend of a patient and which related to the care provided to the patient, or which related to the discomfort, pain, suffering, injury, or death of the patient as a result of the unanticipated outcome of medical care.
1. **Statement of Fault.** A statement of fault which is otherwise admissible is not excluded by the rule.
  2. **Health Care Professional.** The rule defines “health care professional” to include any person licensed, certified, or registered by the state of Idaho to deliver health care and any clinic, hospital, nursing home, ambulatory surgical center or other place in which healthcare is provided. It includes any professional corporation or other professional entity.
  3. **Unanticipated Outcome.** The rule defines “unanticipated outcome” to mean the outcome of a medical treatment or procedure that differs from an expected, hoped for or desired result.

### III. TESTIMONIAL PRIVILEGES - I.R.E. ARTICLE V.

- A. Generally: Scope and Burdens of Proof.** Before examining each of the rules of privilege and the related administrative rules, a distinction must be recognized between matters that are “confidential” and matters that are “privileged.” Many

matters are required by statutes, such as Idaho Code §3-201, to be treated as “confidential” and are not subject to public disclosure. The fact that a matter is confidential does not render it privileged from disclosure to the court in judicial proceedings. Only those matters which are protected by the Idaho Rules of Evidence, constitutions, statutes implementing a constitutional right, and other rules of the Idaho Supreme Court are protected from judicial disclosure.

1. **Restriction to Confidential Communications.** A Concept Basic to Each of the Rules of privilege must be recognized. Under the Idaho Rules of Evidence the privilege against disclosure applies only to confidential communications between or among the protected persons, and not to observations made of conduct or condition. Thus, under Rule 502, although the confidential communications between a lawyer and client remain privileged if “made in furtherance of the rendition of professional legal services to the client,” Rule 502, I.R.E., the lawyer may be compelled to disclose observations made by the lawyer of the client’s conduct or condition. The same is true for the application of the physician and psychotherapist-patient privilege, Rule 503, I.R.E., the husband-wife privilege, Rule 504, I.R.E., and others provided in the Rules of Evidence. *See* Rules 505, 507, 514, 515, 516, 517, 518 and 519, I.R.E.
  
2. **What Constitutes a Confidential Communication.** “To be confidential, a communication must not be intended for disclosure to third persons. It is not sufficient that the person claiming privilege did not subjectively wish disclosure; the confidence is lost if the communication takes place in circumstances which permit others, not within the privilege, to hear or see the communication. *See, e.g., State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983), later proceeding, 105 Idaho 660, 671 P.2d 1362 (Ct. App.) and (superseded by statute on other grounds as stated in *State v. Alger*, 115 Idaho 41, 764 P.2d 119)(communication by client to lawyer at counsel table overheard by court reporter seated nearby; no confidential communication); *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (Idaho 1994), related proceeding, 125 Idaho 445, 872 P.2d 708, cert. den. (1994)(communication between husband and wife by gesture not confidential where parents present); *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989), post-conviction proceeding, 124 Idaho 49, 855 P.2d 886 (Ct. App. 1993)(communication between parishioner and minister not confidential where third person present).” Lewis, IDAHO TRIAL HANDBOOK, § 15.3, p. 163.

“The requisite confidentiality may be lacking where a participant to what would otherwise be a confidential communication indicates the possibility that they may disclose the communication in the future. *See State v. Allen*, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993), where the State argued that

communications by a defendant to a psychiatrist were not confidential because the psychiatrist had informed the defendant and his attorney, prior to consultations with the defendant, that the psychiatrist would testify for the state if he obtained evidence which the state would want to product at trial. The Court of Appeals directed the trial court, on remand, to conduct a factual inquiry into whether the communications were confidential.” *Id.*

A communication can be by words, or by conduct which under the circumstances is meant to be a communication. *State v. Fowler*, 101 Idaho 546, 617 P.2d 850 (1980), *cert. denied*, 450 U.S. 916, 67 L.Ed.2d 341, 101 S. Ct. 1359 (1981)(under former statutory husband-wife privilege; however, knowledge of possessions of spouse and their location is generally not a communication). A “meaningful glance” exchanged between the defendant and his then-wife during the viewing of a news story about the crime was communicative. *State v. Jones*, 124 Idaho 477, 873 P.2d 122 Idaho 1994), related proceeding, 125 Idaho 445, 872 P.2d 7098, *cert. den.* (July 29, 1994). *Id.*

The Supreme Court has held that the privileges for confidential communications to clergymen and licensed counselors, IRE 505 and 517, did not prohibit opinion testimony by a clergy man and a substance abuse counselor concerning a defendant’s truthfulness and honesty, there being no showing of a confidential communication involved in the testimony. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989), post-conviction proceeding, 124 Idaho 49, 855 P.2d 886 (Ct. App. 1993). That may, depending on the facts, represent too narrow a view of the privileges. If, for example, the counselor’s opinion as to the defendant’s truthfulness was based on confidential statements the defendant had made to the counselor during counseling which the counselor later concluded were untrue, the counselor’s opinion would seem to be an indirect disclosure of the communications, and the defendant would be unable to effectively challenge the basis of the opinion without necessarily revealing the communications and invading the protection of the privilege. *Id.* at 164.

3. **The Burden of Proving the Privilege** is usually placed upon the person claiming the protection of the privilege. *See, e.g., United States v. Flores*, 628 F.2d 521 (9th Cir. 1980). The proponent must satisfy the trial judge by a preponderance of the evidence that all of the elements of the privilege exist. *See Matter of Grand Jury Empanelled February 14, 1978* (Markowitz), 603 F.2d 469 (3rd Cir. 1979); *United States v. Arthur*, 602 F.2d 660 (4th Cir. 1979) *cert. den.* 444 U.S. 992 (1979); *Cooper v. State*, 671 P.2d 1168 (Okla. Crim. App. 1983).

4. **A Claim of Privilege May be Ineffective** when a criminal defendant asserts: (1) a need to introduce the privileged matter as exculpatory, or (2) a need to use the privileged matter to impeach testimony introduced against the defendant. *See McCormick*, EVIDENCE §74.2 at 178 (Cleary 3d ed. 1984).
- B. Evidence Rules Control.** The law of testimonial privileges in Idaho is governed by the Idaho Rules of Evidence, which supersede any conflicting statutory provisions. Rule 1102, I.R.E; *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994); *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).
1. **Qualifications to Testify.** Idaho Code Sec. 9-202, which provides that children under ten cannot be witnesses if incapable of perceiving, recalling and relating facts truly, is invalid to the extent it attempts to prescribe for the admissibility of evidence and conflicts with the Rules. *State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993).
  2. **Husband-Wife Privilege.** Admissibility of testimony of spouse is governed by Rules of Evidence. *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994); *State v. Durst*, 126 Idaho 140, 879 P.2d 603 (Ct. App. 1994), *rev. den.* (1994).
  3. **Presumptions.** A statute which provides that the Director's reports in SRBA litigation shall be admissible as prima facie proof of the facts stated therein merely creates a rebuttable presumption of the facts stated therein. *In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614 (1995).
  4. **Recognizing Conflict.** Rule 1102 provides that "[s]tatutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect."
  5. **Intent for the Rule.** If a statute is "in conflict with" an Idaho Rule of Evidence, Rule will govern the result. "In conflict with" is intended by the Evidence Committee to apply when the result of the evidentiary question would be different under the Rules from that under the statute. Report of the Idaho State Bar Evidence Committee, 2nd Supp., p.6 (1985).
  6. **Application of Rule 1102.** In *State v. Nickerson*, 132 Idaho 406, 973 P.2d 758 (Ct. App., 1999), the Court of Appeals refused to apply Rule 1102 to exclude evidence of the results of an Intoxilyzer 5000 BAC test. In response to the defendant's argument that Idaho Code Sec. 18-8004(4), which provides that the results of a BAC test by any method approved by the Idaho Department of Law Enforcement is admissible without a witness to establish reliability, is in conflict with the Article VII Rules on expert

testimony and ineffective under Rule 1102, the Court held that no conflict exists between the Rules and the statute because the statute merely establishes one means to prove reliability and that the proponent of the evidence can prove reliability either by expert testimony or by offering a test administered pursuant to DLE approved methods. The ruling is contrary to the intent of the Committee for Rule 1102. The statute should not be given effect to admit evidence that would otherwise be inadmissible. An amendment to Rule 101 to expand the scope of the Rules to give effect to the statute would eliminate the conflict.

**C. Privileges Recognized Only as Provided — I.R.E. 501.** Rule 501, I.R.E. limits the privileges that Idaho courts may recognize and apply to exclude evidence. It provides:

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

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.”

1. **Common Law Privileges Excluded.** Rule 501 is intended to eliminate in Idaho any claim of a common law privilege that is not expressly provided by constitution, statute implementing a constitutional right, rule of procedure, or included in these rules.
2. **Qualified Reporter’s Privilege.** A qualified reporter’s privilege has been recognized by a majority of the Idaho Supreme Court in *Matter of Contempt of Wright*, 108 Idaho 418, 700 P.2d 40 (1985). Two justices based the privilege on the first amendment guarantee of a free press. One justice founded the privilege on Article I, Section 9 of the Idaho Constitution. Thus it has been observed that “arguably,” under Rule 501, Idaho has a qualified privilege for reporters and news persons. G. Bell, HANDBOOK OF EVIDENCE FOR THE IDAHO LAWYER, 106 (3rd ed. 1987). *See also, Marks v. Vehlow*, 105 Idaho 560, 671 P.2d 473 (1983); *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791 (1977) *cert den.*, 434 U.S. 930 (1977). The privilege is deemed qualified since the trial court must balance the need for protecting freedom of the press against the need for the evidence in a civil or criminal trial. G. Bell, HANDBOOK OF EVIDENCE FOR THE IDAHO LAWYER, 107 (3d ed. 1987). *See generally, McCormick, EVIDENCE* §76.2 at 184 (Cleary 3d ed. 1984).

“The determination of the scope of the privilege in a given situation requires a balancing of a number of interests. See *In re Contempt of Wright*, 108 Idaho 418, 700 P.2d 40, 11 Media L. Rep. (BNA) 1937 (1985).” Lewis, IDAHO TRIAL HANDBOOK, Sec. 15.9, p. 169.

The qualified news person’s privilege did not apply to television station’s video tape of auto accident scene that was subpoenaed for use in prosecution of news reporter for resisting arrest because it did not contain confidential information, depicted a public event and station intended to discard tape. *State v. Salsbury*, 129 Idaho 307, 924 P.2d 208 (1996), *reh den.* (1996).

3. **Constitutional Right Against Self-Incrimination.** The language “statute implementing a constitutional right” recognizes and gives effect to the constitutional right against self-incrimination which is codified in Idaho Code Sections 9-1302, 19-198 and 19-3003.
4. **Work-Product Rule.** The phrase “or other rules promulgated by the Supreme Court of this State” is intended to encompass the work-product immunity rules and the interpretations of I.R.C.P. 26(b)(3) and I.C.R. 16(f)(1) and (g), which remain unaffected by Rule 501. Although technically not a testimonial privilege, but rather a rule restricting discovery, the work-product rule does not permit a person to refuse disclosure or production as provided in the procedural rules and the exception in Rule 501 is necessary.

**D. Communications Made Out of State--Whose Law to Apply.** Confidential communications that occur within the jurisdiction of Idaho may be protected from disclosure under the Idaho Rules of Evidence. However, communications that are made in jurisdictions outside of Idaho may not qualify for protection under Idaho law but qualify for protection under the law of the site of the communications.

1. **Restatement.** Sec. 139(2) of the Restatement (Second) of Conflict of Laws provides that “[e]vidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.”
2. **Four Factors.** “Comment d” to Sec. 139 lists four factors that determine whether “special reason” exists for recognizing a foreign state’s privilege that is not recognized by the forum state:
  - “the number and nature” of the forum state’s contacts “with the parties and with the transaction involved”;

- the relative materiality of the evidence;
- the kind of privilege involved; and
- “fairness to the parties.”

*See e.g., Ford Motor Co. v. Leggat*, 904 S.W.2d 643 (Texas 1995)(held Michigan law applied to protect attorney-client communications made in Michigan, which were not protected under Texas law, because “[t]he purpose of the attorney-client privilege and the reliance placed by the client on the confidential nature of the communications create special reasons why Texas should defer to the broader attorney-client privilege of Michigan in this case.”). *See also, Medical Waste Technologies v. Alexian Bros. Med. Center*, 1998 U.S. Dist. Lexis 10104 (N.D. Ill. June 23, 1998)(applying Illinois law to one set of documents and Louisiana law to a second set).

- E. Who is Holder of the Privilege.** Each of the privilege rules specifies who is the holder or beneficiary of the privilege. When others are authorized to “claim” the privilege, it is on behalf of the holder or beneficiary of the privilege.
- F. Who May Claim the Privilege.** Each of the privilege rules specifies who may claim the privilege on behalf of the holder or beneficiary of the privilege. In addition Rule 513 provides that “[w]henever a person has a right to claim a privilege on behalf of himself or for another, it may be exercised by the lawyer for such person,” and that “[t]he authority of the lawyer to do so is presumed in the absence of evidence to the contrary.” The presumption applies only to the authority to exercise the claim and not to the validity of the privilege.
- G. Who May Waive the Privilege.** Rule 510 provides that the holder or beneficiary of the privilege may waive its protection by voluntary disclosure or consent to disclosure of any significant part of the protected matter or communication, except when the disclosure itself is a privilege communication.
- 1. Waiver by Counsel.** Rule 510 requires that the disclosure or consent be made by the holder or beneficiary of the privilege. It does not provide for waiver by counsel for the holder or beneficiary.

“It should be noted that while a lawyer is authorized to assert a privilege on behalf of the client, IRE 513, the lawyer is not the holder of the lawyer-client privilege, *see* IRE 502(b), and thus disclosure of the client’s privileged communication by the lawyer does not constitute a waiver unless the client authorizes or consents to the disclosure.” Lewis, IDAHO TRIAL HANDBOOK, § 15.5, p. 165. *But cf., Hartley v. Bohrer*, 52 Idaho 72, 11 P.2d 616 (1932)(counsel may waive the privilege for the client as the representative of the client).

2. **Failing to Object.** Under Idaho pre-rule case law, a holder of the privilege can waive the marital privilege by failing to object at trial, *State v. Anspaugh*, 97 Idaho 519, 547 P.2d 1124 (1976); *Hess v. Hess*, 41 Idaho 359, 239 P.2d 956 (1925), or by failing to clearly and precisely state the marital privilege objection. *State v. Chaffin*, 92 Idaho 629, 448 P.2d 243 (1968). *See also, State v. Nab*, 113 Idaho 168, 742 P.2d 423 (Ct. App. 1987), *rev. den.*, 116 Idaho 466, 776 P.2d 828 (1987).
- H. Waiver by Voluntary Disclosure - I.R.E. 510.** A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. The rule does not apply if the disclosure itself is a privileged communication. Rule 510, I.R.E. *See Skelton v. Spencer*, 98 Idaho 417, 565 P.2d 1374 (1977), *cert. denied*, 434 U.S. 1014 (1978)(client waived lawyer-client privilege for communications concerning settlement by testifying to alleged duress exerted during discussions with lawyers).
1. **Intentional Relinquishment of Right Unnecessary.** The rule requires only a voluntary disclosure. It need not be an intentional relinquishment of a known right. Once the communication has been voluntarily disclosed, it becomes irrelevant whether it was intended to constitute a waiver.
  2. **Judicial Discretion Require.** Use of the phrase “any significant part of the matter or communication” is intended to confer discretion on the court in the application of the rule with reference to what the privilege protects. The rule makes no attempt to define what constitutes a waiver when one of two or more joint holders of the privilege discloses the confidential communication, leaving resolution of these situations to the courts on a case-by-case basis with reference to the objectives of the particular privilege.
- I. Compulsory Disclosure - I.R.E. 511.** Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege. Rule 511, I.R.E.
1. **Erroneous Compulsion.** Subpart (a) of the rule recognizes that not all persons will remain strong and refuse disclosure when ordered to do so by a court, even where compulsion would be erroneous. To expect this or to assume that a judicial remedy would be available is unrealistic. Moreover, requiring resistance in these circumstances only encourages disobedience of the lawful orders of the courts, however erroneous the orders may be.

2. **Unintended Disclosure.** Illustrative circumstances under subpart (b) are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication, by a family member participating in psychotherapy, or privileged data improperly made available from a computer bank. *See* Comment to Rule 511, I.R.E.

**J. Comment Upon or Inference from Claim of Privilege - I.R.E. 512.** Rule 512 provides protection to a party claiming a privilege from unfair prejudice. The rule applies equally whether the privilege is claimed by a party or a witness, or by the holder or someone on his behalf, if an adverse inference against the party may result.

1. **Comment Improper.** Rule 512(a) provides that the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom. Rule 512(a), I.R.E.
2. **Forbidden Conduct.** Rule 512(b) provides that in jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury. Rule 12(b), I.R.E. The rule recognizes that calling a witness to the stand and requiring that the witness assert the privilege can be effective comment. So also can be calling the witness, having a sidebar discussion with the court and then excusing the witness. Both circumstances are forbidden when they can be avoided. Destruction of the privilege by innuendo can and should be avoided.
3. **Instruction Available.** Rule 512(c) provides that upon request, any party against whom the jury might draw adverse inferences from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom. Rule 512(c), I.R.E. The rule is intended to leave the decision as to whether an instruction will be given to the discretion of counsel for the party against whom the adverse inference may be drawn. The instruction must be given as a matter of right, if requested.

**K. Lawyer-Client Privilege - I.R.E. 502.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication, (4) between representatives of the client or between the client and a representative

of the client, or (5) among lawyers and their representatives representing the same client. Rule 502(b), I.R.E.

**Rule 502(b)(3) was amended in 2002** to make clear that the rule extends the privilege to communications during meetings of lawyers and clients who are dealing with matters of common interest, such as a joint strategy discussion by joint defendants and their counsel. The Rule, as amended, is intended to cover 1) what one lawyer says to a different client on a matter of common interest, 2) what one client says to another client in a joint session where at least one attorney is present, 3) what lawyers say to one another when the clients are not present to the common defense or matter of common interest. *See Comment*, IRE 502(b)(3).

1. **Essential Elements.** The court must find two essential elements to apply the privilege: the communication must be confidential within the meaning of the rule, and the communication must be made between persons described in the rule for the purpose of facilitating the rendition of professional legal services to the client. *Kirk v. Ford Motor Co.*, 141 Idaho 6979, 116 P.3d 27 (2005); *State v. Allen*, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993), overruled on other grounds, *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995), *rev. den.* (1996).
2. **Prospective Lawyer-Client Relationship is Covered.** “Communications between a potential client and a lawyer concerning the possible employment of the lawyer are protected by the lawyer-client privilege, whether or not the lawyer is actually employed; however, communications after the lawyer refuses employment are not. *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984) (under former statutory privilege).” Lewis, IDAHO TRIAL HANDBOOK, § 15.9, p. 167.
3. **“Client”.** A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him or her. Rule 502(a)(1), I.R.E.
4. **“Representative of the Client”.** A “representative of the client” is one having authority to obtain professional legal services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the attorney of the client. Rule 502(a)(2), I.R.E.

The definition of “a representative of the client” states the view adopted by the United States Supreme Court in *Upjohn Company v. U.S.*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1984), which decision recognizes that middle and lower level corporate employees can, by acting within the scope of their employment, embroil the corporation in serious legal

difficulties, and would have relevant information needed by the corporate attorney in order to adequately advise the client. Accordingly, communications between such employees and the lawyer concerning such information are included in the privilege. It does not however extend the privilege to post-employment communications concerning activities occurring while employed. *See* Comment to Rule 502(a)(2), I.R.E.

5. **“Lawyer”**. A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation. Rule 502(a)(3), I.R.E.
6. **“Representative of the Lawyer”**. A “representative of the lawyer” is one employed by the lawyer to assist the lawyer in the rendition of professional legal service. Rule 502(a)(4), I.R.E. The rule makes clear that the privilege extends to persons employed by the attorney to assist him or her in the rendition of legal services to the client. *See* Comment to Rule 502(a)(4), I.R.E.
7. **“Confidential Communications” Protected**. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those persons reasonably necessary for the transmission of the communication. Rule 502(a)(5), I.R.E.

The rule defines a confidential communication in terms of intent. Unless intent to disclose is apparent, the attorney-client communication is confidential. The rule adopts as policy a protection against invasion of the privilege by eavesdroppers. *See* Comment to Rule 502(a)(5), I.R.E.

Documents that were treated as confidential communications made for the purpose of facilitating professional legal services to the client were privileged and not subject to discovery. *Star Phoenix Mining Co. v. Hecla Mining Co.*, 130 Idaho 223, 939 P.2d 542 (1997), *reh. den.* (1997).

Letter to attorney from seller of business was not a “confidential communication” within meaning of this rule where the letter was kept in a file which was turned over to buyers of business as part of assets. Seller did not treat letter as a confidential communication. *Farr v. Mischler*, 129 Idaho 201, 923 P.2d 446 (1996).

8. **Scope of Privilege**. The rule is intended to provide the privilege to all communications between the attorney and client, and others necessary to the communication process for the rendition of professional legal services to the client. *See* Comment to Rule 502(b), I.R.E.

The rule provides: (1) that confidential communications between the client or employees of the client and the attorney or legal assistants are within the privilege; (2) that assistants are within the privilege; (3) that it includes communications relating to matters of common interest in the “joint defense” or “pooled information situations,” where different lawyers are representing clients who share a common interest; (4) that confidential communications between or among the client and the client’s employees are within the privilege; (5) and that it includes communications among lawyers and their representatives representing the same client. *See* Comment to Rule 502(b)(1)-(5), I.R.E.

9. **Protection is Limited.** The rule extends the privilege only to confidential communications. It does not apply to articles of evidence and does not permit a client to immunize evidence by delivering it to a lawyer. *See* Comment to Rule 502(b), I.R.E.

The privilege for confidential communications does not generally extend to the fact of consultation or employment of the lawyer, including the facts of identity of the client, the identity of the lawyer, and the scope or object of the employment. *See* McCormick, EVIDENCE §890 at 215 (Cleary 3d ed. 1984).

10. **Who May Claim Privilege.** The privilege belongs to the client, whether or not the client is a party to the proceeding in which the privileged communication is sought. It survives the death of an individual and the dissolution of a corporation.

The client may claim the privilege on his or her own behalf or if he or she is incompetent, the client’s guardian or conservator may assert it on behalf of the client. The lawyer currently representing the client may also invoke the privilege on the client’s behalf even though the lawyer was not counsel at the time the communication was made. Also the rule expressly provides that the person who was the lawyer at the time of the communication may claim the privilege but, only on behalf of the client. The person who was the lawyer’s representative at the time of the communication may assert the privilege on behalf of the client to cover the situation when the lawyer’s representative may be called to testify in the absence of the client or his or her lawyer. *See* Comment to Rule 502(c), I.R.E.

11. **Burden of Proof.** The burden of proving the right to claim privilege is on the client. If exercised by the client’s attorney, a representative or other person authorized to do so, a presumption exists that such person has authority to exercise the claim of privilege on behalf of the client, but the presumption disappears if evidence to the contrary is introduced. The

presumption is to be treated the same as are other presumptions under Article III, Idaho Rules of Evidence. *See* Comment to Rule 502(c), I.R.E. The presumption applies only to the issue of authority of the attorney or other enumerated representative to exercise the claim of privilege on behalf of the client. The presumption does not apply to the issue of whether the client has the right to claim the privilege.

The person claiming the privilege must first show the relation that existed between the attorney and the client at the time of the communication, the circumstances under which the attorney came into possession of the communication or information, and that the same was obtained by the attorney while acting as attorney for the client and in furtherance of the professional engagement. *See* Comment to Rule 502(c), I.R.E.

**12. Exceptions.** The exceptions to the rule are:

- a. Crime or fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. Rule 502(d)(1), I.R.E. The crime or fraud need not be that of the client. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised that a proposed action is within the law. The commentary to the rule recommends that the trial court require a substantial evidentiary showing that the communication related to a contemplated crime or fraud prior to requiring disclosure. *See* Comment to Rule 502(d)(1), I.R.E.
- b. Claims through same deceased client.** A communication relevant to an issue between parties who claim through the same deceased client, regardless whether the claims are by testate or intestate succession or by inter vivos transaction. Rule 502(d)(2), I.R.E. This exception recognizes that normally the privilege survives the death of the client and may be asserted by his or her representative. When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The exception makes clear that neither side may assert the privilege. *See* Comment to Rule 502(d)(2), I.R.E.
- c. Breach of duty by lawyer or client.** There is no privilege under the rule as to a communication relevant to an issue of breach of

duty by the lawyer to his or her client or by the client to his or her lawyer. Rule 502(d)(3), I.R.E.

- d. **Attested document.** There is no privilege under the rule as to a communication relevant to an issue concerning an attested document in which the lawyer is an attesting witness. Rule 502(d)(4), I.R.E.
- e. **Common interest or defense of joint clients.** There is no privilege under the rule as to a communication relevant to the matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients. Rule 502(d)(5), I.R.E. The exception makes clear that when two or more clients retain the same attorney, communications by one of the clients to the attorney are not privileged as to the other clients in an action between or among the clients. This exception does not apply when clients with a common interest have retained different lawyers. *See Comment to Rule 502(d)(5), I.R.E.*
- f. **Corporate client.** There is no privilege under the rule as to a communication between the corporation and its lawyer or a representative of the lawyer, which was not made for the purpose of facilitating the rendition of professional legal services to the corporation during the litigation and concerning the litigation in which the privilege is asserted: (A) in an action by a shareholder against the corporation which is based on a breach of fiduciary duty; or (B) in a derivative action by a shareholder on behalf of a corporation, provided that disclosure of privileged communications under either subpart (A) or (B) of the exception shall be required only if the party asserting the right to disclosure shows good cause for the disclosure and provided further that the court may use *in camera* inspection or oral examination and may grant protective orders to prevent unnecessary or unwarranted disclosure. Rule 502(d)(6), I.R.E.

L. **Physician and Psychotherapist-Patient Privilege - I.R.E. 503.** Rule 503, I.R.E. provides for the physician and psycho-therapist-patient privilege. Idaho Rule 503 grants the privilege to the patient only and makes a distinction in the application of the rule between a civil action and a criminal action based upon the services being rendered and not by whom rendered.

- 1. **Scope of Rule.** The privilege applies only to protect confidential communications. It does not protect observations made by the

psychotherapist of the condition or conduct of the patient, regardless of the fact that observations are necessary to enable the psychotherapist to prescribe or act for the patient. *See* Comment to Rule 503, I.R.E.

The fact of consultation by the patient and treatment by the psychotherapist, including the number and dates of visits, are generally not protected. *See* McCormick, Evidence §100 at 248 (Cleary 3d ed. 1984).

2. **Rule in Civil Action.** In a civil action a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family. Rule 503(b)(1), I.R.E.

3. **Rule in Criminal Action.** In a criminal action a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his mental or emotional condition, including alcohol or drug addiction, among himself, his psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family. Rule 503(b)(2), I.R.E.

The difference is that in a criminal action there is no privilege for confidential communications made for the purpose of diagnosis or treatment of the patient's physical condition. *See, e.g., State v. Langford*, 136 Idaho 334, 33 P.3d 567 (Ct. App. 2001).

It is error for the trial court to require a defendant's personal psychiatrist to testify at the sentencing hearing. *State v. Wilkins*, 125 Idaho 215, 868 P.2d 1231 (1994).

However, where the defendant gave his counselor permission to discuss his therapy and progress with the state's presentence investigator and failed to object to the counselor's testimony or assert his psychotherapist-patient privilege, the privilege is waived. *State v. Gallipeau*, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994), *rev. den.* (1994).

4. **Who Employs Psychotherapist Immaterial.** The commentary to Idaho Rule 503 indicates that the grant of privilege is intended to apply irrespective of whom employs the physician or psychotherapist or pays for the services. *See* Comment to Rule 503(b), I.R.E.

5. **Who May Claim Privilege.** The privilege may be claimed by the patient or for the patient through the lawyer, guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication may claim the privilege, but only on behalf of the patient. Such person's authority to do so is presumed in the absence of evidence to the contrary. Rule 503(c), I.R.E.
6. **Authority Presumed.** The authority to exercise the claim of privilege for the patient is presumed until evidence to the contrary is produced. When such contrary evidence is produced, the presumption disappears as with other presumptions under Article III of the Idaho Rules of Evidence. The presumption does not apply to the validity of the privilege. See Comment to Rule 503(c), I.R.E.
7. **"Patient".** A "patient" is a person who consults or who is examined or interviewed by a physician or a psychotherapist for the purpose of obtaining diagnosis or treatment of a physical, mental or emotional condition, including alcohol or drug addiction. Rule 503(a)(1), I.R.E.
8. **"Physician".** A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be. Rule 503(a)(2), I.R.E.
9. **"Psychotherapist".** A "psychotherapist" is (a) a physician while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (b) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged. Rule 503(a)(3), I.R.E. The definition includes a physician, if treating a mental or emotional condition, in recognition of the fact that general practitioners are often engaged in the diagnosis or treatment of such conditions, including alcohol or drug addiction. The requirement that the psychologist be in fact licensed or certified in any state or nation, and not merely be believed to be so, is deemed justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories. See Comment to Rule 503(a)(3), I.R.E.
10. **"Confidential Communication".** A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family. Rule 503(a)(4), I.R.E. The

definition is based on the intent that the communication not be disclosed to third persons with certain exceptions to include within the privilege those persons deemed necessary to the diagnosis, treatment or communication process. *See* Comment to Rule 503(a)(4), I.R.E.

**11. Exceptions.** The exceptions are:

- a. Guardian or conservator proceedings.** There is no privilege under the rule for communications relevant to an issue in proceedings for the appointment of a guardian or conservator for a patient or to hospitalize a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization. Rule 503(d)(1), I.R.E.
- b. Court-ordered examinations.** If the court orders an examination of the physical, mental or emotional condition of the patient, whether a party or a witness, communications made in the course thereof are not privileged under the rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise. Rule 503(d)(2), I.R.E. This exception is broader than the waiver under Rule 35(b) of the Idaho Rules of Civil Procedure. The exception deals with a court ordered examination rather than a court appointed psychotherapist. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered. *See* Comment to Rule 503(d)(2), I.R.E.
- c. Condition an element of claim or defense.** There is no privilege under the rule as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element in his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense. Rule 503(d)(3), I.R.E. The commentary to Rule 503(d)(3) states that the exception is intended to also cover an action involving custody of children where the physical or emotional fitness of a parent to have custody is in issue. *See* Comment to Rule 503(d)(3), I.R.E.

In *State v. Santistevan*, 143 Idaho 527, 148 P.3d 1273 (Ct. App. 2006), the Idaho Court of Appeals held the defendant's Fifth Amendment rights were not violated when he was ordered to undergo an examination by a stat expert in an attempted murder case, because defendant had indicated an intent to introduce

psychiatric evidence in his defense; moreover, Rule 503 was not violated since the communications were not confidential and his defense was based on a mental condition.

**d. Child related communications.** There is no privilege under the rule in a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of the child including, but not limited to, the abuse, abandonment or neglect of a child. Rule 503(d)(4), I.R.E. This exception is intended to be a broad exception for communications affecting children. The reference to “abuse, abandonment or neglect” is intended to include, without limitation, the conduct or circumstances included within such terms as defined in Idaho Code §16-1602. *See* Comment to Rule 503(d)(4), I.R.E.

**12. Juvenile Proceeding.** This rule does not apply to communications by a psychotherapist that have become part of the court records in a juvenile proceeding; the privilege or confidentiality of these records is governed by the provisions of I.C. § 16-1816. *State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992).

**M. Husband-Wife Privilege - I.R.E. 504.** Rule 504 provides for the husband-wife privilege. A party in an action or proceeding has a privilege to prevent testimony as to any confidential communication between the party and his or her spouse made during the marriage. Rule 504(b), I.R.E.

**1. Rule Supersedes Statute.** Rule 504 supersedes Idaho Code § 9-203, which provides for a testimonial privilege permitting a spouse to prevent any testimony by the other spouse.

**2. Who May Claim Privilege.** Following the 1998 amendment to Rule 504, any person, regardless of whether the person is a party in the action or proceeding in which the privilege is asserted, may assert the privilege to refuse to testify or to prevent others from testifying as to privileged communications.

As amended, the privilege may be claimed by the person or by the spouse on behalf of the person, or by the lawyer for the person on behalf of the person upon whom the privilege is conferred. The authority of the spouse or lawyer to do so is presumed.

The rule also permits the spouse to preclude testimony by the eavesdropper. Rule 504(b), I.R.E. *See* Comment to Rule 504(b), I.R.E.

3. **Scope of Privilege.** The rule of privilege applies only to confidential communications and not to observations of conduct or condition by one spouse of the other. *See* Comment to Rule 504(b), I.R.E.

The rule does not preclude a spouse from reporting the criminal activity of the other to the police. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995), *rev. den.* (1995).

4. **Communication During Marriage Required.** The confidential communication must be made during marriage to qualify for protection from disclosure. Rule 504(b), I.R.E. *See* Comment to Rule 504(b), I.R.E.

If made during marriage the protection extends beyond death or divorce. *See* Comment to Rule 504(b), I.R.E. *See State v. Anspaugh*, 97 Idaho 519, 547 P.2d 1124 (1976).

“A common-law marriage, made while Idaho Code § 32-201 was still in effect, is a marriage for purposes of this privilege. *Still v. State*, 97 Idaho 375, 544 P.2d 1145 (1976); *State v. Riley*, 83 Idaho 346, 362 P.2d 1075 (1961); Comment to Rule 504, I.R.E.. However, by amendments to Idaho Code §§ 32-301, 302 and 303, effective January 1, 1996, common-law marriages are no longer recognized in Idaho.

5. **“Confidential Communication”.** A communication is “confidential” if it is made during marriage privately by any person to his or her spouse and is not intended for disclosure to any other person. The rule does not apply to nonconfidential communications or actions. Rule 504(a), I.R.E. *See* Comment to Rule 504(a), I.R.E.

A “meaningful glance” that passed between defendant and his wife at the viewing of a news story on the murder, although communicative, occurred in the presence of his wife’s parents and was not confidential. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994), *cert. denied*, 513 U.S. 901 (1994).

A letter from defendant to his wife, which was confiscated by the jail guards and used by the prosecution during trial, is not protected by the privilege when defendant denied that the document was a letter to his wife and denied any intent to deliver it to his wife. *State v. Levitt*, 116 Idaho 285, 775 P.2d 599, *cert. denied*, 493 U.S. 923 (1989).

6. **Exceptions.** The exceptions to the Rule are:

- a. **Child related communications.** There is no privilege under the rule in a criminal or civil action or proceeding as to a

communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child, including, but not limited to the abuse, abandonment or neglect of a child. Rule 504(d)(1), I.R.E. The rule incorporates a broad exception for communications affecting children. The reference to “abuse, abandonment or neglect of a child,” is intended to include, without limitation, the conduct or circumstances included within such terms as defined in Idaho Code §16-1602. No limitation on the scope of the exception is intended. *See* Comment to Rule 504(d)(1), I.R.E.

- b. **Criminal conduct of a spouse.** In a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a person residing in the household of either spouse, or (C) a third person committed in the course of committing a crime against the other spouse or a person residing in the household of either spouse. Rule 504(d)(2), I.R.E.
- c. **Statutory proceedings.** There is no privilege under the rule in proceedings (A) under the Reciprocal Enforcement of Support Act, or (B) concerning desertion or non-support of a spouse. Rule 504(d)(3), I.R.E. The rule incorporates exceptions already provided under existing statutes: (a) Reciprocal Enforcement Act, Idaho Code §9-1069; (b) desertion or non-support actions, Idaho Code §9-203(1). *See* Comment to Rule 504(d)(3), I.R.E.
- d. **Spouse vs. spouse.** There is no privilege under the rule in a civil action or proceeding by one spouse against the other involving the person or property of the other. Rule 504(d)(4), I.R.E.
- e. **Guardian or conservator proceedings.** There is no privilege under the rule for communications relevant to an issue in proceedings for the appointment of a guardian or conservator for a person for mental illness or to hospitalize the person for mental illness. Rule 504(d)(5), I.R.E.

N. **Religious Privilege - I.R.E. 505.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by a person to a cleric in his or her professional character as spiritual advisor. Rule 505(b), I.R.E. The rule permits the communicating person to prevent disclosure not only by himself or herself, but also by the cleric and by eavesdroppers. *See* Comment to Rule 505(b), I.R.E.

- 1. **Who May Claim the Privilege.** The privilege may be claimed by the person, or for the person by the person’s lawyer, guardian, conservator or

personal representative if he or she is deceased. The cleric at the time of the communication may claim the privilege but only on behalf of the person. The cleric's authority to do so is presumed in the absence of evidence to the contrary. Rule 505(c), I.R.E.

2. **“Clergyman”**. A “clergyman” is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting. Rule 505(a)(1), I.R.E.

The rule defines “clergyman” to include those who perform functions similar to those of traditionally recognized priest, ministers, and rabbis, if performed in that capacity for a religious organization. The definition is not broad enough to include self-ordained “ministers.” As stated in the Federal Advisory Committee’s Note to the comparable proposed Federal Rule, “[a] fair construction of the language requires that the person to whom the status is sought to be attached, be regularly engaged in activities conforming at least in a general way with those of a Catholic Priest, Jewish Rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis.” As with the lawyer-client and psychotherapist-patient rules, the “reasonable belief” provision is included in Rule 505. *See* Comment to Rule 505(a)(1), I.R.E.

3. **“Confidential Communication”**. A communication is “confidential” if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication. Rule 505(a)(2), I.R.E. The rule defines the confidential communication in terms of intent that it not be disclosed as do other rules of privilege. It is intended to include all confidential communications and is not restricted to a concession of culpable conduct.

The language “except to other persons present in furtherance of the purpose of the communication” is included to make clear that the privilege covers situations such as where a husband and wife jointly consult a clergyman, as for instance, when they seek marital counseling. It is also intended to include persons who are assisting the clergy in carrying out the spiritual duties. *See* Comment to Rule 505(a)(2), I.R.E.

A conversation between a defendant and his minister was not confidential within the protection of the rule where it was made in the presence of another parishioner. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989), post-conviction proceeding, 124 Idaho 49, 855 P.2d 886 (Ct. App. 1989). *See also Angleton v. Angleton*, 84 Idaho 184, 370 P.2d 788 (1962), subsequent appeal, cause remanded, 84 Idaho 201, 370 P.2d 798 (under former statutory privilege; communications during “friendly

meetings” between Catholic priest and person who was not a member of the church were not privileged.” LEWIS, IDAHO TRIAL HANDBOOK, § 15.12, p. 171.

Statements made to a hospital chaplain by defendant were made in the presence of another family member, with the door open and other personnel just outside the room, were not considered to be confidential, were not received in the chaplain’s “professional character as spiritual advisor,” nor “made privately” and therefore did not constitute privileged communication protected by this rule. *State v. Gardiner*, 127 Idaho 156, 898 P. 2d 615 (Ct. App. 1995), *rev. den.* (1995).

Rule 505 extends the privilege to all communications made confidentially to the clergyman in his or her professional character as spiritual advisor, whether or not the communication is in the nature of a “confession.” The broad form coverage of the rule recognizes the roles performed by modern clergy, who frequently serve as psychological and marriage counselors as well as recipients of “confessions.” *See* Comment to Rule 505(a)(2), I.R.E.

- O. Political Vote Privilege - I.R.E. 506.** Every person has a privilege to refuse to disclose the tenor of his or her vote at a political election conducted by secret ballot. Rule 506(a), I.R.E. The rule confers the privilege only to the voter at a political election conducted by secret ballot.
  - 1. Exception.** Rule 506(b) states a single exception to the rule. The privilege does not apply if the court finds that the vote was cast illegally or determines that the disclosure should be compelled pursuant to the election laws of the State of Idaho. Rule 506(b), I.R.E. The exception is expressly provided for in Idaho Code §34-2017, in an election contest proceeding. *See* Comment to Rule 506(b), I.R.E.
  - 2. Privilege Limited.** Unlike other privilege rules, the rule does not confer a privilege to prevent another person from disclosing the vote. However, although not expressly stated, it is intended to preclude the person who assisted another in voting from disclosing the tenor of that vote. *See* Comment to Rule 506(a), I.R.E.
  
- P. Conduct of Mediations - I.R.E. 507.** The former Mediation Privilege Rule 507 has been replaced with a new Rule 507 that became effective July 1, 2008. The new rule is based on the Uniform Mediation Act, which has been adopted in Idaho as Idaho Code §§ 9-801 - 814.
  - 1. Who May Claim the Privilege.** The new rule provides that: (1) a mediation party may refuse to disclose, and may prevent any other person

from disclosing a mediation communication; (2) a mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator; and (3) a nonparty participant may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator.

2. **Scope of Privilege.** Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.
3. **Waiver and Exceptions.** The privilege may be waived under certain conditions and the Rule provides for exceptions to the privilege. There is no privilege for a mediation communication that is: (1) in an agreement evidenced by a record signed by all parties to the agreement; (2) available to the public under the Idaho Open Records Act or made during a session of a mediation that is open or is required by law to be open to the public; (3) a threat or a statement of a plan to inflict bodily injury or commit a crime of violence; (4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity; (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; (6) subject to a limited exclusion, is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or (7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the public agency participated in the mediation.
4. **Exclusion Based on Need.** There is no privilege if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and the mediation communication is sought or offered in: (1) a court proceeding involving a felony or misdemeanor; or (2) subject to a limited exclusion that prohibits compelling a mediator to testify, a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.
5. **Application of Rule 507.** The new Rule 507 applies to mediations conducted pursuant to a referral or an agreement to mediate made on or after the effective date, except that on or after one year from the effective

date, the privileges apply to all mediations regardless of when the referral or agreement to mediate was made.

**Q. Secrets of State and Other Governmental Privileges - Rule 508.** Rule 508 governs claims of federal and state governmental privileges. The rule rejects all claims of governmental privileges except those that the state must recognize as required by federal law and those specifically provided by statutes of the State of Idaho. Nothing in the rules speaks to the various constitutional issues that may arise when a privilege is claimed. *See* Comment to Rule 508, I.R.E.

**1. Recognition of Governmental Privileges is Restricted.** The rule makes clear that Idaho state courts will recognize federal governmental privileges, but restricts them to include only those that Idaho must recognize under the Constitution of the United States. The rule is the codification of the rationale of *Penn Mutual Life Ins. v. Ireton*, 57 Idaho 466, 65 P.2d 1032 (1937), in which the Idaho Supreme Court recognized the government of the United States could create valid evidentiary privileges, which are applicable in state court. *See* Comment to Rule 508(a), I.R.E.

No other governmental privilege is recognized except as created by the constitution or statutes of the State of Idaho. Rule 508(b), I.R.E. The rule recognizes the authority of the Idaho Legislature to create governmental privileges and gives effect to those created by statutes of Idaho or the constitution.

**2. Idaho Statutory Privilege.** Idaho does not have a general statute imposing a privilege as to all “secrets of state” or “official information.” Idaho Code §9-203(5) provides that a “public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by disclosure.” Idaho Code §9-335 restricts disclosure of investigatory records compiled for law enforcement purposes by a law enforcement agency under specific enumerated conditions. The statute defines a “law enforcement agency” to mean the office of Attorney General, the Department of Law Enforcement, the office of any prosecuting attorney, sheriff or municipal police department. The statutes further provide procedures and guidelines for applications of the statute.

**3. Effect of Sustaining Claim.** If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court must make any further orders the interests of justice require, including striking the testimony of witnesses, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action. Rule 508(c), I.R.E.

**R. Identity of Informer Privilege - I.R.E. 509.** Rule 509 provides for the confidential informant privilege previously provided in Idaho Criminal Rule 16(f)(2). The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation. Rule 509(a), I.R.E.

1. **Conferred Only on Public Entity.** Rule 509 confers the privilege only on the public entity. It is not extended to the informant.
2. **Scope of Privilege.** Only facts that would disclose identity are privileged. Communications are not included within the privilege except to the extent that disclosure of the communication would result in disclosure of identity. See Comment to Rule 509(a), I.R.E.

The phrase “relating to or assisting in an investigation of a possible violation of law” is deemed to be sufficiently broad to cover activities such as furnishing of general intelligence information, solicitation of other informers and assistance in the apprehension of wanted persons. The phrase “a law enforcement officer” is not restricted to only those who qualify as a “peace officer” as defined in Idaho Code §19-5101(d) or Misdemeanor Criminal Rule 2(g).

3. **Who May Claim the Privilege.** The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished. Rule 509(b), I.R.E. The informant cannot claim the privilege. The rule does not define who would be an “appropriate representative of the government” for the purpose of claiming the privilege. It is assumed that ordinarily the attorney for the public entity will be the one to exercise the claim of privilege, but some other representative may be appropriate, such as the “law enforcement officer” while testifying when the inquiry as to the identity of an informant is made. See Comment to Rule 509(b), I.R.E.

4. **Exceptions.** The exceptions are:

- a. **Voluntary disclosure.** No privilege exists under the rule if the identity of the informer or his or her interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer’s own action. Rule 509(c)(1), I.R.E. Although the public entity holds the privilege, it may be waived or lost when the informer’s identity is revealed by the informer as well as by the public entity simply because there is then no further reason to

apply the privilege. The phrase which limits disclosure “to those who would have cause to resent the communication” means that disclosure to another public entity, law enforcement officer, or to a judge pursuant to the rule will not defeat the privilege. The public entity can waive the privilege by disclosure of the informer’s identity to those who would have reason to resent the informer’s communication. *See* Comment to Rule 509(c)(1), I.R.E.

- b. **Informer as a witness.** If an informer appears as a witness for the public entity, disclosure of his identity shall be required unless the court finds, in its discretion, that the witness or others may be subjected to economic, physical or other harm or coercion by such disclosure. Rule 509(c)(2), I.R.E. The rule makes disclosure discretionary if the court finds that the witness or others may be subjected to economic, physical or other harm or coercion by such disclosure. When called as a witness by the public entity the informer’s status should be disclosed because his or her relationship with the public entity is relevant to his or her credibility and such person must be subject to full cross-examination. Informants are known to be motivated at times by pecuniary rewards, reduced sentences or revenge. If these underlying factors are not exposed, the trier of fact will be hampered in ascertaining the truth. *See* Comment to Rule 509(c)(2), I.R.E. *See State v. Davila*, 127 Idaho 888, 908 P.2d 581 (Ct. App. 1995).

In *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992), *rev. den.* (1992), the court held that disclosure of the informant’s identity was not required where the informant did not participate in crime, and informant’s information was relevant only to probable cause, not guilt or innocence.

In *State v. Farlow*, 144 Idaho 444, 163 P.3d 233 (Ct. App. 2007), the Court of Appeals held where a district court found that the facts in a drug case showed that a confidential informant (CI) possibly had information relevant to guilt or innocence and could have given testimony relevant to the issues at trial, it erred by failing to conduct an in-camera review upon defendant’s motion to disclose the identity of the CI. A remand was necessary to determine if a new trial was warranted.

*See also, State v. Wilson*, 142 Idaho 431, 128 P.3d 968 (Ct. App. 2006) in which the court held an in camera review was required

where the informant participated in controlled drug buy and was the only person with a clear view of transaction.

5. **Testimony on relevant issue.** If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case in which a public entity is a party, and the informed public entity invokes the privilege, the court must give the public entity an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit.
  6. **Alternatives to testifying.** If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his or her identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: (a) requiring the prosecuting attorney to comply, (b) granting the defendant additional time or a continuance, (c) relieving the defendant from making disclosures otherwise required of defendant, (d) prohibiting the prosecuting attorney from introducing specified evidence, or (e) dismissing charges. In civil cases the court may make any order the interests of justice require.
  7. **Procedural requirements.** Evidence submitted to the court must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents must not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under the rule except a showing *in camera* at which no counsel or party is permitted to be present. Rule 509(c)(3), I.R.E.
- S. **Parent-Child; Guardian or Legal Custodian-Ward Privilege - I.R.E. 514.** A child or ward has a privilege in a civil or criminal action or proceeding to which the child or ward is a party to refuse to disclose and to prevent his or her parent, guardian or legal custodian from disclosing any confidential communication made by the child or ward to his or her parent, guardian or legal custodian. Rule 514(b), I.R.E.
1. **Who Holds the Privilege.** The rule confers the privilege to the child or ward.
  2. **Scope of Privilege.** The rule restricts the privilege only to communications from the child or ward and only to actions or proceedings

to which the child or ward is a party. No protection is afforded the parent, guardian or legal custodian. *See* Comment to Rule 514(b), I.R.E.

3. **Who May Claim the Privilege.** The privilege may be claimed by the child or ward, the lawyer for the child or ward, or by the parent, guardian or legal custodian on behalf of the child or ward. The authority of the lawyer, parent, guardian or ward to do so is presumed in the absence of evidence to the contrary. Rule 514(c), I.R.E.
  4. **“Confidential Communication”.** A communication is “confidential” if it is made by a minor child to his or her parent or a minor ward to his or her guardian or legal custodian, and is not intended for disclosure to any other person. Rule 514(a), I.R.E. The rule defines the confidential communication in terms of intent that it not be disclosed as do the other rules of privilege. Only communications from the child to the parent and from the ward to the guardian or legal custodian are within the scope of the definition. *See* Comment to Rule 514(a), I.R.E.
  5. **Exceptions.** The exceptions are:
    - a. **Civil action.** There is no privilege under the rule in a civil action or proceeding by one of the parties to the confidential communication against the other. Rule 514(d)(1), I.R.E.
    - b. **Criminal action.** There is no privilege under the rule in a criminal action or proceeding for a crime committed by one of the parties to the confidential communication against the person or property of the other. Rule 514(d)(2), I.R.E.
- T. **Accountant-Client Privilege - I.R.E. 515.** The accountant-client privilege is identical to the attorney-client privilege. The privilege is extended to any licensed public accountant or certified public accountant, authorized, or reasonable believed by the client to be authorized, to engage in the practice of accounting in Idaho.
- U. **School Counselor-Student Privilege - I.R.E. 516.** A student has a privilege in any civil or criminal action to which the student is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of counseling services to the student, among himself, his or her school counselor, and persons who are participating in the counseling under the direction of the school counselor, including members of the student’s family. Rule 516(b), I.R.E.
1. **Who Holds the Privilege.** The rule confers the privilege on the student in a civil or criminal action to which the student is a party. Like the

psychotherapist-patient privilege in Rule 503, the privilege encompasses communications made to or in the presence of others, if made in the furtherance of the rendition of the counseling services. *See* Comment to Rule 516(b), I.R.E.

2. **Who May Claim the Privilege.** The privilege may be claimed by the student or for the student through his or her counselor, lawyer, parent, guardian or conservator, or the personal representative of a deceased student. The authority of the counselor, lawyer, parent, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary. Rule 526(c), I.R.E.
3. **“Student”.** A “student” is a person regularly enrolled on a part-time or full-time basis in any public or private school located in the State of Idaho, who consults or is examined or interviewed by a school counselor. Rule 516(a)(1), I.R.E. The rule defines “student” in terms to include those regularly enrolled full-time or part-time, in the primary, secondary and higher education schools whether public or private, provided the school is located in Idaho. No distinction is made in regard to age of the “student.” *See* Comment to Rule 516(a)(1), I.R.E.
4. **“School Counselor”.** A “school counselor” is any person duly appointed, regularly employed and designated for the purpose of counseling students by any public or private school located in the State of Idaho, or reasonably believed by the student so to be. Rule 516(a)(2), I.R.E. The definition includes “resource officers” who often serve in the schools in a dual role as counselor and as a law enforcement officer. To the extent that they serve as a counselor, a confidential communication from a student while being counseled should be deemed privileged. *See* Comment to Rule 516(a)(2), I.R.E.
5. **“Confidential Communication”.** A communication is “confidential” if made to the school counselor while acting in his capacity as a school counselor or reasonably believed by the student to be so acting, and is not intended to be disclosed to third persons except persons present to further the interest of the student in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the rendition of counseling services to the student under the direction of the school counselor including members of the student’s family. Rule 516(a)(3), I.R.E.

The rule defines a “confidential” communication in terms of intent that it not be disclosed to others except as provided therein and that it be made to the counselor while acting in his capacity as a counselor or is reasonably believed by the student to be acting as a counselor. The requirement that

the communication not be intended for disclosure is consistent with the definition provided in the other privilege rules. The requirement that it be made to the counselor while acting in his or her capacity as a counselor or is reasonably believed by the student to be acting as a counselor is in recognition of the dual role performed by school resource officers. See Comment to Rule 516(a)(3), I.R.E.

**6. Exceptions.** The exceptions are:

- a. Civil action.** There is no privilege under the rule in a civil action, case or proceeding by one of the parties to the confidential communication against the other. Rule 516(d)(1), I.R.E. This exception is similar to that provided in the attorney-client and psychotherapist-patient privilege rules. See Comments to Rules 502 and 503, I.R.E.
- b. Guardian or hospitalization.** There is no privilege under the rule as to a communication relevant to an issue in proceedings for the appointment of a guardian or conservator for a student for mental illness or to hospitalize the student for mental illness. Rule 516(d)(2), I.R.E.
- c. Child related communications.** There is no privilege under the rule in a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child. Rule 525(d)(3), I.R.E. The rule provides an exception for child related communications similar to that provided in the psychotherapist patient privilege rule. See Comments to Rules 503 and 515(d)(3), I.R.E.
- d. Crime or harmful act.** There is no privilege if the communication reveals the contemplation of a crime or harmful act. Rule 516(d)(4), I.R.E. See Comment to Rule 516(d)(4), I.R.E.

- V. Licensed Counselor-Client Privilege - I.R.E. 517.** A client has a privilege in any civil or criminal action to which the client is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of licensed counseling services to the client, among himself, his or her licensed counselor, and persons who are participating in the licensed counseling under the direction of the licensed counselor including members of the client's family. Rule 517(b), I.R.E.

1. **“Client”**. A “client” is a person who is rendered licensed counselor services. Rule 517(a)(1), I.R.E. It does not include those persons examined, tested or interviewed pursuant to court order or in the process of preparing a report for a court. *See* Comment to Rule 517(a)(1), I.R.E.
2. **“Licensed Counselor”**. A “licensed counselor” is any person licensed to be a licensed professional counselor or a licensed counselor in the State of Idaho pursuant to Title 54, Chapter 34, Idaho Code, or reasonably believed by the client so to be. Rule 517(a)(2), I.R.E.
3. **“Confidential Communication”**. A communication is “confidential” if not intended to be disclosed to third persons except persons present to further the interest of the client in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the rendition of counseling services to the client under the direction of the licensed counselor, including members of the client’s family. Rule 517(a)(3), I.R.E.
4. **Who May Claim the Privilege**. The privilege may be claimed by the client, or for the client through his or her licensed counselor, lawyer, guardian or conservator, or the personal representative of a deceased client. The authority of the licensed counselor, lawyer, guardian, conservator or personal representative to do so is presumed in absence of the evidence to the contrary. Rule 517(c), I.R.E.
5. **Exceptions**. The exceptions are:
  - a. **Civil action**. There is no privilege under the rule in a civil action, case or proceeding by one of the parties to the confidential communication against the other. Rule 517(d)(1), I.R.E.
  - b. **Proceedings for guardianship, conservatorship or hospitalization**. There is no privilege under the rule as to communications relevant to an issue and proceedings for the appointment of a guardian or conservator for a client for mental illness or to hospitalize the client for mental illness. Rule 517(d)(2), I.R.E.
  - c. **Child related communications**. There is no privilege under the rule in a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child. Rule 517(d)(3), I.R.E.

- d. **Licensing board proceedings.** There is no privilege under this rule in an action, case or proceeding under Idaho Code §54-3404. Rule 517(d)(4), I.R.E.
  - e. **Contemplation of crime or harmful act.** There is no privilege if the communication reveals the contemplation of a crime or harmful act. Rule 517(d)(5), I.R.E.
- W. Licensed Social Worker-Client Privilege - I.R.E. 518.** A client has a privilege in a civil or criminal action to which the client is a party to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of licensed social services to the client, among himself, his or her licensed social worker, and persons who are participating in the licensed social work under the direction of the licensed social worker, including members of the client’s family. Rule 518(b), I.R.E.
- 1. **“Client”.** A “client” is the person who is rendered licensed social worker services. Rule 518(a)(1), I.R.E. It does not include those persons examined, tested or interviewed pursuant to court order or in the process of preparing a report for a court. *See* Comment to Rule 518(a)(1), I.R.E.
  - 2. **“Licensed Social Worker”.** A “licensed social worker” is any person licensed to be a licensed certified social worker or a licensed social worker in the State of Idaho pursuant to Title 54, Chapter 32, Idaho Code. Rule 518(a)(2), I.R.E.
  - 3. **“Confidential Communication”.** A communication is “confidential” if not intended to be disclosed to third persons except persons present to further the interest of the client in the consultation or interview, or persons reasonably necessary to the transmission of the communication, or persons who are participating in the rendition of social services to the client under the direction of the licensed social worker, including members of the client’s family. Rule 518(a)(3), I.R.E.
  - 4. **Who May Claim the Privilege.** The privilege may be claimed by the client, or by the client through his or her licensed social worker, lawyer, guardian or conservator, or the personal representative of a deceased client. The authority of the licensed social worker, lawyer, guardian, conservator or personal representative to do so is presumed in the absence of evidence to the contrary. Rule 518(c), I.R.E.
  - 5. **Exceptions.** The exceptions are:
    - a. **Contemplation or execution of crime or harmful act.** There is no privilege if the communications reveal the contemplation or

execution of a crime or harmful act. Rule 518(d)(1), I.R.E. This exception varies in one respect from the similar exception found in Rules 516 and 517, I.R.E. This exception includes communications revealing the execution of a crime or wrongful act in addition to communications revealing the mere contemplation of such conduct. The rule recognizes that the social worker serves a function different from that served by the school counselor or the licensed counselor, including service as probation officers for the courts which justifies the difference in treatment. *See* Comments to Rules 503, 516 and 518(d), I.R.E.

- b. **Charges against licensee.** There is no privilege under this rule when the client waives the privilege by bringing charges against the licensee. Rule 518(d)(2), I.R.E.
- c. **Civil action.** There is no privilege under this rule in a civil action, case or proceeding by one of the parties to the confidential communication against the other. Rule 518(d)(3), I.R.E.
- d. **Proceedings for guardianship, conservatorship or hospitalization.** There is no privilege as to a communication relevant to an issue in proceedings for the appointment of a guardian or conservator for a client for mental illness or to hospitalize the client for mental illness. Rule 518(d)(4), I.R.E.
- e. **Child related communications.** There is no privilege under this rule in a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child, including, but not limited to the abuse, abandonment or neglect of a child. Rule 518(d)(5), I.R.E. *See* Comment to Rule 503(d)(4), I.R.E.

**X. Hospital, In-Hospital Medical Staff Committee and Medical Society Privilege - I.R.E. 519.** A hospital, in-hospital medical staff committee, medical society, and maker of a confidential communication has a privilege to refuse to disclose and to prevent any other person from disclosing the confidential communication as defined in the rule. Rule 519(b), I.R.E.

- 1. **Scope of Rule.** The rule is applicable in any civil or criminal action. It is drafted to include only statements of opinion or conclusion. The rule explicitly omits and thereby excludes from the rule of privilege all communications of fact. *See* Comment to Rule 519(b), I.R.E.

2. **Who May Claim the Privilege.** The privilege may be claimed by the maker of the confidential communication, by a representative of the hospital, in-hospital medical staff committee or medical society, or for the holder of the privilege by its lawyer. The authority of the representative or lawyer to do so is presumed in the absence of evidence to the contrary. Rule 519(c), I.R.E.

3. **“Hospital”.** A “hospital” is a facility defined in Idaho Code §39-1301(a)(1) and either licensed under Idaho Codes §§39-1301 through 39-1314 or similarly licensed in another jurisdiction. Rule 519(a)(1), I.R.E.

The rule defines “hospital” in terms sufficiently broad to include hospitals located in Idaho and nonresident hospitals.

4. **“In Hospital Medical Staff Committee”.** An “in-hospital medical staff committee” is any individual doctor who is a hospital staff member, or any hospital employee, or any group of such doctors or hospital employees, or any combination thereof, who are duly designated a committee by hospital staff by-laws, by action of an organized hospital staff or by action of the board of directors of a hospital and which committee is authorized by said by-laws, staff or board of directors, or to conduct research or study of hospital patient cases, or of medical questions or problems using data and information from hospital patient cases. Rule 519(a)(2), I.R.E.

A “medical society” is any duly constituted, authorized and recognized professional society or entity made up of physicians licensed to practice medicine in Idaho, having as its purpose the maintenance of high quality in the standards of health care provided in Idaho or any region or segment of the state, operating with the approval of the Idaho State Board of Medicine, or any official committee appointed by the Idaho State Board of Medicine. Rule 519(a)(3), I.R.E.

5. **“Confidential Communication”.** A communication is a “confidential communication” under this rule if it: (A) is made in connection with a proceeding for research, discipline or medical study conducted by an in-hospital medical staff committee or medical society for the purpose of reducing morbidity and mortality, or improving the standards of medical practice or health care in the State of Idaho; (B) is a statement of opinion or conclusion concerning the subject matter of the proceeding; and (C) is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication. Rule 519(a)(4), I.R.E.

“Confidential communication” is defined to require a finding of three elements:

\*Element (A) requires that the communication be made in connection with the proceeding for research, discipline, or medical study conducted by an in-hospital medical staff committee or medical society for the purpose of reducing morbidity or mortality, or improving the standards of medical practice or health care in the State of Idaho.

\*Element (B) restricts the scope of the privilege to include only those confidential communications that are a statement of opinion or conclusion concerning the subject matter of the element (A) proceeding. It includes statements made in written form.

\*Element (C) further requires that the element (B) statement be not intended for disclosure to third persons, except those present to further the research, or medical study, or persons reasonably necessary for the transmission of the communication, or persons participating in the process. *See* Comment to Rule 519(a), I.R.E.

6. **Exception.** Rule 519(d) states the exception to the rule. There is no privilege under the rule as to a communication made in connection with the on-going provision of medical care to a patient. Rule 519(a), I.R.E. It provides an exception to the rule when the statements of opinion or conclusion are made at the time of and concern the on-going treatment of a patient. Although a patient may waive his right of privilege, the exception is necessary because under this rule the privilege is conferred on the maker of the privileged statement, hospital, in-hospital medical staff committee and medical society and a waiver by the patient will not suffice. The scope of the exception is intended to be sufficiently broad that no communications made at the time and relevant to on-going treatment are privileged regardless of the purpose for which the communications were made. Rule 519 does not affect the right of discovery of or the admissibility of any original medical records of a patient. *See* Comment to Rule 519(d), I.R.E.
7. **Waiver.** Rule 519(e), I.R.E. provides for a waiver of the privilege. The privilege to a confidential communication under this rule is waived if the maker of the confidential communication gives evidence of his opinion or conclusion concerning the subject matter of the confidential communication. Rule 519(e), I.R.E. This waiver is in addition to that which exists under the general waiver provisions of Rule 510, I.R.E., relating to voluntary disclosure of a privileged communication. *See* Comment to Rule 519(e), I.R.E.

- Y. Medical Malpractice Screening Panel Privilege - I.R.E. 520.** Rule 520 provides for the medical malpractice screening panel privilege. In any civil action or proceeding, a medical malpractice screening panel or any member thereof, any

party to the medical malpractice screening panel proceeding, and any witness or other person who participated in the medical malpractice screening panel proceedings has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication under this rule. Rule 520(b), I.R.E.

1. **Who May Claim the Privilege.** The privilege may be claimed by any holder of the privilege or for him through his lawyer. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary. Rule 520(c), I.R.E.
2. **“Confidential Communication”.** A communication is a “confidential communication” under the rule if it is made in a proceeding conducted or maintained under the authority of Idaho Code §§6-1001 to 6-1011 and is not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication. Rule 520(a), I.R.E.

“Confidential communication” is defined to require a finding of two elements. First, the communication must be “made in a proceeding conducted or maintained under the authority of Idaho Code §§6-1001 to 6-1011.” Second, it must be “not intended for disclosure to third persons, except persons present to further the purposes of or participate in the proceeding, or necessary for the transmission of the communication.” See Comment to Rule 520(a), I.R.E.

3. **Exceptions.** There are no exceptions to this rule of privilege.

#### IV. PRIVILEGE AGAINST SELF-INCRIMINATION

A. **Fifth Amendment Privilege.** A witness has a Fifth Amendment privilege against self-incrimination. The privilege extends to criminal and civil proceedings, where answers might be used to incriminate the witness in future proceedings. *McPherson v. McPherson*, 112 Idaho 402, 403, 732 P.2d 371 (Ct. App. 1987), citing, *Baxter v. Palmigiano*, 425 U.S. 308 (1976). See also, *Lefkowitz v. Turley*, 414 U.S. 70 (1973). The privilege is also available to persons who claim innocence where the circumstances are such that a direct answer to a question might provide evidence that could be used in a prosecution of the witness. *Ohio v. Reiner*, 532 U.S. 17, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001).

1. **Right to Remain Silent.** The individual may remain silent without suffering a sanction or penalty that would make assertion of the privilege “costly.” *McPherson*, 112 Idaho at 403, citing, *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967).

2. **Scope of Privilege.** This protection extends to information that could furnish a link in a chain of evidence leading to prosecution. *McPherson*, 112 Idaho at 403, citing *Maness v. Meyers*, 419 U.S. 449 (1975).
3. **Consequences Required.** Consequences other than criminal prosecution--such as disgrace, pecuniary loss or liability for civil damages--are not sufficient to invoke the privilege. *Id.*
4. **Reasonable Cause to Fear Prosecution Required.** The privilege must be supported by more than a vague, subjective fear of prosecution. The protection afforded by the Fifth Amendment is confined to instances where the individual has a reasonable cause to apprehend danger from a direct answer.
5. **Court Must Determine if Silence Justified.** A witness is not exonerated from answering merely because the witness declares that in so doing the witness would incriminate him/herself--the witness' say-so does not itself establish the hazard of incrimination. It is for the court to say whether the witness' silence is justified, and to require the witness to answer if it clearly appears to the court that the witness is mistaken. *McPherson*, 112 Idaho at 404, citing, *Hoffman v. United States*, 341 U.S. 479 (1951).

Although the task of discerning what is self-incriminating and what is non-incriminating may fall initially upon the person asserting the privilege, the responsibility for weighing the objective reasonableness of a fear of prosecution lies with the court. *McPerson*, 112 Idaho at 404-405.

6. **Context Must be Considered.** In determining whether the answer to a question (or an explanation of why it cannot be answered) might be incriminating, the judge must consider the context of the propounded question. *McPherson*, 112 Idaho at 405.

A trial judge must examine the "implications of the questions in the setting in which they are asked. The judge must be governed as much by his [her] personal perception of the peculiarities of the case as by the facts actually in evidence." *Idaho State Tax Commission v. Peterson*, 107 Idaho 260, 262, 688 P.2d 1165 (1984).

7. **Proof Required to Establish Right.** If the trial judge decides from his/her examination of the questions, their setting, and the peculiarities of the case, that no threat of self-incrimination exists, it then becomes incumbent upon the witness to show that answers to the questions might incriminate. This does not mean that the witness must confess the crime. The law does not require the witness to prove guilt to avoid admitting it.

Neither does the law permit the witness to be the final arbiter of his/her own assertion validity. *McPerson*, 112 Idaho at 405.

The individual must sketch a plausible scenario of how a potential response would provide direct or circumstantial evidence of criminal conduct or clues leading to evidence of criminal conduct. *Id.*

8. **Contents of Documents.** The contents of documents, if voluntarily created by the witness, such as business records or diaries, are not protected by the privilege. However, the act of producing the documents, e.g., in response to a subpoena, may be privilege if the production would have the testimonial effect of authenticating the documents or tying them to the witness. *See, U.S. v. Doe*, 465 U.S. 605 (1984)
9. **Application at Sentencing.** The privilege applies at sentencing as well as at trial. Where defendant was ordered to submit to psychosexual evaluation for sentencing had a Fifth Amendment privilege and attorney's failure to advise defendant of the privilege constituted ineffective assistance of counsel. *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006), petition for cert. filed, 75 U.S.L.W. 3586 (2007).
10. **Inapplicability if Defendant Asserts Mental Condition as a Defense.** An accused who raises an issue of mental condition as a defense can be compelled to submit to a psychological evaluation by State experts under Idaho Code § 18-207(4) and such evaluation does not violate the defendant's privilege against self-incrimination. *State v. Santistevan*, 143 Idaho 527, 148 P.3d 1273 (Ct. App. 2006).

**B. Waiver of Self-Incrimination Privilege.**

1. **Scope of Waiver.** 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. *U.S. v. Havens*, 446 U.S. 620 (1980); *State v. Hargraves*, 62 Idaho 8, 107 P.2d 854 (1940). *See also*, LEWIS, IDAHO TRIAL HANDBOOK, Sec. 17.4, p. 196.

If one desires protection against being compelled in a criminal case to testify against oneself, the witness must claim it or the witness will not be considered to have been compelled within the meaning of the Fifth Amendment. *State v. Curless*, 137 Idaho 138, 44 P.3d 1193 (2002).

2. **Testimony on Credibility Ineffective as Waiver.** Testimony by the defendant only upon matters concerning the credibility of other witnesses, does not constitute a waiver of the privilege against self-incrimination.

See I.R.E. 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.”

3. **Cross-examination Limited.** Cross-examination on matters not pertinent to direct testimony or credibility would improperly compel the defendant to furnish original evidence against him/herself. *Harrison v. U.S.*, 392 U.S. 219 (1968); *Fitzpatrick v. U.S.*, 178 U.S. 304 (1900).

**C. Constitutional Right Not to Testify.**

1. **Fifth Amendment Right.** An accused has a constitutional right not to testify in a criminal proceeding. *Griffin v. California*, 380 U.S. 609 (1965); *State v. Hodges*, 105 Idaho 588, 671 P.2d 1051 (1983).
2. **Comment Prohibited.** Any direct or indirect comment by the prosecution on the defendant’s failure to testify is a violation of that right.
3. **Waiver of Right by Testifying at Pre-trial Hearing.** A defendant may waive the right not to testify by offering testimony at pre-trial. However, a defendant who testifies at a pre-trial hearing only on the admissibility of evidence does not waive the right to refuse to testify at trial. *Simmons v. United States*, 390 U.S. 377 (1968).

If the defendant does not testify at trial the prosecution may not introduce evidence of the defendant’s pre-trial testimony. *Id.*

**V. THE “DEADMAN” RULE — I.R.E. 601(b).**

- A. Generally.** I.R.E. 601(b) operates to exclude testimony in support of a claim against the estate of a decedent under certain circumstances.

I.R.E. 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).

- B. Rule 601(b):** Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against an estate or a deceased person as to any communication or agreement, not in writing, occurring before the death of such deceased person.

The Rule incorporates the former “Deadman Statute,” Idaho Code 9-202(3).

- C. Scope of Rule Limited.** “The rule only prohibits testimony concerning oral communications of 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) (former similar statute did not prohibit testimony by claimant concerning condition of written deed at time of delivery).” LEWIS, IDAHO TRIAL HANDBOOK, Sec. 14.2, p. 152.
- D. Scope of Disqualification.** The rule does not prohibit non-parties to the action from testifying about oral communications or agreements prior to the decedent’s death. Only parties, assignors, and real parties in interest are disqualified.

A relative of a claimant may testify to an oral promise to devise property, if the witness has no financial stake in the outcome. *Quayle v. Mackert*, 92 Idaho 563, 447 P.2d 679 (1968) (applying I.C. 9-202(3)).

- E. Who May Assert the Exclusion.** The rule may only be asserted by the executor or administrator of the estate; it is not available to claimants against an estate. *In re Estate of Irwin*, 99 Idaho 543, 585 P.2d 953 (1978).

It may not be asserted by persons defending a claim by an estate, *Chiara v. Amabile*, 64 Idaho 55, 127 P.2d 795 (1942), or in actions in which the estate is not a party. *In re Estate of Cooke*, 96 Idaho 48, 524 P.2d 176 (1973)(testimony of widow in action by children against widow for share of estate).

A former personal representative may not assert the rule to bar testimony offered to defend against claims of misappropriation from the estate. *Kuloch v. First Sec. Bank of Idaho*, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996), *rev. den.* (1996)(in action by heirs of estate against personal representative for misappropriation from the estate, the personal representative is treated as a party prosecuting an action against the state).

- F. Executor May Waive Rule.** The executor or administrator may waive the rule either by failing to object or by cross-examining a witness as to the protected matter. *Chapman v. Booth*, 71 Idaho 359, 232 P.2d 668 (1951).

## VI. PAROL EVIDENCE RULE.

- A. Contract Construction Rule.** The “parol evidence rule” is not an evidence rule, but rather a rule of construction of contracts, which may operate to exclude evidence that is relevant and otherwise admissible under the Rules of Evidence.
- B. Statement of the Rule.** Under the rule, if a written agreement is complete upon its face and unambiguous, in the absence of fraud or mistake, evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the written contract. *Valley Bank v.*

*Christensen*, 119 Idaho 496, 808 P.2d 415 (1991); *Miller Const. Co. v. Stresstek*, 108 Idaho 187, 697 P.2d 1201 (Ct. App. 1985). It is a rule of substantive law; not a rule of procedure or evidence law.

- C. **Application of Rule.** The rule applies only when the integrated character of the writing is established. *Katseanes v. Yamagata*, 103 Idaho 773 (Ct. App. 1082); rev. denied, 116 Idaho 466, 776 P.2d 828 (1982); appeal after remand, 109 Idaho 702 (1985). The rule applies only to contractual matters that were intended to be integrated into the written contract. It does not apply to subsequent modification of an agreement.

In addition to the situations when the language in the contract is ambiguous and requires extrinsic evidence to ascertain the intent of the parties, exceptions to the rule exist in which extrinsic evidence is admissible even though the language in the document appears clear and unambiguous. For example, extrinsic evidence is admissible to show the nonexistence of a contract or to show the invalidity of a contract. *McMullen v. Hoffman*, 174 U.S. 630 (1899).

Parol evidence does not apply to averments of fraud, misrepresentation, mutual mistake or other matters which render the contract or deed void or avoidable. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987).

The rule does not bar evidence of incapacity or duress asserted to invalidate a contract or deed. *Golder v. Golder*, 110 Idaho 57, 714 P.2d 26 (1986); *Empire Refineries v. Jones*, 69 Idaho 335, 206 P.2d 519 (1994). Extrinsic evidence is allowed to show a deed was intended as a security. *Smith v. Swendsen*, 57 Idaho 715, 69 P.2d 131 (1937).

- D. **Who May Assert the Rule.** The rule is available only to a party to a valid written contract. *Large v. Cafferty Realty*, 123 Idaho 676, 851 P.2d 972 (1993)(realtor could not assert rule to exclude parol evidence concerning earnest money agreement to which realtor was not a party).

## VII. CONFRONTATION CLAUSE DECISIONS

### A. U.S. 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*, 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 nontestimonial, 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.” *Davis*, 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 nontestimonial out-of-court statements.

3. ***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 case involves the admission of statements that the murder victim had made to a police officer responding to a domestic violence call. Giles was convicted. While his appeal was pending, the Court held that the Sixth Amendment’s Confrontation Clause gives defendants the right to cross-examine witnesses who give testimony against them, except in cases where an exception to the confrontation right was recognized at the founding. *Crawford v. Washington*, 541 U.S. 36, 53-54. The State Court of Appeal concluded that the Confrontation Clause permitted the trial court to admit into evidence the unopposed 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.

A finding that this was not a testimonial statement would have eliminated the constitutional question, leaving admission as a matter of state law application of the hearsay exception. 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.

4. ***Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_\_ (Doc. No. 07-591 2009)**. The U. S. Supreme Court held the admission of certificates of state laboratory analysts stating that material seized by police and connected to the accused was cocaine of a certain quantity, which were admitted in evidence against the accused as prima facie evidence of what they asserted, violated the defendant's Sixth Amendment right to confront the witnesses against him.

Under *Crawford*, a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. The certificates here are affidavits, which fall within the "core class of testimonial statements" covered by the Confrontation Clause. They asserted that the substance found in petitioner's possession was, as the prosecution claimed, cocaine of a certain weight – the precise testimony the analysts would be expected to provide if called at trial. Not only were the certificates made, as *Crawford* required for testimonial statements, "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 the relevant Massachusetts law their sole purpose was to provide prima facie evidence of the substance's composition, quality and net weight. Defendant was entitled to be confronted with the persons giving this testimony at trial.

The arguments advanced to avoid this rather straightforward application of *Crawford* were rejected. Respondent's claim that the analysts are not subject to confrontation because they are not "accusatory" witnesses was rejected. The affiants' testimonial statements were not "nearly contemporaneous" with their observations, nor, if they had been, would that fact alter the statements' testimonial character. The Court found no support for the proposition that witnesses who testify regarding facts other than those observed at the crime scene are exempt from confrontation. The absence of interrogation is irrelevant; a witness who volunteers his testimony is no less a witness for Sixth Amendment purposes. The affidavits do not qualify as traditional official or business records. The argument that the analysts should not be subject to confrontation because their statements result from neutral scientific testing is little more than an invitation to return to the since-overruled decision in *Ohio v. Roberts*. Defendants power to subpoena the analysts is no substitute for the right of confrontation. Finally, the requirements of the Confrontation Clause may not be relaxed because they make the prosecution's task burdensome.

## **B. IDAHO DECISIONS.**

1. ***State v. Hooper.*** The Idaho Court of Appeals applied the *Davis* analysis to a question of the admissibility of a videotaped interview of a child sexual abuse victim. In *State v. Hooper*, \_\_\_ Idaho \_\_\_, \_\_\_P.3d. \_\_\_, 2006 WL 2328233, 06, 17 ICAR 761 (not released for publication in Idaho Reports or P.3d) (Ct. App., 2006) (*rev. granted*). 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 held that the interview by the nurse bore more resemblance to the police interviews that were held to be testimonial in *Crawford* and *Hammon* than to the 911 call that was at issue in *Davis*. The Court noted that the interview was not a plea for assistance in the face of an ongoing emergency, but was to determine events that occurred earlier that day, conducted in a controlled and safe environment, and the statement that the child gave was precisely the kind that a witness would give on direct examination at trial. The Court also concluded that the fact that the interview was conducted by a nurse rather than police did not prevent it from being testimonial where it was done at the behest and under the direction of a police officer and the nurse knew that the interview was in preparation for trial and likely would be used in the criminal prosecution. **On review**, employing a totality of circumstances analysis, the Idaho Supreme Court held the videotaped statements were testimonial in nature, based on *Crawford* and *Davis*, and that admission of the statements was not harmless error. The conviction was vacated and case remanded. *State v. Hooper*, 145 Idaho 139, 176 P.3d 911, 2007 WL 4472263 (Idaho 2007).
2. ***State v. Rose***, 144 Idaho 762, 171 P.3d 253 (2007) held the *Crawford* constitutional right of confrontation does not apply to probation revocation hearings.

**C. DOES THE CONFRONTATION CLAUSE APPLY AT PRELIMINARY HEARINGS?**

Whether the Sixth Amendment's Confrontation Clause applies at the preliminary hearing stage has never been addressed by Idaho appellate courts. Nor has the United States Supreme Court 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 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 stage. See e.g. *State v. Conner*, 453 N.W.2d 617 (S.D. 1990); *Gresham v. Edwards*, 644 S.E.2d 122 (Ga. 2007); *State v. Rhinehart*, 153 P.3d 830 (Utah App. 2006); *Sheriff v. Witzenburg*, 145 P.3d 1002 (Nev. 2006); *State v. Martinez*, 874 P.2d 617 (Kan. 1994); *State v. Sherry*, 667 P.2d 367 (Kan. 1983). 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).

By Idaho 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). However, whether this statute has any effect after adoption of the Idaho Rules of Evidence is open to debate.

(End of Outline)

**TRIAL EVIDENCE FOR JUDGES: THE EXCLUSIONARY RULES**  
**QUESTIONS FOR THE 2009 IDAHO JUDICIAL CONFERENCE**

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.

How do you rule?

## 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.

How do you rule?

### 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.

How do you rule?

#### 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 do you rule?

## 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.

How do you rule?

## 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.

(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 do you rule?

#### 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 do you rule?

## 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 do you 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?

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 do you rule if Wife moves to compel and seeks sanctions?

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

## 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 do you rule?

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 you are required to rule on a motion to compel disclosure, how do you rule?

**END OF QUESTIONS**

**5**

**PART V**

**TRIAL EVIDENCE FOR JUDGES:  
THE HEARSAY RULES**

**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**  
**2010 JUDICIAL CONFERENCE**

**September 22, 2010**  
**Idaho Falls, Idaho**

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## TABLE OF CONTENTS

BIOGRAPHICAL SUMMARIES .....	1
TRIAL EVIDENCE FOR JUDGES By Merlyn W. Clark, Esq. D. Craig Lewis, Esq.....	2
I. INTRODUCTION.....	2
II. GENERAL PRINCIPLES.....	2
A. Factors for Evaluating Testimony .....	2
B. Judicial Discretion.....	3
1. Rule 403 Factors.....	3
2. Additional Factors .....	3
3. Self-Authentication does not Qualify Inadmissible Hearsay for Admission .....	3
4. Constitutional Hearsay Considerations .....	3
C. Evidence Rules are Controlling Authority - Rule 802 .....	8
1. Statutory Exceptions Are Ineffective .....	8
2. Exceptions Created by Other Rules .....	8
III. WHAT IS HEARSAY - I.R.E. 801.....	9
A. Definitions .....	9
1. Rule 801(c) Definition of Hearsay .....	9
2. Rule 801(a) Definition of Statement .....	9
B. Assertions Can be Oral, Written or Nonverbal Conduct.....	9
1. Oral Assertion .....	9
2. Written Assertion .....	9
3. Assertive Nonverbal Conduct .....	10
a. Obvious Examples of Non-verbal Statements .....	10
b. Less Obvious Example of Non-verbal Statement .....	10
C. Human Declarant Required.....	10
1. Machines and Animals do not Produce Hearsay.....	10
2. Intoximeter Printout is Not a Statement.....	10
D. Purpose to Prove Its Truth.....	11
E. Various Uses of Statements Other than as Proof of the Truth of the Statement.....	11
1. Impeachment .....	11

2. Verbal Acts (Words of Independent Legal Significance) .....	11
3. Effect on Listener or Reader .....	11
4. “Verbal Markers/Inscriptions.” .....	12
IV. WHAT IS NOT WITHIN THE DEFINITION OF HEARSAY .....	12
A. Unintended Assertions are Nonhearsay Statements .....	12
1. Nonassertive Utterance .....	12
2. Nonassertive Writing.....	12
3. Nonassertive Nonverbal Conduct.....	13
4. Statement with Direct Legal Significance.....	14
a. Verbal Acts.....	14
b. Defamatory Words .....	14
5. Circumstantial Evidence of Facts.....	15
a. Circumstantial Evidence of the Speaker’s State of Mind .....	15
b. Circumstantial Evidence of the Speaker’s Knowledge or Memory .....	15
c. Circumstantial Evidence of the Speaker’s Mental Health .....	16
6. Fraud.....	16
B. Statements Implying a Particular State of Mind of Declarant are not Hearsay .....	16
1. Guilty Conscience .....	17
a. False Exculpatory Statements .....	17
b. Inconsistent Statements .....	17
2. Conspiracy.....	17
3. Victim’s State of Mind.....	18
4. Knowledge at the Time .....	18
5. Intent.....	19
a. Direct Assertion of Intent.....	19
b. Past Intent.....	19
6. Ambiguous Conduct.....	19
a. Statement with Delivery of Property.....	20
b. Ambiguous Acts .....	20
c. Statements re Testamentary Intent .....	20
7. Motive and Feelings .....	20

C. Statements that Produce a Particular State of Mind in Another are not Hearsay.....	21
1. Knowledge or Notice .....	21
2. Understanding of an Agreement .....	21
3. Willingness to Accept Policy Limits.....	21
4. Motive .....	22
5. Fraud.....	22
a. Intent to Defraud .....	22
b. Intent Not to Defraud .....	22
6. Instructions or Directions .....	22
7. Mens Rea.....	22
D. Implicit Intended Assertions are Hearsay .....	23
1. Implicit Assertion by Statement.....	23
2. Implicit Assertion by Question .....	23
V. STATEMENTS THAT ARE DEEMED NONHEARSAY - I.R.E. 801(d). .....	23
A. Statements Which are Not Hearsay Under Rule 801(d) .....	23
B. Prior Statement by Witness - Rule 801(d)(1).....	24
1. Inconsistent Former Testimony.....	24
2. Prior Consistent Statements Offered to Rebut Charge of Fabrication, Improper Influence or Motive.....	24
3. Identification of a Person .....	25
a. Purpose.....	25
b. Constitutional Standards Apply .....	25
c. Underlying Rationale .....	25
C. Admission by Party-Opponent - Rule 801(d)(2).....	26
1. Statement of a Party .....	26
a. Plea of Guilty .....	26
b. Allegations in Complaint .....	27
2. Adopted Statement .....	27
3. Authorized Statement.....	27
4. Statement by Agent or Servant.....	28
5. Statement by Co-conspirator.....	28

a. Course of Conspiracy .....	29
b. Order of Proof .....	29
VI. EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL - I.R.E. 803 .....	30
A. Generally .....	30
1. Rule 803 Rationale .....	30
2. Rule 804 Rationale .....	30
3. Judicial Discretion .....	30
4. Other Provisions of Rules Still Apply .....	30
5. Self-Serving Nature of Statements is Irrelevant .....	30
6. Rule 403 is Applicable .....	31
B. Rule 803 Hearsay Exceptions .....	31
1. Present Sense Impression - Rule 803(1) .....	31
a. “Verbal Camera” .....	31
b. Underlying Rationale .....	31
c. Foundation Required .....	31
2. Excited Utterance - Rule 803(2) .....	32
a. Spontaneous Declaration .....	32
b. Underlying Rationale .....	32
c. Foundation Required .....	32
d. Allowable Lapse of Time May Vary With Circumstances .....	33
3. Then Existing Mental, Emotional or Physical Condition - Rule 803(3) .....	34
a. “State of Mind (or Body)” Exception .....	34
b. Underlying Rationale .....	35
c. Examples in the Rule are not Exclusive .....	35
d. The Hillmon Doctrine .....	35
4. Statements for Purposes of Medical Diagnosis or Treatment - Rule 803(4) .....	36
a. Underlying Rationale .....	36
b. Scope of Rule .....	36
c. Statements as to Past Symptoms .....	36
5. Recorded Recollection - Rule 803(5) .....	37
a. Foundation Required .....	37

b. Procedure.....	37
c. Underlying Rationale .....	37
6. Records of Regularly Conducted Activity - Rule 803(6).....	38
a. “Business” Defined .....	38
b. Foundation Required .....	38
c. Types of Information that Qualify .....	40
d. Purpose of Untrustworthiness Provision.....	41
7. Absence of Entry in Records - Rule 803(7).....	42
a. Foundation Required .....	42
b. Summaries Qualify.....	42
8. Public Records and Reports - Rule 803(8).....	42
a. Exclusions from Exception .....	42
b. Limited Scope of Rule.....	43
c. Reports to Public Agencies Qualify .....	43
d. Applying the Rule .....	44
9. Records of Vital Statistics - Rule 803(9) .....	44
a. Foundation Required .....	44
b. Limited Scope of Rule.....	44
c. Preliminary Showing Required .....	44
10. Absence of Public Record - Rule 803(10) .....	44
11. Records of Religious Organizations - Rule 803(11) .....	45
a. Scope of Exception.....	45
b. Use of Exception is Expanded Beyond Rule 803(6).....	45
12. Marriage, Baptismal and Similar Certificates - Rule 803(12) .....	45
a. Scope of Exception.....	45
b. Foundation Required .....	45
13. Family Records - Rule 803(13).....	46
14. Records of Documents Affecting an Interest in Property - Rule 803(14).....	46
15. Statements in Documents Affecting an Interest in Property - Rule 803(15) .....	46
a. Foundation Required .....	46
b. Scope of Exception.....	47

c. Circumstances of Use is Limited .....	47
16. Statements in Ancient Documents - Rule 803(16).....	47
17. Market Reports, Commercial Publications - Rule 803(17).....	47
a. Scope of Exception.....	47
b. Proof of Stock Prices.....	47
18. Learned Treatises - Rule 803(18).....	47
a. Use for Substantive Evidence .....	48
b. Scope of Use.....	48
19. Reputation Concerning Personal or Family History - Rule 803(19).....	48
a. Scope of Exception.....	49
b. Reputation Evidence Allowed.....	49
c. Foundation Required .....	49
d. Application of Rule 403 .....	49
20. Reputation Concerning Boundaries or General History - Rule 803(20).....	49
a. Scope of Exception.....	49
b. Foundation Required to Prove Boundaries and Customs.....	49
c. Foundation Required to Prove Events of General History.....	50
21. Reputation as to Character - Rule 803(21).....	50
a. Purpose of Exception .....	50
b. Application of Rule 803(21) .....	50
22. Judgment of Previous Conviction - Rule 803(22).....	50
a. Use Restricted to Criminal Felony Judgments in Subsequent Proceedings.....	51
b. Judgment on Trial or Plea Required.....	51
c. Felony Grade Required .....	51
d. Restriction on Use of Conviction of Third Person.....	51
e. Evidence is not Conclusive .....	51
23. Medical or Dental Tests and Test Results for Diagnostic or Treatment Purposes. ....	52
24. Other Exceptions - Rule 803(24) .....	52
a. Advance Notice Required .....	52
b. Comparable to Rule 804(b)(5) .....	53

c.	Application of “Catch-All” Exception is Limited.....	53
d.	Foundation Required.....	53
e.	Examples of Application.....	55
f.	Rule 403 is Applicable.....	55
VII.	EXCEPTIONS; DECLARANT UNAVAILABLE - I.R.E. 804.....	55
A.	General Comments.....	55
1.	Attempt to Procure Attendance by Process may be Required.....	56
2.	Underlying Rationale.....	56
3.	Determination by the Court.....	56
a.	Procedure.....	56
b.	Burden of Proof.....	56
4.	Other Evidence Rules Apply.....	56
a.	Self-Serving Nature of Statements is Irrelevant, Except under Rule 804(b)(3).....	57
B.	“Unavailability” Defined - Rule 804(a).....	57
1.	Former Testimony - Rule 804(a)(1).....	57
2.	Refusal to Testify - Rule 804(a)(2).....	57
3.	Lack of Memory - Rule 804(a)(3).....	57
4.	Death, Physical or Mental Illness or Infirmary - Rule 804(a)(4).....	58
a.	Judicial Discretion and Factors to Consider.....	58
b.	Confrontation Concerns.....	58
5.	Absence and Inability to Obtain Testimony - Rule 804(a)(5).....	58
a.	Criminal Case Special Requirements.....	58
b.	Effort to Depose Required.....	59
c.	Putting Witness On Stand Required.....	59
d.	Unavailability of a Witness Must be of Such Duration that a Continuance is Not a Practical Alternative.....	59
C.	Disqualification.....	59
D.	Former Testimony - Rule 804(b).....	60
1.	Former Testimony - Rule 804(b)(1).....	60
a.	Foundation Required.....	60

b.	Identity of Parties .....	60
c.	Similar Motive to Develop the Testimony .....	60
d.	Similarity of Issues .....	61
e.	Opportunity to Cross-Examine .....	61
f.	Type of Proceeding .....	61
g.	Preliminary Hearing Testimony .....	61
2.	Statement Under Belief of Impending Death - Rule 804(b)(2) .....	62
a.	Underlying Rationale .....	62
b.	Judicial Discretion .....	62
c.	Foundation Required .....	62
3.	Statement Against Interest - Rule 804(b)(3) .....	63
a.	Underlying Rationale .....	63
b.	“Reasonable Man” Test .....	63
c.	Self-Serving and Disserving Statements .....	64
d.	Statements Against Penal Interest .....	64
e.	Third-Party Statements .....	65
f.	Prosecution’s Use of Such Statements .....	65
4.	Statement of Personal or Family History - Rule 804(b)(4) .....	65
a.	Antecedent Statement not Required .....	66
b.	Any Form of Unavailability Qualifies .....	66
c.	Scope of Matters Excepted .....	66
d.	Personal Knowledge - Own History .....	66
e.	Personal Knowledge - Another’s History .....	66
6.	Other Exceptions - Rule 804(b)(5) .....	66
a.	Purpose of Exceptions .....	67
c.	Advance Notice Required .....	67
VIII.	HEARSAY WITHIN HEARSAY - I.R.E. 805 .....	68
A.	Multiple Hearsay .....	68
1.	Purpose of Rule .....	68
2.	Problem with Multiple Hearsay .....	68
3.	Judicial Discretion to Exclude Evidence .....	68

IX. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT - RULE 806.....	68
A. Impeachment of Hearsay Declarant .....	68
1. What May be Shown .....	69
2. Rehabilitation .....	69
3. Foundation Required .....	69
4. Right to Cross-Examine Declarant.....	69
X. OTHER HEARSAY EXCEPTIONS. ....	69
A. Hearsay Exceptions Created by Rule 101 .....	69
B. Use of Hearsay At Preliminary Hearing .....	70
C. Use of Depositions .....	71
PROBLEMS.....	1
RULES 801 - 806.....	1

## BIOGRAPHICAL SUMMARIES

**Merlyn W. Clark, Esq.** is a partner in the Boise office of Hawley Troxell Ennis & Hawley LLP, where he practices primarily in the area of civil litigation. He was admitted to the degree of Juris Doctor by the University of Idaho, College of Law in 1964. Mr. Clark engaged in the general practice of law in Lewiston, Idaho from 1964 to 1979, when he joined Hawley Troxell. He also served as Prosecuting Attorney for Nez Perce County from 1974 to 1977.

Mr. Clark served as chairman and reporter of the Idaho State Bar Evidence Committee from its inception in 1980 through the process of adoption and implementation of the Idaho Rules of Evidence in 1985. He continued to serve as a member of the Idaho Supreme Court Evidence Rules Advisory Committee from 1986 to 1992. He is the recipient of the Distinguished Lawyer Award of the Idaho State Bar, the Award of Legal Merit presented by the University of Idaho College of Law and the Distinguished Service Award presented by the Idaho Judiciary for his voluntary contributions and service toward modernizing the Idaho Rules of Evidence and providing training and procedural guides for state court judges. Publications include "Idaho Rules of Evidence: Their Effect on Idaho Law," 22 Idaho Law Review 1 (1985). Mr. Clark is a Fellow of The American College of Trial Lawyers, a Master Lawyer of The American Inns of Court Foundation, Boise CXXX, a Certified Professional Mediator of the Idaho Mediation Association and a Fellow of The American College of Civil Trial Mediators.

**D. Craig Lewis, Esq.** served as a professor of law at the University of Idaho, College of Law, Moscow, Idaho from 1975 until he retired in 2007, teaching in the areas of civil procedure, evidence and trial practice. Mr. Lewis was admitted to the degree of Bachelor of Science by Northwestern University in 1966 and received an LL.B. from Yale Law School in 1969. He engaged in litigation practice in Denver, Colorado with Holme Roberts & Owen from 1969 to 1971 and with Pendleton, Sabian, Guthery & Lewis, P.C. from 1971 to 1975. He has been a member of the Idaho State Bar since 1977.

Mr. Lewis served as a member of the Idaho State Bar Evidence Committee from its inception in 1980 through the process of adoption and implementation of the Idaho Rules of Evidence in 1985, with primary responsibility for editing the drafting of the rules and comments to the rules. Mr. Lewis is author of the Idaho Pre-Trial Civil Procedure (Idaho Law Foundation, Inc. 1982) and Idaho Trial Handbook, 2<sup>nd</sup> ed. (Lawyers Cooperative Publishing Co. 1995), which he updates annually.

# TRIAL EVIDENCE FOR JUDGES

By

Merlyn W. Clark, Esq.

D. Craig Lewis, Esq.

## I. INTRODUCTION.

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

The hearsay rules are found primarily in Article VIII of the Idaho Rules of Evidence. Article VIII approaches hearsay in the traditional manner of a definition provided in Rule 801 and a rule excluding hearsay, Rule 802, subject to certain exceptions under which hearsay is not required to be excluded. In some instances hearsay is admissible pursuant to an exception without regard to the availability of the declarant as a witness as under Rule 803, while in other instances the hearsay exception requires that the declarant or the declarant's testimony be unavailable as under Rule 804. Provision is also made for hearsay within hearsay under Rule 805 and for attacking and supporting the credibility of a hearsay declarant under Rule 806.

Article VIII departs from the common law in Rule 801(d)(1) by treating certain prior statements by a witness as non-hearsay, and in Rule 801(d)(2) by treating admissions of a party-opponent as non-hearsay rather than as exceptions to the hearsay rule. Out-of-court statements that are not hearsay or fall within a hearsay exception to be admitted into evidence must still meet other requirements for admissibility, such as relevance, authenticity, and when the contents of a document are sought to be proved, the original writing rule of Rule 1002, I.R.E. To further enhance reliability the first-hand knowledge requirement of Rule 602 must be read into the hearsay exceptions governed by Rules 803 and 804.

In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.

## II. GENERAL PRINCIPLES

- A. **Factors for Evaluating Testimony.** Factors to be considered in evaluating testimony of a witness are perception, memory and narration. Traditionally, to foster reliable testimony the witness has been generally required to testify: (1) under oath or affirmation, (2) in the personal presence of the trier of fact so

demeanor can be observed, and (3) subject to cross-examination. The danger against which the hearsay rule is directed is that evidence which is untested by these three conditions will be unreliable because faults in the perception, memory and narration of the declarant will not be exposed.

**B. Judicial Discretion.** The trial judge must exercise discretion in applying the hearsay rules to implement the rules' paramount goal of insuring just and accurate determinations.

1. **Rule 403 Factors.** In addition to determining whether the proffered evidence is relevant, the judge must weigh the need and the value of the evidence against the dangers of unfair prejudice it would pose. *See* Rule 403, I.R.E.

2. **Additional Factors.** Other factors to be considered include the availability of the declarant, availability of other evidence, the nature of the statement, the nature of the case, whether a jury or non-jury case, and whether a criminal or civil case. In a criminal case there is greater danger of prejudice to an accused and additional limiting factors must be considered such as the right of confrontation, limitations on the use of extra judicial statements of the accused imposed by the privilege against self-incrimination and the right to counsel, and rather limited discovery.

3. **Self-Authentication does not Qualify Inadmissible Hearsay for Admission.** “[T]he fact that a document is self-authenticating under the provisions of IRE 902 does not “bootstrap” the document into admission if the document is inadmissible hearsay. *City of Idaho Falls v. Beco Constr. Co.*, 123 Idaho 516, 850 P.2d 165 (1993).” Lewis, IDAHO TRIAL HANDBOOK, § 19.1 at 218.

4. **Constitutional Hearsay Considerations.** In criminal prosecutions, the admission of hearsay against a criminal defendant may implicate the Confrontation Clause, U.S. Constitution Amendment VI. There is no comparable provision in the Idaho Constitution. The Confrontation Clause requires the exclusion of a testimonial statement against an accused, no matter how reliable a court may deem it to be, if the accused does not have an adequate opportunity to cross-examine the witness who made the statement.

a. ***Crawford v. Washington***, 124 Sup. Ct. 1354 (2004). The *Crawford* decision overruled *Ohio v. Roberts*, 448 U.S. 56 (1980) to the extent that a testimonial hearsay statement of an unavailable witness will no longer be admitted against a criminal defendant based on a foundation that the statement bears “adequate indicia of reliability,” a test under *Roberts* that was met when the evidence either fell within a “firmly rooted hearsay

exception” or bore “particularized guarantees of trustworthiness.” The *Crawford* Court declined to delineate a comprehensive definition of “testimonial” hearsay statements, stating:

Various formulations of this core class of “testimonial” statements exist: [1] *ex parte in-court testimony or its functional equivalent* -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] *extrajudicial statements . . . contained in formalized testimonial materials*, such as affidavits, depositions, prior testimony, or confessions . . . [3] *statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . .*

*Crawford*, 124 Sup. Ct. at 1364.

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.

**b. *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 nontestimonial, 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.

*c. Whorton v. Bockting*, 595 U.S. 406, 127 S. Ct. 1173, 1183 (2007) held that the Confrontation Clause has no application to nontestimonial out-of-court statements.

*d. Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), held that lab reports and the like prepared for law enforcement are "testimonial" and therefore subject to the Confrontation Clause. 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.

*e. Giles v. California*, 128 S. Ct. 2678 (2008), held 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 case involves the admission of statements that the murder victim had made to a police officer responding to a domestic violence call. Giles was convicted. While his appeal was pending, the Court held that the Sixth Amendment's Confrontation Clause gives defendants the right to cross-examine witnesses who give testimony against them, except in cases where an exception to the confrontation right was recognized at the founding. *Crawford v. Washington*, 541 U.S. 36, 53-54. The State Court of Appeal 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.

A finding that this was not a testimonial statement would have eliminated the constitutional question, leaving admission as a matter of state law application of the hearsay exception. 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.

**f. In the Interest of: John Doe, a Juvenile, State v. John Doe.** In a decision following the issuance of *Crawford*, the Idaho Court of Appeals held that the *Crawford* ruling was inapplicable because the statements involved non-testimonial hearsay. In the Interest of: John Doe, a Juvenile, State v. John Doe, 140 Idaho 873, 103 P.3d 967 (Ct. App. 2004) (statements by minor to mother and grandmother that the accused “put his finger in her bum” were admissible under the excited utterance exception to the hearsay rule (I.R.E. 803(2)) and not excluded by the Confrontation Clause because the statements were clearly non-testimonial in nature. See also, *State v. Rolon*, 146 Idaho 684, 201 P.3d 657 (Ct. App. 2008) review denied (February 19, 2009) holding there is no Confrontation Clause protection for nontestimonial statements.

**g. 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.

**h. State v. Sanchez**, 147 Idaho 521, 211 P.3d 130 (Ct. App. 2009) review denied (July 8, 2009), held recorded statements of two-year old girl to mother describing her injuries and physical abuse by the defendant, were

not testimonial because they were not made to the government, they were informal, and were spontaneous and not the product of interrogation.

**i. State v. Rose**, 144 Idaho 762, 171 P.3d 253 (2007) held right of confrontation does not apply to probation revocation hearings.

**j. State v. McAway**. “In *State v. McAway*, 127 Idaho 54, 896 P.2d 962 (1995), the Idaho Supreme Court took a questionable position regarding the application of the Confrontation Clause to the admission of statements defined as “not hearsay” under IRE 801(d) ... . There the Court claimed that the admission of an out-of-court statement as a prior consistent statement under IRE 801(d)(1)(B) raised no Confrontation Clause issue because the statement was non-hearsay under the rule. But the Confrontation Clause is concerned with the right to contemporaneous cross-examination of witnesses whose statements are offered for their truth. The fact that IRE 801(d) calls such statements “not hearsay” does not change the fact that the statement were made out of court and are being offered for their truth, without a contemporaneous cross-examination. *Compare Bourjaily v. United States*, 483 U.S. 171, 97 L.Ed.2d 144, 107 Sup. Ct. 2775 (1987) (applying Confrontation Clause to co-conspirator statements defined as “not hearsay” under FED. R. EVID. 801(d)(2)(E)).” Lewis, *Trial Handbook for Idaho Lawyers* § 19.4, p. 363 (2009-2010 Supp.).

**C. Evidence Rules are Controlling Authority - Rule 802.** Rule 802 expressly provides that hearsay is not admissible unless an exception is provided under the Idaho Rules of Evidence or other rules promulgated by the Supreme Court of Idaho.

**1. Statutory Exceptions Are Ineffective.** Hearsay exceptions which are created by statute are rendered ineffective by Rule 802. *See, e.g., State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992) (hearsay statements of child to mother are inadmissible hearsay notwithstanding statutory exception); *State v. Poole*, 124 Idaho 346, 859 P.2d 944 (1993) (Idaho Code § 9-202, concerning testimony of child witnesses, is no longer valid).

*See also Montgomery v. Montgomery*, 147 Idaho 1, 205 P.3d 650 (2009), holding that the omitted spouse statute, I.C. § 15-3-301(a), does not create a hearsay exception for statements of a deceased spouse. The applicable hearsay law is found in I.R.E. 803(3), “then existing mental, emotional, or physical condition.”

**2. Exceptions Created by Other Rules.** Exceptions which are created by rules other than the hearsay rules of Article VIII will be found in I.R.E.

101, which gives effect to certain hearsay exceptions as specified in enumerated proceedings and also renders the evidence rules inapplicable in other enumerated proceedings; I.R.C.P. 32, which provides for the use of deposition testimony in civil proceedings; and I.C.R. 15, which provides for the use of deposition testimony in criminal proceedings.

### III. WHAT IS HEARSAY - I.R.E. 801.

#### A. **Definitions.** Rule 801 provides the definitions which apply to the hearsay rules.

1. **Rule 801(c) Definition of Hearsay.** Hearsay is "... a statement other than [present trial testimony], offered ... to prove the truth of the matter asserted." I.R.E. 801(c).

*See Isaacson v. Obendorf*, 99 Idaho 304, 309, 581 P.2d 350 (1978), stating "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion of the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."

2. **Rule 801(a) Definition of Statement.** A "statement" is (1) an oral or written assertion or (2) non-verbal conduct of a person if it is intended by him as an assertion. I.R.E. 801(a).

#### B. **Assertions Can be Oral, Written or Nonverbal Conduct.**

1. **Oral Assertion.** The most common form of hearsay is an out-of-court oral assertion. If a witness relates what she has heard someone say, and if her testimony is offered to prove that what she heard is true, then the witness' testimony is hearsay. In this technological age, hearsay can arise not only from repeating what another person has said directly, but from repeating what she has said indirectly to a recording device, or through a computer.

*See, e.g., U.S. v. Escobar*, 674 F.2d 469 (5th Cir. 1982) in which the court held, in a case involving prosecution for drug-related offenses, that it was reversible error to permit a police officer to testify that he learned through a computer check that defendant was a suspected narcotics smuggler.

2. **Written Assertion.** A common form of hearsay is a written assertion. If a witness relates what he has read and if his testimony is offered to prove that what he read is true, the witness' testimony is hearsay. If the writing is marked as an exhibit and offered into evidence, the writing is hearsay. Every writing, other than one made by a witness during his testimony in

court, that is offered to prove the truth of the content of what is written, is hearsay.

*See, e.g., U.S. v. Watkins*, 519 F.2d 294 (D.C. Cir. 1975) where a receipt of payment made out to defendant was hearsay because it was offered to prove that defendant made the payment. *Compare State v. Barlow*, 113 Idaho 573, 746 P.2d 1031 (Ct. App. 1987), where court held in a prosecution for violation of state sales tax laws, that checks written by the taxpayer to his suppliers were admissible as party admissions. At common-law, they would be deemed hearsay, but admissible as party admissions. Under Rule 801(d)(2), they are treated as non-hearsay because they are party admissions.

3. **Assertive Nonverbal Conduct.** Assertive nonverbal conduct may be hearsay when it is used as a substitute for words to express a fact or opinion.
  - a. **Obvious Examples of Non-verbal Statements.** Obvious examples of non-verbal “statements” are nodding or shaking the head to answer a question, or pointing someone out in response to a request for identification. Another is sign language used by a mute. *See, e.g., State v. Simmon*, 247 A.2d 313 (N.J. 1968) (sign language assertions by rape victim who was a deaf-mute were admitted under excited utterance exception of Rule 803(2)).
  - b. **Less Obvious Example of Non-verbal Statement.** Less obvious is the conduct of a person who reenacts events on a videotape to show what happened.

C. **Human Declarant Required.** Rule 801 contemplates that the statement will be made by a “declarant.” Hearsay rests for its value upon the credibility of the out-of-court declarant. *See, e.g., Isaacson v. Obendorf*, 99 Idaho 304, 581 P.2d 350 (1978). Thus, hearsay requires a human declarant.

1. **Machines and Animals do not Produce Hearsay.** The mechanical output of machines (e.g. the radar gun which “says” the speed was 80) and the actions of animals (e.g. the sniff dog which “says” there are drugs in the suitcase) do not produce hearsay. For such evidence, the admissibility question usually will be one of proper authentication to show reliability (i.e., relevance).
2. **Intoximeter Printout is Not a Statement.** A printout from the Intoximeter is not a “statement” for hearsay purposes. The printout, although a writing offered to prove the truth of the matter asserted therein, is not extrajudicial testimony, prohibited by the hearsay rule; the printout

is a test result produced by a machine. The Intoximeter machine is not a “declarant” capable of being hailed into the courtroom, placed under oath, made to testify and then cross-examined. *State v. Van Sickle*, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991).

- D. Purpose to Prove Its Truth.** Not all out-of court assertions are hearsay. An out-of-court assertion is hearsay only if it is offered to prove its truth. It is not hearsay if it is offered for any other purpose. *See, e.g., Anderson v. U.S.*, 417 U.S. 211, 94 Sup. Ct. 2253, 41 L.Ed.2d 20 (1974). In other words, whether an out-of-court assertion is hearsay depends upon the purpose for its use.

*See, e.g., State v. Nichols*, 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993), in which a police officer was allowed to testify at trial that he had a conversation with defendant and related what he had told the defendant about statements that had been made to the officer by others about the defendant’s involvement in another crime. The Court of Appeals held that the evidence of the statements by the third parties was not hearsay because it was offered at trial to show what the defendant had been told by the officer which led to his confession and not to prove the truth of the statements of the third parties.

- E. Various Uses of Statements Other than as Proof of the Truth of the Statement.** There are a variety of uses of statements that can be relevant apart from the truth of the statement.

- 1. Impeachment.** The use of a statement for impeachment avoids a hearsay objection on the reasoning that it is offered, not to show that the impeaching statement is true, but instead to suggest that the statement being impeached is false. When used for this purpose the impeaching statement cannot be used as substantive proof of its assertion (unless the statement qualifies under Rule 801(d)(1)(A)).
- 2. Verbal Acts (Words of Independent Legal Significance).** At times the law attaches legal consequence to the making of a statement. Evidence of the statement is not hearsay if offered to establish the consequence. This use is commonly encountered in contract cases (e.g., words of offer, acceptance, warranty, etc.). It can also arise in tort settings (e.g., product warnings, product descriptions, defamation) and, occasionally, in the criminal context (e.g., threats, words of solicitation).
- 3. Effect on Listener or Reader.** At times evidence that words were spoken to (or written to) an individual will be relevant to prove the effect they may have had on the individual. Examples include evidence that a driver was warned before getting into a car that the brakes were bad, to prove comparative negligence (Note: independent proof would be required to prove that the brakes were, in fact, bad); evidence offered by a criminal

defendant that he had heard that Victim was out to get him, in support of self-defense.

4. **“Verbal Markers/Inscriptions.”** Tangible items of evidence may contain inscriptions of words which appear to have been placed on them out of the context of the events in litigation, e.g., the word “Porsche” on the back of an automobile, an individual’s name painted on a souvenir mug, the logo, name and address of a restaurant printed on a matchbook found at the scene of a crime. In such circumstances the words are properly treated as characteristics of authentication of the item, not as “statements” within the hearsay rule.

#### IV. WHAT IS NOT WITHIN THE DEFINITION OF HEARSAY.

A. **Unintended Assertions are Non-hearsay Statements.** The Rules adopt the position that a statement is not hearsay if it is offered to prove something the declarant was not trying to assert. If non-verbal conduct is not intended as an “assertion,” then it does not constitute a “statement” and if it is not a “statement,” it cannot constitute “hearsay,” as defined in Rule 801. Accordingly, the last part of the hearsay rule can more accurately be paraphrased to read “... offered ... to prove the truth of the matter [the declarant was intending to assert].”

1. **Nonassertive Utterance.** An utterance, or a writing, or nonverbal conduct, that is not assertive is not hearsay. *See, e.g., U.S. v. Monaco*, 700 F.2d 577 (10th Cir. 1983), in which the court, affirming convictions of prostitution-related offenses, upheld admission, over hearsay objection, of testimony from two undercover policemen who posed as customers of implicated massage parlors. The policemen related that females working in the parlors had offered to perform sexual behaviors for them at certain prices. The utterances of the female employees were relevant circumstantial evidence that the massage parlors were being used for prostitution.

*See also, U.S. v. Zenni*, 492 F. Supp. 464 (E.D. Ky. 1980) which involved prosecution for illegal bookmaking activities. The court admitted testimony from government agents that, while searching the premises, they answered the telephone several times, and that unknown callers gave them directions for placing bets on various sporting events. The court held that this testimony related to nonassertive utterances that were relevant and admissible as circumstantial evidence that the premises were used for taking bets.

2. **Nonassertive Writing.** Nonassertive writings are often introduced as circumstantial evidence because of what they imply. For example, numbers slips found on a person are non assertive and thus not excludable

as hearsay. They may be admissible because they imply that the person who possessed them was engaged in unlawful gambling activities.

*See, e.g., U.S. v. Day*, 591 F.2d 861 (D.C. Cir. 1978), in which a slip of paper with defendants' names and a telephone number given by the victim of a murder to the witness about an hour prior to his death was admitted as nonassertive circumstantial evidence to prove an association between individuals which was relevant to an issue in the case.

3. **Nonassertive Nonverbal Conduct.** Nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay. The admissibility of nonassertive, nonverbal conduct as circumstantial evidence of a fact in issue is governed by principles of relevance, not hearsay. A witness may testify, "I looked out of the window and I saw many people carrying raised umbrellas." This testimony may be offered as circumstantial evidence that it was raining. It is not excludable as hearsay because the people outside were not intentionally expressing facts or opinions.

Conduct of a person who is not trying to make a statement by the conduct is not hearsay, even though the conduct may reflect the actor's belief. For example, as proof that X suffered from diabetes, Party offers evidence that Dr. Smith wrote X a prescription for a drug used to treat diabetes. The prescription is not hearsay because by writing it Dr. Smith was not trying to assert that X has diabetes.

*See, e.g., State v. Miller*, 141 Idaho 148, 106 P.3d 474 (2004) (*rev den*, 2005) upholding admission of the paper bundle containing the methamphetamine, which defendant was accused of possessing, that was made from a receipt entitled "misdemeanor probation," issued to the name of the defendant and dated a few days prior to the traffic stop. The court held the receipt was not offered for the truth of the matter asserted and did not meet the definition of hearsay under I.R.E. 801, but it was relevant to prove the nexus between her and the drug.

*See, e.g., U.S. v. Singer*, 687 F.2d 1135 (8th Cir. 1982), in which the court upheld admission of an envelope addressed to the defendant and another individual as nonhearsay because its purpose was to imply from the sender's behavior that both individuals lived at that address.

*See also, State v. Agundis*, 127 Idaho 587, 903 P.2d 752 (Ct. App. 1995) holding that documents evidencing use of the same address by the defendant and an alleged accomplice were not hearsay when offered to prove that the two persons were connected. The evidence was not offered to prove that it was their address but instead as circumstantial evidence of

a link between the two men because they both had knowledge of and made use of the same address.

*See also, U.S. v. Arrington*, 618 F.2d 1119 (5th Cir. 1980), in which utility bills addressed to the defendant and found in a house were admitted for the inference that defendant resided at the house.

*See also, State v. Morrison*, 130 Idaho 85, 936 P.2d 1327 (1997), in which the failure of persons to report an event was offered as evidence that the event did not occur. The court held that the officer's testimony that no member of a hospital staff that was treating the shooting victim had contacted the officer concerning the victim's involvement, which was offered to support a claim the victim had no weapon, was not hearsay.

- 4. Statement with Direct Legal Significance.** A statement that is the basis for a prosecution or perjury has direct legal significance and is non-hearsay. *See, e.g., U. S. v. Anfield*, 539 F.2d 674 (9th Cir. 1976). A statement that constitutes a threat may have direct legal significance and be nonhearsay. *See, e.g., U.S. v. Jones*, 663 F.2d 567 (5th Cir. 1981), where the transcript of the sentencing hearing was admitted in a prosecution against the defendant for threatening the lives of the judge and prosecutor at the sentencing hearing.

- a. Verbal Acts.** Verbal acts in which the utterance is an operative fact which gives rise to legal consequences are non-hearsay. *See, e.g., Craghe v. Iowa Home Mutual Casualty Co.*, 323 F.2d 981 (10th Cir. 1963) where testimony of the insurance agent that the insured told him to cancel the policy was not hearsay.

*See, e.g., Quayle v. Mackert*, 92 Idaho 563, 447 P.2d 679 (1968) upholding admissibility of testimony by the witness that he overheard the oral offer of contract to show that the offer had been made.

*See, e.g., State v. McDonald*, 141 Idaho 287, 108 P.3d 434 (Ct. App. 2005) upholding admission of testimony by an officer describing the verbal instructions another officer, that was not at trial, had given the accused when the other officer administered the horizontal gaze nystagmus to the accused, citing I.R.E. 801.)

- b. Defamatory Words.** Defamatory words have direct legal significance and thus are not hearsay. *See, e.g., M. S. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167 (10th Cir. 1968).

5. **Circumstantial Evidence of Facts.** An out-of-court assertion constitutes circumstantial evidence if the trier of fact may infer from it, alone or in combination with other evidence, the existence or nonexistence of a fact in issue, regardless of its truth. Such an out-of-court assertion is not hearsay.

An assertion that constitutes circumstantial evidence proves a fact indirectly, by implication. Credibility of the declarant is not important because the relevance of his assertion does not depend on its truth. In fact, the implication may contradict the assertion. For example, declarant may tell the police, "I did not poison my wife." If only her murder could have known that declarant's wife had been poisoned, the assertion is circumstantial evidence that declarant did indeed poison his wife. *See, e.g., U.S. v. Green*, 680 F.2d 520 (7th Cir. 1982).

- a. **Circumstantial Evidence of the Speaker's State of Mind.** At times a speaker's words are relevant because of what they reflect about the speaker's state of mind, e.g., the fact that Clark called Lewis a "dirty, no good son of a bitch" when offered to support the claim that Lewis was an unlikely recipient of a bequest from Clark.

An illustration of the difference between an out-of court assertion that constitutes circumstantial evidence and an out-of-court assertion that is hearsay is found in *U.S. v. Brown*, 490 F.2d 758 (D.C. Cir. 1973). The court upheld admissibility of the out-of-court statement that "X is no good" to circumstantially prove declarant's state of mind toward X, where that mental state was a material issue in the case. Technically it is not hearsay since it is not being admitted for the truth of the matter alleged. The issue is not whether X is in fact "no good" but whether the declarant disliked him. However, the statement "I hate X" is direct evidence of the declarant's state of mind and, since it was offered for the truth of the matter alleged, it must come within some exception to the hearsay rule to be admissible.

- b. **Circumstantial Evidence of the Speaker's Knowledge or Memory.** Occasionally a declarant's words will be relevant apart from their truth because (1) the issue is whether the declarant has been somewhere or seen something and (2) the declarant's words describe unique features that the declarant could only know if the declarant had in fact been there or seen the item.

In other words, the declarant's words are circumstantial evidence of the declarant's memory, and under the circumstances that memory could only have been obtained in a way relevant to the issues. The classic illustration is a child's out-of-court description

of unique features of a defendant's lodgings, offered to prove the child had been there.

- c. **Circumstantial Evidence of the Speaker's Mental Health.** Out-of-court assertions from which the trier of fact can infer declarant's mental health are often relevant when his capacity to contract, to make a will, to conduct his own affairs, or to give an informed and understanding consent, is an issue. For example in a will contest, declarations of the testator which tend to show his state of mind may be admissible to determine when the will was the product of fraud or undue influence.

The leading case on the admissibility of an out-of-court statement to furnish circumstantial evidence of declarant's mental health is *Throckmorton v. Hold*, 180 U.S. 552, 21 Sup. Ct. 474, 45 L.Ed. 663 (1901), a case involving the validity of the declarant's will.

This nonassertive utterance commonly arises when the statement says A, and from that we conclude that the declarant believes (but was not trying to assert) B. For example, X's statement, "I am Napoleon Bonaparte," when offered as proof of X's mental instability.

- 6. **Fraud.** Fraud. Out-of-court false statements are often introduced as circumstantial evidence of fraud. *See, e.g., U.S. v. Saavedra*, 684 F.2d 1293 (9th Cir. 1982) involving a prosecution for wire fraud in which defendant was accused of participating in a conspiracy to obtain money orders by using improperly acquired credit card numbers. Three victims of the scheme were allowed to testify that they received telephone calls from men who identified themselves as law enforcement officers and elicited the card numbers. The testimony was not offered to prove that the statements made by the callers were true; i.e., that they were in fact law enforcement officials. Instead, the testimony was introduced to show how the card numbers were fraudulently obtained by persons posing as law enforcement officers, thus providing the numbers to purchase money orders was intentional.

- B. **Statements Implying a Particular State of Mind of Declarant are not Hearsay.** An out-of-court statement, regardless of its truth, may imply guilt, knowledge, intention, motive, physical or emotional feeling, or other particular state of mind of the declarant. If offered as circumstantial evidence to prove such state of mind, the statement is not hearsay.

1. **Guilty Conscience.** An out-of-court statement, shown by other evidence to be false, may be offered as circumstantial evidence that declarant has a guilty conscience.
  - a. **False Exculpatory Statements.** The leading case is *Wilson v. U.S.*, 162 U.S. 613, 16 S. Ct. 895, 40 L.Ed. 1090 (1896), in which the Supreme Court approved introduction by the prosecutor of false exculpatory statements made by defendant after he was taken into custody. The Court stated that if the jury were satisfied from the evidence that false statements in the case were made by defendant or on his behalf, at his instigation, they had the right, not only to take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements made in explanation or defense, or procured to be made, as in themselves tending to show guilt.
  - b. **Inconsistent Statements.** An example of proof of guilty conscience by evidence of inconsistent statements is found in *Commonwealth v. Boyle*, 447 A.2d 250 (Pa. 1982), in which the second conviction of Tony Boyle, for the murders of "Jock" Yablonski and his family was affirmed. Boyle did not testify at his second trial. The prosecution introduced some of his testimony from his first trial and offered other evidence that contradicted it. The court, approving admission of the evidence, explained that although the responses of Mr. Boyle standing alone may appear neutral, when coupled with the evidence of their falsity those statements assist in proving his consciousness of guilt and efforts to avert suspicion. The evidence of the earlier false statement had independent probative value and was properly admitted to be considered as proof of a consciousness of guilt.
2. **Conspiracy.** Out-of-court statements of conspirators are often offered as a circumstantial evidence of a conspiracy. *See, e.g., U.S. v. Bobo*, 586 F.2d 355 (5th Cir. 1978), which involved the prosecution of multiple defendants for conspiring to possess and distribute heroin. At trial, witness "A" testified that he had a conversation with declarant Rowan about an informer problem in the organization. According to witness "A", declarant Rowan said that defendant Bobo had been arrested on a drug charge and that the search warrant had stated that they had been told that defendant Bobo was carrying drugs by an informant who had given reliable information in the past. Defendant Bobo objected that the statement was inadmissible hearsay and prejudicial to his case. The court

determined the statement was not hearsay under Rule 801(c). The court stated the only purpose for which the declarant Rowan's statement was valuable as evidence was for the fact that it was said, not for the truth of its content. Whether Defendant Bobo had actually been arrested and what the search warrant might actually have said were irrelevant to the prosecution of the case for conspiracy to possess and distribute heroin. The importance of the statement was that it revealed declarant Rowan's state of mind; it indicated that he was concerned about informers. This tended to prove the existence of the conspiracy in that it evidenced a desire for secrecy and a concern that his activities might be reported to the police. Since the truth of the statement was irrelevant, it was not offered to prove the truth of the matter asserted and was not hearsay. A conspiracy may be proved by evidence of inculpatory statements made by the alleged conspirators, regardless of their truth.

3. **Victim's State of Mind.** Assertions made by the victim, regardless of their truth, have been admitted for the implication that he feared the defendant in an extortion case. *See, e.g., U.S. v. DeCarlo*, 259 F.2d 358 (3d Cir. 1972), in which the prosecution introduced a letter addressed by the victim to the FBI asking for protection, stating that he had been beaten and his family threatened by defendants. The letter was not hearsay; it was circumstantial evidence of the victim's state of mind that he was afraid of defendants.
4. **Knowledge at the Time.** A person's out-of-court statements may imply his knowledge at the time. *See, e.g., U.S. v. Perry*, 649 F.2d 292 (5th Cir. 1981), which involved a prosecution for violation of drug laws. Defendant admitted participation but asserted he did so in good faith believing he was working for agents of the DEA. The court held his mother should have been allowed to testify about statements he had made that he was working with a government agent, not to show that he was, but rather that he thought he was.

*Compare State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988). In a prosecution for assault upon a police officer, the testimony of the witness that the police radio dispatcher stated that the defendant had said he "wanted to kill a cop" was inadmissible because it was relevant only for the impermissible hearsay purpose of showing that the defendant actually had expressed a desire to "kill a cop" and it was irrelevant if offered for the non-hearsay purpose of showing what information the officers possessed and how this information affected the subsequent actions of the officers because evidence of the officers' motives did not prove any element of the offense charged.

5. **Intent.** A person's out-of-court assertions may imply his intent, regardless of their truth. *See, e.g., Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529 (3d Cir. 1976), a suit under the Sherman Act by a truck driver alleging that defendant trucking companies conspired to black list him. Plaintiff introduced evidence that the vice-president of defendant trucking company said, "He [plaintiff] will not drive any of Cooper-Jarrett's trucks ever again nor will he drive for any other freight company." The court upheld admission of the testimony to show intent to enlist the cooperation of others.

*See also, State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986, *rev. den.*, 116 Idaho 466, 776 P.2d 828, later proceeding, 114 Idaho 188, 755 P.2d 485 (Ct. App.), *rev. den.*, 1988 Ida. LEXIS 89 (Idaho) (neighbor allowed to testify to hearing child say "No Dad, don't do this" because nonhearsay when offered to prove father's premeditation or intent).

- a. **Direct Assertion of Intent.** It should be noted that a direct assertion of the declarant's present intent is hearsay, but is excepted from the hearsay rule under Rule 803(3), I.R.E.
- b. **Past Intent.** An out-of-court assertion may imply not only declarant's present intent, but his past intent. *See, e.g., Krimlofski v. U.S.*, 190 F. Supp. 734 (N.D.Ia. 1961), in which the issue was whether named beneficiaries of a life insurance policy were co-beneficiaries, or primary and contingent beneficiaries. The court held the various statements made by the insured during a period of six or seven years after the policy was issued, to the effect that his wife was sole beneficiary, were admissible as circumstantial evidence of what his intent had been when he had completed an application form for renewal of the policy.

6. **Ambiguous Conduct.** A declarant's out-of-court assertions may be introduced as circumstantial evidence to help explain or clarify ambiguous conduct. If an act is ambiguous, an accompanying assertion by the actor, regardless of its truth, may help resolve the ambiguity. In such event it is not hearsay. Rather it is circumstantial evidence of the true meaning of the act.

*See, e.g., Sanders v. Worthington*, 382 S.W.2d 910 (Tex. 1964), which admitted declarations by an occupant of land as verbal parts of his act of occupation, serving to prove intent to possess the land adversely under claim of ownership.

*See also, Taylor v. Fluharty*, 41 Idaho 511, 239 P. 1049 (1925) holding that statements made by the declarant when he delivered a promissory

note to the witness, explaining changes in the note, tended to show the intentions of the parties. It was considered to be a part of the transaction, a circumstance in connection with the delivery of the note, and not hearsay.

- a. **Statement with Delivery of Property.** The delivery of property may be ambiguous as to whether it is a gift, loan, bailment, repayment of a debt, or something else. If the trier of fact may infer the true nature of the transaction from an assertion made by the deliverer, the assertion is not hearsay. It is circumstantial evidence of the meaning of the delivery.
- b. **Ambiguous Acts.** The ambiguous acts of a testator can often be explained by inference from his assertions. *See, e.g., Savoy v. Savoy*, 220 F.2d 364 (D.C. Cir. 1954), in which a will that was torn and taped together was offered for probate. The court held it was reversible error to exclude testimony of statements made by testator from which the trier of fact can infer that the tearing was not an intentional revocation of the will.
- c. **Statements re Testamentary Intent.** *See e.g., In re Mattes' Will*, 68 N.W.2d 18 (Wis. 1955), in which the court approved admission of statements made by testator that he had taken good care of his son in his will as circumstantial evidence from which the trier of fact could infer that his failure to provide for his son in his will was unintentional.

Compare *Montgomery v. Montgomery*, 147 Idaho 1, 205 P.3d 650 (2009), holding that the omitted spouse statute, I.C. § 15-3-301(a), does not create a hearsay exception for statements of a deceased spouse. The applicable hearsay law is found in I.R.E. 803(3), “then existing mental, emotional, or physical condition.”

7. **Motive and Feelings.** Declarant’s assertion may be offered as circumstantial evidence of his motive. *See, e.g., Provenzo v. Sam*, 244 N.E.2d 26 (N.Y. 1968), an action for personal injuries, in which the plaintiff alleged that the rescue doctrine saved him from a finding of contributory negligence. Plaintiff testified that while observing an automobile weave across the highway he remarked to his wife, “this person must be sick, must have had a heart attack.” Plaintiff was running across the road toward that automobile when he was struck by a second car. The statement was admissible to prove plaintiff’s state of mind as to why he crossed the highway.

Declarant's assertions, regardless of their truth, may imply the declarant's feelings about someone. *See, e.g., Loetch v. New York City Omnibus Corp.*, 52 N.E.2d 448 (N.Y. 1943), a wrongful death action in which the court held it was reversible error to exclude a will executed by plaintiff's decedent four months before her death wherein she stated that her husband had reciprocated her tender affection with acts of cruelty and indifference. The statement, regardless of its truth, was circumstantial evidence that decedent thought ill of her husband and was relevant to prove that he had no reasonable expectation of receiving substantial assistance or support from her had she not been killed.

**C. Statements that Produce a Particular State of Mind in Another are not Hearsay.** A person's particular state of mind may be proved by introducing evidence that he was exposed to an assertion made by another. Such an assertion, if not offered to prove its truth, but to prove its effect on one who heard it, or read it, or observed it, is not hearsay.

**1. Knowledge or Notice.** An out-of-court assertion is often introduced to prove that one to whom the assertion was communicated had knowledge or notice of something. *See, e.g., U.S. v. Tamura*, 694 F.2d 591 (9th Cir. 1982), a prosecution of a corporation and its manager for bribery. Telexes sent to the corporation's branch office from its home office were admitted to prove that the manager had knowledge of the bribery scheme.

*See also, Frank v. City of Caldwell*, 99 Idaho 498, 584 P.2d 643 (1978), which involved a statement by an out-of-court declarant which was admissible as non-hearsay for the purpose of showing knowledge of information and its effect on police officers. It was offered for the purpose of showing the reasonableness of the police officers' conduct which was challenged in a civil action for personal injury allegedly caused by the officers.

**2. Understanding of an Agreement.** *See, e.g., Furness v. Park*, 98 Idaho 617, 570 P.2d 854 (1977) holding that the hearsay rule does not prohibit a witness from testifying to his understanding of an agreement.

**3. Willingness to Accept Policy Limits.** *See, e.g., Gibbs v. State Farm Mutual Ins. Co.*, 544 F.2d 423 (9th Cir. 1976) which upheld admission of letters sent by the insured to the carrier's lawyer expressing the opinion that the claimants would accept a settlement within policy limits in an action for bad faith adjustment and denial of the claim. The court determined that the letters were not hearsay because they were offered to show that information the carrier possessed when it failed to settle the claims, not to prove the truth of the assertions contained therein.

4. **Motive.** A person's motive for doing something may be evidenced by statements made to him. *See, e.g., U.S. v. Kline*, 570 F.2d 731 (8th Cir. 1978), in which the court approved admission of testimony that the victim of voluntary manslaughter told defendant he was going to turn defendant in to the United States Marshall. The statement was admissible to show that the defendant had a motive for killing the decedent. The state of mind of the defendant was relevant in determining whether the killing was murder, manslaughter, or self defense.
5. **Fraud.** Out-of-court assertions communicated to a person are often introduced to prove good or bad faith in cases involving fraud.
  - a. **Intent to Defraud.** *See, e.g., Frank v. U.S.*, 220 F.2d 557 (10th Cir. 1955) in which defendant was convicted of mail fraud in connection with the solicitation of investments by means of false and fraudulent representations concerning an alleged oil finding device. The court held it was reversible error to preclude defendant from testifying about testimonials he had received praising the accuracy of the device. The testimony was offered for the inference that it tended to show that defendant was in good faith in making representations respecting reliability of the device.
  - b. **Intent Not to Defraud.** *See, e.g., Robert A. Pierce Co. v. Sherman Gardens Co.*, 419 P.2d 781 (Nev. 1966), in which the court stated: "Where intent to defraud is in issue, conversations with third persons, or statements made by them, tending to negate an intent to defraud on the part of the party whose motive is material, are admissible."
6. **Instructions or Directions.** Instructions or directions are often offered to prove why the recipient acted as he or she did. *See, e.g., State v. Miller*, 228 A.2d 136 (Conn. 1966), in which the court upheld admission of instructions that a police officer gave to a witness before her appearance at a line-up to explain why the witness did not immediately point out the defendant.

*See also, Patino v. Grigg & Anderson Farms*, 97 Idaho 251, 542 P.2d 1170 (1975), in which plaintiff was allowed to testify to instructions received from a fellow employee to show the plaintiff's own state of mind as he approached his job.
7. **Mens Rea.** In criminal prosecutions for homicide or assault and battery in which self defense is raised, the state of mind of defendant at the time of the incident is relevant. If a defendant acted because of a reasonable fear for his own life or well being, his acts, which if performed with mens rea

would be criminal, may be justified. The state of mind of defendant may also affect the seriousness of a homicide conviction. It is common practice for a defendant to testify that threatening out-of-court statements were made by the victim, that they were communicated to defendant directly by the victim or indirectly through others, that these threatening statements caused defendant to believe that the victim intended to harm him, and that the fear engendered by this belief was responsible for defendant's assault on the victim.

*See, e.g., State v. Miller*, 195 S.E.2d 353 (N.C. 1973), in which defendant was convicted of murdering a police officer during a gambling raid. The court determined that defendant should have been permitted to testify that others had told him of recent robberies of gambling games in the area to prove the reasonableness of his apprehension that a robbery was in progress and that he was about to suffer death or serious bodily injury. The evidence was not offered to prove that other robberies had in fact occurred but only that he believed a robbery was occurring. The evidence was not hearsay and it was relevant to his state of mind in relation to his plea of self-defense.

**D. Implicit Intended Assertions are Hearsay.** As noted above, the hearsay rules do not apply if a statement is offered to prove something other than what the declarant was intending to assert. At times people speak both directly and indirectly, explicitly and implicitly.

**1. Implicit Assertion by Statement.** Consider the case in which Declarant is shown to have been present during a bank robbery and the prosecution offers Declarant's statement at the time of the robbery, "They ought to give Lewis twenty years," as proof that Lewis was the robber. That statement is not offered to prove how much time Lewis should get; it is, however, offered to prove something Declarant was implicitly communicating by his statement, that Lewis was the robber, and is hearsay for that purpose.

**2. Implicit Assertion by Question.** Questions that contain an implicit statement are treated as hearsay. For example, the question "Has it stopped raining yet,?" is hearsay when offered to prove it had been raining earlier.

## **V. STATEMENTS THAT ARE DEEMED NONHEARSAY - I.R.E. 801(d).**

**A. Statements Which are Not Hearsay Under Rule 801(d).** Rule 801(d) treats two types of statements as non-hearsay: prior statements of a witness, to the extent specified in subsection (d)(1), and admissions by a party-opponent, to the extent provided in subsection (d)(2). Although these statements might otherwise

literally fall within the subsection (c) definition of hearsay, they are expressly excluded from the rule against hearsay.

**B. Prior Statement by Witness - Rule 801(d)(1).** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

**1. Inconsistent Former Testimony.** Subpart (A) gives substantive effect to former testimony consisting of prior inconsistent statements given under oath and subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition.

The exclusion is based on two considerations: first, juries are already allowed to consider these statements for purposes of impeachment and it is unrealistic to assume that juries do not consider them substantively, despite limiting instructions as under Rule 105; second, statements made closer in time to the event in question and before the exertion of external pressures may be more trustworthy than testimony at trial and should not be excluded.

**2. Prior Consistent Statements Offered to Rebut Charge of Fabrication, Improper Influence or Motive.** Subpart (B) treats as non-hearsay prior consistent statements offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive. It is not limited to former testimony.

The rule gives the statement substantive effect if admitted for rehabilitation for two reasons: (1) it is not deemed to be cumulative if the opponent opens the door by attacking credibility and (2) it is unrealistic to believe the jury does not consider the evidence substantively, notwithstanding a limiting instruction. Impeachment is a precondition to admission of such evidence.

*See, e.g., State v. Howard*, 135 Idaho 727, 24 P.3d 44 (2001) upholding admission of evidence of prior consistent statement contained in police officer's report, which was admitted to show credibility and that testimony was not recently fabricated.

*See, e.g., State v. Howell*, 137 Idaho 817, 54 P.3d 460 (Ct. App. 2002) (*rev den* 2002) upholding admission of evidence of prior consistent statements of victim of lewd conduct to friends, when offered to rebut claims of fabrication of testimony.

*See also, State v. Rossignol*, 147 Idaho 818, 215 P.3d 538 (2009) holding in a trial on charges of lewd conduct with a minor under 16 years of age

and sexual abuse of a child, prior consistent statements made by the victim to a number of different individuals were admissible because the prior statements were more reliable than the victim's trial testimony (due to the lapse in time between the abuse and the trial), were probative of whether the abuse actually occurred, and contained the necessary circumstantial guarantees of trustworthiness.

3. **Identification of a Person.** Subpart (C) allows a prior statement of a declarant to be excluded from the definition of hearsay so long as it pertains to the identification of a person he or she perceived and provided the general requirements that the declarant testify and be subject to cross-examination are satisfied.

*See, e.g., State v. Woodbury*, 127 Idaho 757, 905 P.2d 1066 (Ct. App. 1995), in which the court upheld admission of a victim's general description of an assailant's appearance and clothing, given to police about forty-five minutes after the assault, as statements of identification within the scope of Rule 801(d)(1)(C). But, *see, J. Lansing*, concurring, in which she questions whether a general description of an individual qualifies as an "identification" of a particular individual under the Rule.

- a. **Purpose.** The purpose of the provision is to make clear that nonsuggestive lineup, photographic and other identifications are not hearsay. *See, e.g., Gilbert v. California*, 388 U.S. 218, 87 Sup. Ct. 1926, 18 L.Ed.2d 1149 (1967).
- b. **Constitutional Standards Apply.** Although the rule makes prior identification statements admissible, they still must meet constitutional standards. *See U. S. v. Owens*, 108 Sup. Ct. 838, (1988) (prior identification statement qualifies as nonhearsay under federal rule; Confrontation Clause requires only an adequate opportunity for cross-examination).

*See also, State v. Kysar*, 116 Idaho 992, 783 P.2d 859 (1989)(an out-of-court identification of the accused is subject to constraints concerning the manner in which the identification was made, to protect against unduly suggestive circumstances).

- c. **Underlying Rationale.** The underlying rationale for treating these statements as nonhearsay is that in this instance the prior statement is deemed to be more probative and more reliable evidence than a later in-court statement, so long as the declarant testifies and can be cross-examined. Even then the statement may still be subject to challenge on constitutional grounds.

- C. Admission by Party-Opponent - Rule 801(d)(2).** Under Rule 801(d)(2) a statement is not hearsay if the statement is offered against a party and is:
- (A) his own statement, in either his individual or a representative capacity, or
  - (B) a statement of which he has manifested his adoption or belief in its truth, or
  - (C) a statement by a person authorized by him to make a statement concerning the subject, or
  - (D) a statement by his agent or servant concerning the matter within the scope of his agency or employment, made during the existence of the relationship, or
  - (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The rule is in accord with the traditional view that admissions by a party-opponent, or his or her agent or representative, are admissible against the party-opponent as substantive evidence of the fact as stated. They are admissible whether or not the declarant is available or appears as a witness. The rule is confined to questions of hearsay evidence and makes no attempt to resolve the constitutional questions relating to confessions.

1. **Statement of a Party.** Subpart (A) provides that the statement of a party offered against him or her is not hearsay regardless of whether it was made in an individual or representative capacity. The statement need not have been made against interest, need not be based on personal knowledge and may be in the form of an opinion. Moreover, the rule imposes no requirement that in order to be offered against a party in his or her representative capacity the statement must have been made in his or her representative capacity. The fact that the statement is relevant to representative affairs is sufficient. *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (1987).
  - a. **Plea of Guilty.** Evidence of a party's plea of guilty to a traffic infraction is admissible against that party in a subsequent civil action arising from the same occurrence as an admission by a party opponent. The evidence of such a plea is not conclusive on the issue of negligence; the party against whom the evidence is offered is free to explain the circumstances under which the guilty plea was entered. *Beale v. Speck*, 127 Idaho 521, 903 P.2d 110 (Ct. App. 1995).

*See, also, Kuhn v. Proctor*, 141 Idaho 459, 111 P.3d 144 (Substitute Opinion, 2005) holding that payment of a traffic citation by mail is an admissible statement of guilt in a civil action because Idaho Infraction Rule 6(a) provides that any person charged with an infraction by a citation may enter an admission by paying a fixed penalty by mail, which constitutes an admission of the charge, and I.R.E. 801(d)(2)(A) provides that a statement made by a party is not considered hearsay and is admissible regardless of availability at trial. A statement includes conduct where the conduct is intended as an assertion. I.R.E. 801(a).

**b. Allegations in Complaint.** The allegations in a Complaint do not rise to the level of an admission by a party opponent. *Curtis v. Canyon Highway Dist. No. 4*, 122 Idaho 73, 831 P.2d 541 (1992); *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 903 P.2d 730 (1995).

**c. Statements of Accomplice.** Where defendant and his accomplice were apprehended separately and charged with burglary and attempted robbery and where both gave the same residential address at the time of booking, the trial court erred in ruling that the accomplice's statement of his residence address was an admission of a party opponent when proffered against defendant, because a nonjudicial statement is admissible under subsection (d)(2) only as against the party who made the statement or on whose behalf it was made. It was hearsay as to defendant. *State v. Gerardo*, 147 Idaho 22, 205 P.3d 671 (2009).

**2. Adopted Statement.** Subpart (B) provides that a statement of which a party has manifested his or her adoption or belief in its truth is not hearsay. The adoption may be prospective as when one adopts an utterance to be made by a named person. As with his or her own statements or actions, the adoption can be expressed either in words or conduct, provided adoption is "manifested" as required by the rule. The party contending for adoption has the burden of proving adoption was intended. Adoption of a statement may be manifested by silence of a party where a duty to deny or otherwise respond is imposed, e.g., in cases of a continuing commercial relationship. However, in criminal cases an inference of adoption or admission from the silence of the accused may not be made if he or she had a right to remain silent.

**3. Authorized Statement.** Subpart (C) provides that a statement by a person authorized by a party to make a statement concerning the subject is not hearsay and is treated as an admission. Ordinarily cases falling in this

category are resolved by applying agency doctrine rather than by reference to principles of evidence, i.e., trustworthiness. There must be a showing of “speaking authority.” The question in these situations is whether the speaker has the authority to act as agent and whether the statements were made in a course of exercising that authority. The facts must be shown by evidence independent of the statement itself.

4. **Statement by Agent or Servant.** Subpart (D) provides that a statement by an agent or servant of a party concerning a matter within the scope of his agency or employment, made during the existence of the relationship, is not hearsay. Unlike subpart (C), there is no requirement under subpart (D) of “speaking authority” i.e., authority to speak for the principal, in order to bind the principal by admissions. The rule assumes that the authority to do an act conclusively implies authority to speak narratively after the act, if the utterance was made before the termination of the agency and concerns the authorized act. The rule rejects privity as a ground of admissibility by making no provision for it.

*See, e.g., Vreeken v. Lockwood Eng’g, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009), holding that evidence established that daughter was acting and speaking as agent of a party and her comments were admissible as a statement by a party’s agent.

5. **Statement by Co-conspirator.** Subpart (E) provides that a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy is not hearsay. It applies in both civil and criminal actions, and in a criminal case there need not be a charge of conspiracy to make the rule applicable. The rule retains the traditional, limited approach toward conspirators’ statements in that it retains the “in furtherance” requirement, i.e., a damaging statement by a co-conspirator is not authorized unless it tends to advance the object of the conspiracy. This requirement is analogous to conventional agency theory under which the acts of an agent bind the principal only when the agent acts within the scope of his or her authority.

*See, e.g., State v. Walker*, 109 Idaho 356, 707 P.2d 467 (Ct. App. 1985) (co-conspirator statement is deemed to be admissible nonhearsay, rather than hearsay admission under exception to rule against hearsay).

*See also, State v. Rolon*, 146 Idaho 684, 201 P.3d 657 (2008) (held no err in admitting a co-conspirator’s testimony about another co-conspirator’s statements under subdivision (d)(2)(E), because the statements were made in furtherance of the conspiracy; the statements were made after the co-

conspirator had agreed to join the drug ring and were part of his “orientation” as they explained the operation and roles of the conspiracy).

- a. **Course of Conspiracy.** Rule 801(d)(2)(E) requires that the statement be made by a co-conspirator during the course of the conspiracy. This language is designed to deal with two conditions. The first condition is that the party and the declarant were participating in a plan to commit a crime or civil wrong. The significance of this condition is that there must be evidence establishing the conspiracy and the defendant’s participation in it before such declarations are admissible against him or her. The second condition is that the statement was made while the plan was in existence and before its complete execution or other termination. This is the usual rule in the United States and has long been the stated policy in the federal courts.

*See, e.g., State v. Harris*, 141 Idaho 721, 117 P.3d 135, 2005 WL 873746 (Ct. App. 2005) holding that under I.R.E. 801(d)(2)(E), co-conspirator statements made after the conspirators attain the object of the conspiracy are not admissible under this exception unless the proponent demonstrates an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission and that secrecy plus overt acts of concealment do not establish an express agreement to act in concert in order to conceal the crime, citing *Grunewald v. United States*, 353 U.S. 391 (1957).

The conspiracy that forms the basis for admitting a co-conspirator’s out-of-court statements need not be the same conspiracy for which the defendant is charged.

*See, e.g., State v. Ingram*, 138 Idaho 768 (Ct. App. 2003) (*rev den* 2003) upholding admission of out-of-court statements of co-conspirator under I.R.E. 801(d)(2)(E) finding that State proved the statements were made in furtherance of a conspiracy that existed when the statements were made, albeit not the conspiracy for which the defendant is charged.

- b. **Order of Proof.** With respect to the order of proof, while the court has discretion to admit the co-conspirators’ declaration subject to being connected up later by introduction of sufficient independent evidence of the existence of the conspiracy and defendant’s participation, whenever reasonably practical the independent evidence of the conspiracy and the defendant’s

connection with it should be admitted prior to the co-conspirator's declaration. This procedure avoids the danger of injecting into the record inadmissible hearsay in anticipation of proof of a conspiracy which never materializes.

## VI. EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL - I.R.E. 803.

- A. **Generally.** Each exception of Rules 803 and 804 specifies requirements considered to be sufficient guarantees of trustworthiness to justify introduction absent opportunity to conduct contemporaneous cross-examination of the declarant before the trier of fact.
1. **Rule 803 Rationale.** Rule 803 includes those hearsay statements made which had been considered so trustworthy as to be admissible without requiring imposition of the time and expense associated with production of an available declarant or in spite of the fact that the declarant of the statement actually testifies at trial.
  2. **Rule 804 Rationale.** The exceptions under Rule 804 require that the declarant be unavailable, thereby manifesting a recognition that in such instances the live testimony of the declarant is preferable but that it is better to permit the evidence pursuant to one of those exceptions than to deprive the fact finder of the evidence altogether.
  3. **Judicial Discretion.** Whether the requirements of a hearsay exception contained in Rule 803 have been satisfied is to be determined by the court pursuant to Rule 104(a).
  4. **Other Provisions of Rules Still Apply.** A statement qualifying as an exception to the hearsay rules must satisfy other provisions in the rules before it may be admitted. The exceptions are phrased in terms of non-application of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration. Thus, for example, a statement that qualifies as an exception to the hearsay rule must be relevant, Rule 401; be based on personal knowledge, Rule 602; be properly authenticated, Rule 901; and meet the requirements of Rule 1002 where the content of a writing is being proved, before it can be admitted into evidence.
  5. **Self-Serving Nature of Statements is Irrelevant.** Hearsay statements falling within an exception to Rule 803 are admissible whether or not self-serving when made or offered.

6. **Rule 403 is Applicable.** Rule 403 is applicable to evidence offered as falling within a hearsay exception. Thus, even though the evidence meets the requirement of an exception, the court may still exclude the evidence on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

B. **Rule 803 Hearsay Exceptions.** Rule 803 contains 24 hearsay provisions consisting of 23 exceptions (subpart (23) is reserved) and each hearsay exception is treated as a separate rule.

1. **Present Sense Impression - Rule 803(1).** Rule 803(1) provides that a present sense impression is not excluded by the hearsay rule. A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

a. **“Verbal Camera”.** This is the “verbal camera” exception, applying to an observer’s description or explanation of an event in issue. The key condition is that the statement must be contemporaneous with or immediately after the event the declarant is describing.

This exception is often referred to by the courts as within the “res gestae” whenever statements closely connected in time to a relevant act or situation re admitted. Res gestae is broader doctrine than Rule 803(1) and encompasses the excited utterance exception which is treated in Rule 803(2).

b. **Underlying Rationale.** The underlying rationale is that the declarant has no time to fabricate, so any significant lapse of time should disqualify this exception.

c. **Foundation Required.** The rule provides that certain conditions must be satisfied for the statement to be admissible under this exception:

**First**, the statement must be made while the event or condition is being perceived by the declarant or “immediately thereafter.” The trial judge, in his or her discretion, pursuant to Rule 104(a) must determine whether the lapse of time is justified under the circumstances or whether it undermines the reliability of the evidence.

**Second**, the declarant must have perceived the event or condition. The declarant need not have been a participant. A statement by a bystander or even an unidentified bystander may be admissible, if the judge determines that the declarant did in fact perceive the event or condition.

**Third**, the statement must be one “describing or explaining” the event or condition. Narratives of past events or conditions, or statements on other subjects, or statements evoked by the event but which do not describe or explain it are not admissible under this exception.

2. **Excited Utterance - Rule 803(2).** Rule 803(2) provides that an excited utterance is not excluded by the hearsay rule. An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

a. **Spontaneous Declaration.** This exception is often referred to as the spontaneous declaration and is an exception generally considered to be within the scope of the outdated *res gestae* doctrine.

b. **Underlying Rationale.** The rationale underlying this exception derives from the “special reliability generally regarded as furnished by the excitement suspending the declarant’s powers of reflection and fabrication.” *State v. Hoover*, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003); *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992); *State v. Valverde*, 128 Idaho 237, 912 P.2d 124 (Ct. App. 1996); *State v. Burton*, 115 Idaho 1154, 772 P.2d 1248 (Ct. App. 1989).

c. **Foundation Required.** In order to apply this exception there must have been a startling event or condition. The trial court must not only determine whether the event occurred, but also whether it was startling or exciting.

The statement must be made “while the declarant was under the stress of excitement caused by the event or condition.” This condition involves two factors:

**First**, that the declarant was excited.

**Second**, that the declarant made the statement while excited.

- d. **Allowable Lapse of Time May Vary With Circumstances.** As a consequence of the fact that the justification of this rule is the lack of capacity to fabricate rather than the lack of time to fabricate, the period of acceptable time may be longer than in cases arising under the present sense impression exception. The rule does not require that the statement describe or explain the event or condition as is required to qualify the present sense impression exception. The statement must, however, relate to the startling event or condition.

The fact that the statement is self-serving to the declarant does not conclusively show that the statement is non-spontaneous, but it is relevant in determining whether it was the product of reflective thought. *State v. Burton*, 115 Idaho 1154, 772 P.2d 1248 (Ct. App. 1989)(delay of five minutes was too long where statement was self-serving).

*See State v. Hoover*, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003), where the court found totality of circumstances distinguishable from *State v. Hansen*, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999) and upheld admission of statements made by victim of domestic violence to a security officer several minutes after being beaten because her statements were the product of her shocked mental condition and a spontaneous reaction to the violence she endured.

*See also, State v. Hansen*, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999), in which the court reversed a conviction for battery upon the defendant's girlfriend, holding that her statements to the police made 10 minutes after the fight with her boyfriend, should not have been admitted because they did not qualify as "excited utterances" under Rule 803(2). The court concluded the statements were not a spontaneous reaction; she had time and motive to fabricate or exaggerate.

*See also, State v. Timmons*, 145 Idaho 279, 178 P.3d 644 (Ct. App. 2007) holding in a felony injury to a child case, the court properly admitted the child's hearsay statements to a neighbor, even though they were not spontaneous. Given the child's young age, proximity to the physical altercation, and ongoing emotional upset, the statements were the product of the startling events and not the child's normal reflective thought process.

*See also, State v. Griffith*, 144 Idaho 356, 161 P.3d 675 (Ct. App. 2007), review denied, (July 11, 2007) holding delay of three hours between exciting event and child's statement was not too long where the child appeared distracted during the interim and the statement was volunteered.

**Sex Crime Cases.** The Idaho Court has held in the context of rape cases that two to three hours was not too long after the event to conclude that the victim was still under the stress of the event. *State v. Bingham*, 116 Idaho 415, 776 P.2d 424 (1989) (two hours); *State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1986) (two -three hours).

In *State v. Valverde*, 128 Idaho 237, 912 P.2d 124 (Ct. App. 1996) the court upheld admission of a tape of a child's 911 telephone call to police in which she reported sexual molestation about 30 minutes after the last act, where the tape demonstrated the child's distress.

*But, compare State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992) (statements of child five to seventeen days after event were too long to qualify).

*See also, State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007) holding delay of two days between alleged sexual abuse and 7-year old child's statements describing the abuse was too long to qualify statements as excited utterances.

3. **Then Existing Mental, Emotional or Physical Condition - Rule 803(3).** Rule 803(a) provides that a statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health) but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will are not excluded by the hearsay rule. *See, e.g., Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987); *Montgomery v. Montgomery*, 147 Idaho 1, 205 P.3d 650 (2009).

- a. **"State of Mind (or Body)" Exception.** This is the "state of mind (or body)" exception. Its key qualifier is that the declarant must be describing his or her present, not past condition. Thus, "my head hurts like crazy" qualifies; "My head has been hurting for a week" does not. Opportunities for misapplication arise when the declarant mixes a statement of present condition with a statement concerning the historical cause of that condition, e.g., "I'm scared

to death. Lewis has been threatening me for weeks.” The latter part of the statement is outside the exception.

*See, e.g., State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986) in which the court held that a victim’s out-of-court statements of fear were admissible to show the victim’s state of mind but not to prove the underlying facts upon which the fear is based. The evidence was relevant on issue whether the victim provoked defendant.

- b. **Underlying Rationale.** This exception is actually two exceptions in one, in that it combines the exception for statements of physical condition and the exception for statements of mental or emotional condition. The rationale underlying each is the same. As in the case of statements of present sense impressions, of which the instant statements are but a specified application, the factor of contemporaneity provides some insurance against fabrication.

*See, e.g., Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 201 (Ct. App. 1995) (handwritten statements of declarant in her notebook would be admissible on issue of donative intent of declarant to prove whether cattle were owned separately or as community property).

- c. **Examples in the Rule are not Exclusive.** The rule provides examples of issues to which statements of the declarant’s then existing state of mind may be relevant. The list is not exclusive.
- d. **The Hillmon Doctrine.** This rule is intended to incorporate the Hillmon doctrine which, in its simplest form, permits evidence of a declarant’s statement of intent as proof that the declarant carried out the intent. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892) (allowing evidence of intent as tending to prove the doing of the act intended).

A more controversial use of the doctrine (unresolved in Idaho) is where a declarant’s statement of intent to do something with someone else is offered as proof of the declarant’s action and as proof of the other person’s actions. Courts have split on the propriety of this use of the exception. *Compare United States v. Jenkins*, 579 F.2d 840 (4th Cir., cert. denied, 439 U.S. 967 (1978) (restricted use to acts of declarant) and *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976) (admitted statement of declarant that he was going to meet defendant to prove that defendant attended the meeting).

4. **Statements for Purposes of Medical Diagnosis or Treatment - Rule 803(4).** Rule 803(4), provides that statements made for purposes of medical diagnosis or treatment in describing medical history, or past or present symptoms, pain or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment are not excluded by the hearsay rule.

However, statements to a psychologist have been held to be not for “medical” purposes within the meaning of this exception. *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

- a. **Underlying Rationale.** The rule is based on the rationale that the declarant’s motive to disclose the truth because his or her treatment will depend in part on what he says, guarantees the trustworthiness of the statements and there is a need for the statement when other evidence is unavailable. Because the declarant’s motive to promote treatment or diagnosis is a factor crucial to reliability, the rule does not require that the statement be made to a physician. Statements to hospital attendants, ambulance drivers or even members of the family will qualify if made for purposes of diagnosis or treatment.

*But see, State v. Kay*, 129 Idaho 507, 927 P.2d 897 (Ct. App. 1997), in which the court stated that where a young child is the declarant the court should consider the totality of the circumstances to determine whether the motivation for the statement promotes its reliability and described an extensive list of factors to be considered.

- b. **Scope of Rule.** Admissible statements are not restricted to the declarant’s condition and may include statements concerning someone else’s condition if made for purposes of diagnosis or treatment of that person, e.g., statements made by a parent relating to the symptoms of his or her child.
- c. **Statements as to Past Symptoms.** Unlike Rule 803(3), this exception includes statements as to past symptoms, pain or sensations, medical history and even causation if made for the purposes of diagnosis or treatment. However, statements as to fault will usually not be excepted.

*See, e.g., State v. Crawford*, 110 Idaho 577, 716 P.2d 1349 (Ct. App. 1986), in which the court questioned whether the victim’s identification of the assailant was necessary for the doctor’s diagnosis of injuries.

5. **Recorded Recollection - Rule 803(5).** Rule 803(5) provides that a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his or her memory and to reflect that knowledge correctly is not excluded by the hearsay rule. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

*See, e.g., State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992) in which notes taken by a witness at a previous trial of the same matter were properly read into evidence to impeach another witness.

- a. **Foundation Required.** This exception requires a present witness who inadequately remembers past events, a record of the events which the witness can establish as accurate, made when the matters were fresh in the witness's memory.

The witness need not have made the record (it can be "adopted" by the witness). Although the rule does not so require, presumably an effort should ordinarily be made to try to refresh the witness's present memory before relying on the hearsay record.

- b. **Procedure.** Note that the record may only be read into evidence, not received as an exhibit. This is because the record is a secondary substitute for present testimony and should not be given special weight.

- c. **Underlying Rationale.** The rule is justified under two theories: first, that use of the memorandum is necessary because the witness is unavailable as a result of his or her lack of memory of the event in question (cf. Rule 804(a)(3), I.R.E.) and second, that a contemporary accurate record is inherently superior to a present recollection, given the fallibility of human memory. The rule recognizes that requiring some demonstration of impaired memory discourages the use of self-serving statements especially prepared for litigation.

On the other hand, memory need not be wholly exhausted before the memorandum can be used. By providing for admission of the memorandum if the witness now has insufficient recollection to enable him or her to testify fully and accurately, Rule 803(5) decrees that admission of the memorandum should not be on an all or nothing basis. Admissibility of those portions about which memory is lacking should be determined by the court on a question

by question basis rather than by viewing the witness's memory as a whole.

6. **Records of Regularly Conducted Activity - Rule 803(6).** Rule 803(6) provides that a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was a regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, **or by certification that complies with Rule 902(11)**, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, is not excluded by the hearsay rule. The bolded portion of the rule was added by amendment of the rule in 2005. By virtue of the amendment, a business record properly certified under the provisions of I.R.E. 902(11) may be introduced without the need for any foundation witness.

- a. **“Business” Defined.** The rule applies in effect to any regularly conducted activity. The requirement that the records be of a regularly conducted “business” activity is not limited in the conventional sense. The definition of “business” is sufficiently broad that it may include personal records kept for business reasons.

*See, e.g., State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (1987). The term “business” as used in this rule includes business, institution, association, occupation, and calling of every kind, whether or not conducted for profit.

- b. **Foundation Required.** The rule imposes several foundation requirements that must be met before the record can be admitted. Because records of regularly conducted activity are not normally self-proving, as public records may be under Rule 803(8), the testimony of the custodian or other person who can explain the record keeping of the organization is ordinarily essential.

*See, e.g., City of Idaho Falls v. Beco Constr. Co.*, 123 Idaho 516, 850 P.2d 165 (1993) (court discusses proper foundation for admission of business records); *Herman v. Herman*, 136 Idaho 781, 41 P.3d 209 (2002) (excluded letter as inadmissible hearsay for lack of foundation required under I.R.E. 901).

Rule 902(11) provides the foundational requirements for admissibility of certified records of regularly conducted activity

under Rule 803(6). The original or a duplicate of a record of regularly conducted activity, within the scope of Rule 803(6), which the custodian thereof or another qualified individual certifies (i) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (ii) is kept in the course of the regularly conducted activity and (iii) was made by the regularly conducted activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes the intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to prove the adverse party with a fair opportunity to challenge it. The rule defines “certifies” to include a written declaration under oath. It also provides for foreign certification.

**Knowledge of the system is essential.** The custodian need not have personal knowledge of the actual creation of the document or need he or she have been an employee of the business when the record was made. The test is whether that person has knowledge of the system used to make the record and not whether he or she has knowledge of the contents of the record.

*See, e.g., Large v. Cafferty Realty*, 123 Idaho 676, 851 P.2d 972 (1993) holding that the person who prepared business record is not a necessary foundation witness if a qualified witness testifies to the necessary foundation.

*See, also, State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004) (*rev den* 2004), in which the court states that a document is not admissible under I.R.E. 803(6) unless the person testifying has a personal knowledge of the recordkeeping system used by the business which created the document.

*But, compare Department of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992) in which the court stated that a “qualified witness” under this rule must be the person who either has custody of the business records or one who supervised its creation. This seems to impose an unduly restrictive condition on qualifying the record for admissibility under this rule if it requires only knowledge of the system used to make the record.

**Each participant must qualify.** The rule mandates that each participant in the chain producing the record--from the initial observer-reporter to the final entrant--must be acting in the course of this regularly conducted business, or must meet the test of some other hearsay exception. The initial informers or reporters providing the information that is recorded must have personal knowledge, unless the information qualifies under some other hearsay exception, e.g., admissions, excited utterances or statements for purposes of medical diagnosis or treatment, but the person transmitting or recording the information need not have this first hand knowledge.

**Close proximity in time is essential.** The memorandum, report, record, or data compilation must be made at or near the time of the events recorded. The expression "data compilation" includes, without limitation, electronic computer storage.

**Mere receipt and retention is insufficient.** Mere receipt and retention of a document created by another entity cannot transform the document into a business record of the recipient for the purposes of the business record exception. *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct. App. 2004) (*rev den* 2004); *In the Interest of S.W.*, 127 Idaho 513, 903 P.2d 102 (Ct. App. 1995); *State v. Mubita*, 145 Idaho 925, 188 P.3d 867 (2008)(lab report in doctor's records did not qualify as business record where doctor's office did not make the report).

**Proof by certification.** I.R.E. 803(6) was amended effective July 1, 2005 to permit proof of the foundation by "certification that complies with Rule 902(11)" in addition to testimony of the custodian or other qualified witness.

- c. **Types of Information that Qualify.** The types of information that will be admissible under the rule include records of medical diagnosis and opinions, and non-medical opinions in business records, subject to the trial court's discretion to exclude a particular record where there are inadequate indications of trustworthiness.

**Handwritten statements** in decedent's notebook concerning decedent's cattle operations are admissible as business record. *Herrick v. Leuzinger*, 127 Idaho 293, 900 P.2d 210 (Ct. App. 1995).

**Invoices prepared by another** and sent to a party may qualify as business records within the exception, if retained in the regular course of business. *See, e.g., State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987).

**Documents prepared in anticipation of litigation** do not qualify under this rule. *See, e.g., City of Idaho Falls v. Beco Constr. Co.*, 123 Idaho 515, 850 P.2d 165 (1993). Excluded from this restriction are trial exhibits summarizing evidence that is within exceptions. *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), in which the Court held that a trial court properly admitted illustrative exhibits which had been prepared for trial by testifying experts where the data on which the exhibits were based qualified under the business records (Rule 803(6)), public records (Rule 803(8)), and market reports (Rule 803(17)) exceptions.

**Police reports may qualify under limited exceptions.** *See, e.g., State v. Vivian*, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996). Court stated that a police report may qualify as a public record and be admitted if offered by the defendant (Rule 803(8) bars use of a police investigative report by prosecution), but in this case, where defendant offered the report because it contained his statement of denial of having dropped drugs while running from an officer, it was inadmissible because it contained hearsay within hearsay, and no exception exists for the out-of-court denial which would have qualified the statement for admission under Rule 805.

**Public record exclusion may bar admissibility as a business record.** In *State v. Sandoval-Tena*, 138 Idaho 908, 71 P.3d 1055 (2003), the court held a police crime lab report that was inadmissible under the public records exception of I.R.E. 803(8) could not be admitted under the business records exception of I.R.E. 803(6) because doing so would render the exclusion under I.R.E. 803(8) meaningless.

- d. **Purpose of Untrustworthiness Provision.** The provision mandating an exclusion of an otherwise admissible record if “the sources of information or other circumstances indicate lack of trustworthiness,” permits the trial court, when ruling on admissibility pursuant to Rule 104, to consider problems of motivation in the preparation of the material, including factors

such as whether it was prepared specifically for litigation, purposes for which it was prepared and by whom it was prepared.

Minor alterations in a document do not necessarily disqualify it as a business record. *See, e.g., Christensen v. Rice*, 114 Idaho 929, 763 P.2d 302 (Ct. App. 1988).

7. **Absence of Entry in Records - Rule 803(7).** Rule 803(7) provides an exception to the hearsay rule for evidence of the absence of entry in records kept in accordance with the provisions of Rule 803(6). The rule provides that evidence that a matter is not included in the memorandum, reports, records, or data compilation, in any form, kept in accordance with the provisions of Rule 803(6), to prove the non-occurrence or non-existence of the matter if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness, is not excluded by the hearsay rule.

This exception permits evidence of the absence of an entry in Rule 803(6) business records to prove that an event in question did not occur.

- a. **Foundation Required.** It requires a foundation showing that the event is one for which an entry ordinarily would have been made had the event occurred. The evidence of the absence of the entry ordinarily would come from someone who has examined the records, although it also could come from introduction of the records themselves.
- b. **Summaries Qualify.** Note that if it comes through testimony, the evidence may be a summary of voluminous documents, subject to the requirement of IRE 1006 that the originals have been made available to the other side for examination.

8. **Public Records and Reports - Rule 803(8).** Rule 803(8) provides an exception to the hearsay rule for evidence of public records and reports. The rule provides that unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matter observed pursuant to duty imposed by law and as to which there was a duty to report or factual findings resulting from an investigation made pursuant to authority granted by law are not excluded by the hearsay rule.

- a. **Exclusions from Exception.** The following are not within the exception to the hearsay rule:

- (A) **investigative reports by police** and other law enforcement personnel, except when offered by an accused in a criminal case;
- (B) **investigative reports prepared by or for a government**, a public office or an agency when offered by it in a case in which it is a party;
- (C) **factual findings** offered by the government in criminal cases;
- (D) **factual findings** resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

- b. **Limited Scope of Rule.** The Idaho Rule treats the admissibility of investigative reports and factual findings in a manner much more restrictive than they are treated under the comparable Federal Rule 803(8).

*See, e.g., Jeremiah v. Yanke Mach. Shop, Inc.*, 131 Idaho 242, 953 P.2d 992 (1998) in which the court held that the Idaho Human Rights Commission determination of “no probable cause” in a discrimination investigation was inadmissible hearsay and not excepted under Rule 803(8).

- c. **Reports to Public Agencies Qualify.** In *Cosgrove v. Merrell Dow Pharmaceuticals*, 117 Idaho 470, 788 P.2d 1293 (1989), modified on other grounds 1990 Ida. LEXIS 42 (Idaho), the Court held that the public records exception applied to a drug company’s reports of sales which were required to be submitted to the Federal Drug Administration.

*See also, State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992), in which the court held, in a criminal case, that teletype reports of a person’s driving record and criminal status gathered from law enforcement agencies qualified under the public records exception, but were limited to objective facts, not factual findings or investigative conclusions within the prohibition of Rule 803(8)(A) or (C).

*See also, Navarro v. Yonkers*, 144 Idaho 882, 173 P.3d 1141 (2007) holding that in a child custody proceeding, a certified copy of a Nevada proceeding was admissible because it fell within the public record exception to the hearsay rule.

- d. **Applying the Rule.** In applying Rule 803(8), it must be kept in mind that it is not a rule of exclusion. It is a rule of admissibility in certain defined circumstances. As a result, evidence not admissible under Rule 803(8) may, at least theoretically, be admissible under other provisions of the rules, e.g., Rules 803(5) and (6).
9. **Records of Vital Statistics - Rule 803(9).** Rule 803(9) provides an exception for records of vital statistics. It states that records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law are not excluded by the hearsay rule.
- a. **Foundation Required.** The rule does not require that the person furnishing the information on which the record was based have a public or official status. It requires only that the report be made to a public office pursuant to law. Consequently, reports by parents about the birth or death of their children are admissible.
  - b. **Limited Scope of Rule.** This exception is limited to birth, death, and marriage records, if the report was made to a public office pursuant to legal requirements.
  - c. **Preliminary Showing Required.** In order to determine whether a particular record qualifies pursuant to Rule 803(9), a preliminary showing will have to be made--usually by means of the certificate accompanying the record (cf. Rules 902(4) and 1005)-- that the report was made to a public office pursuant to requirements of law. The form of the records does not matter; the wording of Rule 803(9) is broad enough to include data compilations.
10. **Absence of Public Record - Rule 803(10).** Rule 803(10) provides an exception to the hearsay rule for evidence of the absence of a public record or entry. It provides that to prove the absence of a record, report, statement, or data compilation, in any form, or the non-occurrence or non-existence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or date compilation, or entry, is not excluded by the hearsay rule.

**The rule is concerned with two problems:**

(1) that evidence of the absence of a public record or an entry in a public record is not excluded by a hearsay rule and

(2) how the absence of the public record or entry may be proved.

With regard to the first problem the rule duplicates Rule 803(7) regarding absence of entry of regularly conducted business activity.

**11. Records of Religious Organizations - Rule 803(11).** Rule 803(11) provides an exception for records of religious organizations. It provides a statement of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in regularly kept record of a religious organization are not excluded by the hearsay rule.

**a. Scope of Exception.** This provides exception similar to the Vital Statistics exception, but this exception is broader. It covers in addition divorces, legitimacy, ancestry, and family relationships.

**b. Use of Exception is Expanded Beyond Rule 803(6).** This exception broadens the possible use of such records over that available under Rule 803(6) to prove matters reflected beyond the “business” of the religious organization, e.g., by authorizing use of a record of baptism to prove age, as well as the fact of baptism.

**12. Marriage, Baptismal and Similar Certificates - Rule 803(12).** Rule 803(12) provides an exception for evidence of marriage, baptismal, and similar certificates. It provides that statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter are not excluded by the hearsay rule.

**a. Scope of Exception.** This exception duplicates the public records exceptions in Rule 803(8) and (10) to some extent. The rule, however, extends beyond public officials to include clergymen and others who perform marriages and other ceremonies or administer sacraments. The certificates of such matters as baptism or confirmation, as well as marriage, are included.

**b. Foundation Required.** When the person making the certificate is not a public official, the self-authentication provisions of Rule 902

are not applicable and proof is required that the person making the certificate was authorized and did make it.

- 13. Family Records - Rule 803(13).** Rule 803(13) provides an exception for evidence of family records. It provides that a statement of fact concerning personal or family history contained in family bibles, genealogies charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like, are not excluded by the rule against hearsay.

Records of family history kept in family bibles have by long tradition been received in evidence. The exception includes inscriptions on a variety of family papers, on family photographs, tombstones, urns, crypts, engravings on rings, and publicly displayed pedigrees.

- 14. Records of Documents Affecting an Interest in Property - Rule 803(14).** Rule 803(14) provides an exception for records of documents affecting an interest in property. It provides that the record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is the record of a public office and an applicable statute authorizes a recording of documents of that kind in that office, is not excluded by the hearsay rule.

This is an exception that has been created by statute. It is concerned with the rather limited problem of allowing a record of a title document to be used as proof of the contents of the original document, and its due execution and delivery. If the particular record meets the recording requirements of the local jurisdiction, receipt of the record as an exception to the hearsay rule is authorized.

- 15. Statements in Documents Affecting an Interest in Property - Rule 803(15).** Rule 803(15) provides an exception for statements and documents affecting an interest in property. It provides that a statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document, is not excluded by the hearsay rule.

- a. Foundation Required.** This rule excepts from the hearsay rule recitals of fact contained in dispositive instruments if the matter stated was relevant to the purpose of the document and provided

there has been no dealing subsequent to the making of the document inconsistent with the truth of the statement.

- b. **Scope of Exception.** This provides an exception for statements in deeds, leases and the like. The rule is not restricted to deeds and wills. It is applicable to instruments dealing with personal property as well as realty.
- c. **Circumstances of Use is Limited.** This exception will be necessary only in limited circumstances. Much of the time statements in such documents have independent legal significance and are not hearsay for the purpose for which they are offered.

16. **Statements in Ancient Documents - Rule 803(16).** Rule 803(16) provides an exception for statements in ancient documents. It provides that statements in a document in existence thirty years or more, the authenticity of which is established, is not excluded by the rule against hearsay.

The Idaho rule requires a period of thirty years rather than the 20 year period provided in the comparable federal rule. The common law period for this exception has generally been 30 years.

17. **Market Reports, Commercial Publications - Rule 803(17).** Rule 803(17) provides an exception for market reports, and similar commercial publications. It states that market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations are not excluded by the hearsay rule.

- a. **Scope of Exception.** The scope of the exception makes market reports and similar commercial publications admissible if generally used and relied upon by the public or persons in particular occupations. This is in accord with actual practice which has allowed such publications as newspaper market reports, telephone directories and city directories to be admitted even though they have not been prepared for the use of a trade or business.
- b. **Proof of Stock Prices.** This exception allows proof of a stock's price through an issue of the Wall Street Journal. It is broadly written, and would similarly permit use of lists or directories published for much smaller audiences.

18. **Learned Treatises - Rule 803(18).** Rule 803(18) provides an exception for learned treatises. It states that to the extent called to the attention of an

expert witness upon cross-examination or relied upon him in direct examination, statements contained in published treatises, periodicals, pamphlets on a subject of history, medicine or other science or arts, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice are not excluded by the rule against hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits, except upon motion and order for good cause shown.

a. **Use for Substantive Evidence.** Rule 803(18) allows the treatise to be used as substantive evidence, but only under limiting conditions. The contents must be called to the attention of an expert witness upon cross-examination or relied upon him or her in direct examination and the publication must be established as the reliable authority by the testimony or by judicial notice.

b. **Scope of Use.** “Idaho appears to follow an unusually liberal approach to the admission of scientific or scholarly works under this exception. In *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (1988), *review denied*, 1989 Ida. LEXIS 9 (Idaho), the Idaho Court of Appeals, relying on *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979) (overruled in part on other grounds by *Runcorn v. Shearer Lumber Prods.*, 107 Idaho 389, 690 P.2d 324), ruled that an article from Scientific American magazine would have been properly admitted over a hearsay objection even though it was offered without a testifying expert to declare it authoritative.” Lewis, IDAHO TRIAL HANDBOOK, § 19.5, at 225.

*See, also, Robinson v. State Farm Mutual Automobile Ins. Co.*, 137 Idaho 173, 45 P.3d 829 (2001) holding it was error to admit a publication on treatment of a herniated disc as a learned treatise under I.R.E. 803(18) to prove a medical fact, but that it was admissible as non-hearsay to prove that the party that circulated the publication had knowledge of its contents.

19. **Reputation Concerning Personal or Family History - Rule 803(19).** Rule 803(19) provides an exception for evidence of reputation concerning personal or family history. It provides that reputation among members of one’s family by blood, adoption, or marriage, or among one’s associates or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of one’s personal or family history is not excluded by the hearsay rule.

Without this exception one could properly raise a hearsay objection to the question, “Who was your birth mother?” or “What is your date of birth?” The exception recognizes that much of what we know about our family history is, in fact, what we have been told.

- a. **Scope of Exception.** The use of reputation evidence to prove facts of personal or family history is made more liberal by this rule in accordance with recent trends. Such facts may include, without limitation, marriage, divorce, legitimacy, relationship by blood, adoption, birth, death, or ancestry.
- b. **Reputation Evidence Allowed.** The evidence may be of reputation among (1) family members, (2) the community or, (3) associates.
- c. **Foundation Required.** Before a witness can testify to reputation pursuant to Rule 803(19), the witness must be qualified by showing his or her membership in a group that could have been familiar with the personal or family history of the person in question. The rule omits the common law requirement that the reputation has been formulated before the controversy arose.
- d. **Application of Rule 403.** However, under Rule 403, the trial judge may, in his or her discretion, exclude testimony as to reputation that post dates the controversy if he or she finds that the possibility of prejudice, confusion or delay substantially outweighs the probative value of the evidence.

20. **Reputation Concerning Boundaries or General History - Rule 803(20).** Rule 803(20) provides an exception for evidence of reputation concerning boundaries or general history. It provides that evidence of reputation in the community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located is not excluded by the hearsay rule.

- a. **Scope of Exception.** The rule follows the American majority rule in allowing reputation to prove private and public boundaries, land customs and events of general history.
- b. **Foundation Required to Prove Boundaries and Customs.** With regard to boundaries and customs, the rule retains the requirement that the reputation be one arising before the controversy, but rejects the common law requirement of antiquity and the requirement that no better evidence be available.

- c. **Foundation Required to Prove Events of General History.** With regard to events of general history, the rule similarly omits the requirement of antiquity and the requirement that living witnesses be unavailable. However, unlike matters affecting boundaries and customs, the reputation need not have arisen before the controversy. The requirement that the event be important to the community or state or nation is inserted in the rule to ensure reliability.

- 21. **Reputation as to Character - Rule 803(21).** Rule 803(21) provides an exception for reputation as to character. It states that reputation of a person's character among his associates or in the community is not excluded by the rule against hearsay.

This exception is necessary to eliminate a hearsay objection in those situations where the character evidence rules, notably Rules 404(a), 405(b), and 608(a), permit proof of character. It does not trump the character evidence rules and make otherwise inadmissible character evidence admissible.

- a. **Purpose of Exception.** The exception deals only with the hearsay aspect of this kind of evidence when used as a substantive fact. When character evidence is used to support or impeach the credibility of a witness under Rules 404(a)(3) and 608, it is not used substantively, but only as an aid in evaluating testimony.
- b. **Application of Rule 803(21).** Reputation testimony as to character may be employed to prove a fact of consequence when character is an issue under Rule 405(b), or to establish a pertinent trait of character of the accused, under Rule 404(a)(1), or victim under Rule 404(a)(2). For example, Rule 405(a) provides that in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. To assure that a hearsay objection cannot bar the reception of such evidence, the exception is expressly provided in this rule. The exception, like Rule 405(a), includes reputation of a person's character among his or her associates as well in the community.

- 22. **Judgment of Previous Conviction - Rule 803(22).** Rule 803(22) provides an exception for evidence of a judgment of previous conviction. It provides that evidence of a final judgment, entered after a trial or upon a plea of guilty (but not a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including

when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused are not excluded by the hearsay rule. The pendency of an appeal may be shown but does not effect admissibility.

- a. **Use Restricted to Criminal Felony Judgments in Subsequent Proceedings.** The rule provides an exception for evidence of a final criminal felony judgment in subsequent criminal or civil proceedings to prove any fact essential to sustain the judgment. The exception does not apply to the use of civil judgments in a subsequent litigation. The rule is restricted to prior criminal judgments offered in subsequent proceedings.
- b. **Judgment on Trial or Plea Required.** The judgment must have been entered after a trial or have been based upon a plea of guilty.
- c. **Felony Grade Required.** The offense must have been of felony grade measured by federal standards under the federal rule and by state standards under the Idaho rule. The limitation to felony grade recognizes that one is not always motivated to defend a lesser charge.
- d. **Restriction on Use of Conviction of Third Person.** Although a judgment of conviction conforming to the rule is excepted from the rule against hearsay in both civil and criminal proceedings to prove any fact essential to sustain the judgment, because of considerations of confrontation, a judgment of conviction of a third person offered by the prosecution against the accused in a criminal case for purposes other than impeachment is inadmissible. This limitation is dictated by *Kirby v. United States*, 174 U.S. 47 (1899), wherein the Supreme Court reversed a conviction for possession of stolen goods when the only evidence they were stolen was the record of conviction of the thieves, on the ground that the accused had been denied his Constitutional right of confrontation.
- e. **Evidence is not Conclusive.** The party against whom the evidence is offered, who frequently will but need not be the person against whom the judgment of conviction was entered, may attempt to rebut such evidence by offering whatever explanation there may be concerning either the circumstances surrounding the conviction or the underlying event. Introduction of evidence to rebut may be curtailed, if required, under Rule 403, I.R.E. The ultimate weight to be afforded to evidence of conviction is for the trier of fact to determine.

- 23. Medical or Dental Tests and Test Results for Diagnostic or Treatment Purposes.** Effective January 1, 2009, Rule 803 was amended to adopt subpart 23, which provides an exception for “A written, graphic, numerical, symbolic or pictorial representation of the results of a medical or dental test performed for purposes of diagnosis or treatment for which foundation has been established pursuant to rule 904, unless the sources of information or other circumstances indicate lack of trustworthiness.

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(a) 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.

The exception does not apply to: (a) psychological tests; (b) reports generated pursuant to I.R.C.P. 35(a); (c) medical or dental tests performed in anticipation of or for purposes of litigation; or (d) public records specifically excluded from the Rule 803(8) exception to the hearsay rule.

- 24. Other Exceptions - Rule 803(24).** Rule 803(24) provides for a “catch-all” exception. It provides that a statement not specifically covered by any of the foregoing exceptions but having the equivalent circumstantial guarantees of trustworthiness, if the court determines that:

- (A) the statement is offered as evidence of a material fact;
- (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence, is not excluded by the rule against hearsay.

- a. Advance Notice Required.** A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet

it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The inclusion of a copy of a hearsay report in the complaint with an allegation that it was true was not adequate compliance with this notice requirement. *Department of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992).

- b. Comparable to Rule 804(b)(5).** Rule 804(b)(5) is identical to Rule 803(24) with the exception of the additional requirement that the declarant be unavailable under Rule 804. Thus cases decided under Rule 804(b)(5) are significant authority with respect to Rule 803(24) and vice versa.
- c. Application of "Catch-All" Exception is Limited.** Rules 803(24) and 804(b)(5) are not intended to operate to destroy the hearsay rule. As the Federal Advisory Committee's Note to Federal Rule 803(24) cautioned, "They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions."
- d. Foundation Required.** Rule 803(24) contains five express requirements, all of which must be determined by the court to have been satisfied (Rule 104(a)) before the statement may be admitted. Specific findings as to the prerequisites are required as a condition of admission under these catch-all exceptions. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990). The findings by the court should be made explicitly on the record unless there is a waiver explicitly.

The five findings are summarized as follows:

**First, the statement must have "circumstantial guarantees of trustworthiness"** equivalent to that of statements admitted under one of the specific exceptions. In evaluating the reliability of a prior statement, the court should look to four criteria: (1) that the statement was made; (2) assurance of personal knowledge of the declarant of the underlying event; (3) practical availability of the declarant at trial for meaningful cross-examination concerning the underlying event; and (4) an assessment of reliability based upon the totality of the circumstances considered in light of the class-type exceptions to the hearsay rule supposed to demonstrate such characteristic.

“To comply with the Confrontation Clause, the ‘equivalent circumstantial guarantees of trustworthiness’ under IRE 803(24) must be found in the circumstances surrounding the making of the hearsay statement as they existed at time of the statement; corroboration of the truth of the statement by other evidence is irrelevant to that determination. *Idaho v. Wright*, 497 U.S. 805, 111 L.Ed.2d 638, 110 S. Ct. 3139, 30 Fed. R. Evid. Serv. (Callaghan) 24 (1990).” Lewis, IDAHO TRIAL HANDBOOK, § 19.7 at 227.

*See, e.g., State v. Slater*, 136 Idaho 293, 32 P.3d 685 (Ct. App. 2001) (*rev den* 2001) (statements by passenger in car that accused driver swallowed something and dropped something through a hole in the floor of the car while being pursued by police were not sufficiently trustworthy to be admitted under I.R.E. 803(24)).

**The second finding is need.** Need involves two aspects: (1) the availability of other evidence not raising hearsay dangers and (2) if the extra-judicial declarant is available, the trial judge may condition admissibility on his or her being called to testify.

In order to determine credibility of the declarant when he or she made the statement attributed to the declarant, and to do this the statement must be viewed as part of the other evidence in the case. Factors to be considered include whether the statement is oral or written, the relationship of the parties, the probable motivation of the declarant in making the statement, the circumstances under which it was made, and the knowledge and qualifications of the declarant. Also significant may be whether it is a jury or non-jury case, whether civil or criminal in nature, and whether offered by prosecution or defense.

**The third finding required is that the statement “is offered as evidence of a material fact.”** This is no more than a statement of the general requirement of relevancy under Rules 401 and 402, I.R.E. If offered not for its truth, but only on the issue of credibility, it will not be hearsay.

**The fourth finding required is that admissibility must accord with “the general purposes of these rules and the interest of justice.”** This is a restatement of Rule 102, I.R.E.

**The fifth finding required is that the proponent gave notice of his or her intention to offer the statement “sufficiently in advance of the trial or hearing to provide a fair opportunity to meet**

it and the particulars including the name and address of the declarant.” The notice in advance of trial requirement, while generally enforced, may be dispensed with if the need for the hearsay statement arises on the eve of the trial or in the course of trial, if no prejudice to the opponent is apparent. One method used to avoid prejudice is to grant a continuance to the opponent to prepare to meet or contest introduction of the hearsay statement. The federal courts appear to be divided whether to grant a continuance or deny admissibility when advance notice has not been given.

- e. **Examples of Application.** In *State v. Ransom*, 124 Idaho 703, 864 P.2d 149 (1993), *cert. denied*, 127 L.Ed.2d 571, 114 S. Ct. 1227 (U.S.), the court upheld the admission of a videotape of an interview of a child two days after the alleged sexual abuse in which the child described the acts and identified the defendant as the perpetrator under Rule 803(24). The court noted that the child was developmentally and emotionally disabled, would “clam up” and respond only to leading questions at trial, and exhibited memory loss since the events. On the tape, the child’s statements were “spontaneous and clear” and the safeguards of *State v. Wright* had been met.

However, in *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992), the court held that a child’s utterance while asleep were unreliable and did not qualify for admission under the “catch-all” exception.

In *City of Idaho Falls v. Beco Constr. Co.*, 123 Idaho 516, 850 P.2d 165 (1993), the court held an affidavit of a since-deceased witness prepared for purposes of a summary judgment motion in the litigation was insufficiently reliable to qualify for admission under Rule 804(b)(5).

- f. **Rule 403 is Applicable.** Rule 803(24), like the rest of Rule 803, is subject to the application of Rule 403.

## VII. EXCEPTIONS; DECLARANT UNAVAILABLE - I.R.E. 804.

- A. **General Comments.** Rule 804 provides for certain hearsay exceptions each sharing the requirement that the declarant be “unavailable as a witness” as “unavailability” is defined in Rule 804(a). Unlike the hearsay exceptions contained in Rule 803 which are based on the assumption that the availability or unavailability of the declarant is not a relevant factor in determining admissibility, the hearsay exceptions contained in Rule 804 recognize that a statement meeting

the requirements of the particular exception is not equal in quality to the testimony of the declarant at trial. Accordingly, Rule 804 provides for admissibility only if the declarant is unavailable. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of a specified quality, is preferred over complete loss of the evidence of the declarant.

1. **Attempt to Procure Attendance by Process may be Required.** Unavailability is treated as a single concept applicable to each exception. A variance from this unified approach exists only with respect to imposition of a requirement with respect to procurement of testimony of a witness absent from the hearing, applicable solely to Rules 804(b)(2), (3) and (4), where the proponent of the hearsay statement is unable to compel the witness's attendance by process or other reasonable means.
2. **Underlying Rationale.** Rule 804(a) is based upon the premise that the essential factor in determining unavailability is the unavailability of the testimony rather than the unavailability of the witness. Thus, physical presence on the witness stand does not make a witness available within the meaning of the rule if the witness exercises a privilege, refuses to answer, or testifies to a lack of memory as to the subject matter of his or her prior statement.
3. **Determination by the Court.** Whether the requirements of a hearsay exception contained in Rule 804 have been satisfied is to be determined by the court pursuant to Rule 104(a), I.R.E. As provided in Rule 104(a), the Trial court is not bound by the rules of evidence except those respecting privilege.
  - a. **Procedure.** The finding of inability to testify may be made without holding a formal hearing.
  - b. **Burden of Proof.** The burden of showing unavailability is upon the party offering the statement.
4. **Other Evidence Rules Apply.** A statement meeting the requirements of the hearsay exception must satisfy other provisions of the rules of evidence before it may be admitted. The exceptions in Rules 803 and 804 are phrased in terms of non-application of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration. Thus, for example, a statement that qualifies as an exception to the hearsay rule, must be relevant, Rule 401; be properly authenticated, Rules 901 and 902; be based upon personal knowledge, Rule 602, with the exception of statements by the declarant as to his own personal or family history, Rule

804(b)(4); and meet the requirements of the original writing rule, Rule 1002, where the content of a writing is in issue, before it can be admitted into evidence. Questions arising with respect to multiple level hearsay are addressed in Rule 805; attacking and supporting the credibility of the declarant is governed by Rule 806.

a. **Self-Serving Nature of Statements is Irrelevant, Except under Rule 804(b)(3).** With the exception of a statement against interest, Rule 804(b)(3), hearsay statements falling within an exception are admissible whether or not self serving when made or offered.

**B. “Unavailability” Defined - Rule 804(a).** The requirement of unavailability applicable to the hearsay exceptions is defined in Rule 804(a). The requirement of unavailability is applied to the five hearsay exceptions contained Rule 804(b). They are:

- (1) former testimony,
- (2) statement under belief of impending death,
- (3) statement against interest,
- (4) statement of personal or family history, and
- (5) other exceptions.

1. **Former Testimony - Rule 804(a)(1).** Rule 804(a)(1) provides that a witness exempt from testifying concerning the subject matter of his or her statement on the grounds of privilege is unavailable. An actual claim of privilege must be made by the witness and allowed by the court before the witness will be considered unavailable on the basis of privilege. The scope of the privilege must include the subject matter of the hearsay statement at issue.

2. **Refusal to Testify - Rule 804(a)(2).** Rule 804(a)(2) provides that one who persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court that he or she do so is unavailable. Silence resulting from misplaced reliance upon a privilege without making a claim, or in spite of a court denial of an asserted claim of privilege, constitutes unavailability under this subsection.

3. **Lack of Memory - Rule 804(a)(3).** Rule 804(a)(3) provides that a witness who testifies to a lack of memory of the subject matter of his or her statement is unavailable. A witness may either truly lack recollection or for a variety of reasons, including concern of a possible perjury

prosecution, feign lack of recollection. In either event, the witness is unavailable to the extent that he or she asserts lack of recollection of the subject matter of the prior statement, even if the witness recalls other events. The witness must actually testify as to the lack of memory.

4. **Death, Physical or Mental Illness or Infirmary - Rule 804(a)(4).** Rule 804(a)(4) provides that a witness unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity is unavailable. In criminal matters, if the reason for the government's witness unavailability is only temporary, considerations underlying the Confrontation Clause may require resort to a continuance. In both civil and criminal cases where the testimony of the witness is critical, the trial court should consider carefully the option of granting a continuance.

- a. **Judicial Discretion and Factors to Consider.** Whether to declare the witness who is temporarily ill or infirm to be unavailable or to grant a continuance, is a matter for the trial judge's discretion considering the nature of the disability, and its expected duration, length of time the case has been pending, whether delays, if any, are attributable to the proponent of the hearsay, the nature of the case, the significance of the disabled witness' testimony, the availability of other evidence on the point, and whether the nature of the expected testimony on the subject of the hearsay statement is such that cross-examination would be expected to be particularly helpful.

- b. **Confrontation Concerns.** This problem is accentuated by the accused's right of confrontation in criminal proceedings.

5. **Absence and Inability to Obtain Testimony - Rule 804(a)(5).** Rule 804(a)(5) provides that in both civil and criminal cases a declarant is unavailable if his or her presence cannot be secured by process or other reasonable means.

- a. **Criminal Case Special Requirements.** In criminal cases the Confrontation Clause also requires that the prosecution make a good faith effort to obtain the presence of the witness at trial going beyond the mere showing of an inability to compel appearance by subpoena before prior testimony may be introduced as a substitute for testimony. Whether the prosecution has shown good faith in attempting to locate and procure the witness' attendance by process or voluntarily by reasonable means must be determined on a case-by-case basis after careful review of the particular facts and circumstances.

- b. **Effort to Depose Required.** In addition, Rule 804(a)(5) requires that it be shown that the deposition of the witness cannot be procured by process or other reasonable means before a hearsay statement may be admitted as a hearsay exception pursuant to Rule 804(b)(2), (3) or (4). The requirement of an attempt to depose the witness as a prerequisite to a finding of unavailability imposed by Rule 804(a)(5) is not applicable to either Rule 804(b)(1), former testimony, or Rule 804(b)(5), other exceptions.

However, practical considerations must be taken into account when determining whether the requirement that an attempt to depose the declarant has been made should be a condition of admission. There are situations when a deposition may legally be obtainable, but it is not reasonably practicable to do so, particularly where a relatively small claim is over balanced by the cost to obtain the deposition or where the evidence comes too late during the trial and a continuance is not possible. See Comment to Rule 804(a)(5).

- c. **Putting Witness On Stand Required.** An essential component in a declaration of unavailability under Rule 804(a)(2) is an order from the court directing the witness to testify at the time the proponent of the testimony seeks to have that testimony admitted. *State v. Barcella*, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000) (failure to call witness to stand and test his refusal to testify was error).

*See, also, Milburn v. State*, 135 Idaho 701, 23 P.2d 775 (Ct. App. 2000).

- d. **Unavailability of a Witness Must be of Such Duration that a Continuance is Not a Practical Alternative.** The unavailability exception is not a rule of simple convenience. *State v. Button*, 134 Idaho 864, 11 P.3d 483 (Ct. App. 2000) (failure to delay trial one day and declaring witness unavailable was error); *State v. Perry*, 144 Idaho 266, 159 P.3d 903 (Ct. App. 2007)(the unavailability of a terminally ill witness on the scheduled day of trial testimony due to a relapse was insufficient grounds for declaring the witness unavailable and admitting her preliminary hearing testimony where there was no substantial showing as to whether she would be available if the case was continued for a few days or started anew in a few weeks).

- C. **Disqualification.** The rule is qualified by the final paragraph of Rule 804(a) which states that a declarant is not unavailable when the declarant's absence,

refusal to testify, loss of memory, etc., “is due to the procurement or wrongdoing of the proponent of his statement.” This portion of the rule is designed to prevent the parties from creating the unavailability of the declarant in order to gain an unfair advantage.

**D. Former Testimony - Rule 804(b).** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

**1. Former Testimony - Rule 804(b)(1).** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination is not excluded by the hearsay rule if the declarant is unavailable as a witness.

**a. Foundation Required.** The rule imposes two conditions to admissibility:

**First**, the witness is unavailable as defined in Rule 804(a), and

**Second**, the party against whom the testimony is being offered, or in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination. Identity of counsel in both proceedings is not a condition of admissibility.

**b. Identity of Parties.** With regard to identity of the parties, the federal courts have been reluctant to interpret “predecessor in interest” in its old, narrow, substantive law sense, of privity which would require the party to share a property interest with the predecessor in interest.

**c. Similar Motive to Develop the Testimony.** With respect to the party or predecessor in interest in civil cases, and a party to the prior hearing in a criminal case who had an opportunity to develop the witness’ testimony by direct and redirect or cross-examination, the former testimony will be admitted against the party only if the party, or predecessor in civil cases, had a similar motive to develop the testimony at the prior hearing. Generally speaking, a similar motive would have existed at the prior hearing when the issue at the prior hearing and at the current hearing are substantially identical.

- d. **Similarity of Issues.** All the issues at the earlier hearing need not be the same; only the particular issue as to which the testimony was first offered must be substantially similar to the issue upon which offered in the current action. Accordingly, it follows that neither the form of the proceeding, the theory of the case, nor the nature of the relief sought needs to be the same.
- e. **Opportunity to Cross-Examine.** With regard to the opportunity to cross-examine, it must be noted that actual cross-examination is not required under the hearsay rule. Generally, the mere opportunity to exercise the right to cross-examine will suffice. However, in some situations the federal courts have held that the “opportunity” for cross-examination must be meaningful in light of the circumstances which prevailed when the former testimony is offered.
- f. **Type of Proceeding.** Although, the rule is silent as to the type of proceeding or hearing which will qualify it, this exception is not limited to testimony at a trial, and applies as well to testimony in a deposition or a “proceeding.” Its availability turns on the required demonstration of unavailability, and its insistence that the party against whom the evidence is offered had an “opportunity and similar motive to develop the testimony” at the earlier proceeding.

The exception does not apply to an affidavit of a since-deceased witness that was submitted in support of a motion for summary judgment because reliability cannot be tested by cross-examination. *City of Idaho Falls v. Beco Const. Co., Inc.*, 123 Idaho 516, 850 P.2d 165 (1993).

- g. **Preliminary Hearing Testimony.** In *State v. Elisondo*, 114 Idaho 412, 757 P.2d 675 (1988), the Idaho Supreme Court held, on non-constitutional grounds, that preliminary hearing testimony cannot be used in Idaho proceedings in the absence of the witness. Since *Elisondo*, the Idaho Court of Appeals has twice held that *Elisondo* is no longer controlling, and that the passage of Idaho Code § 9-336 makes preliminary hearing testimony potentially admissible under this exception. See *State v. Owen*, 129 Idaho 920, 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997); *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

*See also, State v. Mantz*, 148 Idaho 303, 222 P.3d 471 (Ct. App. 2009), in an aggravated assault case where the victim testified in a preliminary hearing but died before trial, defendant’s confrontation right was not violated by admission of that testimony at trial.

Defendant was represented at the preliminary hearing by counsel who engaged the victim in full and effective cross-examination as to his truthfulness, bias, memory and motive.

The common law developed two requirements in order to ensure that the former examination of the witness was equivalent to what would have occurred at the subsequent trial had the witness been available: identity of issues and identity of parties. Rule 804(b)(1) broadens the common law rule but does so explicitly only insofar as the identity of issue requirement is concerned. The rule places the focus on motive to develop the prior testimony rather than similarity of issues, although similarity or dissimilarity of issues can affect motive. The decision whether there is sufficient similarity of motive lies within the discretion of the trial judge.

2. **Statement Under Belief of Impending Death - Rule 804(b)(2).** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death, is not excluded by the hearsay rule if the declarant is unavailable as a witness.
  - a. **Underlying Rationale.** The hearsay exception for a statement made under belief of impending death, known in the common law as a dying declaration, finds its guarantee of trustworthiness in the assumption that the belief of impending death precludes the possibility of falsification by the declarant. A statement under belief of impending death is a statement made by a declarant, while believing that his death was imminent, concerning the cause and circumstances of what he believed to be his impending death.
  - b. **Judicial Discretion.** Whether the requirements of the hearsay exception have been satisfied, including whether the declarant believed himself in extremis when the statement was made, is to be determined by the court pursuant to Rule 104(a).
  - c. **Foundation Required.** Belief in the imminence of the declarant's may be showed by the declarant's own statements or from circumstantial evidence, such as the nature of the declarant's wounds, statements made in his or her presence, or by opinion of his or her physician. At the same time, it must also be established that the declarant was sufficiently possessed of his or her mental faculties as to be able to perceive, record, recollect and communicate the cause or circumstances surrounding his or her death. Any adequate means of communication including words or

signs will suffice so long as the indication is positive and definite. Statements in the form of an opinion are admissible.

3. **Statement Against Interest - Rule 804(b)(3).** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him or her to civil or criminal liability, or to render invalid a claim by him or her against another, that a reasonable person in that position would not have made the statement unless he or she believed it to be true is not excluded by the hearsay rule if the declarant is available as a witness. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

a. **Underlying Rationale.** The circumstantial guarantee of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. The rule which creates an exception for statements against interest applies when the statement is made by a person who is not a party to the action. If the statement is made by a party to the action, it is treated as an admission under Rule 801(d)(2), I.R.E. and is treated as non-hearsay. Admissions by a party need not be against "interest" to be admissible. They need only be statements made by a party opponent.

b. **"Reasonable Man" Test.** An aspect of the "reasonable man" test is whether the declarant believed the statement was against his or her interest. If not, the rationale for the exception fails. It is not the fact that the declaration is against interest, but rather, the awareness of the fact by the declarant which gives the statement significance. Rule 804(b)(3), in conjunction with Rule 403, gives the court sufficient discretion to exclude statements if it finds that they are inherently unreliable because the particular declarant would not have had the requisite belief due to circumstances such as currying favor or ignorance.

*See State v. Meister*, 148 Idaho 236, 220 P.3d 1055 (2009) holding that a judge's inquiry made to assure himself that the corroboration requirement of subdivision (b)(3) has been satisfied, should be limited to asking whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true. The Court stated the factors for determining the reliability and corroboration of a

statement subjected to the hearsay exception established in subdivision (b)(3) are: (1) whether the declarant is unavailable; (2) whether the statement is against the declarant's interest; (3) whether corroborating circumstances exist which clearly indicate the trustworthiness of the exculpatory statement, taking into account contradictory evidence, the relationship between the declarant and the defendant; (4) whether the declarant has issued the statement multiple times; (5) whether a significant amount of time has passed between the incident and the statement; (6) whether the declarant will benefit from making the statement; and (7) whether the psychological and physical surroundings could affect the statement.

- c. **Self-Serving and Disserving Statements.** With regard to statements which are both self-serving and disserving, the paramount consideration should be whether the rationale for the exceptions still holds when determining which approach to follow; (1) admit all, (2) weigh the self-serving against the disserving and admit the statement only if the disserving interest predominates, or (3) admit the disserving parts of the declaration, and exclude the self-serving facts where the self-serving and disserving parts can be served.
- d. **Statements Against Penal Interest.** This exception broadened the common law exception by including statements against the declarant's penal interest, thus opening the door to a defendant's offer of exculpatory third-party confessions, as well as the prosecution's potential use of incriminating third-party confessions and statements.

Statements against penal interest are admissible in both civil and criminal actions.

The statement need not be a confession of guilt; all that is required is that the statement "tend" to expose the declarant to criminal liability to such an extent that a reasonable person would not have made such a statement unless he believed it to be true. Statements tending to expose the declarant to criminal liability may be offered in the criminal matter to inculpate or exculpate the accused.

*See, e.g., Kuhn v. Proctor*, 141 Idaho 459, 111 P.3d 144 (Substitute Opinion 2005) holding that payment of a traffic citation by mail is an admissible statement of guilt in a civil action because Idaho Infraction Rule 6(a) provides that any person charged with an infraction by a citation may enter an admission by paying a fixed

penalty by mail, which constitutes an admission of the charge, and I.R.E. 801(d)(2)(A) provides that a statement made by a party is not considered hearsay and is admissible regardless of availability at trial. A statement includes conduct where the conduct is intended as an assertion. I.R.E. 801(a). The decision in *Kuhn* effectively overrules the Court of Appeals' decision in *LaRue v. Archer*, 130 Idaho 267, 939 P.2d 586 (Ct. App. 1997) holding that the admission resulting from the payment of a traffic citation for an infraction, without appearing in court and entering a plea of guilty, is the functional equivalent of a plea of nolo contendere, which is inadmissible under I.R.E. 410(a)(2).

e. **Third-Party Statements.** The rule conditions a defendant's use of a third-party statement on clear corroboration of the trustworthiness of the statement.

f. **Prosecution's Use of Such Statements.** The prosecution's use of such statements is significantly curtailed by federal constitutional decisions. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that in a joint trial a non-testifying co-defendant's confession, which also implicated the defendant, could not be introduced without violating the confrontation clause. Much more recently, in *Lilly v. Virginia*, 119 S. Ct. 1887 (1999), the Court held that the Confrontation Clause permits prosecutorial use of only those parts of an absent declarant's incriminating statements which are against the declarant's own penal interest, and does not permit use of blame-shifting or "neutral" portions of the statement.

4. **Statement of Personal or Family History - Rule 804(b)(4).** A hearsay exception is provided by Rule 804(b)(4) for:

(A) a statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship of blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; and

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

- a. **Antecedent Statement not Required.** Rule 804(b)(4) drops the requirement that the statement be made before the controversy arose. Such a fact is now to be considered on the question of weight rather than admissibility.
  - b. **Any Form of Unavailability Qualifies.** The rule also broadens the traditional exception by rejecting the view that only death is sufficient to constitute unavailability. Any form of unavailability within Rule 804(a) will suffice.
  - c. **Scope of Matters Excepted.** The rule broadens the traditional scope of matters excepted beyond “pedigree,” to encompass the whole area of personal or family history.
  - d. **Personal Knowledge - Own History.** The requirement of personal knowledge in Rule 602 is explicitly dispensed with in relation to statements concerning the declarant’s own personal or family history under Rule 804(b)(4)(A), I.R.E. Subpart (A) recognizes that a person cannot have competent first-hand knowledge of one’s own birth and may not have personal knowledge of other facts of his personal or family history. Consistent with former practice, personal knowledge is not required of the declarant when making statements of his own personal or family history.
  - e. **Personal Knowledge - Another’s History.** With respect to such statements concerning another person, the requirement of personal knowledge is satisfied if the unavailable declarant is shown to be a member of the family and thus, in a position to be familiar with the matter, or so intimately associated with the other family as to be likely to have accurate information upon the matter addressed under Rule 804(b)(4)(B). The declarant need be related to only one of the other persons about whom the statement is made. Moreover, as provided in Rule 602, evidence of personal knowledge may consist of the statement of the declarant himself.
5. **Forfeiture by Wrongdoing – Rule 804(b)(5).** Rule 804(b)(5) was added effective July 1, 2008. It creates an exception for 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.
6. **Other Exceptions - Rule 804(b)(5).** Rule 804(b)(5) provides for “other exceptions” in language identical to that found in Rule 803(24), I.R.E. In

accordance with Rule 804(b), the requirements for admission under Rule 804(b)(5) for statements possessing equivalent circumstantial guarantees of trustworthiness but not falling within any of the specific exceptions contained in the rule are identical to those provided in Rule 803(24) with the addition of the requirement that the declarant be unavailable as unavailability is defined in Rule 804(a), I.R.E.

a. **Purpose of Exceptions.** These open-ended exceptions were included in the rules to permit the future growth and development of the law of hearsay. The Senate Judiciary Committee's Report accompanying the Federal Rules of Evidence stated, "[i]t is intended that the residual hearsay exceptions will be used very rarely and only in exceptional circumstances." The Report further indicated the intention that trial courts admitting evidence under these exceptions would "exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule." Whether that intent has been honored is open to question.

b. **"CARES" (Children At Risk Evaluation Services)** videotapes, when properly conducted, are one form of hearsay which has received frequent approval for admission under the residual exceptions in Idaho. See, e.g., *State v. Ransom*, 124 Idaho 703, 864 P.2d. 149 (1993), cert. denied, 127 L.Ed.2d 571, 114 St. Ct. 1227 (U.S.).

In *State v. Gray*, 129 Idaho 784 (Ct. App. 1997), a decision which pushes the envelope of the residual exceptions, the court approved the admission under the residual exceptions of statements by a murder victim describing the attitudes and conduct of her husband. The guarantees of trustworthiness were found in the lack of an apparent motive to fabricate, spontaneity of the statements, and the fact that they were repeated to two different individuals.

c. **Advance Notice Required.** As under Rule 803(24), this rule requires adequate advance notice of the intent to rely on the exception. That requirement was not met by the inclusion of a copy of a hearsay report in a complaint, with allegations that it was true and correct. *Dept. of Health & Welfare v. Altman*, 122 Idaho 1004, 842 P.2d 683 (1992).

## VIII. HEARSAY WITHIN HEARSAY - I.R.E. 805.

A. **Multiple Hearsay.** Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in the Idaho Rules of Evidence.

1. **Purpose of Rule.** This rule recognizes that hearsay can appear in multiple layers, e.g., the nurse's report recording a patient's statement. The rule simply recognizes that such an item can survive a hearsay objection if each layer qualifies under a hearsay exception. The unstated corollary is that the item is properly excluded if any layer cannot.
2. **Problem with Multiple Hearsay.** The problem of multiple hearsay arises most frequently with respect to hospital records, police reports and business records, when the entrant has no personal knowledge of the underlying event and has based the entry on information supplied by someone else. If the statement of the person furnishing the information independently qualifies as a hearsay exception the record is admissible under Rule 805.

*See, e.g., State v. Boehner*, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988), *reh'g denied, remanded*, 1988 Ida. App. LEXIS 102 (Idaho Ct. App.) in which the court held that a police officers' testimony that they heard the police dispatcher say that defendant had said he "wanted to kill a cop" would be admissible if the state of mind of the officers was at issue, but not to prove the state of mind of the defendant which was not an issue in the case.

3. **Judicial Discretion to Exclude Evidence.** The trial judge has authority under Rule 403 to exclude a statement of multiple hearsay, even if it technically satisfies the rule, when the judge finds the statement so unreliable that its probative value is substantially outweighed by the danger of unfair prejudice or confusion.

## IX. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT - RULE 806.

A. **Impeachment of Hearsay Declarant.** When a hearsay statement, or a statement defined in Rule 801(d)(2),(C), (D) or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his or her hearsay statement, is not subject to any requirement that he or she may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls

the declarant as a witness, the party is entitled to examine the witness on the statement as if under cross-examination.

1. **What May be Shown.** The credibility of the declarant of a hearsay statement or other statement defined as nonhearsay under either Rule 801(d)(2)(C), (D) or (E) may be attacked by any evidence which would be admissible for that purpose if the declarant had testified as a witness. Just the declarant's bias, interest, prejudice, or corruption, his or her prior conviction of a crime, or his or her inconsistent statements may be shown.
2. **Rehabilitation.** If the declarant's credibility has been attacked, it may be rehabilitated to the same extent as if he or she were a witness.
3. **Foundation Required.** Rule 806, in effect, eliminates all foundation requirements when impeaching the hearsay statements of declarants. The rule makes clear that evidence of an inconsistent statement or conduct of the declarant is not subject to any requirement that the witness be afforded an opportunity to deny or explain. Accordingly, the requirements of Rule 613(b), including that the witness be given an opportunity to explain or deny, do not apply to impeachment by prior inconsistent statement when a statement of a declarant not testifying as a witness is introduced into evidence. Moreover, evidence of such prior inconsistent statement or conduct may be introduced to attack the credibility of the declarant without reference to (1) whether the prior inconsistent statement or conduct occurred prior to or after the statement was admitted into evidence or (2) whether the prior statement admitted into evidence was made at a prior hearing or deposition.
4. **Right to Cross-Examine Declarant.** The last sentence of Rule 806 allows the party against whom an out-of-court statement has been admitted to call the declarant and examine him or her as if under cross-examination. Such a witness is hostile in law and may be interrogated by leading questions pursuant to Rule 611(c).

## X. OTHER HEARSAY EXCEPTIONS.

- A. **Hearsay Exceptions Created by Rule 101.** Rule 101(d) creates specific hearsay exceptions by making the Rules inapplicable in part to certain enumerated proceedings. They are:

- (1) **Preliminary Hearings,** which gives effect to certain hearsay exceptions in Idaho Criminal Rule 5.1(b).
- (2) **Juvenile Corrections Act.**

- (3) **Masters Proceedings.**
- (4) **Uniform Post-Conviction Act.**
- (5) **Driver's License Suspension Proceedings.**
- (6) **Paternity Act Proceedings.**

In each proceeding, the court is authorized to give effect to the hearsay exceptions that are provided under the statute or rules which govern the particular proceeding.

By reason of the fact that the rules, except for privileges, do not apply to the following enumerated proceedings, hearsay is not excluded from these proceedings:

- (1) **Preliminary questions of fact.**
- (2) **Special Inquiry Judge.**
- (3) **Miscellaneous proceedings.**
- (4) **Contempt proceedings.**
- (5) **Small claims.**
- (6) **Child Protective Act, except adjudicatory proceedings and termination proceedings.**
- (7) **Informal hearings for emergency medical treatment.**
- (8) **Judicial Authorization for Abortion.**

- B. Use of Hearsay At Preliminary Hearing.** Idaho Criminal Rule 5.1 provides that for purposes of a finding of probable cause at a preliminary hearing, hearsay in the form of testimony or affidavits, if deemed credible by the magistrate, may be admitted to prove the existence or non-existence of business or medical facts and records, judgments and convictions of courts, ownership of real or personal property, and reports of scientific examinations of evidence by state or federal agencies or officials.

In *State v. Horsley*, 117 Idaho 920, 792 P.2d 934 (1990), the Court held that a report of a DNA comparison done by a private laboratory was not a report of medical facts and records admissible in affidavit form pursuant to Criminal Rule 5.1(b), and was instead an inadmissible report of a scientific examination by a non-governmental agency.

- C. Use of Depositions.** Excepted from the definition of hearsay are statements constituting a prior statement by a witness or an admission by a party opponent as defined in Rule 801(d)(1) and (2). Included within the definition of hearsay are statements made in depositions unless the statements qualify as non-hearsay under Rule 801(d).

As stated in Rule 802, hearsay is not admissible except as provided by the Idaho Rules of Evidence or other rules promulgated by the Supreme Court of Idaho. The reference in Rule 802 to “other rules promulgated by the Supreme Court of Idaho” is intended to include the Idaho Rules of Civil Procedure and the Idaho Criminal Rules which permit use of deposition testimony and create their own exceptions to the rule against hearsay.

The admissibility of statements made in a deposition, although excepted by the procedural rule from the rule against hearsay, must still satisfy the other requirements for admissibility, including relevance under Rules 401 and 402, first hand knowledge under Rule 602, and authentication under Rule 901. It must also be tested for admissibility under Rule 403, I.R.E.

## PROBLEMS

### PROBLEMS - HEARSAY

1. Plaintiff sued for defamation of credit. To prove P was a bad credit risk, D offers evidence that P applied for a loan from MegaBank and that Smith, the loan officer, turned P down. Smith has since died, P objects to this testimony as hearsay.

2. Plaintiff sued Defendant Company and Employee for injuries when Employee drove Company truck into rear of Plaintiff's vehicle. Defendant Company denies Employee was acting within scope of his employment when hit Plaintiff. 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.

3. Lewis and Clark are involved in a collision at an intersection in Boise. 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.

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.

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.

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.

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 Walters' testimony at the preliminary hearing, at which he stated he saw Lewis leaving the law office in question at 3 a.m., carrying a suitcase.

8. In the same trial, the prosecution has recorded 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.

9. Rightly or wrongly, the court allows the introduction of Clark's confession. 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.

## **RULES 801 - 806**

### **Rule 801. Definitions.**

The following definitions apply under this Article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if -

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony and was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(Adopted January 8, 1985, effective July 1, 1985.)

### **Rule 803. Hearsay exceptions; availability of declarant immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

(A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or arts, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits, except upon motion and order for good cause shown.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Medical or dental tests and test results for diagnostic or treatment purposes. A written, graphic, numerical, symbolic or pictorial representation of the results of a medical or dental test performed for purposes of diagnosis or treatment for which foundation has been established pursuant to Rule 904, unless the sources of information or other circumstances indicate lack of trustworthiness. This exception shall not apply to: (A) psychological tests; (B) reports generated pursuant to I.R.C.P. 35(a); (C) medical or dental tests performed in anticipation of or for purposes of litigation or; (D) public records specifically excluded from the Rule 803(8) exception to the hearsay rule.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the

statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Adopted January 8, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 24, 2005, effective July 1, 2005; amended October 23, 2008, effective January 1, 2009.)

**Rule 804. Hearsay exceptions; declarant unavailable.**

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant - (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of declarant's statement has been unable to procure declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that declarant's death was imminent, concerning the cause or circumstances of what declarant believed to be the declarant's impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid a claim by declarant against another, that a reasonable man in declarant's position would not have made the statement unless

declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) a statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Forfeiture by wrongdoing. 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.

(6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the party's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Adopted January 8, 1985, effective July 1, 1985; amended April 4, 2008, effective July 1, 2008.)

**Rule 805. Hearsay within hearsay.**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

(Adopted January 8, 1985, effective July 1, 1985.)

**Rule 806. Attacking and supporting credibility of declarant.**

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with declarant's hearsay statement, is not subject to any requirement that declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay

statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Adopted January 8, 1985, effective July 1, 1985.)