The Idaho Rules of Evidence have been updated and restyled and as part of that effort some substantive amendments are also being recommended, primarily to be consistent with the Federal Rules of Evidence. Please send any comments you have on the proposed amendments to Cathy Derden at cderden@idcourts.net by **Monday, January 15, 2018**. Along with the proposed amendments there is also a link to the proposed restyling of the rules for you review.

Amendments Recommended by the Evidence Rules Advisory Committee.

Rule 103. Rulings on Evidence. Add a new subsection (b) as found in the federal rules:

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

This subsection was added to the federal rules in 2000. It has not as yet been added to the Idaho Rules of Evidence, although it is consistent with Idaho case law. *State v. Higgins*, 122 Idaho 590, 596, 836 P.2d 536, 542 (1992); *State v. Hester*, 114 Idaho 688, 699, 760 P.2d 27, 38 (1988).

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

> **(c) Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:
>
> (1) ~~it is a criminal case and~~ the hearing involves the admissibility of a confession;
>
> (2) a defendant in a criminal case is a witness and so requests; or
>
> (3) justice so requires.

The federal rule requiring a hearing on the admissibility of a confession to be conducted outside the hearing of the jury applies to civil as well as criminal cases, unlike the Idaho rule, which applies only to criminal cases. This is a difference that dates back to the adoption of the Uniform Rules of Evidence in 1974 and of the Federal Rules of Evidence in 1975. It was the view of the Committee that the requirement of a hearing outside the presence of the jury on the admissibility of a confession should apply to both civil and criminal cases.

Rule 408. Compromise and Offers to Compromise. Consistent with the federal rule add the following language to the rule:

> **(a) Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim <u>or to impeach by a prior inconsistent statement or a contradiction:</u>

This amendment was made to the federal rule in 2006. The comment to this amendment stated, "Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements." The Idaho rule contains no reference to impeachment, and the Idaho Supreme Court has held that such statement can be used for impeachment. *Mosell Equities v. Berryhill & Co.*, 154 Idaho 269, 297 P.3d 232 (2013); *Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987). The Committee noted that when a settlement is being negotiated it may be more about resolution than defining the facts of what really happened and was concerned that allowing impeachment with an inconsistent statement could open it to very trivial matters.

Rule 412. Sex Crime Cases; Relevance of Victim's Past Behavior. Consistent with the federal rule, add the following language:

> **(b) Additional Prohibited Uses and Exceptions.** Notwithstanding any other provision of law, in a criminal case in which a defendant is accused of a sex crime, evidence of an alleged victim's past specific instances of sexual behavior is also not admissible, but the following such evidence may be admitted:
>
> (1) an alleged victim's past sexual behavior, if offered to prove that someone other than the defendant was the source of semen or injury or other physical evidence; or

Rule 604. Interpreters. Delete this rule since I.C.A.R. 52 addresses court interpreters and their qualifications. The current Rule 604 states that an interpreter "is subject to the provisions of these rules relating to qualification as an expert." Rule 52 of the Idaho Court Administrative Rules governs the qualifications and assignments of interpreters.

> ~~**Interpreter.**~~
> ~~An interpreter must be qualified as an expert under these rules and must give an oath or affirmation to make a true translation.~~

Rule 606. Competency of Juror as Witness. Consistent with the federal rules, add another exception to the rule that jurors generally cannot testify about their deliberations during an inquiry into the validity of a verdict or indictment, that would allow a juror to testify about whether a mistake was made in entering the verdict on the verdict form.

> **(b) During an Inquiry into the Validity of a Verdict or Indictment.**
> *******
>
> **(2) Exceptions.** A juror may testify about whether:
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
> (B) an outside influence was improperly brought to bear on any juror; ~~or~~
> (C) the jury determined any issue by resort to chance; or
> (D) a mistake was made in entering the verdict on the verdict form.

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

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

This language was added to the federal rule in 1997, but has not yet been adopted in Idaho. The federal committee's note to the amendment is as follows:

> Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.
>
> Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. *See, e.g.*, *United States v. Beckham*, 968 F.2d 47, 51 (D.C.Cir.1992); *United States v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir.1993), *cert. denied*, 114 S.Ct. 2714 (1994); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988); *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir.), *cert. denied*, 115 S.Ct. 152 (1994); *United States v. Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir.1988); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir.1988); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir.1988); *United States v. Hernandez*, 829 F.2d 988, 993 (10th Cir.1987), *cert. denied*, 485 U.S. 1013 (1988); *United States v. Byrom*, 910 F.2d 725, 736 (11th Cir.1990).
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> Third, the amendment extends the reasoning of Bourjaily to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In Bourjaily, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

As amended 801(d)(2) would read as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
> ***
> **(2) Statement by Party-Opponent.** The statement is offered against ~~a~~ an opposing party and:
> (A) was made by the party in an individual or representative capacity;
> (B) is one the party manifested that it adopted or believed to be t rue;
> (C) was made by a person whom the party authorized to make a statement on the subject;
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.
> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 1003. **Admissibility of Duplicates**. Strike the words "or continuing effectiveness", consistent with the federal rule.

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

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