

## **Highlights of Rule Amendments For 2016**

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The following is a list of rule amendments for 2016, with the effective dates designated. The orders amending these rules can be found on the Idaho Supreme Court website at <http://www.isc.idaho.gov/recent-amendments>. Be sure to check the Idaho State Bar e-bulletin for your chance to comment on proposed amendments before adoption.

**Idaho Appellate Rules.** The Idaho Appellate Rules Advisory Committee is chaired by Justice Roger Burdick.

The following amendments were effective January 1, 2016.

Rule 11, 11.1 and 17. These rules on filing the notice of appeal were all amended to require that a copy of the judgment or order being appealed be attached to the notice of appeal.

Rule 28. Preparation of the Clerk's or Agency's Record. The standard record in an appeal from an administrative proceeding now includes the findings of fact and conclusions of law made by a referee or a hearing officer.

Rule 34.1. Electronic Briefs (optional). A new subsection was added to this rule to provide that, in criminal cases, the parties may file an electronic brief without the necessity of filing any paper copies of the brief. The filing must still comply with the other requirements in the rule for filing an electronic brief.

Rule 30. Augmentation of the Record. The parties are required to paginate documents attached to the motion to make it easy to identify the augmented pages if the motion to augment is granted entirely or in part.

Rule 118. Petitions for Review. The rule now clarifies that the brief in support of the petition for review must address the criteria for review set out in I.A.R. 118(b). There is still no response to a petition for review unless the Supreme Court requests a party to respond to the petition for review before granting or denying the petition. If a petition for review is granted, the Supreme Court will rely on the original briefs filed by the parties and considered by the Court of Appeals. There will be no additional briefing unless it is ordered by the Supreme Court.

The following amendment was effective January 21, 2016.

Rule 5. Special Writs and Proceedings. Several new subsections have been added to this rule on original writs filed with the Supreme Court. The rule now states that if the court denies the petition or issues a peremptory writ it shall be a separate document that only states the relief ordered. There is also a new subsection addressing the filing of a memorandum of costs and what costs are allowed. The memorandum must be filed within 14 days of the order denying the

petition or granting the peremptory writ and failure to timely file is a waiver of the right to costs. An objection to the memorandum of costs must be filed no later than 14 days after service of the memorandum of costs. If mailed, both the memorandum and the objection are deemed filed upon mailing.

**Idaho Rules of Civil Procedure.** The Idaho Rules of Civil Procedure Advisory Committee is chaired by Chief Justice Jim Jones. A special ad hoc committee tasked with updating and reformatting the rules was chaired by Senior Judge David Day.

The following amendment was effective January 1, 2016.

Rule 54. Judgments. A new subsection was added to Rule 54(a) providing that, if the court orders an amendment to a judgment, the amendment will be effective only after the court enters an amended judgment setting forth all of the terms of the new judgment, including those terms of the prior judgment that remain in effect. Subsection (b) was amended to reflect that the judgment in this subsection is only a partial judgment since it is not final as to all parties and all claims.

The following amendments are effective July 1, 2016.

The Idaho Rules of Civil Procedure have been reformatted with a new table of contents, and the language has been simplified, clarified and modernized. Each rule addresses a single topic, and a consistent format for the rules has been adopted. In addition, there is a separate set of Rules for Small Claims Actions. Some rules that were obsolete were deleted and some rules were moved to the Idaho Court Administrative Rules. As part of this review, there were also a number of substantive changes that were recommended by the Idaho Rules of Civil Procedure Advisory Committee and adopted by the Supreme Court as part of the newly formatted rules.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions. Language found in the federal rule on the procedure for a motion for sanctions, the nature of a sanction imposed under this rule, and limitations on monetary sanctions was added. The rule also clarifies that a law firm may be held jointly responsible for a violation committed by a partner, associate, or employee.

Rule 16. Pretrial Conferences; Scheduling; Management. A new subsection was added entitled “request for trial setting by a party”, that allows a party to request the court to set the matter for trial and to set any other deadlines and conferences should the court fail to do so after all defendants have appeared.

Rule 26. General Provisions Governing Discovery. New subsections similar to those found in the federal rule were added regarding limits on electronically stored information and limits on frequency and extent of discovery where discovery sought is unreasonably cumulative or duplicative or can be obtained from a source less burdensome or less expensive. In addition, language was added to clarify the obligation on a party who has been notified that privileged information was sent by mistake until the claim of privilege is resolved, including that the party must not use or disclose the information until the claim is resolved, must take reasonable steps to retrieve the information if the party disclosed it before being notified, and may promptly present

the information to the court under seal for a determination of the claim. Subsection (c) on protective orders was amended to add the requirement that the motion include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. A statement on the effect of a signature with respect to a statement of fact in a discovery response was added to the subsection on signing discovery requests.

Rule 29. Stipulations about Discovery Procedure. This rule was amended to add a statement that a stipulation to extend time must have court approval if it would interfere with the time set for trial, or if approval is required by other order of the court.

Rule 30. Depositions by Oral Examination. The officer taking the deposition must identify all persons present in the opening statement on the record. Similar to the federal rule, a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(4).

Rule 31. Depositions by Written Questions. Language found in the federal rule on deposition by written question with leave was added to include where the parties have not stipulated to the deposition and the deponent has already been deposed in the case.

Rule 37. Failure to Cooperate in Discovery; Sanctions. In subsection (a)(5) on “payment of expenses; protective orders”, a reference was added similar to that found in the federal rule about providing discovery after a motion to compel is filed. There is also a new subsection on the consequences of a failure to supplement an earlier response when required or to comply with a disclosure requirement ordered by the court that includes not allowing the party to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. A new subsection on failure to provide electronically stored information states that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Rule 43. Taking Testimony. The rule now provides that for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Rule 55. Default; Default Judgment. References to the clerk entering default judgment were removed.

Rule 66. Sureties on Bond. Language that formerly applied only to temporary restraining orders and preliminary injunctions was added to this rule to make it applicable to any instance where a surety gives security under the civil rules. The provision is that the surety’s liability may be enforced on motion without an independent action. The motion, and any notice that the court orders, may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

Rule 77. Class Actions. This rule was formerly Rule 23. The amendments add language found in the federal rule, including a subsection on what the court must consider in appointing class counsel and a subsection on attorney's fees and nontaxable costs that includes the procedure for claiming the award.

Appendix A. Filing Fee Schedule. The amendment reflects that a request for a modification for support or custody that requires a filing fee will still require that fee even if initiated by a stipulation.

**Idaho Court Administrative Rules.** As part of the effort to update the Idaho Civil Rules of Procedure, a number of rules were moved to the Idaho Court Administrative Rules, including rules on jurisdiction and assignment of magistrates, transfer of a case from magistrate to district court, reporting of proceedings in the magistrate division, withdrawal of files, the clerk's office and orders by the clerk, selection of master jury list and master jury wheel, selection of jury panel, qualifications of a civil mediator, and registration of private civil litigation evaluators. These, as well as the following amendments, are effective July 1, 2016.

Rule 32. Records of the Judicial Department – Examination and Copying- Exemption from and Limitations on Disclosure. There were several amendments to this rule. The Public Records Act was recodified by the Legislature in 2015 as chapter 1 of title 74 so references to the Public Records Act have been updated. Subsection (g) of this rule provides that certain records are confidential and exempt from disclosure and that willful or intentional disclosure of a confidential court record may be treated as contempt. However, in certain instances the disclosure of the record may be either explicitly or implicitly authorized by provisions in Rule 32 itself, for instance with regard to those persons who have access to confidential records under subsection (c) of the rule. Therefore, the amendment to subsection (g) clarifies this by providing that the disclosures that may be treated as contempts of court are those "not otherwise authorized under this rule." Subsection (g)(5) provides that arrest warrants are exempt from disclosure, while bench warrants are not. The terms "arrest warrant" and "bench warrant" have been defined to clarify this provision. An arrest warrant is a warrant issued for the arrest and detention of a defendant at the initiation of a criminal case. A bench warrant is a warrant issued for the arrest of a defendant who has already appeared in a criminal action and includes a warrant issued for a failure to appear, for violation of the conditions of release or bail, or for a probation violation.

Subsection (j) of the rule, dealing with sealing, redaction, and opening of records, has been revised in two respects. First, this subsection has been divided into sub-parts for clarity and ease of reading. Second, since Idaho is moving into a period when some courts will have fully electronic case files and others will still have paper case files, the rule has been revised to provide clearer procedures for the sealing and redaction of records in both of these settings. As Idaho moves to electronic case files, clarity is needed as to who are the custodian and custodian judges of the electronic case records within each county, and who are the custodian and custodian judge of the statewide case management system. Subsections (j)(2)(G) and (j)(3)(A) have been amended to provide that the Administrative Director of the Courts and the Chief Justice are the custodian and custodian judge of only the statewide case management system.

Rule 56. Coordinated Family Court Services Cost Recovery Fees. The amendment allows partial waivers of fees charged by Family Court Services in order to be consistent with the companion statute, I.C. § 32-1406, which authorizes partial fee waivers.

**Idaho Criminal Rules.** The Criminal Rules Advisory Committee is chaired by Justice Daniel Eismann.

The following amendments were effective February 25, 2016.

Rules 4. Arrest Warrant – Summons - Determination of Probable Cause. The word “arrest” was added to describe this warrant as part of an effort to clarify in the rules the difference between a bench warrant and an arrest warrant. According to I.C.A.R. 32, an arrest warrant is exempt from disclosure but a bench warrant is not. The wrong designation can result in the entire case being sealed if the warrant is outstanding.

Rule 5.3 Initial Appearance on Probation Violations. The amendment clarifies that the warrant issued for a probation violation is a bench warrant.

Rule 16. Discovery and Inspection. The section on the disclosure of evidence by the prosecution was amended with a new subsection designed to address the delay caused by the need to redact information and the use of body worn cameras by law enforcement. The amendment allows prosecutors to disclose the unredacted media to defense counsel without delay, even if there is information that needs to be protected, so that defense counsel can make decisions necessary to expedite resolution of the case. However, defense counsel cannot share the unredacted version with the defendant without prior consent of the State or a court order and, when shared, the defendant is not able to retain a copy. If the State determines there is protected information that needs to be redacted before it is disclosed, then the State must prepare a redacted version and indicate what was redacted. If defense counsel disagrees with the redactions, a motion to compel may be filed.

Rule 44.1 Withdrawal and Substitution of Counsel. The amendment allows the court, in the order of appointment, to state at what time or upon what event the appointment terminates. It also adds a section on substitution of counsel that allows for notice to the court instead of leave of the court and specifies that if a new attorney appears in an action, the action shall proceed in all respects as though the new attorney of record had initially appeared for that party, unless the court finds good cause for delay of the proceedings.

Rule 46. Bail or Release on Own Recognizance. This rule was amended to reflect that the warrant referred to in this rule is a bench warrant.

Rule 46.2. No contact orders. The reference to “victims” in this rule was changed to “protected persons” as a no contact order is not limited to the protection of victims and may be issued to protect others, such as a witness, a co-defendant, or a reporting party. The change also more accurately reflects I.C. § 18-920, which states “an order forbidding contact with another person may be entered.”

Rule 54.17. Appellate Review. If a district court on appeal remands less than all of the issues back to the magistrate court, a problem can arise if an appeal is filed and the magistrate court is also attempting to proceed on remand. A provision similar to that found in the Civil Rules of Procedure was added, requiring a remittitur to be issued to the magistrate court after the time for an appeal has expired and is issued only if no appeal is filed to the Supreme Court.

**Idaho Rules of Evidence.** The Evidence Rules Advisory Committee was chaired by Judge Karen Lansing when these amendments were considered. It is now chaired by Judge Molly Huskey.

The following amendments were effective January 1, 2016.

Rule 609. Impeachment by evidence of conviction of crime. The term “character for truthfulness” has been substituted for the term “credibility” in the first sentence of this rule. The amendment and the comment clarify that the restrictions in Rule 609 apply only where the conviction is offered to attack a witness’s general character for truthfulness and not for some other purpose, such as contradicting the witness’s specific testimony.

Rule 801(d)(1)(B). Definitions - Statements which are not hearsay - prior statement of witness. Before the amendment, the definition in this section was that 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 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. The amendment added “or, to rehabilitate the declarant’s credibility as a witness when attacked on another ground.”

Rule 803. Hearsay exceptions; availability of declarant immaterial. The amendments to subsections (6) through (8) clarify the burden of proving circumstances indicating the evidence is not trustworthy. If the proponent has established the stated requirements of the exception, regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification, then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The amendment to subsection (10), absence of public record or entry, creates a procedure by which a defendant may waive the Sixth Amendment right to confront a witness and permit the admission of the certification to prove absence of the public record. The certification is admissible only if the prosecutor who intends to offer the certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice, unless the court sets a different time for the notice or the objection.

Rule 804. Hearsay exceptions; declarant unavailable. Subsection (b)(3), statement against interest, was amended. Under the rule, statements tending to expose the declarant to criminal liability and to exculpate a criminal defendant must meet an additional requirement before the statement may be admitted, as there must be corroborating circumstances indicating that the evidence is trustworthy. The amendment broadens the rule to apply whether the evidence exculpates or inculpates the defendant.

**Idaho Rules of Family Law Procedure.** The Children and Families in the Courts Committee is chaired by Judge Russell Comstock.

The following amendments are effective July 1, 2016.

Rule 112. Appearance and Withdrawal of Counsel. The reference to “local” rules is deleted and the reference to Rule 115.D is corrected and now refers to new Rule 819.

Rule 201. Commencement of Action. Subsection C, Proceedings to modify child custody, child support and spousal maintenance, was amended to expressly permit a proceeding to modify custody or support to be initiated by stipulation. The current rule requires that a petition be filed first; however, the courts often see modifications filed by stipulation without an accompanying petition. The amendment ratifies existing practice.

Rule 207. Documents; Caption; Name of Parties; Language; Abbreviation; and Numbers. This rule as amended reflects the changes made to I.R.C.P. 2, formerly I.R.C.P. 10.

Rule 720. Brief Focused Assessments. This new rule authorizes the court to order a “brief focused assessment” in child custody cases where less than a comprehensive parenting time evaluation is needed or warranted. The rule distinguishes between a brief focused assessment and a parenting time evaluation and further defines (i) the scope of the assessment to a limited number of issues, (ii) the qualifications of assessors by making them consistent with those who can perform parenting time evaluations, and (iii) the procedure for appointment.

Rule 803. Judgments. A new subsection D was added on entry of judgment as this was inadvertently omitted from the I.R.F.L.P.

Rule 819. Notice of orders or judgments. This new rule is the equivalent of Rule 77 found in the Idaho Rules of Civil Procedure.

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

The following amendments are effective July 1, 2016.

Rule 1. Application and Designation of Rules. A reference to “bicycles” has been added. The amendment allows bicycle friendly communities in the state to deal with bicycle violations in an educational fashion rather than through uniform citation and financial penalty.

Rule 8. Failure to appear - Default judgment - Notice of judgment. The form found in subsection (d) on default judgment and notice of noncompliance has been updated.

Rule 10. Failure to pay penalty - Suspension of driver's license - Notice of nonpayment - Late payment - Receipt and notice of payment - Other sanctions. References to mailing the receipt for payments to the defendant have been deleted as some payments are now made online. The

amendment also recognizes that receipt of payment is automatically sent to the Department of Transportation electronically. The form for notice of non-payment was updated and the form for receipt and notice of payment was deleted.

**Idaho Juvenile Rules.** The Juvenile Rules Advisory Committee is chaired by Judge Mark Ingram.

The following amendments are effective July 1, 2016.

Rule 19. Standards and Procedures for Commitment to the Department of Juvenile Corrections (J.C.A.). In 2014, the Office of Performance Evaluation's report on Confinement of Juvenile Offenders recommended that the court or the legislature revisit the criteria for commitment to state custody. Specifically, the report stated that some stakeholders had said the criteria lacked definition and judges had too much discretion in applying the existing criteria. The proposed revision is a draft proposal which seeks to address some of those concerns and to base commitment decisions on a more evidence based risk/needs analysis. The proposal eliminates the distinction between misdemeanor and felony criteria and reduces the number of criteria to four.

Rule 40. Notice of Further Proceedings Including Parents, Foster Parents and Other (C.P.A.). The Preventing Sex Trafficking and Strengthening Families Act of 2014 requires that courts ask foster children about their desires for permanency. The amendments require foster children 12 and older to attend review and permanency hearings unless the youth declines in writing prior to the hearing, declines through counsel, or is excused by the court.

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

The following amendments are effective July 1, 2016.

Rule 8. Deferred Payment Agreement - Form. The amendment adds a reference to any other court ordered payment in case restitution was ordered. The form for the deferred payment agreement has been updated as to notifications for the defendant.

Rule 9.1. Suspension of Driver's License Upon Conviction of Offense Authorizing or Requiring Suspension of License - Suspension Upon Plea or Finding of Guilty of Offense - Notice of Increased Penalty on Subsequent Violations - Temporary Restricted License. The amendment recognizes that the order of suspension is transmitted electronically to the Department of Transportation. The forms for the order of suspension and temporary restricted license have been updated. The forms can now be used in felony cases as well as misdemeanors.

Rule 9.2. Suspension of Driver's License for Failure to Take Evidentiary Test. References to seizing a driver's license have been deleted since that is no longer the practice of law enforcement, and the rule has been changed to refer to refusal to submit to evidentiary testing rather than alcohol testing since the rule also applies to drugs. The affidavit of refusal has been



updated and the alternative form for probable cause eliminated since each law enforcement agency has its own probable cause affidavit. The suspension order for a refusal has also been updated.

Rule 9.3. Suspension of Driver's License for Failure to Take Evidentiary Test. The title of the rule as well as the rule have been amended to delete references to seizing a driver's license since that is no longer the practice.

Rule 13(b). Bail Bond Schedule. Currently the bail bond schedule sets bail for a violation of 63-2441 Special Fuel Permit Violation at 382.00. In 2015, I.C. § 63-2441 was repealed and renumbered so the schedule now reflects the new code citation to 63-2455. In addition, a violation of I.C. § 63-2450 on fuels tax was added at the same bond amount.