## IDAHO EVIDENCE ROUND-UP

--DIFFERENCES BETWEEN IDAHO & FEDERAL RULES --RECENT IDAHO JUDICIAL DECISIONS

Professor John E. Rumel, University of Idaho College of Law Idaho State Bar, Young Lawyers Section

January 16, 2024

# DIFFERENCES BETWEEN THE FEDERAL RULES AND THE IDAHO RULES

- Idaho rules are largely based on the Federal rules
- There are many small differences between them, but they are substantially the same
- The presentation will focus on the Idaho rules that differ substantially from the Federal rules, despite there being other, small changes in the rules.

#### ADMISSIBILITY OF PRIOR CONVICTIONS TO IMPEACH (RULE 609)

#### **BACKGROUND**

Rule 609 pertains to attacking a witness's character for truthfulness, by evidence of a criminal conviction.

- Federal rule: divided into 2 different categories.
- First, if the prior crime was punishable by death or
   1 year of prison, the evidence must be admitted:
  - (1) subject to Rule 403, as long as the witness is not the defendant; and
  - (2) if the witness is the defendant, only if the probative value outweighs the prejudicial effect.
- Second, for any crime (regardless of punishment), the evidence is admitted if the court can readily determine the elements of the crime committed required proving — or the witness's admitting — a dishonest act or false statement

#### ADMISSIBILITY OF PRIOR CONVICTIONS TO IMPEACH (RULE 609)

#### BACKGROUND

609 pertains to attacking a witness's character for truthfulness, by evidence of a criminal conviction.

#### Idaho rule:

- "such evidence must be admitted...but only if:
  - 1) the court determines in a hearing outside the presence of the jury that the fact or the nature of the prior conviction are
    - (A) relevant to the witness's character for truthfulness; and
    - (B) the probative value of this evidence outweighs its prejudicial effect to the party offering the witness.
- If the evidence of the fact of a prior felony conviction, rather than the nature of the conviction, is admitted for impeachment of a party, the party can present evidence of the nature of the conviction; but evidence of the circumstances of the conviction is not admissible

# DIFFERENCES IN RULE 609

- Idaho does NOT distinguish based on the nature of the crime (beyond it being a felony)
- Does NOT distinguish based on the punishment for the crime
- Does NOT distinguish between witness and defendantwitness
- Idaho DOES require a hearing outside of the presence of jury for relevance and probative value

# ADMISSIBILITY OF EXPERT EVIDENCE (RULE 702)

- Both Federal and Idaho rules state that "a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise IF..."
- IDAHO: "... the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
- FEDERAL: "... the proponent demonstrates to the court that it is more likely than not that:
  - 1. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  - 2. the testimony is based on sufficient facts or data;
  - 3. the testimony is the product of reliable principles and methods; and
  - 4. the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

# ADMISSIBILITY OF EXPERT EVIDENCE (RULE 702) (CONT'D)

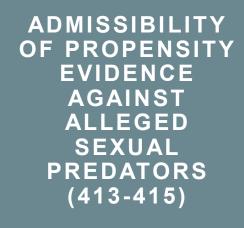
- Daubert standard: case law used to assess the reliability and relevance of expert witness testimony before it is presented to a jury under FRE 702.
  - Has been adopted by many states, in addition to being used at a Federal level.
  - Daubert factors:
    - 1. Testability
    - 2. Peer review and publication
    - 3. Known or potential rate of error of scientific technique at issue
    - 4. Existence of standards controlling its operation
    - 5. General acceptance of the expert's testimony/theory
- Idaho has declined to explicitly adopt Daubert, though it still applies some of the factors.
- Idaho courts seem to reject (5), the "general acceptance" standard in particular.

### ADMISSIBILITY OF EXPERT EVIDENCE (RULE 704)

Both Idaho and Federal Rule 702 state: "an opinion is not objectionable just because it embraces an ultimate issue."

But only Federal rules include the following exception:

 "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."



- Federal rules provide that in a criminal case, in which the defendant is accused of either **child molestation** or **sexual assault**, the court may admit evidence that the defendant committed any other child molestation or sexual assault, respectively, on any relevant matter. The prosecutor must give prior notice to the defendant.
- Idaho has no counterpart in the Idaho Rules of Evidence, and instead subjects such evidence to the general rules of admissibility.

## RAPE SHIELD LAWS (RULE 412)

## Both Federal Rules and Idaho rules cover the following:

"In a criminal case in which a defendant is accused of a sex crime, reputation or opinion evidence of the alleged victim's past sexual behavior is not admissible, **except to prove**:

- (1) that someone other than the defendant was the source of semen or injury or other physical evidence:
- (2) to prove consent;
- (3) evidence whose exclusion would violate the defendant's constitutional rights.

#### Idaho adds the following exceptions to prove:

- (4) an alleged victim's prior false allegations of sex crimes made at an earlier time;
- other than the defendant that occurred at the time of the event giving rise to the sex crime charged.
- Takeaway: Idaho grants 2 more explicit exceptions to the rape shield law.

### **PRIVILEGES**

- Idaho privileges are laid out explicitly in statute
- Federal privileges are left to the common law
- SCOTUS + Congress considered codifying federal immunities, but instead opted to explicitly state that common law governs federal immunity.

### IDAHO PRIVILEGES (STATUTORY)

- Lawyer / client privilege
- 2. Physician/psychotherapist / patient privilege 10. Accountant / client privilege
- 3. Husband / wife privilege
- 4. Religious (clergymen) privilege
- 5. Political vote privilege
- Conduct of mediation
- 8. Identity of informer

- 9. Parent / child privilege
- 11. School counselor / student privilege
- 12. Licensed counselor / client privilege
- 13. Licenses social worker / client privilege
- 14. Hospital staff privilege
- Secrets of the state, or governmental secret 15. Medical malpractice screening panel privilege

# FEDERAL PRIVILEGES (GENERALLY RECOGNIZED BY COMMON LAW)

- Lawyer / client privilege
- Psychotherapist / patient privilege
- Husband / wife privilege
- Clergymen privilege
- Political vote

- Trade secret
- State secrets
- Identity of informer

# UPDATES TO IDAHO EVIDENCE LAW IN THE LAST 3 YEARS

- There have been many cases decided by the Idaho Supreme Court in the last few years regarding the topic of evidence law.
- Most cases involve the Supreme Court applying evidentiary rules to a unique set of facts; thus,
   while shedding some light on evidence law, not substantially changing/updating them.
- However, some important changes have occurred in recent years.
- This presentation will discuss two notable cases decided by the Idaho Supreme Court on evidence law.

## STATE V. SMITH, 516 P.3D 1071 (IDAHO 2022):

Idaho Supreme Court clarified the line between lay opinion testimony under Rule 701 and expert opinion testimony under Rule 702 which was causing confusion in the lower courts.

- Background: at common law, lay witnesses were prohibited from providing any opinion testimony.
- But courts eventually acknowledged the practical impossibility of determining by rule what constitutes a "fact" free from "opinion."
- Thus, 701 came into existence, and liberalized the common law rule by permitting, in certain circumstances, "lay" testimony in the form of an opinion or inference."
- 701 has three requirements for the admission of lay opinion testimony:
  - 1. must be rationally based on the witness's perception;
  - 2. helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
  - 3. not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
- IMPORTANT: Rule 701 does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Thus, there is a fine line between lay opinion testimony under Rule 701 and expert testimony under Rule 702.
- Result: because the line turns on testimony, courts must remain mindful that the same witness, not disclosed as an expert, could offer both a lay and expert opinion in one trip to the witness stand.

### STATE V. SMITH, (CONT'D):

- The result (and problem) lies in two scenarios:
  - (I) The "expert in lay witness clothing," who, if going unnoticed, can evade the reliability requirements of Rule 702 and mandatory discovery requirements for experts.
  - (2) The lay witness who improperly acts as an expert and testifies to an opinion he or she is not qualified to give.
- Remember the distinction:
  - Lay opinion: based on the ordinary experience of an average person.
  - **Expert opinion:** wholly scientific, or so far removed from common knowledge that expert knowledge is essential to the formation of the opinion.
- Supreme Court: "if courts attempt to divine what constitutes 'common knowledge'—without first analyzing how the
  witness reached the opinion—the 'usual and ordinary experience of the average person' risks becoming the 'usual and
  ordinary experience of whoever wears the robe and holds the gavel."
- Guidance: "trial courts should not merely focus on whether the witness has an unusual experience base, but rather whether the witness is using a reliable and specialized mode of analysis ... something beyond everyday reasoning—to draw an inference or opinion from the information."
- Opinion/inference reached through application of everyday reasoning = lay opinion in conformance w/ 701
- Opinion/inference reached through special mode of reasoning = expert opinion, and must comply w/ 702

### STATE V. SMITH, (CONT'D):

#### **Application to present case:**

Here, a nurse testified as a lay witness (not disclosed as expert) about two relevant things:

- (I) she compared before/after photos of a victim's neck and concluded that the "dark discolorations" could be bruises;
- (2) she explained how bruising appears on African American skin tones and how it is diagnosed differently from paler skin.
  - The nurse testified that African American skin tones can have dark discolorations that, based on rational perception, could be bruising or just natural coloring.

Because the comparison opinion of bruising on the victim's neck was based on both her rational perception and specialized knowledge within the scope of Rule 702, the Supreme Court held the testimony was not admissible.

Second, the testimony about the bruising of African American skin tones was improperly admitted because the *only reliable way* the witness could have discerned the difference (between darker and paler skin) was by applying her specialized knowledge to interpret both (I) the condition of the skin after the passage of time; and (2) other corroborating symptoms. Because rational perception indicated that the discoloration could be bruising OR natural coloring, the nurse necessarily relied on her special knowledge.

Result: the witness utilized special knowledge and a special mode of analysis; thus, it was expert testimony, subject to 702.

## STATE V. CHAMBERS, 465 P.3D 1076 (IDAHO 2020)

#### Quick factual background:

- The Defendant was charged with committing a sex crime against a young woman (N.S.)
- Pursuant to I.R.E. 412, Defendant moved to introduce evidence of a purportedly false allegation N.S. made against a different individual approximately six months after her alleged rape by Defendant.
- The State objected to the admission of such evidence.
- After a Rule 412 hearing, the district court excluded evidence of the purportedly false allegation.

Generally, evidence of a sex crime victim's past sexual behavior is not admissible in a criminal case under the rape shield laws.

But see Rule 412: "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:

- ... (3) an alleged victim's prior false allegations of sex crimes made at an earlier time..."
- The plain language of 412 states that false allegations of sex crimes "made at an earlier time" are admissible in a criminal case. But there are conflicting interpretations of this what that language means.
- The Defendant argued that the plain language indicated that "made at an earlier time" means a false allegation made prior to its admission at trial.
- Conversely, the State argued that the "made at an earlier time" means that the alleged false allegation must have occurred "earlier" than the charged crime.
- Thus, the Supreme Court, reviewing de novo, interpreted what the language of the rule meant.

The Court relied heavily on the purpose of the rule when determining its meaning.

The Court was most concerned with the purpose of the rule, even if the purpose runs the risk of conflicting with the plain language of the rule; it stated that "the plain language of the rule may be tempered by its purpose."

The Court concluded that the most logical interpretation of Rule 412 was that it contained no temporal requirement.

The Court reached this conclusion for three main reasons:

- First, false allegations made after the charged conduct are just as relevant as false allegations made prior to the charged conduct (as it relates to credibility and to the fairness of the trial for the defendant);
- Second, the timing of the allegation does not increase the risk of embarrassment to the victim; and
- Third, this interpretation aligns with the comment made in the model rule upon which Rule 412 was based.

Consequently, the district court erred in interpreting I.R.E. 412(b)(2)(C) to require that the false allegation had to precede the events giving rise to the charge.

The lower court also stated: even if evidence were admissible under 412, the probative value of the evidence is far outweighed by considerations of "confusion of the issues, unfair prejudice, ... and it has the definite risk of misleading the jury."

Thus, the lower court invoked the 403 balancing test when analyzing the evidence of a prior false allegation.

On appeal, the Supreme Court held that the lower court erred by applying the 403 balancing test instead of the 412 balancing test, and concluded that 412 contained a separate and distinct test to the 403 test.

**412 test:** a court may introduce the evidence if "the probative value of such evidence outweighs the danger of unfair prejudice."

**403 test:** relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence

Two key differences:

- (I) the balancing tests are the inverse of one another (probative outweighing prejudice VS prejudice outweighing probative).
- (2) 403 includes many factors that can outweigh the probativeness, while under 412, a judge can only consider unfair prejudice.

For these reasons, the 412 balancing test separate and distinct from the 403 test, as it contains a modified standard that require that the probative value of the evidence outweigh the danger of unfair prejudice; if it were not a separate test, it would conflict with the 403 test.

Finally, the Supreme Court established a **3-part** test for determining the admissibility of false allegations of sex crimes under Rule 412.

#### TEST:

First, the defendant must establish by a preponderance of the evidence, that the accusation was false.

Second, the court must determine whether the evidence is relevant (noting that, typically, evidence of false claims is highly probative).

Third, the court must engage in the 412 balancing-test, to determine if "the probative value of such evidence outweighs the danger of unfair prejudice."

### QUESTIONS/COMMENTS?

## **FINIS**