

Uldaho Law

Digital Commons @ Uldaho Law

Articles

Faculty Works

2009

Civil Procedure in Idaho: An Examination of Significant Differences Between the Rules of Procedure of the Idaho State and Federal Courts

Katie Ball
ktball@uidaho.edu

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#)

Recommended Citation

46 Idaho L. Rev. 13 (2009)

This Article is brought to you for free and open access by the Faculty Works at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Articles by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

CIVIL PROCEDURE IN IDAHO: AN EXAMINATION OF SIGNIFICANT DIFFERENCES BETWEEN THE RULES OF PROCEDURE OF THE IDAHO STATE AND FEDERAL COURTS

ELIZABETH HERBST SCHIERMAN AND KATIE BALL*

TABLE OF CONTENTS

I. HISTORY AND COMPOSITION OF IDAHO’S STATE AND FEDERAL COURTS	14
II. PRACTICE BEFORE THE COURTS IN GENERAL	16
A. Admission to Practice	16
B. The Local Practice Rules	17
C. Filing Documents with the Court	18
D. Contact with the Court	19
III. THE FIRST STAGES OF A CIVIL ACTION	19
A. Filing a Complaint	19
B. Answering a Complaint	21
C. Assignment of Cases to Magistrate Judges	21
IV. DISCOVERY	23
A. Initial Disclosures and the Discovery Conference	23
B. Discovery Requests and Responses	23
C. Expert Witness Disclosures	24
D. Discovery Motions	26
V. DURING THE COURSE OF THE LITIGATION, IN GENERAL	27
A. Motions and Page Limits	27
B. Proposed Orders	28
C. Hearings	29
D. Calculating Deadlines	29
E. Extending Deadlines	32
F. Stipulations	32
G. Alternative Dispute Resolution	32
VI. JURY TRIALS	33

* Elizabeth Herbst Schierman and Katie Ball previously served together as judicial law clerks to then-Chief U.S. Magistrate Judge Larry M. Boyle. Elizabeth Herbst Schierman is a patent attorney with Dykas, Shaver & Nipper, LLP in Boise; she frequently appears in federal courts across the country as part of her intellectual property litigation practice. Katie Ball is currently a career judicial law clerk to U.S. Magistrate Judge Ronald E. Bush and is also the Externship Coordinator for the University of Idaho College of Law. Ms. Schierman and Ms. Ball are both graduates of the University of Idaho College of Law and former members of the Idaho Law Review. Special thanks to Mindy Willman, Law Clerk at the Fourth Judicial District for the State of Idaho, for her insight into the state court civil procedural rules, and to all those at the federal court who provided ideas and information for this article.

VII. CONCLUSION	34
-----------------------	----

The University of Idaho College of Law celebrates its centennial this year. The rules of civil procedure do not have that lengthy a history, but they are still a critical part of current legal education and any civil practice.¹ Civil practitioners choosing an Idaho forum have two court system options for many types of cases—the federal courts or the state courts.² The goal of this article is to point out the significant differences in the state and federal civil procedural rules for Idaho practitioners. It is meant to particularly address those Idaho attorneys who have practiced primarily or exclusively in either the federal or the state court system and are faced with the need to delve into practice in the other, less-familiar court system. Of course, this article is not a substitute for actually reading the Idaho Rules of Civil Procedure, the Federal Rules of Civil Procedure, or the respective local rules of procedure in the Idaho courts. It is, however, a starting point for familiarity with the federal and state court systems.

I. HISTORY AND COMPOSITION OF IDAHO'S STATE AND FEDERAL COURTS

On July 3, 1890, just about twenty years before the University of Idaho College of Law was established, the United States Congress organized Idaho as a single federal judicial district and authorized one judgeship for the United States District Court for the District of Idaho.³

1. The Idaho Supreme Court ordered Idaho's civil procedural rules into effect on November 1, 1958. IDAHO R. CIV. P. 1(a) Compiler's Notes (West 2009). The Federal Rules of Civil Procedure were adopted on December 20, 1937, by order of the United States Supreme Court, as the "Rules of Procedure for the District Courts of the United States." FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 28 (West rev. ed. 2009). The federal civil procedural rules supplanted the Equity Rules. *Id.*

2. Idaho's state district courts are courts of general jurisdiction. IDAHO STATE JUDICIARY, OVERVIEW OF THE IDAHO COURT SYSTEM 5, available at <http://www.isc.idaho.gov/overview.pdf>. The state courts have exclusive jurisdiction over divorce and child custody matters, as well as probate issues. *Id.* See DAVID L. METCALF, FEDERAL CIVIL PRACTICE 3, available at <http://www.id.uscourts.gov/docs/jurisdct.pdf> (noting cases in which the federal court has determined it has no jurisdiction to hear domestic relation disputes or quiet title actions, or to interfere with state court probate proceedings). Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Original jurisdiction exists for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2006). The federal court may decide cases that involve the United States government, controversies between states, and controversies between the United States and foreign governments. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, UNDERSTANDING THE FEDERAL COURTS 10, available at <http://www.uscourts.gov/understand03/media/UFC03.pdf>. See also METCALF, *supra*, at 2 (discussing "arising under" jurisdiction). Cases may also be filed in federal court based on the litigants' "diversity of citizenship," such as between citizens of different states or between United States citizens and those of another country, if the amount in controversy exceeds \$75,000 "exclusive of interest and costs." 28 U.S.C. § 1332(a) (2006).

3. Federal Judicial Center, U.S. District Court of Idaho Legislative History, <http://www.fjc.gov/history/home.nsf> (follow "Courts of the Federal Judiciary" hyperlink; then

Today, the District of Idaho remains a single federal judicial district and has four divisions: the Northern, Central, Southern, and Eastern Divisions.⁴ Currently, two full-time district judges, two full-time magistrate judges, and two magistrate judges on recall status hear civil matters throughout all of these divisions.⁵

As of January 1, 2009, the Idaho state district courts had forty-three district court judges serving seven judicial districts.⁶ In addition, there are eighty-six state magistrate judges and forty-four judges on senior status.⁷

In 2008, the Idaho state courts had 9,537 civil case filings in the district courts,⁸ while the Idaho federal district court had just 555 civil case filings.⁹ Based on these statistics, it is probably fair to assume that most attorneys practicing civil law in Idaho appear primarily in the state courts. Although law students are required to pass a course in civil procedure during law school, these courses often do not distinguish the state civil procedure rules from the federal rules. Further, though the Idaho Rules of Civil Procedure (i.e., the rules governing procedure in the Idaho state courts) were patterned after the Federal Rules of Civil Procedure (i.e., the rules governing procedure in the federal courts of Idaho) “to the extent practicable,”¹⁰ there are some significant differences.¹¹ The rule differences will be examined in the order they would normally be encountered during the course of a civil action.

follow the “U.S. District Courts” hyperlink; then select “Idaho” from the drop-down box on the left hand side of the page) (last visited Dec. 1, 2009).

4. DIST. IDAHO LOC. CIV. R. 3.1.

5. United States Courts, District of Idaho, Contact Information, <http://www.id.uscourts.gov/contact.htm> (last visited Dec. 1, 2009).

6. See IDAHO STATE JUDICIARY, IDAHO COURT ANNUAL REPORT FOR 2008 app. at 320, available at <http://www.isc.idaho.gov/08annual/SECTION%2010.pdf>.

7. See *id.*

8. IDAHO STATE JUDICIARY, *supra* note 6, app. at 4, available at <http://www.isc.idaho.gov/08annual/SECTION%202.pdf>.

9. UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO, DISTRICT COURT CASELOAD (2008), available at <http://www.id.uscourts.gov/stats/08DecDC.pdf>.

10. IDAHO R. CIV. P. 1(a) Compiler’s Notes (West 2009).

11. Many of the state and federal procedural rules are identical, and the Idaho Supreme Court has stated a preference for interpreting the Idaho Rules of Civil Procedure “in conformance with the interpretation placed upon the same language in the federal rules.” *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 796, 41 P.3d 220, 224 (2001) (discussing relation back of amendments under Rule 15). See also *Rural Kootenai Org. v. Bd. Of Comm’rs*, 133 Idaho 833, 846, 993 P.2d 596, 609 (1999) (adopting the reasoning of federal cases on levying costs against an intervening party under Rule 54(d) of the Federal Rules of Civil Procedure, “which is analogous to Rule 54(d) of the Idaho Rules of Civil Procedure”); *Rohr v. Rohr*, 118 Idaho 689, 692, 800 P.2d 85, 88 (1990) (noting that it is “well established that our adoption of the Idaho Rules of Civil Procedure is presumably with the interpretation placed upon similar language in the Federal Rules of Civil Procedure by the federal courts”); *Chacon v. Sperry Corp.*, 111 Idaho 270, 273–76, 723 P.2d 814, 817–20 (1986).

II. PRACTICE BEFORE THE COURTS IN GENERAL

Some of the most significant differences between the state and federal courts of Idaho are with regard to admission to practice, general local rules and procedures, document filing procedures, and contact with the court.

A. Admission to Practice

Generally, to make an appearance for a party in the state courts of Idaho, an attorney must be an admitted, active member of the Idaho State Bar.¹² Admission to the Idaho State Bar is available to those holding degrees from accredited law schools following passage of the Idaho Bar Exam, the Multistate Professional Responsibility Exam, and demonstration of good moral character.¹³ Within six months of obtaining certification of eligibility, an appearance before the Supreme Court of Idaho is required so as to take the necessary oath of admission.¹⁴ The Idaho Supreme Court generally holds admission ceremonies for this purpose twice annually.¹⁵ Idaho's federal court currently holds joint admission ceremonies with the state court for those who meet the federal court appearance requirements.¹⁶

To make an appearance in Idaho's federal courts, an attorney must not only be an active member of the Idaho State Bar, but must also obtain separate admission to the District of Idaho.¹⁷ Admission requires a written petition for admission that states little more than the applicant's addresses and a list of courts where admission has previously been obtained,¹⁸ along with payment of the appropriate fee.¹⁹ Once approved, an oath must be signed and a personal appearance before the court is generally required, though it can be waived in exceptional cir-

12. IDAHO BAR COMM'N R. 222. There are certain exceptions to this requirement, such as when *pro hac vice* admission may be obtained. *See id.*

13. IDAHO BAR COMM'N R. 200A-203.

14. IDAHO BAR COMM'N R. 214.

15. *See* Idaho State Bar, Admission Ceremony, http://isb.idaho.gov/admissions/bar_exam_results/admission_ceremony.html (last visited Dec. 1, 2009).

16. *Id.*

17. DIST. IDAHO LOC. CIV. R. 83.4(a) & (b). There are certain exceptions to this requirement, such as when *pro hac vice* admission may be obtained. *See* DIST. IDAHO LOC. CIV. R. 83.4(e). Of note, as of September 7, 2009, the District of Idaho Local Civil Rules Committee also had proposed Local Rule 83.6(a) to govern an attorney's appearance in a federal court case, which would provide that "[a]n attorney's signature to a pleading filed with the Court shall constitute an appearance by the attorney who signs it. Otherwise, an attorney who wishes to appear for a party or participate in any manner in any action must file a Notice of Appearance." DIST. IDAHO LOC. CIV. R. 83.6(a) (proposed Sept. 7, 2009), <http://www.id.uscourts.gov/announcements/2010LOCALRULESRed.pdf>.

18. DIST. IDAHO LOC. CIV. R. 83.4(a).

19. UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO, DISTRICT COURT FEES (2008), <http://www.id.uscourts.gov/docs/dcfes08.pdf> [hereinafter DISTRICT COURT FEES].

cumstances.²⁰ Accordingly, while admission to the state courts is readily available in six month intervals, admission to the federal courts of Idaho is readily available at any time in the year.

B. The Local Practice Rules

Once admitted to practice before the court, whether state or federal, an attorney needs to become familiar with the local rules of that court. Local rules often provide more detailed guidance than, and may add requirements to, the federal or state procedural rules.

The Idaho state courts are authorized to make local rules governing internal case management and procedure that are consistent with the Idaho Rules of Civil Procedure.²¹ All seven of the state judicial districts have enacted local rules.²² Attorneys should not have much difficulty becoming familiar with these rules as the longest set of local rules is no more than ten pages.²³

Federal district courts may adopt and amend rules governing practice within those courts if the rules are consistent with—but do not duplicate—federal statutes and rules.²⁴ The United States District Court for the District of Idaho has adopted, and routinely updates, its local rules,²⁵ and the District of Idaho's local civil rules are rather extensive compared to the local rules of the state courts. Currently, the District's

20. DIST. IDAHO LOC. CIV. R. 83.4(a). As of September 7, 2009, the District of Idaho Local Civil Rules Committee had proposed deleting the personal appearance waiver. DIST. IDAHO LOC. CIV. R. 83.4(a) (proposed Sept. 7, 2009). Any approved change to the rule will take effect on December 1, 2009. See Announcement to Attorneys and the Public, District Court Local Rules Comm. (2009), <http://www.id.uscourts.gov/announcements/2010LOCALRULESRed.pdf> [hereinafter Announcement to Attorneys].

21. IDAHO R. CIV. P. 1(c).

22. Idaho District Court Websites, <http://www.isc.idaho.gov/district.htm> (last visited Dec. 1, 2009).

23. See *id.* See also LOC. R. IDAHO 2D DIST. (2006), available at <http://www2.state.id.us/2djudicial/Miscellaneous/2006 S.Ct. order.pdf> (exemplifying a set of local rules being fewer than ten pages in length).

24. FED. R. CIV. P. 83(a)(1). The District of Idaho Local Civil Rules Committee is in the process of developing Local Patent Rules. DIST. IDAHO LOC. PATENT R. 1-5 (proposed Sept. 7, 2009), <http://www.id.uscourts.gov/announcements/2010LOCALRULESRed.pdf>. If approved, these rules will take effect on December 1, 2009. Announcement to Attorneys, *supra* note 20.

25. See Local Rules, <http://www.id.uscourts.gov/rules.htm> (last visited Dec. 1, 2009). At the time this article was written the District of Idaho Local Civil Rules Committee was reworking several of the local rules, anticipating proposed changes to the rules would be published for comment by October 15, 2009, and the final changes to take effect on December 1, 2009. Interview with the Honorable Candy W. Dale, Chief U.S. Mag. J., Dist. Idaho, in Boise, Idaho (Sept. 8, 2009). See also DIST. IDAHO LOC. CIV. R. 1.2 (explaining process for amending the local rules).

local civil rules span nearly 100 pages.²⁶ Additionally, the District of Idaho provides a Procedural Policies manual describing the preferences of each federal judge on how matters are handled in his or her chambers.²⁷

C. Filing Documents with the Court

In the Idaho state courts, documents may be filed with the court by physically presenting the documents to the court clerk or judge during normal working hours.²⁸ When there is no associated filing fee and the document to be filed is ten pages or fewer in length, the documents may be presented via facsimile transmission during normal working hours.²⁹ Courtesy copies of motions and memoranda may also need to be filed, depending upon the local rules of the state district court.³⁰

In Idaho's federal courts, on the other hand, "[u]nless expressly prohibited, the filing of all documents required or permitted to be filed with the Court . . . shall be accomplished electronically."³¹ One of the benefits of electronic filing is the ability to file documents after normal business hours, while away on vacation, or from home. Electronic filing is achieved by uploading documents to the District of Idaho's Case Management/Electronic Case Files (CM/ECF) system.³² Accordingly, attorneys practicing in the District of Idaho must be registered with the District's CM/ECF system,³³ which requires a review of the Electronic Case Filing Procedures³⁴—procedures separate and in addition to the local civil procedural rules.³⁵ Further, because all filing is accomplished electronically, courtesy copies of briefs and supporting documents are not expected.³⁶

26. See DIST. IDAHO LOC. CIV. R. 1.1–83.8, available at <http://www.id.uscourts.gov/docs/2009LOCALRULESClean.pdf>.

27. District Court Chambers Policies, <http://www.id.uscourts.gov/ChambersPreferences/01-DC-Intro.htm> (last visited Dec. 1, 2009).

28. IDAHO R. CIV. P. 5(e).

29. IDAHO R. CIV. P. 5(e)(2). However, the local rules of the state district courts may modify the limitations on filing by facsimile. IDAHO R. CIV. P. 5(e)(4). See also LOC. R. IDAHO 6TH DIST. 17, <http://www.co.bannock.id.us/localrul.pdf>.

30. See, e.g., LOC. R. IDAHO 4TH DIST. 8.3, available at http://www.isc.idaho.gov/FourthDistrictLocalRules_05.08.pdf (requiring courtesy copies be delivered to the judge's chambers if a document is filed within seven days of a hearing).

31. DIST. IDAHO LOC. CIV. R. 5.1(c).

32. U.S. DIST. & BANKR. CT. FOR D. IDAHO, AMENDED ELECTRONIC CASE FILING PROCEDURES 4 (2009), available at http://www.id.uscourts.gov/docs/ECFProcedures_010109.pdf.

33. *Id.* at 2.

34. Electronic Case Filing (ECF) in the District of Idaho, http://www.id.uscourts.gov/cm_ecf/ecf_certification.cfm (last visited Dec. 1, 2009).

35. U.S. DIST. & BANKR. CT. FOR D. IDAHO, *supra* note 32.

36. See *id.* at 7–8.

D. Contact with the Court

Letters to chambers from counsel are more common in state court. The Seventh Judicial District, for example, allows counsel to write letters to the judge regarding procedure or scheduling if a copy “is supplied contemporaneously to all counsel in the case.”³⁷ In federal court, on the other hand, “[a]ttorneys or parties to any action or proceeding should refrain from writing letters to the judge, or otherwise communicating with the judge, unless opposing counsel is present.”³⁸ Instead, “[a]ll matters to be called to a judge’s attention should be formally submitted.”³⁹

III. THE FIRST STAGES OF A CIVIL ACTION

Even in the earliest stages of a lawsuit, the procedural rules of Idaho’s state and federal courts differ significantly.

A. Filing a Complaint

In both Idaho’s state and federal courts, an action begins with the filing of a complaint and an accompanying summons.⁴⁰ Also, in both court systems, the plaintiff must pay a fee upon filing the complaint, but in significantly different amounts.⁴¹ Currently, the filing fee for a general civil action is \$88.00 in state court⁴² and \$350.00 in federal court.⁴³ Another difference in complaint-filing procedures is that, in federal court, the complaint must be accompanied by a completed civil cover sheet.⁴⁴ The cover sheet must include the basis for federal court jurisdiction, the citizenship of the principal parties, and the nature of the suit.⁴⁵

In state court, at the plaintiff’s request, the Clerk of the Court “shall forthwith issue a summons and deliver it for service.”⁴⁶ In federal court, because a complaint and summons must be filed electronically,

37. LOC. R. IDAHO 7TH DIST. 18, available at <http://www.isc.idaho.gov/7distrul.pdf>.

38. DIST. IDAHO LOC. CIV. R. 77.4.

39. *Id.*

40. FED. R. CIV. P. 3–4; IDAHO R. CIV. P. 3–4.

41. DISTRICT COURT FEES, *supra* note 19; IDAHO STATE JUDICIARY, APPENDIX “A” FILING FEE SCHEDULE – DIST. CT. & MAG. DIV. 2 (2009), available at <http://www.isc.idaho.gov/rules/09filingfee.pdf> [hereinafter STATE FILING FEE SCHEDULE].

42. STATE FILING FEE SCHEDULE, *supra* note 41.

43. DISTRICT COURT FEES, *supra* note 19. Check for changes to the fee schedule on October 1st each year.

44. DIST. IDAHO LOC. CIV. R. 5.2(d).

45. UNITED STATES COURTS, DISTRICT OF IDAHO, CIVIL COVER SHEET, <http://www.id.uscourts.gov/forms-dc/js044.pdf>.

46. IDAHO R. CIV. P. 4(a)(1). A summons may be transmitted by facsimile. IDAHO R. CIV. P. 4(c)(3).

once executed by the appropriate court officer the executed summons is returned electronically, via e-mail, to the attorney who filed the complaint.⁴⁷

Once the summons has been executed and returned to plaintiff's counsel, the complaint and summons must be served within a particular time frame. Idaho's state courts give a six-month deadline for service of the complaint and summons.⁴⁸ In federal court, only 120 days (approximately four months) are allowed.⁴⁹ Both court systems allow extensions of the time for service upon a showing of good cause.⁵⁰

The allowable methods of service are prescribed by the procedural rules of both courts,⁵¹ and both court systems allow complaining parties to essentially avoid having to accomplish formal service if receipt of service is appropriately acknowledged by the defending party or parties. In Idaho's state courts, service upon an individual can be accomplished by that individual's written acknowledgment of service stating the capacity in which service was received.⁵² Under the federal rules, individuals and corporations have a duty to avoid unnecessary expenses of service, and the rules allow a plaintiff to request that a defendant waive service of a summons.⁵³ These waiver requests must provide at least thirty days for a defendant to respond if the request is sent to an individual in the United States, and a longer period of time if outside the United States.⁵⁴ The benefit to a party executing a waiver of service is that the party has a longer period of time to answer the complaint.⁵⁵ In general, a defendant must serve an answer within twenty days after being served with a summons and complaint.⁵⁶ If a waiver is timely executed, a defendant within the United States has sixty days to respond and a defendant out-

47. U.S. DIST. & BANKR. CT. FOR D. IDAHO, *supra* note 32, at 6.

48. IDAHO R. CIV. P. 4(a)(2).

49. FED. R. CIV. P. 4(m). In an unpublished federal court case, the court found that a pro se plaintiff's mistake with respect to service—his reliance in good faith on the Idaho rule's six-month service period—did not constitute good cause to extend the service period under Federal Rule of Civil Procedure 4(m), although the court extended the service period for other reasons. *Spencer v. Berger*, No. CV08-04-N-EJL, 2009 WL 1956673 (D. Idaho July 7, 2009).

50. See FED. R. CIV. P. 4(m); IDAHO R. CIV. P. 4(a)(2); *Harrison v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 145 Idaho 179, 182, 177 P.3d 393, 396 (2008). The Supreme Court of Idaho has relied on federal case law to interpret Idaho's "good cause" standard. See *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 347–48, 941 P.2d 314, 319–20 (1997).

51. FED. R. CIV. P. 4(e)(1) (allowing for service in a judicial district of the United States on certain types of defendants by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made."); IDAHO R. CIV. P. 4(b)(3) (providing for service by publication). See also FED. R. CIV. P. 4(h)(1)(A).

52. IDAHO R. CIV. P. 4(d)(6).

53. FED. R. CIV. P. 4(d)(1).

54. FED. R. CIV. P. 4(d)(1)(F).

55. See FED. R. CIV. P. 4(d).

56. See FED. R. CIV. P. 12(a)(1)(A)(i). *But see* FED. R. CIV. P. 12(a)(2)–(3) (allowing 60 days for the United States or its agencies, officers, and employees). The rule amendment effective December 1, 2009, absent action by Congress, changes the general rule to allow twenty-one days to serve an answer. FED. R. CIV. P. 12(a)(1)(A)(i) (proposed Nov. 26, 2008), http://www.uscourts.gov/rules/Supreme_Court_2008/2008-CV-Clean_Rules.pdf.

side of the United States has ninety days to respond.⁵⁷ Additionally, if the United States, its agencies, or its employees are named as defendants, each has sixty days to answer a complaint, regardless of whether a waiver has been executed.⁵⁸

In federal court cases removed from state court, the Idaho Rules of Civil Procedure are applied to service attempts made prior to removal because “[s]tate procedural rules govern until the action is removed to federal court.”⁵⁹

B. Answering a Complaint

Often, the next step in the course of a civil action in both state and federal courts is the filing of an answer to the complaint.⁶⁰ In Idaho’s state courts, a defendant must pay a fee, currently \$58.00, upon answering a complaint.⁶¹ In federal court, there is no fee to the defendant for answering a complaint.⁶²

This answering stage is also the time for submitting motions to dismiss based on Rule 12(b) defenses.⁶³ The state procedural rules provide eight Rule 12(b) defenses, while the federal procedural rules provide only seven.⁶⁴ The “extra” rule in state court is a defense on the grounds that another action is pending between the same parties for the same cause.⁶⁵

C. Assignment of Cases to Magistrate Judges

In the state court system, the magistrate judges’ jurisdiction in civil cases is limited to certain types of proceedings, such as proceedings under the Child Protective Act, divorce and child custody proceedings,

57. FED. R. CIV. P. 12(a)(1)(A)(ii).

58. FED. R. CIV. P. 12(a)(2). The federal procedural rules also contain specific requirements for serving the United States and/or its employees sued in either an individual or official capacity. *See* FED. R. CIV. P. 4(i). Idaho has comparable rules for providing service to the state and its agencies or governmental subdivisions. *See* IDAHO R. CIV. P. 4(d)(5).

59. Tomlinson Black N. Idaho v. Kirk-Hughes, No. CV06-118-N-EJL, 2006 WL 1663591, at *1 n.1 (D. Idaho June 8, 2006).

60. *See* FED. R. CIV. P. 7; IDAHO R. CIV. P. 7.

61. STATE FILING FEE SCHEDULE, *supra* note 41.

62. *See* DISTRICT COURT FEES, *supra* note 19.

63. *See* FED. R. CIV. P. 12(b); IDAHO R. CIV. P. 12(a)–(b).

64. FED. R. CIV. P. 12(b); IDAHO R. CIV. P. 12(b).

65. IDAHO R. CIV. P. 12(b)(8). Although the federal court does not have a corresponding rule, the federal court may use principles of comity and the abstention doctrines to abstain from deciding issues more properly before another court or jurisdiction or issues already pending in another court. *See, e.g.*, BNSF Ry. Co. v. O’Dea, 572 F.3d 785, 791 n.15 (9th Cir. 2009); Doyle v. City of Medford, 565 F.3d 536, 543 (9th Cir. 2009); Sarausad v. Porter, 503 F.3d 822, 825 (9th Cir. 2007).

and civil actions of any nature where “the amount of damages or value of the property claimed does not exceed \$10,000.”⁶⁶ The state rules provide a process for objecting to any “irregularity in the method or scope of assignment” to a magistrate judge.⁶⁷

United States Magistrate Judges in Idaho have jurisdiction over certain specified matters,⁶⁸ but also “may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case” upon the consent of all parties.⁶⁹ An appeal from a judgment entered by a United States Magistrate Judge is directed to the United States Court of Appeals for the Ninth Circuit in the same manner as an appeal from any other judgment of the District Court.⁷⁰

Cases filed in federal court are randomly assigned to one of the district judges or one of the magistrate judges.⁷¹ In cases assigned to a magistrate judge, the parties receive a Notice of Assignment to a United States Magistrate Judge and Consent Form.⁷² The parties may consent or request reassignment to a United States District Judge.⁷³

Because the District of Idaho is very busy and the criminal docket is growing rapidly, proceeding before a Magistrate Judge often means a civil case will be resolved more quickly than it would if presented before a District Judge.⁷⁴ Notices sent to counsel with the consent forms advise:

[E]ven if parties do not consent, the District Judge to whom the matter is assigned may nonetheless refer all pre-trial proceedings to a Magistrate Judge pursuant to 28 U.S.C. § 636(b), FRCP 73, and Local Rule 72.1. For any dispositive matters so referred, the Magistrate Judge will enter a Report and Recommendation for the District Judge’s consideration. At that point, the review process by a District Judge generally takes 60 days. Thus, by consenting to Magistrate Judge jurisdiction at the outset, the parties also can avoid the delays and expense of this review process, while still preserving their appeal rights.⁷⁵

66. IDAHO R. CIV. P. 82(c)(1)–(2). *See also* IDAHO CODE ANN. § 1-2208 (2006).

67. IDAHO R. CIV. P. 82(c)(3).

68. 28 U.S.C. § 636(a) (2006).

69. *Id.* § 636(c)(1). *See also* DIST. IDAHO LOC. CIV. R. 73.1; Gen. Order No. 237 (D. Idaho 2009), available at <http://www.id.uscourts.gov/generalorders/GeneralOrder-237.pdf>.

70. 28 U.S.C. § 636(c)(3); FED. R. CIV. P. 73(c).

71. Gen. Order No. 237, *supra* note 69.

72. Notice of Assignment to a United States Judge and Consent Form (D. Idaho 2009), available at http://www.id.uscourts.gov/docs/assignment_final062909.pdf.

73. Request for Reassignment to a U.S. District Judge (D. Idaho 2009), available at http://www.id.uscourts.gov/docs/Request_4ReAssignment.pdf. Parties are free to withhold their consent without adverse substantive consequences, and the Clerk of Court will take reasonable steps to ensure voluntariness and confidentiality of consents and requests for reassignment. *See* DIST. IDAHO LOC. CIV. R. 73.1(b).

74. The Consent Process: What Is It? (D. Idaho 2009) (available by request to the District of Idaho Clerk of Court and also on file with the Idaho Law Review office).

75. *Id.* at 2.

IV. DISCOVERY

A. Initial Disclosures and the Discovery Conference

The Idaho Rules of Civil Procedure do not require initial disclosures, and discovery in state courts may begin without a conference between counsel for the parties and any unrepresented parties.⁷⁶ The Federal Rules of Civil Procedure, however, require parties in most types of civil actions to exchange initial disclosures.⁷⁷ These disclosures must be made promptly, without awaiting a discovery request from the opposing party, and should be made within fourteen days of the parties' Rule 26(f) conference,⁷⁸ unless a different time is set by stipulation or order, or a party objects.⁷⁹ "A party must make its initial disclosures based on the information then reasonably available to it."⁸⁰ Importantly, "[a] party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures."⁸¹ Additionally, by local rule in federal court, "[u]nless otherwise agreed to between the parties, a party may not seek discovery from any source before the parties have met and conferred as required by Federal Rule of Civil Procedure 26(d) and (f)."⁸²

B. Discovery Requests and Responses

In Idaho's state courts, filing a notice of service with the court is required for certain discovery documents.⁸³ In federal court, on the other

76. See IDAHO R. CIV. P. 26(a) (allowing parties to obtain discovery by "depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission").

77. FED. R. CIV. P. 26(a)(1)(A)–(B).

78. In every case in which initial disclosures are required, attorneys of record and any unrepresented parties must arrange a conference to discuss any issues about preserving discoverable information and develop a proposed discovery plan. FED. R. CIV. P. 26(f). This conference must be held as soon as practicable and in any event at least twenty-one days before the scheduling conference or before a scheduling order is due under Federal Rule of Civil Procedure 16. *Id.*

79. FED. R. CIV. P. 26(a)(1)(C).

80. FED. R. CIV. P. 26(a)(1)(E).

81. *Id.*

82. DIST. IDAHO LOC. CIV. R. 26.2(a). See also 28 U.S.C. § 473(a) (2006) (authorizing courts to control discovery).

83. See, e.g., IDAHO R. CIV. P. 33(a)(5), 34(d), 36(c)(2).

hand, although discovery must be served on opposing parties, discovery documents and certificates of service related to discovery documents must *not* be filed with the Clerk of Court.⁸⁴

The state procedural rules do not set a limit on the number of depositions that may be taken.⁸⁵ The local federal rules and Federal Rule of Civil Procedure 30 provide a presumptive limit of ten depositions, and each deposition is limited to a duration of one day of no more than seven hours “unless otherwise stipulated between the parties or authorized by the Court.”⁸⁶

In state court, each party is limited to serving forty interrogatories upon any other party without the answering party’s stipulation or leave of the court based upon a showing of good cause.⁸⁷ In federal court,

[n]o party may serve upon any other single party to an action more than twenty-five (25) interrogatories, including subparts (which will be counted as separate interrogatories), without first obtaining a stipulation of such party to additional interrogatories or, in the event the parties are unable to agree, obtaining an order of the Court upon showing of good cause granting leave to serve a specific number of additional interrogatories.⁸⁸

C. Expert Witness Disclosures⁸⁹

The state court rules do not require an exchange of expert reports, although the parties may agree to exchange reports. Instead, “[d]iscovery of facts known and opinions held by experts, expected to testify . . . may be obtained by interrogatory and/or deposition.”⁹⁰ The discoverable information includes information similar to what is required in an expert report submitted under the federal rules, such as

[a] complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to

84. DIST. IDAHO LOC. CIV. R. 5.4.

85. See IDAHO R. CIV. P. 30.

86. DIST. IDAHO LOC. CIV. R. 30.1. (“[P]arties should, however, be prepared at the scheduling conference to discuss whether the presumptive level should be decreased or increased due to the nature of the litigation.”).

87. IDAHO R. CIV. P. 33(a)(3).

88. DIST. IDAHO LOC. CIV. R. 33.1.

89. A notable difference in federal and state court civil practice regarding expert witnesses (that is beyond the scope of this article) is the Idaho Supreme Court’s treatment of the standards for expert testimony admissibility set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-95 (1993). Specifically, the Idaho Supreme Court “has not adopted the *Daubert* standard for admissibility of an expert’s testimony but has used some of *Daubert*’s standards in assessing whether the basis of an expert’s opinion is scientifically valid.” *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007) (citing *Swallow v. Emergency Med. of Idaho*, 138 Idaho 589, 595 n.1, 67 P.3d 68, 74 n.1 (2003) and *State v. Merwin*, 131 Idaho 642, 646, 962 P.2d 1026, 1030 (1998)).

90. IDAHO R. CIV. P. 26(b)(4).

be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.⁹¹

In federal court, however,

[u]nless otherwise stipulated or ordered by the court, this disclosure *must be accompanied by a written report—prepared and signed by the witness . . .* The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the data or other information considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.⁹²

91. IDAHO R. CIV. P. 26(b)(4)(A)(i).

92. FED. R. CIV. P. 26(a)(2)(B) (emphasis added). *See also* DIST. IDAHO LOC. CIV. R. 26.2(b). The Advisory Committee on Federal Rules of Civil Procedure, in its June 15, 2009, report, proposed changes to Federal Rule of Civil Procedure 26 related to “experts who are expected to testify as trial witnesses.” Letter from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Federal Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 2 (June 15, 2009), *available at* <http://www.uscourts.gov/rules/jc09-2009/2009-09-Appendix-C.pdf>. [hereinafter Letter from Hon. Kravitz to Hon. Rosenthal] One proposed change “creates a new requirement to disclose a summary of the facts and opinions to be addressed by an expert witness who is not required to provide a disclosure report under Rule 26(a)(2)(B).” *Id.* The other proposed change

extends work-product protection to drafts of the new disclosure and also to drafts of 26(a)(2)(B) reports. It also extends work-product protection to communications between attorney and trial-witness expert, but withholds that protection from three categories of communications. The work-product protection does not apply to communications that relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the ex-

Federal courts have excluded expert testimony for failures to timely provide a report that complies with the federal rule's requirements.⁹³

D. Discovery Motions

Both the state and federal courts impose "good faith" meet and confer requirements for discovery motions.⁹⁴ Though both court systems have this requirement, it is at times overlooked by attorneys in both state and federal court and thus warrants discussion here. The federal court may deny a motion to compel when "there has been no affidavit [or declaration] filed to demonstrate that . . . counsel has attempted to meet and confer."⁹⁵ In one case, the court's ruling was "without prejudice to Defendants filing a future motion seeking to compel more detailed initial disclosures after defense counsel makes a *reasonable* effort to meet and confer with Plaintiff's counsel on the matter and properly documents those attempts for the Court."⁹⁶ As another decision explained, the court "has neither the time nor the inclination to mediate over counsels' bickering and squabbling whether it be orally, in writing, or over

pert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

Id.

No change was proposed "with respect to the provisions that severely limit discovery as to an expert employed only for trial preparation." *Id.* See also SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2009), available at http://www.uscourts.gov/rules/Reports/Combined_ST_Report_Sept_2009.pdf. The United States Supreme Court has not acted on these proposed changes.

93. See *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (upholding a district court's decision to exclude an expert's testimony as a sanction for failure to timely file a rebuttal expert report, even though that decision "made it much more difficult, perhaps almost impossible," for one party to rebut the damages calculations of the opposing party's expert); *Millenkamp v. Davisco Foods Int'l*, No. CV 03-439-S-EJL, 2005 WL 1863183, at *2 (D. Idaho Aug. 4, 2005) (striking a defendant's expert witness designation, in part, because defendant did not provide an expert report before the time to do so had expired); *Sadler v. Boise State Univ.*, No. CV 95-391-S-BLW (D. Idaho June 6, 1996) (order denying the defendant's motion for continuance and excluding expert testimony due to failure to participate in discovery in a timely manner), available at <http://www.lawschool.westlaw.com/Files/Download/4432038/Sadler%20v1.%20Boise%20State%20case.pdf>. See also METCALF, *supra* note 2, at 29.

94. See FED. R. CIV. P. 37(a)(1) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."); DIST. IDAHO LOC. CIV. R. 37.1 ("[T]he moving party through counsel or self-represented litigant, files with the Court, at the time of filing the motion, a statement showing that the party making the motion has made a reasonable effort to reach agreement with opposing attorneys or self-represented litigant on the matters set forth in the motion."); IDAHO R. CIV. P. 37(a)(2) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.").

95. *Santiago v. Select Portfolio Servicing*, No. CV 07-262-S-EJL, 2008 WL 130922, at *1 n.1 (D. Idaho Jan. 10, 2008).

96. *Id.* (emphasis added).

email,” so counsel should make good faith attempts to resolve discovery disputes and avoid acrimonious communications in their attempts to do so.⁹⁷

V. DURING THE COURSE OF THE LITIGATION, IN GENERAL

A. Motions and Page Limits

The state court procedural rules do not require parties to file a brief or memorandum of law in support of a motion, but the moving party must state in the motion whether it desires to present oral argument or file a supporting brief within fourteen days.⁹⁸ Additionally, if a supporting brief is submitted, it must be filed with the court and served so that it is received by the parties at least fourteen days prior to the hearing.⁹⁹ Response briefs must be filed with the court and received by the parties at least seven days prior to the hearing, and reply briefs must be filed at least two days prior to the hearing.¹⁰⁰

Though the state procedural rules do not require supportive memoranda, the local rules of Idaho’s Fourth Judicial District do. In the Fourth District, motions must be accompanied by a separate memorandum, not to exceed twenty-five pages, containing all of the reasons, points, and authorities relied upon by the moving party.¹⁰¹ Reply briefs are capped at fifteen pages.¹⁰² None of the other judicial districts in the state impose page limits by local rule.

The federal court requires each motion, other than a routine or uncontested matter, to be accompanied by a separate brief¹⁰³ and imposes a twenty-one day deadline for the nonmoving party to respond to a motion.¹⁰⁴ The moving party then has ten days to file a reply brief.¹⁰⁵ Also, “[n]o memorandum of points and authorities in support of or in opposition to a motion shall exceed twenty (20) pages in length, nor shall a

97. *Scentsy, Inc. v. Performance Mfg., Inc.*, No. CV 08-553-S-EJL, 2009 WL 1240131, at *2 (D. Idaho May 4, 2009).

98. IDAHO R. CIV. P. 7(b)(3)(C).

99. IDAHO R. CIV. P. 7(b)(3)(E).

100. *Id.*

101. LOC. R. IDAHO 4TH DIST. 8.1, available at http://www.isc.idaho.gov/FourthDistrictLocalRules_05.08.pdf.

102. *Id.* at 8.1.2.

103. DIST. IDAHO LOC. CIV. R. 7.1(b)(1).

104. DIST. IDAHO LOC. CIV. R. 7.1(c)(1).

105. DIST. IDAHO LOC. CIV. R. 7.1(b)(3). The changes proposed to the District of Idaho Local Civil Rules include a change that would provide for fourteen days to file a reply brief, instead of the ten days provided at the time this article was written. *Id.* (proposed Sept. 7, 2009), <http://www.id.uscourts.gov/announcements/2010LOCALRULESRed.pdf>. The rules should be checked, as updated, to verify the time allowed for the moving party to file a reply brief.

reply brief exceed ten (10) pages in length, without express leave of the Court.¹⁰⁶ Leave is granted only under unusual circumstances.¹⁰⁷ At the time this article was written, the federal local rules also required a separate statement of facts not to exceed ten pages to be filed with summary judgment motions and opposition briefs.¹⁰⁸ There is no similar provision in the Idaho state procedural or local rules.

In federal court, supporting information may be submitted by way of declaration in place of an affidavit:

Wherever any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same . . . , such matter may, with like force and effect, be supported, evidenced, established, or proved by the *unsworn* declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated¹⁰⁹

B. Proposed Orders

In state and federal court, proposed orders may be required in certain circumstances.¹¹⁰ The state procedural rules allow for proposed orders to be submitted with a motion as a separate document.¹¹¹ In the Fourth Judicial District court, proposed orders must be accompanied by envelopes with sufficient postage, addressed to all parties.¹¹²

In federal court proposed orders should be submitted only for routine or uncontested matters and are sent to the court via e-mail in accordance with electronic filing procedures.¹¹³ Proposed orders must be

106. DIST. IDAHO LOC. CIV. R. 7.1(a)(2).

107. *Id.*

108. DIST. IDAHO LOC. CIV. R. 7.1(b)(1), (c)(2). The District of Idaho Local Civil Rules Committee is seeking comments on whether to continue this statement of facts requirement. See Announcement to Attorneys, *supra* note 20, at 1. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States initially had proposed changes to Federal Rule of Civil Procedure 56, which would have included changes to the summary judgment procedure and the statement of facts requirement. Letter from Hon. Kravitz to Hon. Rosenthal, *supra* note 92, at 6–7. After the comment period, the Committee “concluded that although the point-counterpoint procedure is worthy, and often works well, the time has not come to mandate it as a presumptively uniform procedure for most cases,” even though several districts have similar procedures required by local rule. *Id.* at 7. Other proposed changes to Rule 56 may have gone into effect on December 1, 2009. More information on the rule revision process is available on the U.S. Courts’ Federal Judiciary website. Federal Judiciary Rulemaking, <http://www.uscourts.gov/rules/> (last visited Dec. 1, 2009).

109. 28 U.S.C. § 1746 (2006) (setting forth the precise language that must be included in the declaration) (emphasis added).

110. See LOC. R. IDAHO 2D DIST. 10, available at <http://www2.state.id.us/2judicial/Miscellaneous/2006S.Ct.order.pdf>; LOC. R. IDAHO 4TH DIST. 3, available at http://www.isc.idaho.gov/FourthDistrictLocalRules_05.08.pdf.

111. IDAHO R. CIV. P. 7(b)(1).

112. LOC. R. IDAHO 4TH DIST. 8.2.

113. DIST. IDAHO LOC. CIV. R. 7.1(a)(4).

submitted in Word or WordPerfect Version 5.1 or higher format¹¹⁴ and should not be submitted until after the corresponding motion has been filed.¹¹⁵

C. Hearings

Hearings are contemplated in the ordinary course of state practice.¹¹⁶ In fact, a notice of hearing must be filed with a motion,¹¹⁷ and the Idaho Rules of Civil Procedure direct judicial districts to establish regular times and places at which “motions requiring notice and hearing may be heard and disposed of,” absent local conditions that make a motion day impractical.¹¹⁸ The Fourth Judicial District rules require counsel to contact the judge’s clerk to obtain a time for the hearing before sending out the notice.¹¹⁹ Further, at a hearing on a contested motion, each side is allowed only fifteen minutes to present its argument, absent a different amount of time allowed by the presiding judge.¹²⁰

In federal court, no notice of hearing is expected to be filed concurrently with the filing of a motion. To the contrary, the presiding judge will determine whether oral argument on a motion is appropriate, and only if the presiding judge decides a hearing is appropriate will the courtroom deputy select a hearing date for the argument and set the hearing on the court calendar.¹²¹ The presiding judge also sets the amount of time allowed for the hearing.

D. Calculating Deadlines

When computing periods of time in state court, intermediate Saturdays, Sundays, and holidays are excluded when the period of time is less than seven days.¹²² Under the federal rules in effect at the time this article was written, these intermediate days are excluded for periods

114. UNITED STATES COURTS, DISTRICT OF IDAHO, SUBMITTING PROPOSED ORDERS TO THE COURT (2009), *available at* http://www.id.uscourts.gov/cm_ecf/ReferenceGuide/District/Links/ProposedOrders-DC.pdf (identifying format requirements, providing detailed instructions for submitting orders, and listing the e-mail addresses for sending proposed orders to the different judges’ chambers).

115. *See generally* DIST. IDAHO LOC. CIV. R. 7.1(a)(4).

116. *See* IDAHO R. CIV. P. 7(b)(1).

117. *Id.*

118. IDAHO R. CIV. P. 78. Most of the state judicial districts have established motion days by local rule. *See, e.g.,* LOC. R. IDAHO 2D DIST. 7, 8, *available at* <http://www2.state.id.us/2djudicial/Miscellaneous/2006S.Ct.order.pdf>

119. LOC. R. IDAHO 4TH DIST. 2.2, *available at* http://www.isc.idaho.gov/FourthDistrictLocalRules_05.08.pdf.

120. LOC. R. IDAHO 4TH DIST. 6.

121. DIST. IDAHO LOC. CIV. R. 7.1(d)(2)(i).

122. IDAHO R. CIV. P. 6(a).

less than eleven days.¹²³ The state rules address how “half holiday[s]” are counted, while the federal rules define which holidays count as legal holidays.¹²⁴ Both rules provide that the last day of the period is to be included unless it is a Saturday, Sunday, or holiday.¹²⁵ However, the federal rule allows the last day of the time period to be continued to the next day (not a Saturday, Sunday, or holiday) if the act to be done is filing a paper in court or the last day falls on a day on which weather or other conditions make the clerk’s office inaccessible.¹²⁶

Additionally, in both state and federal court, three extra days may be added to a responsive deadline, depending upon the method of service of the motion requiring a response.¹²⁷ In Idaho’s state courts,

[w]henver a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.¹²⁸

In the District of Idaho, three days are added to any time period when service is made other than by handing it to the person or leaving it at the person’s office or usual place of abode.¹²⁹ Accordingly, extra time is available even when service of a motion was made essentially instantaneously, as by facsimile or via electronic mail.

On March 26, 2009, the Supreme Court of the United States ordered that the Federal Rules of Civil Procedure governing time-computation be amended.¹³⁰ If Congress did not enact legislation to re-

123. FED. R. CIV. P. 6(a)(2).

124. FED. R. CIV. P. 6(a)(4); IDAHO R. CIV. P. 6(a).

125. FED. R. CIV. P. 6(a)(3); IDAHO R. CIV. P. 6(a).

126. FED. R. CIV. P. 6(a)(3). This weather condition exclusion may seem unnecessary with the advent of the electronic filing requirement in federal courts, but in the Idaho federal court, pro se filings are exempt from the electronic filing requirement. See Gen. Order No. 187, Provisions Relating to Electronic Case Filing 1 (D. Idaho Nov. 15, 2004), available at <http://www.id.uscourts.gov/generalorders/GeneralOrder-187.pdf>; U.S. Dist. & Bankr. Ct. for the Dist. of Idaho, Amended Elec. Case Filing Procedures 5 (Aug. 1, 2005), available at http://www.id.uscourts.gov/cm_ecf/docs/ECFprocedures.pdf.

127. FED. R. CIV. P. 6(d); IDAHO R. CIV. P. 6(e)(1).

128. IDAHO R. CIV. P. 6(e)(1). A note of caution, however; three extra days are not added to time limits in which a party must act “after entry of the judgment,” such as a Rule 59 motion. *Williamsen Idaho Equip. v. W. Cas. & Sur. Co.*, 95 Idaho 652, 652 516 P.2d 1166, 1167 (1973) (emphasis added).

129. See FED. R. CIV. P. 6(d); see also FED. R. CIV. P. 5(b)(2)(A), (B).

130. See Order Amending Federal Rules of Civil Procedure (Mar. 26, 2009), available at http://www.uscourts.gov/rules/SC_March_2009.pdf. Congress has a statutory period of at least seven months to act on any rules prescribed by the Supreme Court. 28 U.S.C. §§ 2074–2075 (2006). Congress has enacted the Statutory Time-Periods Technical Amendments Act of 2009, effective December 1, 2009, which approved changes to statutory deadlines in line with the pending changes to the Rules of Civil Procedure. Pub. L. No. 111-16, H.R. 1626, 111th Cong. (2009).

ject, modify, or defer the rules, they took effect as a matter of law on December 1, 2009.¹³¹

The Judicial Conference Committee on Rules of Practice & Procedure explained the time-computation changes in a report to the Chief Justice of the United States and Members of the Judicial Conference:¹³²

The principal simplifying change in the amended time-computation rules is the adoption of a “days-are-days” approach to computing all time periods. Under some of the current rules, intermediate weekends and holidays are omitted when computing short periods but included when computing longer periods. By contrast, under the proposed rules amendments, intermediate weekends and holidays are counted *regardless of the length of the specified period*.

...

The amended time-computation rules also fill a gap in the present rules by addressing the special timing considerations that accompany electronic filing. Under the proposed amendments, unless a statute, local rule, or court order provides otherwise, the last day of a period for an electronic filing ends at midnight in the court’s time zone, while the last day for a paper filing ends when the clerk’s office is scheduled to close.¹³³

Three of the many changes to note are (1) the one-day time period before a hearing to serve an affidavit opposing a motion becomes seven days under Rule 6(c)(2); (2) the one-day period to give notice in Rule 54(d) becomes 14 days, “correct[ing] an unrealistic short time period for the clerk to give notice before taxing costs;” and (3) the ten-day periods in Rules 50, 52, and 59(b), (d), and (e) become twenty-eight-day periods to “extend[] the present inadequate time allowed to prepare and file post judgment motions [and] .

131. 28 U.S.C. §§ 2074–2075. Although this article is published in mid-December, it was written in August of 2009, when Congress still had time to reject the proposed rule changes.

132. COMM. ON RULES OF PRACTICE & PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE 1 (2008), available at http://www.uscourts.gov/rules/SupremeCourt2008/Excerpt_ST_CV.pdf.

133. *Id.* at 1–2 (emphasis added). Although Idaho has two time zones, “[a]n electronic document is considered timely if received by the Court before midnight, Mountain Time, on the date set as a deadline, unless the judge specifically requires another time frame.” U.S. DIST. & BANKR. CT. FOR D. IDAHO, AMENDED ELECTRONIC CASE FILING PROCEDURES 2.B.2 (2009), available at http://www.id.uscourts.gov/docs/ECFProcedures_010109.pdf.

. . . prevent unfair results from these unrealistic short time periods.”¹³⁴

E. Extending Deadlines

In state court, a deadline may be extended, before or after the expiration of the time period, by written stipulation if it “does not disturb the orderly dispatch of business or the convenience of the court . . . or . . . upon motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect.”¹³⁵ A federal court may extend a deadline for “good cause,” and, after the time has expired, the party must also demonstrate that it “failed to act because of excusable neglect.”¹³⁶

F. Stipulations

In state court, stipulations from the parties as to any procedural matter are considered by the court as joint motions and, thus, are not binding upon the court.¹³⁷ The coordinating local federal rule provides that all written stipulations of the parties, regardless of the subject, are binding only when approved by the judge.¹³⁸ Accordingly, counsel should ensure that stipulations are made in accord with the standards required for the requested action, e.g., with good cause for a stipulated deadline extension.

G. Alternative Dispute Resolution

In state court, the court may, in its discretion, “recommend[] and encourag[e] that the parties use some form of alternative dispute resolution and, in appropriate cases, order[] the parties to engage in mediation or a court conducted settlement conference.”¹³⁹

The federal court has an alternative dispute resolution (ADR) program, encouraging (and at times ordering) parties to participate in ADR, with options for mediation, arbitration, or participation in a set-

134. COMM. ON RULES OF PRACTICE & PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE 5–6 (2008), available at http://www.uscourts.gov/rules/SupremeCourt2008/Excerpt_ST_CV.pdf.

135. IDAHO R. CIV. P. 6(b).

136. FED. R. CIV. P. 6(b)(1). By local rule in federal court “[a]ll requests to extend briefing periods or to vacate or reschedule motion hearing dates must be in writing,” state the specific reason(s) for the requested time extension, and be supported by “a showing of good cause.” DIST. IDAHO LOC. CIV. R. 6.1(a).

137. IDAHO R. CIV. P. 6(e)(3). See also IDAHO R. CIV. P. 29 (allowing parties to stipulate to how depositions are taken).

138. DIST. IDAHO LOC. CIV. R. 7.3. However, stipulations between the parties to commence discovery prior to making their initial disclosures do not have to be approved by the court. *Id.* See also FED. R. CIV. P. 29 (discussing stipulations about discovery procedure).

139. IDAHO R. CIV. P. 16(a)(6).

tlement conference conducted by a United States Magistrate Judge.¹⁴⁰ The District of Idaho federal court has an ADR Coordinator responsible for implementing, administering, overseeing, and evaluating, along with the Board of Judges, the ADR program and procedures covered by the local rules. The ADR Coordinator also maintains the requirements for, and roster of, available neutrals/mediators and information regarding the ADR process. The Idaho federal court plans to implement an early, voluntary case management conference program through which judges will help counsel identify areas of agreement, clarify and focus the issues, and encourage the parties to enter into procedural and substantive stipulations.¹⁴¹

VI. JURY TRIALS

The usual number of jurors in a state civil trial is twelve, but the parties may agree in open court to a number less than twelve, and civil actions assigned to magistrate judges are tried by a jury of not more than six.¹⁴² The state procedural rules allow for one or two additional jurors to be called but not deliberate unless needed to replace jurors who may be excused during the trial or deliberations.¹⁴³ Three-fourths of a jury may render a verdict.¹⁴⁴

140. See DIST. IDAHO LOC. CIV. R. 16.4(b). The proposed changes to the local rules include changes clarifying the federal court's settlement conference and ADR procedures. DIST. OF IDAHO LOC. CIV. R. 16.4(b)(1)(A) (proposed Sept. 7, 2009), <http://www.id.uscourts.gov/announcements/2010LOCALRULESRed.pdf>. As of September 8, 2009, the proposed changes included omitting Rule 16.4 and including the following explanation in proposed Local Rule 16.4(b)(1)(A):

A Judicial Settlement Conference is a process in which a Magistrate Judge (Settlement Conference Judge) is made available in order to facilitate communication between the parties and assist them in their negotiations, e.g., by clarifying underlying interests, as they attempt to reach an agreed settlement of their dispute.
Id.

The proposed changes, at Local Rule 16.4(b)(1)(B) also explain that “[a]t any time after an action or proceeding is commenced, any party may request, or *the assigned judge on his or her own initiative may order*, a Judicial Settlement Conference.” DIST. OF IDAHO LOC. CIV. R. 16.4(b)(1)(B) (proposed Sept. 7, 2009) (emphasis added).

141. DIST. OF IDAHO LOC. CIV. R. 16.1(A)(1) (proposed Sept. 7, 2009). Proposed Local Rule 16.1(A)(1) explains that this conference “is a tool whereby a Magistrate Judge hosts an informal meeting with counsel in civil cases to identify areas of agreement, clarify and focus the issues, and encourage the parties to enter procedural and substantive stipulations,” and clarifies that the conference “is not a settlement conference; it is an effort to: (1) assist in the reduction of expense and delay; and (2) enhance direct communication between the parties about their claims.” *Id.* See also 28 U.S.C. § 473(b)(4) (2006).

142. IDAHO R. CIV. P. 48(a).

143. IDAHO R. CIV. P. 47(l).

144. IDAHO R. CIV. P. 48.

The federal trial court, “after reviewing the complexity and possible length of the case, will determine the number of trial jurors necessary” and that number will not be “less than six nor more than twelve.”¹⁴⁵ The federal court does not use alternate jurors.¹⁴⁶ The verdict must be unanimous, unless the parties stipulate otherwise.¹⁴⁷

In state court, “[t]he parties may . . . present brief opening statements to the entire jury panel, prior to voir dire.”¹⁴⁸ Voir dire is first conducted by the court, then the plaintiff’s attorney, followed by the defendant’s attorney.¹⁴⁹

Any question propounded by an attorney to a prospective juror which is not directly relevant to the qualifications of the juror, or is not reasonably calculated to discover the possible existence of a ground for challenge, or has been previously answered, shall be disallowed by the court upon objection or upon the court’s own initiative.¹⁵⁰

In Idaho’s Sixth Judicial District, “[e]ither attorney may voir dire the panel in gross[,] . . . individually[,] or some combination thereof.”¹⁵¹

In federal court, the jury box must be filled before examination on voir dire and counsel must submit written requests for voir dire questions to the presiding judge no less than five days before trial.¹⁵² “The Court will examine the jurors as to their qualifications and, if permitted, will direct the order and manner of examination by counsel.”¹⁵³

VII. CONCLUSION

The similarities between the procedural rules of the state and federal court systems in Idaho outnumber the differences. However, given the potential damage that can result when one of the “different” rules is disregarded, the differences cannot be overlooked. Failure to closely follow the rules may result in, for example, a motion being granted or denied, or an expert being precluded from testifying. To ensure effective client representation, regardless of how similar or different the two procedural rule sets are, attorneys practicing before the state courts must know and follow both the Idaho Rules of Civil Procedure and the appli-

145. DIST. IDAHO LOC. CIV. R. 47.1(b).

146. DIST. IDAHO LOC. CIV. R. 47.1. *See also* FED. R. CIV. P. 48 (explaining that each juror must participate in the verdict “unless excused for good cause”). FED. R. CIV. P. 47(c).

147. FED. R. CIV. P. 48.

148. IDAHO R. CIV. P. 47(i)(1).

149. IDAHO R. CIV. P. 47(i)(2).

150. *Id.*

151. LOC. R. IDAHO 6TH DIST. 13, *available at* <http://www.co.bannock.id.us/localrul.pdf>.

152. DIST. IDAHO LOC. CIV. R. 47.1. As of September 7, 2009, the District of Idaho Local Civil Rules Committee had proposed that the five days in this Local Rule be changed to seven days. DIST. IDAHO LOC. CIV. R. 47.1(a) (proposed Sept. 7, 2009), <http://www.id.uscourts.gov/announcements/2010LOCALRULESRed.pdf>.

153. DIST. IDAHO LOC. CIV. R. 47.1(a).

cable local rules. Those practicing before the federal court must know and follow both the Federal Rules of Civil Procedure and the local rules of the District of Idaho. With rule changes often taking effect each December 1st, the end of every year is a good time to review the procedural rules.