10-2017

# Avoid These Eleven Common Evidentiary Mistakes

John E. Rumel
*University of Idaho College of Law*, jrumel@uidaho.edu

# Avoid These Eleven Common Evidentiary Mistakes

*John Rumel*
*Tim Gresback*

The law provides attorneys with numerous tools not only to prove a case, but to prevent the other side from submitting improper evidence. Unfortunately, all too often, lawyers make misplaced objections or fail to make appropriate objections at trial—because they both misunderstand the rules governing the admissibility of evidence and also have not fully evaluated the objection's strategic consequences. Mastering the fundamentals of effective evidentiary objections opens the door to a more sophisticated and effective litigation strategy. Here are some of the most common misguided evidentiary objections.

> "[O]ne of the most overworked formulas is an objection that the evidence is 'incompetent, irrelevant and immaterial.' Its rhythm and alliteration seduce some lawyers to employ it as a routine ritual."[6]
>
> — *Professor Charles McCormick*

## Objections relating to substantive admissibility

*The General Objection: Irrelevant, immaterial and incompetent:* In the early years of Idaho trial practice, objecting to evidence as irrelevant, immaterial and incompetent was a common and successful practice.[1] Indeed, as of 1930 and as late as 1965, objections on these grounds were sustained by Idaho judges and affirmed by the Idaho Supreme Court.[2] However, by the mid-1930s, the Idaho Supreme Court began to question the sufficiency of a general objection.[3] Likewise, an increasing number of treatises viewed an objection that evidence was irrelevant, immaterial and incompetent as an impermissible general objection, only to be sustained if the evidence was not admissible on any grounds.[4] Thus, by the early 1970s, the Idaho high court held that the mantra was improper when a more specific objection might have been made.[5]

Professor Charles McCormick, an early national authority on the Law of Evidence, decried attorneys' use of the general objection, stating in his hornbook that "[o]ne of the most overworked formulas is an objection that the evidence is 'incompetent, irrelevant and immaterial.' Its rhythm and alliteration seduce some lawyers to employ it as a routine ritual."[6] Similarly, more recent commentators have referred to the general objection as a "hackneyed alliterative phrase."[7]

*Take away:* The alliteration is outdated and should be avoided.

*Objection: Relevance:* Relevance objections are often lodged without an understanding that relevance is very easy to establish. Under I.R.E. 401, relevant evidence need only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[8]

Professor McCormick uses a brick wall metaphor to illustrate how almost all evidence is relevant.[9] A party has broad discretion on how to build its wall of truth, even if the other side hotly disputes the existence of every, some, or a single evidentiary brick offered at trial. As McCormick explains, "A brick is not a wall."[10] That is, a single item of evidence need not prove every element of a cause of action. Some evidence is more compelling than other evidence. A relevance objection is an improper mechanism to inform a court that a lawyer does not find the opponent's proof convincing.

*Take away:* Many relevance objections are misplaced because the admissibility threshold is easily met.[11] Repetitive and reflexive relevance objections bog trials down and undermine a lawyer's credibility. Relevance objections are best made sparingly.

*Objection: Highly Prejudicial:* Sometimes evidence drives a nail through the heart of a claim or defense; its admission is devastating. Our rules do not reject devastating evidence—they invite it. In a desperate attempt to keep the hammer from the nail, many lawyers conflate the purpose of the IRE 403 balancing test and wrongly think that highly prejudicial evidence is somehow objectionable.

Under Rule 403, the first inquiry is whether the proffered evidence is relevant. As already explained, the vast majority of evidence is relevant. Once this easy threshold is crossed, the court then weighs whether the

probative value of the evidence will be "substantially outweighed" by the danger of "unfair prejudice." Close calls favor admissibility: evidence is excluded only if the "unfair prejudice" "substantially" outweighs the probative value. The Rule 403 balancing test, like our rule on relevance, favors admissibility. An unbiased eyewitness who clearly sees a stabbing provides extremely prejudicial testimony. Although highly prejudicial, nothing whatsoever about the evidence is unfair.

By contrast, evidence that the defendant previously stabbed someone else on a prior occasion requires a more nuanced analysis. As already mentioned, the threshold inquiry does not set a high bar. Certainly, the fact that a person acted in a certain way yesterday does not conclusively prove how the person acted today. The "any tendency" standard, however, does not require anything close to conclusive proof. As such, yesterday's conduct is indeed relevant in evaluating today's.

For Rule 403 balancing of a prior incident, it may help not to consider whether the prior incident is irrelevant, but whether it is "too" relevant. In other words, jurors may reason that because the defendant stabbed before, the defendant is a bad person and should be convicted even if the proof of the charged incident is underwhelming.[12] Now, the danger of *unfair* prejudice is high, and the need for 403 balancing is more compelling.

*Take away:* The goal in using the Rule 403 balancing test is not to convince the court that the evidence devastatingly prejudices your case. Its admission must *unfairly* prejudice your client for a compelling policy reason that *substantially* outweighs its probative value. The prejudice must be unfair, and imbalance must be substantial.[13]

*Objection: Lack of Foundation:* Admissible evidence cannot arise from a factual vacuum. For example, before a party can testify in an auto collision case that the traffic light was green at the time of a crash, numerous predicate foundational facts should be established—including that the witness remembers the crash, was at the scene, and saw the traffic light before impact. On direct exam, foundational facts are usually elicited through non-leading journalist questions that start with who, what, where, when, or how.

Our experience is that foundation objections, like relevance objections, are lodged too frequently—and they usually backfire.

Our experience is that foundation objections, like relevance objections, are lodged too frequently—and they usually backfire. The overuse of foundation objections occurs mostly in criminal cases. Defenders time and again help prosecutors prove guilt by demanding more foundation. Prosecutors then shore up their case and add the missing facts. Veteran defenders, by contrast, wait for closing argument to explain the absence of details.

*Take away:* Like relevance objections, just because a foundation objection can be made does not mean that it should be made. Avoid the premature pounce.

*Objection: [Blah Blah Blah]* – The Speaking Objection Jurors are not supposed to hear lawyers argue legal issues meant for the court. Unfortunately, many lawyers ignore the constriction and use an objection as a showboating opportunity in front of the jury. Although a few judges may tolerate such a technique, most will rebuke it. Objections, when lodged, must be succinctly stated without a commentary.[14]

*Take away:* Legal objections to evidence neither present an opportunity to charm jurors nor help a lawyer establish credibility. Bombarded with speaking objections—particularly those that are overruled, a jury may begin to tire and wonder why the wordy objector is slowing down the process. Even worse, the jury may consider the source rather than the content of the objection and not take legitimate objections seriously.

### Objections regarding the form of the question or substance of the answer

*Objection: Leading Question (on Re-direct Examination)* Under the Idaho Rules of Evidence, the law concerning use of leading questions on direct and cross-examination is well established and well understood: "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness," including examining "a hostile witness, an adverse party, or a witness identified with an adverse party ...."[15] In contrast, "[o]rdinarily leading questions should be permitted on cross-examination."[16] But what about on re-direct examination?

Although undecided in Idaho, courts in other jurisdictions have held and commentators have made clear that leading questions are generally inappropriate on redirect examination and are, therefore, ob-

jectionable.[17] Indeed, one court held that the failure to object to leading questions on re-direct examination in a criminal case amounted to "unprofessional errors" constituting ineffective assistance of counsel, although the court ultimately concluded that the error was not prejudicial.[18] However, a number of courts have held that a trial court has discretion to permit leading questions on re-direct examination.[19] Courts typically allow leading questions on re-direct to rebut an implication raised on cross-examination,[20] or under circumstances where leading questions would be permitted on direct examination—e.g., where the witness is a child,[21] is hostile,[22] or has difficulty communicating.[23]

Many defending lawyers fail to object to leading questions on re-direct, most likely because they just finished a series of leading questions on cross-examination and their opponent's continued use of them "sounds" right.

*Take away:* Just because a witness is being questioned on re-direct examination does not mean that opposing counsel is permitted to lead the witness with impunity. Objections can and should be made to leading questions on re-direct examination—unless an exception applies.

*Objection: Nonresponsive:* On occasion, a witness's answer will not fairly meet and address the question posed. For example, when asked what color the traffic light was, the witness might answer: "The defendant was going way too fast."

Under the Idaho Rules of Evidence, a trial judge may "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time ... ,"[24] Thus, where a witness's answer to a question is nonresponsive, i.e. where the answer is not pertinent or competent, an objection on the grounds that the answer was nonresponsive may be properly made.[25] But to whom does the objection belong?

The Idaho Supreme Court has made clear that a "nonresponsive" objection belongs to the party asking the questions, and not to the non-questioning party.[26] Thus, as the Idaho high court recently reiterated:

> The right to have an irresponsive answer of a witness stricken out is a right of the party examining the witness, and not a right of the party adverse to the examiner; if the answer of a witness is competent and pertinent in itself, the adverse party has no right to have it expunged from the record merely because it was irresponsive; in such a case it is optional with the court to strike it out, and a denial of a motion to do so is no ground of error. The party examining the witness is not, however, bound or precluded by an irresponsive answer, and may himself object to its competency, although the person is his own witness. He would seem to have an absolute right to have the irresponsive matter expunged, regardless of its competency.[27]

*Take away:* "Nonresponsive" can be a valid objection, but only for the party examining the witness.

In an almost Pavlovian response, lawyers hear the words "she said" or "he said" and quickly blurt out a hearsay objection. The rules of evidence, however, define a great deal of out-of-court statements as non-hearsay.

### Hearsay-related objections

*Objection: Hearsay:* In an almost Pavlovian response, lawyers hear the words "she said" or "he said" and quickly blurt out a hearsay objection. The rules of evidence, however, define a great deal of out-of-court statements as non-hearsay.

For example, in civil cases, almost everything a party opponent says is defined as non-hearsay under 801(d)(2). In criminal cases, under the same rule, statements of the accused are non-hearsay admissions. Moreover, a prior statement, through earlier testimony, of a non-party witness likewise is defined as non-hearsay.[28]

*Take away:* Many out-of-court statements offered to prove the truth of the matter asserted are defined as non-hearsay.

*Objection:* 'State of Mind'/'Effect on the Listener': When faced with a hearsay objection, the examining party will often attempt to salvage the question by responding "non-hearsay—goes to state of mind" or "effect on the listener," or words to that effect.

Certainly, evidence concerning an out-of-court declarant's state of mind may be relevant and not offered to prove the truth of the matter asserted by the statement.[29] Thus, when a victim-declarant expresses fear about a defendant and the reasons for it, that testimony will be admissible to prove the victim's state of mind, but not to establish the truth of the reasons given.[30] Similarly, under an exception to Idaho's hearsay rule, a declarant's out-of-court statement concerning his or her "then existing state of mind ... (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed" will be admissible for the truth of the matter asserted.[31] And, when a declarant makes an out-of-court statement relevant to an issue in the case—say, motive—the statement may be admissible for "non-truth" purposes to demonstrate the state of mind of the defendant—or in other words, the effect on the listener.[32]

The Idaho Supreme Court has noted, however, that a "state of mind" or "effect on the listener" rejoinder to a hearsay objection is frequently without merit.[33] For example, the Court recently stated that "[i]n limited circumstances inadmissible hearsay might be admissible to show the effect on the listener, but generally the evidence submitted is not relevant. The effect on the listener exception is often used as a ruse to put inadmissible evidence before the jury improperly."[34]

*Take away:* An out-of-court statement may survive a hearsay objection when offered to prove the state of mind of the victim or the statement's effect on the listener, or for the hearsay purpose of proving the declarant's state of mind or future plans. However, most of the time, the state of mind of the victim or defendant or the effect of the statement on the defendant will not be relevant to a material issue in the case.

### Waiver of objections/error

*Objection — The Expert is Not Qualified:* Lawyers are often required to establish a foundation that a witness is qualified to provide an expert opinion under Rule 702. Similarly, a 702 foundation must be laid before the results of scientific tests or opinions are admitted.

When your opponent's expert or scientific evidence lacks foundation, flush out the foundational shortcoming in a motion in limine before trial or you will risk the court finding that your tardiness serves as a waiver of the objection.

One of the greatest shortcomings we have seen in establishing foundations involving experts is that lawyers wait until the middle of trial to object. When the lawyer waits, suddenly—and without warning—a court is forced to make a decision on the admission of critical evidence. Judges need notice and a properly developed factual context to make sound rulings that involve experts and science.

*Take away:* When your opponent's expert or scientific evidence lacks foundation, flush out the foundational shortcoming in a motion in limine before trial or you will risk the court finding that your tardiness serves as a waiver of the objection.

*Failing to Object and Preserve Appellate Rights:* The Idaho Rules of Evidence provide that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context ..."[35]

When a party fails to make a timely objection to the admission of evidence at trial, the party waives the right to raise the issue on appeal.[36] Stated another way, "[o]bjections to evidence cannot be raised for the first time on appeal."[37]

In addition, the Idaho Supreme Court has stated that "[a]n objection to the admission of evidence on one basis does not preserve a separate and different basis for excluding the evidence."[38] Thus, the Court has made clear that "[i]f a person objecting to the admission of evidence states one ground for objection in the trial court, which is overruled, we will not consider on appeal whether a different objection would have been sustained."[39] However, a party need not object to preserve the issue on appeal where the admission of evidence affects a fundamental right.[40]

Appellate reversals on evidentiary grounds are infrequent. The vast majority of evidentiary rulings are reviewed under the deferential abuse of discretion standard.[41] Even if the trial court erred in admitting evidence, the error will only result in reversal if it constitutes prejudicial, i.e. not harmless, error.[42] To help scale this mountain, it is imperative for parties to object to the admission of evidence to preserve possible error on appeal.

*Take away:* Although lawyers overuse objections in many instanc-

es, preserving error for appeal is not one of them.

## Endnotes

1. *See, e.g., Wilson v. Bartlett*, 7 Idaho 271, 62 P. 416, 417 (1900); *State v. Corcoran*, 7 Idaho 220, 61 P. 1034, 1040 (1900).

2. *Flowerdew v. Warner*, 90 Idaho 164, 173, 409 P.2d 110, 115-116 (1965); *State v. Bush*, 50 Idaho 166, 295 P. 432, 435 (1930).

3. *Giraney v. Oregon Short Line R. Co.*, 54 Idaho 535, 539, 33 P.2d 359, 361 (1934) ("[R]espondent ... argues that these objections, 'incompetent, irrelevant and immaterial,' 'hearsay,' 'no proper foundation laid and not binding on the defendant and not rebuttal,' were, when interposed by appellant at another stage of the trial, too general and not sufficiently explicit to be reviewed... .If such contention be sound, then certainly respondent's objections were too general to have been sustained.").

4. *What constitutes general objections?* 88 Corpus Juris Secundum, Sec. 219, Trial (updated in 2016); *General Objections – Objection to incompetent, irrelevant and immaterial evidence,* 75 Am. Jur. 2d, Sec. 333, Trial (2015).

5. *Smith v. Smith*, 95 Idaho 477, 481, 511 P.2d 294, 298 (1973) ("Although the parol testimony of appellant, recalling the contents of the deed, was also secondary evidence, the court admitted the testimony over respondent's objection that it was 'irrelevant, immaterial and incompetent.' Even if the evidence were inadmissible under the best evidence rule, the district court's ruling was proper since the specific objection was not made.").

6. McCormick on Evidence, Sec. 52, 99 (6th Ed. 2006).

7. Christopher B. Mueller & Laird C. Kirkpatrick, Evidence, Sec. 1.3, 9 (5th Ed. 2012).

8. (Emphasis added). The Federal and Idaho Rules of Evidence are referred to interchangeably, as they are essentially identical regarding witness statements. The Federal Rules of Evidence (FRE) were first enacted by Congress in 1975. The Idaho Rules of Evidence (IRE), based substantially on the FRE, were enacted by the Idaho Supreme Court in 1985. The look of the FRE changed in 2011, when the rules were "re-styled." The numerous changes were intended to apply uniform conventions of style and usage throughout the FRE; the revisions were not intended to make any substantive changes to evidence principles. Idaho has not yet made these stylistic changes, although the Idaho Supreme Court's Evidence Rules Advisory Committee has empaneled a subcommittee, chaired by retired Idaho Court of Appeals Judge Karen Lansing, to make recommendations concerning re-styling the IRE.

9. 1 McCormick, Evidence (4th ed.) (1992), § 185, p. 776.

10. *Id.*

11. Just because evidence is relevant, of course, does not mean it is admissible. For example, relevant evidence is often properly excluded because it is confusing, a waste of time or cumulative under IRE 403.

12. IRE 404 (b) also addresses the unfair prejudice issue by prohibiting so-called "propensity evidence," i.e. evidence designed to prove that "on a particular occasion the person acted in accordance with [his or her] character or trait."

13. In the memorable courtroom drama, *A Few Good Men,* an inexperienced trial attorney, played by Demi Moore, doubled down on an objection based on prejudice grounds that had been overruled by the judge by further objecting on the grounds that evidence was "highly prejudicial." After the judge overruled Moore's second objection, Moore was taken to task by one of her co-counsel, played by Kevin Pollack. Pollack was right to do so: objecting on the grounds that evidence is "highly prejudicial," when overruled, can sway the jury by highlighting the fact that damaging evidence has been admitted into the record over the fervent, albeit unsuccessful, objection of the party opposing its admission. This turn of events can also be put to good use during closing argument by the party benefitting from the admission of the evidence.

Objecting on the grounds that evidence is "highly prejudicial," when overruled, can sway the jury by highlighting the fact that damaging evidence has been admitted into the record over the fervent, albeit unsuccessful, objection of the party opposing its admission.

14. Idaho trial judges often expressly prohibit the use of speaking objections, with one judge informing counsel on the first day of trial that "I don't want speaking objections. I want objections." State v. Severson, 147 Idaho 694, 718 n. 31, 215 P.3d 414, 438 n. 31 (2009).

15. IRE 611 (c). A leading questions is a question "which suggests to the witness the answer which the examining party desires." State v. Sandoval, 92 Idaho 853, 860 n.2, 452 P.2d 350, 357 n. 2 (1969); *see also* McCormick *supra* note 6 at 14 (same).

16. *Id.*

17. *State v. Salamon*, 287 Conn. 509, 559, 949 A.2d 1092, 1127 (S.Ct. Conn. 2008); *People v. Culbreath*, 343 Illi. App.998, 798 N.E.2d 1268, 1273 (2003); *Oakes v. Peter Pan Baker, Inc.*, 258 Iowa 447, 453, 138 N.W.2d 93, 97 (S.Ct. Iowa 1965); 98 C.J.S., Sec. 572, Witnesses (updated in 2016); 81 Am. Jr.2d Sec. 682, Witnesses (updated in 2016).

18. The court ultimately concluded that the error was not prejudicial. *Roe v. Belleque*, 232 Fed. Appx. 653, **1 (9th Cir. 2007); *but cf. State v. Watters*, 2014 WL 1067925, **1-2 (Ct.App. Ohio 2004).

19. *Salamon*, 287 Conn. at 559-560, 949 A.2d at 1127; *State v. Gomes*, 764 A.2d 125, 137 (R.I. 2001).

20. *Tanner v. State*, 764 So.2d 385, 405 (Miss. 2000).

21. *In re Sasak*, 2012 WL 516074, *1 (Mich. Ct. App. 2012); *Chappell v. United States*, 519 A.2d 1257, 1258 (D.C. 1987).

22. *State v. Preston*, 673 S.W.2d 1, 5 (Mo. S. Ct. 1984) (en banc); *Xenakis v. Garrett Freight Lines, Inc.*, 1 Utah 2d 299,305, 265 P.2d 1007, 1011 (1954).

23. *Salamon*, 287 Conn. at 559-560, 949 A.2d at 1127; *see also People v. Gillis*, 883 P.2d 554, 560 (Colo. App. 1994) (confusing and unclear testimony on cross-examination).

24. IRE 611 (a).

25. *See State v. Koch*, 157 Idaho 89, 103, 334 P.3d 280, 294 (2014) (where "the answers were competent and pertinent to the questions asked," objection on the grounds of nonresponsiveness was overruled).

26. *Id.* at 102, 334 P.3d at 293.

27. *Id., quoting State ex rel. Rich v. Bair*, 83 Idaho 475, 481-482, 365 P.2d 216, 219 (1961).

28. Provided the statement is inconsistent with the trial testimony of the witness. *See* Rule 401 (d)(1).

29. *State v. Goodrich*, 97 Idaho 472, 546 P.2d 1180 (1976) and *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970), both cited in *State v. Rosencrantz*, 110 Idaho 124, 127-128, 714 P.2d 93, 96-97 (Ct. App. 1986).

30. *Rosencrantz*, 110 Idaho at 127-128, 714 P.2d at 96-97.

31. IRE 803(3), cited in *Vulk v. Haley*, 112 Idaho 855, 857, 736 P.2d 1309, 1311 (1987). For an excellent discussion of the difference between using state of mind evidence for nontruth/nonhearsay and truth/hearsay purposes, *see State v. Abdullah*, 158 Idaho 386, 436-437, 348 P.2d 1, 51-52 (2015), citing 23 C.J.S. Criminal Law, Sec. 1179 (2014); 2 Kenneth S. Broun, McCormick on Evidence, Secs 274-275 (7th ed. 2014); and 29 Am. Jur. 2d Evidence Sec. 677 (2014).

32. *Radabaugh*, 93 Idaho at 731-732, 471 P.2d at 586-587; *Goodrich*, 97 Idaho at 478, 546 P.2d at 1186 ("*Radabaugh* also recognized that evidence of a statement made by a declarant-victim to the defendant may be admissible into evidence for the purpose of demonstrating circumstantially the effect the utterance had upon the defendant as it may bear upon his motive for a crime"); *see also State v. Siegel*, 137 Idaho 538, 541, 50 P.3d 1033, 1035 (Ct. App. 2002), citing McCormick on Evidence § 249 (John W. Strong ed., 5th. Ed.1999) ("A statement that D made to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X....").

33. *State v. Parker*, 157 Idaho 132, 145, 334 P.3d 806, 819 (2014), citing *State v. Field*, 144 Idaho 559, 567, 165 P.3d 273, 281 (2007).

34. *Parker, Id.*

35. IRE 103 (a) (1).

36. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005); *see also Sales v. Peabody*, 157 Idaho 195, 202, 335 P.3d 40, 47 (2014) ("some form of objection is ordinarily necessary to preserve the right to challenge on appeal the admission or consideration of evidence").

37. *Phillips v. Erhart*, 151 Idaho 100,105, 254 P.3d 1, 6 (2011), quoting *Slack v. Kelleher*, 140 Idaho 916, 922, 104 P.3d 958, 964 (2004).

38. *Slack*, 140 Idaho at 922, 104 P.3d at 964, quoting *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003).

39. *U.S. Bank Nat. Ass'n N.D. v. CitiMortgage, Inc.*, 157 Idaho 446, 453, 337 P.3d 605, 612 (2014), quoting *Thomson v. Olsen*, 147 Idaho 99, 105, 205 P.3d 1235, 1241 (2009). As the court explained in *Thomson*:

> On appeal, we review whether the trial court erred. If the objection is made on a specific ground, the trial court is simply asked to decide whether that particular objection is a valid reason for excluding the evidence. If the trial court correctly overrules that objection, it has not erred. If the objecting party made the wrong objection, that is not error by the trial court. When an objection is made, the trial court is only asked to determine the validity of that objection; it is not asked to determine whether there is another objection that would have been sustained had it been made.

*Id.* at 105, 205 P.3d at 1241.

For an excellent discussion of the difference between using state of mind evidence for nontruth/nonhearsay and truth/hearsay purposes, *see State v. Abdullah.*

40. *State v. Walters*, 120 Idaho 46, 48, 813 P.2d 857, 859 (1990); *State v. LePage*, 102 Idaho 387, 390, 630 P.2d 674, 677 (1981).

41. *Parker*, 157 Idaho at 138, 334 P.3d at 812; *Mulford v. Union Pac. R.R.*, 156 Idaho 134, 138, 321 P.3d 684, 688 (2014).

42. *Parker*, 157 Idaho at 139, 334 P.3d at 814; *State v. Moore*, 131 Idaho 814, 821, 965 P.2d 174, 181 (1998). Error will be harmless in a criminal case where the appellate court finds beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence. *State v. Field*, 144 Idaho 559, 572, 165 P.3d 273, 286 (2007).

**John Rumel** *is a professor at the University of Idaho College of Law. John joined the College of Law as a full-time faculty member in Fall 2011. Initially, he primarily taught dispute resolution subjects, including Civil Procedure and Evidence. Since moving to the Boise Campus in Fall 2014, John continues to teach Evidence and will also teach Workplace Law, Education Law, Remedies and Lawyering Process.*

**Tim Gresback,** *is a past ISB president, is a past president of the Idaho Trial Lawyers Association as well as the Idaho Association of Criminal Defense Lawyers. He is certified as a civil trial specialist. He serves on the Idaho Supreme Court Evidence Committee and taught trial advocacy at the University of Idaho College of Law for 10 years.*

*Tim Gresback and John Rumel both serve on the Idaho Supreme Court Evidence Rules Advisory Committee.*