

February 2019

Tailoring the Rules: Finding the Right Fit of Rules of Procedure to Suit Idaho Family Law

Anja R. Rodriguez

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/idaho-law-review>

Recommended Citation

Anja R. Rodriguez, *Tailoring the Rules: Finding the Right Fit of Rules of Procedure to Suit Idaho Family Law*, 52 IDAHO L. REV. 755 (2019).

Available at: <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol52/iss2/10>

This Article is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Law Review by an authorized editor of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

TAILORING THE RULES: FINDING THE RIGHT FIT OF RULES OF PROCEDURE TO SUIT IDAHO FAMILY LAW

TABLE OF CONTENTS

I. INTRODUCTION	756
II. HISTORY OF THE NEW IDAHO RULES OF FAMILY LAW PROCEDURE	757
A. Recurring Family Law Problems in Idaho	758
1. Difficulties in Obtaining a Child’s Wishes and How to Include Children in Court Proceedings.....	759
2. Lack of Disclosure of Basic Financial Information by One or Both Parties	761
3. Pro Se Litigants’ Challenges with Using the Idaho Rules of Civil Procedure and Idaho Rules of Evidence	762
4. Additional Problems in Idaho Family Law	764
B. Creation of the Ada County Family Law Working Group to Address the Problems in Idaho Family Law	765
III. IDAHO’S TAILORING OF THE IDAHO RULES OF CIVIL PROCEDURE TO BETTER FIT FAMILY LAW CASES.....	768
A. Reorganization and Modification of the Idaho Rules of Civil Procedure.....	768
B. Creation of New Rules to Address Problems Specific to Family Law in Idaho.....	770
1. Rules Drafted with Guidance from Similar Rules in Other States.....	771
a. Rule 401—Mandatory Disclosure in Contested Proceedings.....	771
b. Rule 504—Motions for Temporary Orders	777
c. Rule 102—Relaxed Standard of Evidence.....	781
d. Rule 119—Children’s Participation in Court Proceedings.....	784
2. Rule Unique to Idaho.....	786
C. Standardized Forms to Comply with the Idaho Rules of Family Law Procedure.....	786
IV. SUGGESTIONS FOR ADDITIONAL ADJUSTMENTS THAT SHOULD BE MADE TO THE IDAHO RULES OF FAMILY LAW PROCEDURE.....	788
A. Suggested Improvements to the Idaho Rules of Family Law Procedure	789
1. Reorganization and Modification of the Rules to Fit Family Law	790
2. Mandatory Disclosure.....	791
3. Temporary Orders.....	794

B. Suggestions for Consistent Application of the Rules in Idaho	795
1. Additional Trainings	795
2. Additional Evaluations	795
C. Proposed Additions to the Rules	797
V. CONCLUSION	797
APPENDIX A	799
Idaho Rules of Family Law Procedure	799
APPENDIX B	806

I. INTRODUCTION

Family law throughout the United States is continually evolving to better fit the needs of the family, especially children, involved in such sensitive matters.¹ Litigation in family law cases usually involves disputes over deeply personal issues.² The parties to the dispute are typically going through an emotional and difficult time as they try to rebuild their lives and, at the same time, deal with a complicated court system.³ To better fit this evolving and specialized area of law and protect the family, many states have enacted separate court systems and rules of procedure specific to family law cases to better address the problems unique to this area of law.⁴ Because of the sensitive and emotional nature of family law, it is a specialized area of law that diverges significantly from other types of civil cases.⁵ While a contract or property dispute can withstand the adversarial and conflict-driven nature inherent in litigation, this method does not adequately serve the family where they often have to interact with each other on a regular basis outside the courthouse.

Idaho recently followed the national trend toward creating a specialized family law system that protects the family by implementing the Idaho Rules of Family Law Procedure, which reorganizes the Idaho Rules of Civil Procedure in a way that tailors them to family law cases.⁶ The Idaho Rules of Family Law Procedure also include brand new rules to address specific and unique problems that Idaho judges and practitioners experienced in family law cases over the years.⁷ Since implementation of the rules statewide, there has been some confusion and re-

1. See Marlene Eskind Moses, *The Role of Psychology in Family Law Over the Last 50 Years*, 49 TENN. B.J. 30, 30 (2013).

2. Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57, 57 (2010).

3. See *id.*

4. See Russell A. Comstock & David E. Day, *The Idaho Rules of Family Law Procedure: A Pilot Project in the Fourth Judicial District*, 56 ADVOCATE 40, 40 (2013).

5. See generally Barbara Glesner Fines, *Fifty Years of Family Law Practice—The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIM. L. 391, 391 (2012).

6. See Comstock & Day, *supra* note 4, at 40.

7. *Id.*

sistance surrounding the new set of rules of procedure as they pertain to family law cases.

Idaho's adoption of new rules of procedure to suit the evolving needs of the family is a step in the right direction, but there are still adjustments that should be made to more effectively serve the family. Part II of this article describes the origin of the Idaho Rules of Family Law Procedure and the evolution of the rules prior to implementation statewide. Part III explores the final product of the Idaho Rules of Family Law Procedure, including the reorganization and modification of the rules of civil procedure to better apply to family law cases, and also addresses each of the rules new to Idaho. It also describes the evaluations conducted of the rules during a year-long Pilot Project in the Fourth Judicial District of Idaho, as well as current evaluations of the rules in practice statewide. Finally, Part IV discusses the areas that the new rules of procedure have not yet patched, and offers suggestions for how to improve the rules to better fit and protect the family. The purpose of this article is to demonstrate that adopting new rules of procedure to address the needs of Idaho families is a step in the right direction, but there are some important adjustments that should be made to effectively and efficiently serve the needs of the family. Clearly, in the context of family law, dealing with families is different and special steps must be taken to protect the family in our adversarial court system.

II. HISTORY OF THE NEW IDAHO RULES OF FAMILY LAW PROCEDURE

As with all innovations, the Idaho Rules of Family Law Procedure started with an idea. And like most good ideas, the one that led to Idaho's new family law rules happened at a social event: in 2008, two Ada County magistrate judges attended a judicial conference in Sun Valley about the participation of children in court proceedings.⁸ During their conference discussions, Judge Russell A. Comstock and Judge David E. Day realized that the Idaho Rules of Civil Procedure wholly failed to address the important issue that had brought the jurists together.⁹ Seeing the omission as a major flaw in Idaho's family law system, the judges talked about ways to fix it. The chat quickly grew to include other family law problems that the two encountered regularly, which were going similarly unremedied.¹⁰

Having identified a number of recurring issues within Idaho's family law system, Judges Comstock and Day decided to take action. While many good ideas never move past the discussion stage, Judges Com-

8. *Id.*

9. *Id.*

10. *Id.*

stock and Day were determined to find a solution. And they did. As a result of their conversation, the Ada County Family Law Working Group (“Group”) was born.¹¹

The Group, which consisted of both attorneys and magistrate judges, came about to explore and analyze a trend emerging in several states—the creation of a set of procedural rules that apply only to family law cases.¹² Especially curious to determine whether such a system would benefit Idaho,¹³ the Group examined the reoccurring family law problems identified by Judges Comstock and Day; it tried to recalibrate the rules of civil procedure and evidence to address those concerns and worked toward giving Idaho a more efficient method of resolving family law matters.¹⁴

A. Recurring Family Law Problems in Idaho

Just like it is in the rest of the country, family law in Idaho is evolving into a specialized area of law, one full of issues unique to it that, at the time the Group convened, the Idaho Rules of Civil Procedure did not adequately address.¹⁵ Those unique issues affect everything from initial disclosures to evidentiary admissions and everyone from children to pro se litigants. One major gap in the law concerned the extent to which children should participate in cases, including how and when to obtain a child’s wishes related to custody.¹⁶ In addition to those particular children’s issues, the law also suffered from a lack of disclosure of basic financial information by one party or both, case management difficulty caused by the vagaries of notice pleading, particularly in modification cases,¹⁷ and confusion that resulted from trouble locating the relevant rules.¹⁸ This last problem arose because the rules applicable to family law in the Idaho Rules of Civil Procedure were at the time scattered; many rules had been added as subparts to other rules, making them difficult to find and use for people who did not regularly see family law cases.¹⁹

11. *Id.*

12. Comstock & Day, *supra* note 4.

13. *Id.*

14. *Id.*

15. See generally Elizabeth Barker Brandt, The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases, 22 U. ARK. LITTLE ROCK L. REV. 357, 357 (2000).

16. Comstock & Day, *supra* note 4.

17. *Id.* at 40.

18. *Id.*

19. *Id.*

1. Difficulties in Obtaining a Child's Wishes and How to Include Children in Court Proceedings

Prior to adopting the Idaho Rules of Family Law Procedure, obtaining the wishes of a child—and introducing the child's wishes in a court proceeding—was difficult under the Idaho Rules of Civil Procedure. No civil procedure rule addressed how children should participate in court proceedings. Additionally, under the Idaho Rules of Evidence, allowing testimony by someone other than the child, such as a parent or relative, about the child's wishes in a custody case was prohibited by Idaho Rule of Evidence 802, which recognized that hearsay was generally not admissible in Idaho courts.²⁰

The prohibition on hearsay caused particular problems in child custody matters, as young children's wishes are often communicated, if at all, in confidence to those they trust. Small children are less likely to be willing and trustworthy participants in court; instead, they are more prone to tell their true feelings to a known adult contemporaneously. Thus, if those entrusted with the child's words cannot share them with a judge, they often go unheard.

This was an issue because children's participation in court proceedings is important in a system where the final judicial decision affects the child's entire life.²¹ Many commentators have acknowledged that giving a child the opportunity to contribute to decisions about his or her future often contributes to the child's psychological well-being.²² Furthermore, in Idaho the standard for determining child custody is set out in Idaho Code § 32-717, which provides that one of the factors the court must consider when making a determination in child custody cases is the wishes of the child.²³

The question then remained: *how* should a judge consider the wishes of the child in custody determinations? Because § 32-717 asked judges to consider the wishes of the child but contained no guidance regard-

20. Idaho R. Evid. 802.

21. See Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105, 118 (2002).

22. Donald N. Duquette & Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87, 92 (2012).

23. IDAHO CODE § 32-717 (Supp. 2015) provides:

(1) In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children. The court shall consider all relevant factors which may include: (a) The wishes of the child's parent or parents as to his or her custody; (b) The wishes of the child as to his or her custodian; (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings; (d) The child's adjustment to his or her home, school, and community; (e) The character and circumstances of all individuals involved; (f) The need to promote continuity and stability in the life of the child; and (g) Domestic violence as defined in Section 39-6303, Idaho Code, whether or not in the presence of the child.

ing how a judge should obtain those wishes,²⁴ judges retained total discretion over the matter. Thus, it was up to each judge to decide how—or even if—to involve or interview a child. The lack of a uniform approach led to inconsistent procedures among judges about children’s participation in custody proceedings.²⁵ Among those that did allow children to participate, three main ways to involve children emerged. The child could be involved: (1) as a witness at trial; (2) directly through an “in camera interview” by the judge; or (3) indirectly through the parties or third-parties (“hearsay”).²⁶

For those who allowed children to participate, that involvement did not resolve all the problems. At least one pervasive problem remained; when obtaining the wishes of a child in a custody dispute, the child—especially a young child—may be especially vulnerable, lacking the “cognitive and emotional capacity to be fully, or consistently, self-determining,” and as a result, the child’s wishes may not be entirely reliable.²⁷ Finding a balance between those two conflicting problems—getting the wishes of the child past the “hearsay” rule to the judge and the inherent unreliability of some children’s testimony—is difficult. The rules in place prior to the Idaho Rules of Family Law Procedure did not provide any guidance to help judges and attorneys determine the best way to handle that problem.

Additionally, the statute guiding attorney representation of children in Idaho did not provide any guidance for the attorney about how to effectively represent the child.²⁸ Idaho Code § 32-704(4), regarding the representation of a child, provided:

The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his or her support, custody, and visitation, but only in those instances where the court deems legal representation necessary beyond any court ordered and court related services previously authorized for a particular case. . . .²⁹

Under the statute, a judge could appoint an attorney to represent a child, but there were no specific requirements regarding the special qualifications of such an attorney, such as whether the attorney had to have any experience, skill, or training in representing a child.³⁰

Although statutory authority exists for children to have counsel, they usually do not. Thus, children typically must participate in child

24. *Id.*

25. Comstock & Day, *supra* note 4, at 41.

26. *Id.*

27. See Barbara Ann Atwood, The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism, 42 FAM. L.Q. 63, 98–99 (2008).

28. IDAHO CODE § 32-7-4(4) (2006).

29. *Id.*

30. Comstock & Day, *supra* note 4, at 41.

custody proceedings through one of the other methods described above, and do so alone.³¹ Before the Idaho Rules of Family Law Procedure were adopted, a court could order a child to testify about his or her wishes or could conduct an *in camera* interview.³² Often this occurred with little or no advance notice to the parties, which was stressful for the parties and, more importantly, stressful for the child.³³ Adding to that stress was the fact that the methodology was left to the judge's discretion.³⁴ Because each judge chose how to conduct child interviews in his or her chambers, it was difficult to prepare a child to deal with the stressful situation.³⁵ The lack of advance notice and the varying methodology used by different judges made things impossible to predict.³⁶

Since there was a lack of guidance for both judges and attorneys on how to allow children to participate under the old system, there was significant inconsistency around the state. The inconsistency did not effectively serve the needs of the family, and it did not fully satisfy the provision of the statute that judges must consider the wishes of the child in such cases. In addition to the old system being ill-fitting for family law when it came to children's participation in court proceedings, it also failed to protect the child adequately. The child's wishes had to get to the judge somehow, but the way of getting that information to the judge did not always serve the child's best interest and often added additional stress to an already stressful situation.

2. Lack of Disclosure of Basic Financial Information by One or Both Parties

Another recurring issue in Idaho family law cases was the failure of one or both of the parties in a case to provide basic information.³⁷ Before the implementation of the Idaho Rules of Family Law Procedure, there was no system besides the rules of discovery under the Idaho Rules of Civil Procedure for obtaining information relevant to a case.³⁸ The discovery rules in the Idaho Rules of Civil Procedure detailed only the methods of discovery that could be used in a civil case.³⁹ They required that requested information be relevant to the case and placed the burden on the party making the discovery requests to ask for the information necessary.⁴⁰

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.*

37. *Id.* at 40.

38. IDAHO R. CIV. P. 26(a), 26(b)(1); Comstock & Day, *supra* note 4, at 41.

39. IDAHO R. CIV. P. 26(a), 26(b)(1).

40. IDAHO R. CIV. P. 26(a), 26(b)(1); Comstock & Day, *supra* note 4, at 41.

Due to the costs and time required to make discovery requests under the old system, in many cases discovery would not be very thorough or would not be conducted at all.⁴¹ That often led to a lack of information and preparation once the case reached the trial phase.⁴² The fact that parties had such difficulty accessing information important to their case would often lead to surprise and additional, probably unnecessary, conflict.⁴³

In family law matters, there is often basic information, like a party's financial data, that is relevant and important to the case and is discoverable in nearly every type of case.⁴⁴ However, under the old system, relevant information was not being disclosed early on in each case, which meant that the issues could not always be properly identified and resolved without a trial.⁴⁵ Additionally, in cases involving pro se litigants—who were by nature unfamiliar with the rules of discovery—the parties lacked knowledge regarding what information they were entitled to request and how to obtain it.⁴⁶

Before the enactment of the Idaho Rules of Family Law Procedure, the system for obtaining basic information discoverable in nearly every type of family law case was inefficient. Because the exchange of information was not occurring early on in each case, the information would often be discovered shortly before or at trial.⁴⁷ That kind of late discovery slowed down the process, did not facilitate negotiation on some issues that could have possibly been identified and resolved outside of court, and ultimately hurt the parties involved in many cases.⁴⁸

That added injury caused a lot of damage to families. Family law is already a contentious area, as the content of cases is often sensitive and personal. By not identifying and narrowing the issues that could be resolved outside of court, Idaho's lack of early disclosure rules seemed to heap additional conflict onto an already contentious process. As the drafters of the new family law rules eventually realized, the focus should be on reducing conflict as much as possible and taking to trial only the issues that cannot be resolved by the parties beforehand.⁴⁹

3. Pro Se Litigants' Challenges with Using the Idaho Rules of Civil Procedure and Idaho Rules of Evidence

A third recurring issue that plagued Idaho family law cases involved pro se or self-represented litigants.⁵⁰ Those parties, being gener-

41. Comstock & Day, *supra* note 4, at 41.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See id.*

46. *See id.*

47. Comstock & Day, *supra* note 4, at 41.

48. *See id.*

49. *Id.* at 40.

50. *See id.*

ally unfamiliar with court rules, had difficulty understanding the Idaho Rules of Civil Procedure and how they applied in a family law case.⁵¹ The byproduct of their failure to understand how to interpret and use the rules resulted in the court receiving little relevant information from those parties.⁵² Since family law makes up one of the largest categories of civil cases in the Idaho—and more than half of family law cases involve a pro se or self-represented litigant—the court system struggled with the large number of people who did not understand how to apply the Idaho Rules of Civil Procedure.⁵³

It certainly made things more difficult for judges, who were trying to make equitable and just determinations in cases where they did not have all of the issues or relevant information.⁵⁴ While judges are supposed to be impartial decision-makers, when it came to self-represented parties, judges sometimes had to take on the role of attorney to “level the playing field.”⁵⁵ They had to guide the self-represented parties in the unfamiliar court process.⁵⁶ This was a challenge for judges because pro se litigants in a hearing often caused procedural difficulties, delayed proceedings, and posed “ethically compromising dilemmas for the judge that w[ould] be perceived as unfair for either the pro se litigant or the legally represented party.”⁵⁷

Additionally, many attorneys who worked with the Idaho Rules of Civil Procedure on a regular basis and were familiar with the rules applicable to family law cases could potentially take advantage of a self-represented litigant who did not know or understand the applicable rules, such as by withholding information the party did not even know he could request.⁵⁸ Furthermore, pro se litigants tended to strain court resources because judicial proceedings were prolonged when improper or incomplete paperwork was filed.⁵⁹ Those improper filings often resulted in continuances because the court did not have sufficient information to proceed in the case.⁶⁰ By assisting self-represented litigants in the com-

51. *Id.*

52. *Id.* at 42.

53. *Frequently Asked Questions: Idaho Rules of Family Law Procedure*, STATE OF IDAHO JUDICIAL BRANCH, at 1, https://www.isc.idaho.gov/rules/irflp/IRFLP_FAQs_4-14.pdf.

54. *See Comstock & Day*, *supra* note 4, at 42.

55. Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 *FORDHAM L. REV.* 2705, 2706 (2014).

56. *See id.*

57. *Id.* at 2727; *see also* MODEL CODE OF JUDICIAL CONDUCT r. 2.2 cmt. 4 (AM. BAR ASS'N 2011). Canon 2 of the Model Code of Judicial Conduct describes that a judge should be impartial and fair. Rule 2.2, comment 4 further addresses a judge's role with pro se litigants and states: “it is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”

58. *See generally* Comstock & Day, *supra* note 4, at 40.

59. Leslie Feitz, *Pro Se Litigants in Domestic Relations Cases*, 21 *J. AM. ACAD. MATRIM. LAW.* 193, 195 (2008).

60. *Id.*

plicated legal processes, the court would reap “a variety of benefits for the legal system, including saved time in courtrooms, minimized unproductive court appearances, expeditious handling of cases and [the] increased ability of the of the court to [handle] its overflowing caseload.”⁶¹

Under the old system, prior to enacting the Idaho Rules of Family Law Procedure, the system was highly ineffective both in helping judges make a fair determination in the outcome of a case and in getting all of the relevant information to a judge.⁶² This led to a slower-moving court system and the potential for inequality in the process.⁶³ With the family law rules, pro se litigants are in a much better position to litigate, particularly by providing more relevant information to the court.

4. Additional Problems in Idaho Family Law

Prior to the implementation of the Idaho Rules of Family Law Procedure, the rules relating to family law were scattered—and included as sub-parts to unrelated rules—throughout the Idaho Rules of Civil Procedure in a way that was hard to navigate.⁶⁴ The disparate locations of the rules was especially difficult for people who were not using the family law rules on a regular basis, such as pro se litigants and attorneys who take on only the occasional family law case.⁶⁵ Only attorneys who regularly practiced family law knew where the rules were located or what specific subparts of rules related to family law.⁶⁶ For example, “rules in the Idaho Rules of Civil Procedure have been expanded to include subparts that apply to family law rules, such as Rule 16 that is about pre-trial procedure and has been expanded to include alternative trial techniques common in family law like Informal Custody trials.”⁶⁷ The Idaho Rules of Family Law Procedure consists of only five rules new to Idaho, and the rest of the rules (about 90%) are modified from the Idaho Rules of Civil Procedure and reorganized into a new logical and numerical sequence.⁶⁸

Not only were the rules related to family law scattered and added as subparts to other rules of procedure for any other type of civil case, but the Idaho Rules of Civil Procedure apply to all types of civil cases, not just family law.⁶⁹ That meant many of the rules of procedure were not easily applicable in family law cases, like the rules referring to jury

61. *Id.* at 198.

62. *See* Comstock & Day, *supra* note 4, at 40.

63. *Id.* at 41.

64. *Id.* at 41–42.

65. *Id.*

66. *Id.* at 40.

67. *Id.*

68. *See id.* 41–42.

69. *Frequently Asked Questions: Idaho Rules of Family Law Procedure*, STATE OF IDAHO JUDICIAL BRANCH, at 1, https://www.isc.idaho.gov/rules/irflp/IRFLP_FAQs_4-14.pdf.

trials.⁷⁰ The result was confusion about what rules to apply and how the rules would be interpreted by a judge in family law cases.

Finally, the Idaho Rules of Evidence were ineffective at getting all of the relevant information to a judge in a court proceeding. Hearsay evidence arose in nearly every custody trial.⁷¹ However, under the Idaho Rules of Evidence, hearsay evidence was inadmissible.⁷² As mentioned in Part II.A.1, that strict standard made it difficult for the judge to obtain the wishes of the child in custody proceedings without directly involving the child through testimony.⁷³ In custody proceedings, the majority of evidence heard by a judge is through testimony of the parties, children, or third parties; often, to hear all relevant evidence, judges are more liberal in allowing hearsay evidence in those cases.⁷⁴ Additional evidence, such as school reports, medical records, or other documentation—to be admitted in a court proceeding under a strict reading of the Rule of Evidence—would require laying the proper foundation.⁷⁵ That would require a professional, such as a doctor or a counselor, to testify at trial as to the legitimacy of the document before it would be admitted, even though that would add significant burden and cost to the parties, be difficult to accomplish, and was overall unnecessary for indisputably valid documents.⁷⁶

These recurring problems in Idaho family law showed that the system in place under the Idaho Rules of Civil Procedure and Idaho Rules of Evidence was ill-fitting for family law, in large part because those rules were unorganized and difficult to navigate. Many problems in family law were not directly addressed under either of these sets of rules. Additionally, pro se litigants, who represent an increasingly large percentage of parties in family law cases, were unable to effectively use the complicated rules previously in place. The family law rules were intended to address this ineffective system that made it difficult for magistrate judges to make equitable decisions in some cases without being forced to bend the rules.

B. Creation of the Ada County Family Law Working Group to Address the Problems in Idaho Family Law

To address the recurring problems in the area of family law, Judge Comstock and Judge Day created the Ada County Family Law Working

70. *Id.*

71. Comstock & Day, *supra* note 4, at 41.

72. IDAHO R. EVID. 802.

73. *See supra* Part II. A.

74. *See* Linda D. Elrod, *Hearsay and Custody: The Twice Told Story*, 21 FAM. L.Q. 169, 171.

75. *Id.*; IDAHO R. EVID. 802.

76. Elrod, *supra* note 74.

Group (“Group”) in 2008.⁷⁷ The Group consisted of six members, two magistrate judges and four practitioners.⁷⁸ The members included magistrate judges and a cross-section of attorneys from large firms, small firms, and solo practices, in an attempt to receive input from a variety of viewpoints.⁷⁹

The purpose of the Group was to “explore the efficacy of having a self-contained set of rules to complement the specialty into which family law cases have evolved.”⁸⁰ The members of the Group researched and analyzed examples of specialized family law rules of procedure from states all over the country, including Florida, Arizona, Minnesota, West Virginia, and Delaware.⁸¹ These states all had specialized family law rules; some were stand-alone sets of rules, and others were collections of rules designed to supplement the state’s rules of civil procedure.⁸² Therefore, the first decision the Group had to make was which model Idaho should follow.⁸³

The Group decided to follow Arizona’s example and draft a stand-alone set of rules consisting of all of the rules of procedure that relate to family law cases.⁸⁴ Arizona chose to implement a stand-alone set of rules to better address the adversarial nature of family law.⁸⁵ Arizona wanted to create a better, less conflict-driven system that would be less destructive for families.⁸⁶

Arizona took that approach because family law cases are a unique type of civil case; they do not usually end with the final determination of

77. Comstock and Day, *supra* note 4, at 40.

78. Comstock and Day, *supra* note 4, at 41. The two magistrate judges were Judge Comstock and Judge Day. *Id.* The four practitioners were Stanley W. Welsh, James Bevis, Joanne Kibodeaux, and Matthew Gustavel. *Id.* Joanne Kibodeaux is now a magistrate judge in Ada County. Fourth Judicial District Court, *Judges*, http://fourthjudicialcourt.idaho.gov/judges/kibodeaux_joanne.html (last visited Mar. 24, 2016).

79. Comstock and Day, *supra* note 4, at 40.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Mark W. Armstrong, *The New Arizona Rules of Family Law Procedure*, ARIZ. ATTORNEY 30, 31 (2006) [hereinafter Armstrong]. Other states, such as West Virginia, Delaware, and Florida, have an entirely separate judicial system for family law cases, with their own sets of rules of procedure. West Virginia Judiciary, *Rules of Practice and Procedure for Family Court* (Nov. 27, 2001), <http://www.courtswwv.gov/legal-community/court-rules/Family-Court/contents.html>; Delaware State Courts, *Family Court Home*, <http://courts.delaware.gov/family/index.stm>; Florida Supreme Court, *Family Law Rules of Procedure*, [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/416879C4A88CBF0485256B29004BF8F8/\\$FILE/Family.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/416879C4A88CBF0485256B29004BF8F8/$FILE/Family.pdf?OpenElement). Another method, adopted by Minnesota, uses the state’s rules of civil procedure and evidence with some additional supplemental rules that apply only in family law cases. Minnesota Supreme Court Commissioner’s Office, *Minnesota General Rules of Practice for the District Courts: Title IV Rules of Family Court Procedure*, https://www.revisor.mn.gov/court_rules/rule.php?name=gp-toh.

86. Armstrong, *supra* note 85 at 31.

a judge on any particular component of the proceeding. Instead, they often have additional issues to resolve over time, such as the division of assets or child-related matters. As a result, the court remains active in the parties' lives for longer than it would in a different kind of civil case, and maintaining a good relationship among all involved is critical.⁸⁷

Once the Group decided to create a stand-alone set of rules of procedure for family law, it next drafted five new rules designed to address the recurring problems in family law that were not addressed by any rule in the Idaho Rules of Civil Procedure.⁸⁸ The Group divided up the sections for drafting the new rules, and then met quarterly to discuss the language of the rules.⁸⁹ It also reorganized and modified the Idaho Rules of Civil Procedure related to family law to consolidate the rules into one location, the Idaho Rules of Family Law Procedure. They included all of the new rules and all of the rules from the Idaho Rules of Civil Procedure that were applicable in family law.⁹⁰

In November 2012, after the Group finished the Idaho Rules of Family Law Procedure, the Idaho Supreme Court approved the Rules as a Pilot Project in the Fourth Judicial District, effective January 1, 2013.⁹¹ The Planning and Research Department of the Administrative Office of the Courts conducted surveys of judges, practitioners, and court assistance officers during 2013.⁹² The purpose of the evaluation was "to collect and analyze feedback from stakeholders regarding the pilot utilization of the IRFLP in order to identify both potential advantages and concerns prior to implementation statewide."⁹³ Once the Planning and Research Department obtained quarterly survey results, they presented an analysis of the results—and the Department's findings regarding the Idaho Rules of Family Law Procedure—to the Idaho Supreme Court.⁹⁴ The Idaho Supreme Court mandated that the Idaho Rules of Family Law Procedure be implemented statewide by July 1, 2015.⁹⁵ All of the Idaho judicial districts implemented the rules as of March 2015.⁹⁶ Since

87. *Id.*

88. Comstock & Day, *supra* note 4, at 40.

89. *Id.*

90. *Id.*

91. *Id.* (the Fourth Judicial District includes Ada, Elmore, Boise, and Valley Counties).

92. Planning and Research Department Administrative Office of the Courts, Evaluation Report: Pilot Idaho Rules of Family Law Procedure (irflp) Project 1, 3 (2014) [hereinafter Pilot Idaho Rules].

93. *Id.* at 1.

94. *Id.*

95. In re: Implementation of Idaho Rules of Family Law Procedure in Fourth Judicial District, Admin. Order, No. 14-06-13-1, (2014), http://www.isc.idaho.gov/rules/irflp/District_4_IRFLP_Order.pdf.

96. The last District to implement the Idaho Rules of Family Law Procedure was the 3rd Judicial District. The 3rd District implemented the rules to be effective after September 1, 2014. In re: Implementation of Idaho Rules of Family Law Procedure in the Third

implementation, several of the rules have been amended, effective as of July 1, 2015.⁹⁷

III. IDAHO'S TAILORING OF THE IDAHO RULES OF CIVIL PROCEDURE TO BETTER FIT FAMILY LAW CASES

Before the Idaho Rules of Family Law Procedure were created, the only way to describe the rules relevant to family law in Idaho was *scattered, unorganized, and ill-fitting*.⁹⁸ The rules related to family law were spread throughout the Idaho Rules of Civil Procedure, and furthermore because the rules applied to all civil cases they did not adequately address common family law problems.⁹⁹ This system was ineffective to fit the evolving and specialized needs of family law, an area of law that demands making a contentious litigation process as easy as possible to better facilitate litigations for the family. For this reason, the Group desired to reorganize the Idaho Rules of Civil Procedure in a way that flows naturally the way a family law case flows to make the rules more user-friendly for everyone.¹⁰⁰ However, merely reorganizing the existing rules of procedure was not sufficient to address all of the problems facing attorneys and judges. Therefore, to fill the holes left by the Idaho Rules of Civil Procedure, the Group drafted five rules new to Idaho with the intention of better serving the unique needs of the family.¹⁰¹

A. Reorganization and Modification of the Idaho Rules of Civil Procedure

By stripping down the Idaho Rules of Civil Procedure and redesigning them, the rules were better suited for family law. One of the goals of the Idaho Rules of Family Law Procedure detailed in the Pilot Project was to organize the family law rules in a way that increases attorney efficiency and ease of use.¹⁰² A second goal detailed in the Pilot Project was “to modify existing rules or develop new rules that improve attorney effectiveness, improve time management and timeliness, improve protection of the rights of individuals, and ultimately improve the quality of decisions made by the court.”¹⁰³

In the Pilot Project, a survey was conducted by the Planning and Research Department of the Administrative Office of the Courts of attorneys, judges, and court-assistance officers. The results showed that

Judicial District, Admin. Order, No. 2014-7, (2014), http://www.isc.idaho.gov/rules/irflp/District_3_IRFLP_Order.pdf.

97. Order Amending Rules, (2015), http://www.isc.idaho.gov/orders/IRFLP_Order_April_7.15.pdf.

98. See Comstock & Day, *supra* note 4.

99. See *id.*

100. See *id.*

101. *Id.*

102. *Id.*

103. *Id.*

attorneys who practiced family law regularly were strongly in favor of the new organization of the rules, while attorneys who did not practice family law for the majority of their practice struggled with it.¹⁰⁴ Common problems with the rules among attorneys surveyed was that there was a “time loss” in double checking the rules and comparing the Idaho Rules of Family Law Procedure with the Idaho Rules of Civil Procedure, and of more concern was the language modifications in certain rules from the Idaho Rules of Civil Procedure to the Idaho Rules of Family Law Procedure.¹⁰⁵

Judges also had a mixed reaction to the reorganization of the Idaho Rules of Family Law Procedure during the pilot project evaluation.¹⁰⁶ Some judges responded positively to having one concise set of rules applicable in family law case.¹⁰⁷ Others, however, had concerns about juggling between the Idaho Rules of Civil Procedure for some cases and the Idaho Rules of Family Law Procedure for other cases.¹⁰⁸ One judge was quoted: “I just don’t know why we need another brand new set of 180 pages of rules when 80% of them are already written down in the first set of rules.”¹⁰⁹ Another judge commented, “take the family law rules that we need . . . and put those in a separate section in the rules and say ‘all civil rules apply to these unless they’re inconsistent . . .’”¹¹⁰

Based on the survey responses received, the Planning and Research Department recommended that continued efforts be made to simplify the organization of the Idaho Rules of Family Law Procedure.¹¹¹ Specifically, the Planning and Research Department recommended that the language of some of the rules both within the Idaho Rules of Family Law Procedure and between the Idaho Rules of Civil Procedure be modified for consistency.¹¹² Additionally, the Department recommended that an index be created, that the new or modified rules be notated within the Idaho Rules of Family Law Procedure, that there also be a notation of the counterpart in the Idaho Rules of Civil Procedure, and that there be annotations in the Idaho Rules of Civil Procedure to their counterpart in the Idaho Rules of Family Law Procedure.¹¹³ In response to these recommendations, prior to implementing the Idaho Rules of Family Law Procedure statewide, a cross reference table was created that shows the

104. See Comstock & Day, *supra* note 4, at 11.

105. *Id.*

106. *Id.*

107. *Id.*

108. PILOT IDAHO RULES, *supra* note 92, at 12.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Idaho Rules of Civil Procedure and the corresponding rule in the Idaho Rules of Family Law Procedure.¹¹⁴

The Group organized the Idaho Rules of Family Law Procedure so that the rules flow logically the way that a family law case would proceed.¹¹⁵ The purpose of organizing the rules this way was to meet the overall goals of increasing ease of use, attorney efficiency, and time management.¹¹⁶ As Judges Comstock and Day explained:

(a) They [the rules] are easier to use and logically follow the progression of civil litigation. Pleadings are in the 200 series; Judgments are in the 800's. No longer are discovery rules spilling over the mid-twenties into the thirties; rather, all discovery rules are contained in the 400 series; (b) Each numbered rule covers only one specific topic; and (c) There is considerable room to expand and/or modify the rules within each category while keeping the integrity of the overall organization of the rules.¹¹⁷

In a recent survey,¹¹⁸ I asked attorneys statewide whether “The reorganization of the Idaho Rules of Civil Procedure related to family law have made the rules easier to use in family law cases because the rules flow logically the way a family law case proceeds.” Of fifteen (15) family law attorney respondents, 13.33% strongly agreed, 33.33% agreed, 20% were neutral, and 26.67% disagreed with this statement. One attorney commented that “they are handy to have in one place.” These results are fairly consistent with the results of the Pilot Project.¹¹⁹ Based on these results, it appears that overall, the majority of attorneys are in favor of having all of the family law rules organized into one place, and although it may be a bit time consuming to acclimate to the new organization, reorganization of the rules is beneficial overall for family law practitioners.

B. Creation of New Rules to Address Problems Specific to Family Law in Idaho

In addition to reorganizing and modifying the Idaho Rules of Civil Procedure so that they can be easily and effectively applied in family law cases, the Group specially drafted and implemented five rules that are brand new to Idaho family law as part of the Idaho Rules of Family

114. Cross-Reference Tables, STATE OF IDAHO JUDICIAL BRANCH: IDAHO RULES OF FAMILY LAW PROCEDURE, http://www.isc.idaho.gov/rules/irflp/Cross_Reference_Tables_July2015.pdf (last visited Feb. 16, 2015).

115. Comstock & Day, *supra*, note 4, at 42.

116. PILOT IDAHO RULES, *supra* note 92, at 3.

117. Comstock & Day, *supra* note 4, at 42.

118. I conducted a survey in February 2015 of family law practitioners in Idaho through SurveyMonkey. See Results *infra* Appendix B.

119. See Results *infra* Appendix B.

Law Procedure.¹²⁰ The purpose of drafting and implementing new rules specific to family law was to address the problems and fill the gaps left by the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence.

¹²¹ Four of the rules were modeled after similar rules enacted by other states, and one of the rules is unique to Idaho.

1. Rules Drafted with Guidance from Similar Rules in Other States

There are four rules brand new to family law in Idaho that were modeled after similar rules in other states. The new rules are Mandatory Disclosure in Contested Proceedings, Motions for Temporary Orders, Relaxed Standard of Evidence, and Children's Participation in Court Proceedings.¹²²

a. Rule 401—Mandatory Disclosure in Contested Proceedings

The new rule requiring mandatory disclosure of certain information by each party within the first thirty-five days of a responsive pleading is one of the most controversial of the newly implemented rules.¹²³ The rule provides (in part):

The requirements of this rule are minimum disclosure requirements for every family law case. Unless otherwise provided for in this rule or agreed to in writing by the parties or ordered by the court, within thirty-five (35) days after the filing of a responsive pleading, each party shall disclose in writing, signed under oath, to every other party the information set forth in this rule.

¹²⁴

As discussed in detail in Part II. A., *supra*, one of the recurring problems in Idaho family law cases prior to the Idaho Rules of Family Law Procedure was that basic financial information was not being disclosed by the parties early enough in the cases.¹²⁵ Under the prior system, information could only be exchanged by the parties by filing discovery. However, in many family law cases discovery was not filed because of a lack of money, lack of knowledge, or lack of motivation and/or laziness.¹²⁶ This resulted in attorneys' lack of preparation and lack of information at trial, as well as prolonging settlement discussions for many

120. Comstock & Day, *supra* note 4, at 40.

121. *Id.*

122. Idaho R. Family L. P. 401.

123. For the reader's convenience, the entire text of Rule 401-Mandatory Disclosure in Contested Proceedings is included in Appendix A.

124. Idaho R. Family L. P. 401.

125. Comstock & Day, *supra* note 4, at 40.

126. Comstock & Day, *supra* note 4, at 41.

cases and slowing down the court process.¹²⁷ For this reason, the Group created a rule that would require certain information that is common to all types of family law cases to be exchanged by the parties early in the process. This is supposed to facilitate the progression of cases and settlement discussions, and hopefully avoid trial in more cases.¹²⁸

The goal the new Mandatory Disclosure rule was intended to achieve for attorneys in Idaho was to “improve attorney effectiveness, improve time management and timelines, improve protection of the rights of individuals, and ultimately improve the quality of decisions made by the courts.”¹²⁹ For self-represented litigants, the goal of this rule was to provide a “means to collect and exchange necessary information in a timely manner.”¹³⁰ The desired advantages of this rule is: (a) Relevant information is disclosed early; (b) Early disclosure means early identification of issues and earlier preparation; (c) Better preparation means timely resolution of cases; and (d) Better preparation and timely resolution of cases means costs savings to the parties and the court system.¹³¹

The mandatory disclosure rule is intended to decrease the overall cost of preparing discovery for information that is common in family law cases.¹³² It is also intended to motivate the parties to exchange information early in the process so that cases are ready for mediation or settlement discussions earlier.¹³³ At trial this is supposed to result in increasing the “likelihood that the parties will present more relevant information than they otherwise might, which should lead to better decision making.”¹³⁴ The Mandatory Disclosure rule is not intended to duplicate discovery, but to “simplify, standardize and expedite an exchange of information.”¹³⁵ In fact, additional discovery for information not required by the mandatory disclosure rule should be prepared separately.¹³⁶

i. Mandatory Disclosure Rules in Arizona and Florida

While the rule requiring mandatory disclosure of certain information common to family law cases is new to Idaho, Arizona, and Florida previously implemented similar rules. The Idaho Mandatory Disclosure rule followed these similar models.

127. *Id.* at 41.

128. IDAHO R. CIV. P. 26(a), 26(b)(1).

129. PILOT IDAHO RULES, *supra* note 92, at 3.

130. *Id.*

131. Comstock & Day, *supra* note 4, at 41.

132. *Id.*

133. *Id.*

134. *See supra* note 53.

135. *Id.* at 4.

136. *Id.*

A. Arizona

Mandatory Disclosure is a new rule to Idaho, however, this rule was modeled after a mandatory disclosure rule implemented by the Arizona courts in 2006.¹³⁷ The purpose of this rule is to “resolve and narrow issues early in the case and avoid protracted discovery and litigation when such procedures are not necessary.”¹³⁸ The Arizona rule for minimum mandatory disclosure provides:

The requirements of this rule are minimum disclosure requirements for every family law case. Unless otherwise provided for in this rule or agreed to by the parties, within forty (40) days after the filing of a response to an initial petition, each party shall disclose in writing to every other party the information set forth in this rule. (Subsections (A)-(I) omitted, detailing the specific information required to disclose (A) Resolution statement; (B) Child Support; (C) Spousal Maintenance and Attorneys’ Fees and Costs; (D) Property; (E) Debts; (F) Disclosure of Witnesses; (G) Disclosure of Expert Witnesses; (H) Continuing Duty to Disclose; (I) Additional Discovery.¹³⁹

Also, the following rule, Rule 50, details what is required when the parties believe that the case is more complex and that more detailed disclosure is necessary:

Not later than twenty (20) days after filing of a responsive pleading, if a party believes more detailed disclosure is necessary than that set forth in Rule 49, that party shall file a notice with the court that disclosure pursuant to Rule 26.1, Arizona Rules of Civil Procedure, shall be required. If this rule is timely invoked, disclosure shall be made within forty (40) days after the filing of the notice.¹⁴⁰

Interestingly, the Arizona mandatory disclosure rule differs from Idaho’s because it requires that each party to a family law dispute complete a standard *Resolution Statement* “setting forth any agreements and a specific, detailed position the party proposes to resolve all issues in the case, without argument in support of the position.”¹⁴¹ The Resolution Statement must comply with Rule 97 and Forms 4 and 5, which requires information such as each party’s ideal child custody issues and

137. Norman J. Davis, *A Reference Guide to the New Family Court Rules*, ARIZONA ATTORNEY 42, 42 (2006), https://www.myazbar.org/AZAttorney/PDF_Articles/0206family.pdf.

138. *Id.* at 46.

139. Arizona R. Family L. P. 49.

140. Arizona R. Family L. P. 50.

141. *Id.* at 55; *See also* Davis, *supra* note 137, at 46.

schedule, child support, spousal maintenance, division of property and debts, other issues, etc.¹⁴²

B. Florida

Florida also adopted a rule for mandatory disclosure of information in all family law cases.¹⁴³ The purpose of the rule was to (hopefully) minimize the expense of litigation.¹⁴⁴ The Florida rule initially required a more limited disclosure of certain information for incomes under \$50,000, and more extensive disclosure for incomes over \$50,000.¹⁴⁵ However, in a 1997 amendment to the rule, the court changed the rule to require the same amount of information from the parties regardless of income.¹⁴⁶ The Florida mandatory disclosure rule requires:

. . . [E]ach party in a dissolution of marriage case to provide the other party with certain financial information and documents. These documents must be served on the other part within 45 days of service of the petition for dissolution of marriage or supplemental petition for modification on the respondent. . . .¹⁴⁷

The rule also has a build-in exemption that exempts parties from disclosing certain information under the rule when “they are seeking a simplified dissolution of marriage. . . they have no minor children, have no support issues, and have filed a written settlement agreement disposing of all financial issues, or if the court lacks jurisdiction to determine any financial issues.”¹⁴⁸ Additionally, the type and amount of information the parties must disclose may be modified by agreement of the parties or court order.¹⁴⁹ The only requirement that cannot be waived by the parties is the requirement of disclosure of information and completion of the Child Support Guidelines Worksheet.¹⁵⁰ Once a party has completed the mandatory disclosure under the Florida law, the party must file a Certificate of Compliance with Mandatory Disclosure with the court.¹⁵¹

142. ARIZONA R. FAMILY L. P. at 137, 150–57, http://www.supreme.state.az.us/rules/ramd_pdf/r-05-0008.pdf.

143. FLORIDA R. FAMILY L. P. at 65–71, [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/416879C4A88CBF0485256B29004BFAF8/\\$FILE/Family.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/416879C4A88CBF0485256B29004BFAF8/$FILE/Family.pdf?OpenElement).

144. *Id.*

145. Michael L. Hastings & George S. Reynolds, *The New Family Law Rules: What You Must Know*, 70 FLA. BAR J. 14, 16 (1996).

146. FLORIDA R. FAMILY L. P., *supra* note 143, at 71.

147. Instructions for Florida Family Law Rules of Procedure Form 12.932, Certificate of Compliance with Mandatory Disclosure at 1 (2012), <http://www.flcourts.org/core/fileparse.php/293/urlt/932.pdf>.

148. FLORIDA R. FAMILY L. P., *supra* note 143, at 66.

149. *Id.* at 71 (Commentary).

150. *Id.* at 70.

151. Certificate of Compliance with Mandatory Disclosure, *supra* note 147.

ii. Mandatory Disclosure's Effect on Idaho Family Law

The newly implemented requirement of disclosing information within thirty-five days of a responsive pleading has been one of the biggest changes for family law practitioners in Idaho, and has been received with mixed reviews. The Pilot Project survey asked attorneys whether they perceived that the rules “resulted in an earlier exchange of information, improved effectiveness in representation, shortened amount of time needed to ready case for settlement, or saved time.”¹⁵²

The survey feedback from attorneys showed that many attorneys did not agree that this rule saved time and improved effectiveness in representation.¹⁵³ The majority of problems that attorneys encountered with the mandatory disclosure rule is that it was difficult to enforce,¹⁵⁴ duplicative of discovery (which made it wasteful of time), increased client costs, the thirty-five day requirement was too short (and unnecessary when the case will be settled within a short time frame), and attorneys generally preferred to draft their own discovery.¹⁵⁵ Additionally, 86% of attorneys found that the mandatory disclosure was insufficient and they had to do additional discovery specific to each case.¹⁵⁶ One attorney commented “[i]t tends to result in duplicate discovery expense, in that the original mandatory submissions are usually out of date by the time settlements are being negotiated.”¹⁵⁷ Another attorney suggested that “mandatory disclosure should only apply to cases in which both parties are proceeding pro se.”¹⁵⁸

When it comes to self-represented litigants, however, attorneys, judges, and court assistance offices agreed that mandatory disclosure is beneficial because they are providing more information to opposing parties and are not having to proceed through an unfamiliar and complicated discovery system.¹⁵⁹ Self-represented litigants also benefitted because they were able to obtain information from the other party that they would probably not have been able to get otherwise.¹⁶⁰

In a recent survey, Idaho practitioners gave mixed results on whether the rule results in information being exchanged earlier in the process.¹⁶¹ The survey results showed 6.67% strongly agreed, 46.67%

152. PILOT IDAHO RULES, *supra* note 92, at 17.

153. *Id.*

154. “Rule 443 has been amended to allow parties to file a Motion to Compel to enforce compliance with the mandatory disclosure requirements.” *Id.* at 18.

155. *Id.*

156. *Id.* at 19.

157. *Id.*

158. PILOT IDAHO RULES, *supra* note 92, at 19.

159. *Id.* at 19–20.

160. *Id.*

161. *See infra* app. B.

agreed, 13.33% felt neutral, and 33.33% disagreed.¹⁶² One attorney commented, “Most attorneys are not complying with this rule yet, but this will likely change as the rules become more familiar.”¹⁶³ Another attorney commented: “But most of the time this mandatory disclosure does not give me all of the information I really need. People are very creative at ‘hiding’ income. You need bank statements, financial statements, etc. to really determine a person’s income.”¹⁶⁴ Another said: “The mandatory disclosure timeline often requires more cost up front when a case might be resolving, so it is my experience that attorneys will mutually agree to delay formally disclosing the mandatory disclosures in the interests of reaching a settlement and keeping costs down.”¹⁶⁵ Other attorneys commented that the old discovery style was more productive, the new style only sometimes leads to an earlier exchanged of information, and participants do not always comply with timeliness.¹⁶⁶ Additionally, one attorney suggested that this rule be tied to filing a “Notice of Appearance” because many attorneys are getting around triggering the thirty-five day timeline by filing a Notice of Appearance, which is not considered a Responsive Pleading, and therefore prolonging mandatory disclosure.¹⁶⁷

When asked whether the mandatory disclosure process has made the discovery process more cost efficient and time saving, 6.67% strongly agreed, 20% agreed, 6.67% felt neutral, 60% disagreed, and 6.67% strongly disagreed with this statement.¹⁶⁸ One attorney commented: “In addition to the mandatory disclosures, each case will have its own set of specific documents and/or interrogatories.”¹⁶⁹ Regarding the thirty-five day timeline, the majority of attorneys (57%) felt this was sufficient, while 14% did not agree.¹⁷⁰ One attorney commented: “This is true where attorneys are up front with clients as to what needs to be collected. Self-represented litigants still have no clue as to this. Perhaps an

162. *See infra* app. B.

163. *See infra* app. B.

164. *See infra* app. B.

165. *See infra* app. B.

166. Another attorney concern was that Mandatory Disclosure is required in every case under the rule. However, the result in many family law cases is that the parties are required to disclose a large amount of information, i.e. 5 years of taxes and list all property, when these are not contested issues in the case. Mandatory disclosure is also a burden that increases client costs when the rules require a party to disclose this information, even though the party might not have a lot of assets.

167. In response to some of the problems with the rules as originally drafted, the Idaho Supreme Court has amended several of the rules, effective as of July 1, 2015. One of the amended rules pertains to Rule 443: Sanctions for Violation of Mandatory Disclosure and Orders-Motion for Order Compelling Discovery. This provides that when a party violates the Mandatory Disclosure Rule, there is a “mechanism to bypass the motion to compel for mandatory disclosure by allowing a direct motion for sanctions. The rule was also amended to clarify that motions to compel apply to additional discovery.” Catherine Derden, *Highlights of Rule Amendments Effective*, THE ADVOCATE, July 1, 2015, at 54.

168. *See infra* app. B.

169. *See infra* app. B.

170. *See infra* app. B.

automatic order in family law cases would assist with raising awareness.”¹⁷¹ Another attorney commented that adding sanctions for failure to comply would be helpful.¹⁷²

Regarding the thirty-five day timeline of Mandatory Disclosure, some attorneys felt that this time line should be shorter, fifteen to twenty days, while other attorneys felt the timeline should be extended to see if the parties can informally disclose the information and resolve the case. When asked whether the thirty-five day timeline (after filing a responsive pleading) was sufficient for supplying Mandatory Disclosure, 6.67% strongly agreed, 53.33% agreed, 26.67% were neutral, 13.33% disagreed, and 0% strongly disagreed. One attorney commented: “I think the timeline is too short and creates a lot of unnecessary work for the parties in cases that aren’t overly contested. I also think the disclosure rules need to be tailored to the divorce vs. custody as different information is needed depending on the case.”¹⁷³

b. Rule 504—Motions for Temporary Orders

A common and prevalent problem in Idaho is that the court docket is full and slow-moving, which disserves the emergency situations that often come up in family law cases which need to get to a judge as soon as possible, such as child custody determinations during a pending marriage dissolution.¹⁷⁴ Another rule newly implemented in Idaho to address this pressing issue is Rule 504 regarding Motions for Temporary Orders. This rule was adopted from a local rule in the Fourth Judicial District¹⁷⁵ and was designed to make the process for Motions for Tempo-

171. See *infra* app. B

172. See *infra* app. B.

173. See *infra* app. B.

174. An example of one problem Idaho attorneys may face during pending divorces is when one parent is worried that the contentiousness in the case will lead the other parent to not return the child. This fear can (and does) result in the parent refusing to allow the child to visit the other parent until the court orders a final visitation schedule. To prevent problems like this, it is essential that these Motions for Temporary Orders, which make temporary determinations such as child visitations schedules until a Final Judgment can be issued by the court, be heard quickly.

175. Fourth Judicial District Local Rule 8.5. provides: Motions for Temporary Orders in Family Court – Mandatory Disclosure. 8.5.a. Scope. This rule is limited in application to the following cases filed in the Fourth Judicial District: divorce (including claims for spousal maintenance and attorney’s fees), paternity, child custody, child support, and modification of child custody and child support orders. 8.5.b. Form of Motion. A party seeking temporary orders pursuant to Idaho Code Sections 32-704 and 32-717 shall file a separate verified motion with the court setting forth the legal and jurisdictional basis for the motion and the specific relief requested. The motion shall include the following information and documents where relevant: 8.5.b.1. Custody and Parenting Time. If a party seeks an order for temporary custody, parenting time, or visitation, the motion shall set forth a proposed parenting plan specifically stating the custody, parenting time, and visitation requested for all parties to the action. If not contained in a separate affidavit or pleading previously filed in the case, the

rary orders more time efficient to more effectively serve the immediate needs of the family.¹⁷⁶ The new rule provides in part:

A party seeking temporary orders pursuant to Idaho Code Sections 32-704 and 32-717 shall file a separate verified motion, or a motion and affidavit, with the court setting forth the legal and jurisdictional bases for the motion and the specific relief requested . . . Motions for temporary orders shall be heard and decided exclusively on the motion and affidavits unless, at the hearing on the motion for temporary orders, the court determines that the parties should be allowed to present evidence. In such case, the court shall schedule an evidentiary hearing within a reasonable time. . . .¹⁷⁷

Before this rule was implemented in Idaho, the process for temporary orders was that a judge would conduct hearings that were supposed to be short, but often the parties would present testimony and sometimes testimony of witnesses.¹⁷⁸ This resulted in lengthy and expensive “mini-trials” of the issues, which was difficult since the “mini-trials” typically occurred before discovery, so the court was often unfamiliar with the issues in the case. “In essence, the parties would attempt to try many or all of the issues in the case at this early hearing before the date set for the formal trial.”¹⁷⁹ The new rule for temporary orders requires that the parties file affidavits, then the court may conduct an evidentiary hearing if it determines that one is necessary in that particular case.¹⁸⁰ Although determining temporary orders based on affidavits can be difficult because it is more difficult to determine credibility through affidavits than through live testimony, this rule is in many cases a time saving and money saving alternative for both the court and the parties.¹⁸¹

motion shall set forth all facts that are required to be disclosed by Idaho Code Section 32-11-209. The motion shall further set forth the following additional information: (i) the name and date of birth of each child who is subject to the motion; (ii) the nature and extent of any special needs of each child; (iii) a description of the manner in which the parents are currently caring for the child/ren. If the parties live separately, then include a description of the manner in which they have cared for the child/ren, both before and after separation. Fourth Judicial District, *Local Rules of the District Court and Magistrate Division for the Fourth Judicial District*, Rule 8.5, http://fourthjudicialcourt.idaho.gov/pdf/2011fourth_judicial_district-rules.pdf (last visited Feb. 17, 2016).

176. *Id.*

177. Idaho R. of Family L. P., STATE OF IDAHO JUDICIAL BRANCH: SUPREME COURT, Rule 504, <http://www.isc.idaho.gov/irflp> (last visited Feb. 1, 2015). This rule has been reproduced in its entirety, see *infra* app. A.

178. *Frequently Asked Questions*, *supra* note 53, at 4.

179. *Id.*

180. *Id.*

181. *Id.*

i. Arizona's Rule Regarding Motions for Temporary Orders

The rule for issuing Temporary Orders in Arizona was created because the Arizona Rules of Civil Procedure had given no guidance on how to apply the rule for temporary orders.¹⁸² Rule 47 is unique to family law and specifically authorizes temporary orders on a variety of family law issues, including custody, parenting time, child support, spousal maintenance, and attorneys' fees.¹⁸³ It provides procedures for seeking such orders, which may be issued in both pre-decree and post-decree cases.¹⁸⁴ The rule requires the court to set a conference or hearing within 30 days after a request.¹⁸⁵ The rule also provides for simplified and summary procedures for obtaining child support.¹⁸⁶ Finally, the rule provides a procedure to request expedited relief.¹⁸⁷

Basically this rule clarified that any temporary orders can be requested by filing a separate motion that contains the legal and jurisdictional basis for the motion and the specific relief requested.¹⁸⁸ Additionally, the parties must include a proposed parenting plan, child support worksheet, and disclosure documents if child support is desired, and other specific information if spousal maintenance is requested, such as property and debt information.¹⁸⁹ With emergency temporary orders and restraining orders, the process is almost identical to the old system under the Arizona Rules of Civil Procedure (incorporated into the Arizona Rules of Family Law Procedure under Rule 48).¹⁹⁰

ii. Temporary Orders and its Effect on Idaho Family Law

In the Pilot Project survey,¹⁹¹ attorneys were asked whether this rule saved time to obtain temporary orders, clarified expectations of the court, or resulted in reasonable dispositions.¹⁹² Many attorneys were neutral towards these statements, but noted that the rule does standardize the expectations and requirements of judges, which may help

182. Davis, *supra* note 137, at 46.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Armstrong, *supra* note 88, at 32.

188. Davis, *supra* note 71, at 46.

189. *Id.*

190. *Id.*; Armstrong, *supra* note 88, at 32.

191. Attorneys, judges, and court assistance officers surveyed in the Pilot Project had already been operating under the Motions for Temporary Orders rule, which was already a local rule in the Fourth Judicial District. Therefore it was not a significant change for the Fourth District. This could be a potential explanation for the neutral responses received in the Pilot Project. However, for other Judicial Districts in the state this is a brand new rule. Local Rules of the District Court and Magistrate Division for the Fourth Judicial District, FOURTH JUDICIAL DISTRICT COURT, http://fourthjudicialcourt.idaho.gov/pdf/2011fourth_judicial_district-rules.pdf.

192. PILOT IDAHO RULES, *supra* note 92, at 22.

with uniformity.¹⁹³ However, attorneys also noted problems when the rule is combined with the new relaxed standard of evidence (see *supra* Part. IV. C.), results in “opposing counsel providing large affidavits with ‘any and all even barely relevant hearsay evidence.’”¹⁹⁴

Judges also had mixed perceptions of the rule because it can be cumbersome since some attorneys file extensive motions and still seek to make the Motions for Temporary Orders into “mini-trials.”¹⁹⁵ One judge suggested amending the rule to limit the number of pages attorneys may file.¹⁹⁶ Because the judge has the discretion whether or not to hold a hearing based on the information received in the affidavits, attorneys might file lengthy affidavits in an attempt to cover all of the potentially relevant information in a case. This adds additional burden on the judge, and also on the attorney because the attorney must, almost clairvoyantly, try to determine what information a judge would like to see in the affidavit to make a decision. In response to the issues with the length of affidavits under the rule as originally written, the rule was amended, effective July 1, 2015, to limit the number of pages to twenty, and to limit the affidavits to four.¹⁹⁷

In a recent survey of attorneys statewide,¹⁹⁸ Rule 504 received mixed reviews from attorneys. When asked whether the rule has saved time and costs in obtaining a temporary order, attorneys responded: 20% strongly agreed, 33.33% agreed, 6.67% were neutral, 33.33% disagreed, and 6.67% strongly disagreed.¹⁹⁹ One attorney commented “I believe this process encourages people to make false representations to the court because they do not have to appear in front of the judge. Being able to determine someone’s demeanor in court is often critical for a judge to make a better decision.”²⁰⁰ Another disagreed with this rule because “Clients are not happy with the process because they do not feel they have had their day in court. Kids are yanked away based on who prepares the best affidavit, not necessarily the facts to support. Therefore attorneys are hired when pro se could handle themselves.”²⁰¹ Another attorney mentioned “the rules indicate that temporary motions will be decided on affidavits, but do not specify how many affidavits can

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. In response to problems with lengthy affidavits, the Idaho Supreme Court amended Rule 504: Motions for Temporary Orders – Mandatory Disclosure. This amendment states “no party shall file a verified motion or affidavit under this rule that exceeds twenty pages, including attachments. Affidavits from non-parties filed in support of or in opposition to a motion for temporary orders shall be limited to four per party and shall be limited to the same number of pages set forth above.” IDAHO SUPREME COURT, ORDER AMENDING RULES 7 (Apr. 23, 2015), http://www.isc.idaho.gov/orders/IRFLP_Order_April_7.15.pdf.

198. See *infra* Appendix B.

199. *Id.*

200. *Id.*

201. *Id.*

be submitted in support/opposition, so it can (and has) lead to multiple affidavits from not just the parties, but supporting witnesses as well. This increases costs and time.”²⁰² Ultimately this rule seems to save time and client costs when it is used properly, however some ambiguity in the rule and the process itself tends to support that there are some remaining issues that should be addressed. Although it may save court time, deciding cases based on affidavits may not be the most effective way to make a just outcome in some cases. In cases where a judge determines not to hold a hearing on the motion, the outcome, based only on the affidavits filed, cannot take into account the judge’s determination on the client’s character or demeanor based on a paper filing with no in-person testimony or appearance. Lastly, it is often difficult for attorneys to anticipate every issue and question that a judge would like to have addressed in a specific case, and when the motion is decided based solely on affidavits there is no opportunity to ask the client after the fact about a question or issue the judge has. Instead, every issue needs to be anticipated and included in the affidavit for a judge to consider it. This can lead to an unjust result that does not effectively serve the family in every case.

c. Rule 102—Relaxed Standard of Evidence

Another newly implemented rule in Idaho that has been controversial among attorneys and judges in Idaho is Rule 102 which sets out a more relaxed standard of evidence than the previous standard under the Idaho Rules of Evidence. This rule was modified from a similar rule in the Arizona Rules of Family Law Procedure.²⁰³ The new Idaho rule provides in part:

[A]ll relevant evidence is admissible, provided, however, that the court shall exclude evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, needless presentation of cumulative evidence, lack of reliability or failure to adequately and timely disclose same. . . records of regularly conducted activity as defined in Rule 803(6), Idaho Rules of Evidence, may be admitted into evidence without testimony of a custodian or other qualified witness as to its authenticity if such document (i) appears complete and accurate on its face, (ii) appears to be relevant and reliable, and (iii) is seasonably disclosed

202. *Id.*

203. Comstock & Day, *supra* note 4, at 40.

and copies are provided at time of disclosure to all other parties.²⁰⁴

The relaxed standard of evidence is currently acting as the default rule under the Idaho Rules of Family Law Procedure, unless one of the parties files a notice within 30 days to opt-in to the stricter Idaho Rules of Evidence.²⁰⁵ The relaxed standard allows more information in a court proceeding, which makes it easier for a judge to hear more relevant evidence that otherwise would be difficult to bring in under the stricter Idaho Rules of Evidence, such as hearsay evidence.²⁰⁶ The relaxed standard of evidence allows the judge to hear all relevant and material evidence, unless the probative value of the evidence is outweighed by the danger of unfair prejudice, that is cumulative, that confuses the issues, that is unreliable or that has not been timely disclosed.²⁰⁷ Hearsay and character evidence arise in nearly every custody trial and is now admissible under the new standard, but there is still the requirement that the evidence be reliable in place as a safeguard.²⁰⁸ Additionally, the standard is easier for self-represented litigants to understand and use.²⁰⁹ With every type of evidence that a party wishes to admit in a trial, the judge still retains discretion whether or not that evidence may come in and what weight should be given to the evidence.²¹⁰

i. Arizona's Relaxed Standard of Evidence Rule

Idaho's relaxed standard of evidence in family law cases was partially inspired by the almost identical rule implemented in Arizona in 2006. The Arizona rule generally provides:

"The rules of evidence are relaxed in family law cases unless a party timely invokes the formal Rules of Evidence, except that even if the formal rules are invoked, the requirements for admission and consideration of certain documentary evidence are relaxed. Under the relaxed rules, the court will generally follow the rules applicable to administrative hearings- relevant evidence is admissible unless its probative value is outweighed by other, specified considerations."²¹¹

Similar to the Idaho rule, the Arizona rule provides that either party may opt-out of the relaxed standard of evidence by filing a motion with the court at least forty-five days prior to a hearing or trial.²¹² Addi-

204. IDAHO R. FAMILY L. P. 102; *See infra* Appendix A regarding the relaxed standard of evidence has been reproduced in its entirety.

205. Comstock & Day, *supra* note 4, at 40.

206. *Id.*

207. *Id.*

208. *Id.* at 41.

209. *Id.*

210. *Frequently Asked Questions*, *supra* note 53, at 5.

211. Armstrong, *supra* note 85, at 34.

212. Davis, *supra* note 137, at 48.

tionally, the relaxed standard allows for certain documents, such as drug testing results, to be submitted at trial, where under the stricter rule of evidence these documents would not be able to be allowed without laying foundation, such as bringing in an expert, which increases costs and is often difficult to do.²¹³ The goal of relaxing the formal rules of evidence is to enhance both truth seeking and efficiency.²¹⁴

ii. Relaxed Evidence Standard's Effect on Idaho Family Law

In the Pilot Project survey respondents were asked whether the relaxed standard of evidence “saved time, enhanced their ability to get information to the court, contributed to a client’s perception of fairness or allowed information that may unfairly prejudice the court.”²¹⁵ The survey responses were difficult to obtain and it was difficult for the Department to draw conclusions based on the responses in the Pilot Project because very few attorneys had cases under the Idaho Rules of Family Law Procedure that had gone to trial and therefore had not yet utilized this rule sufficiently to be able to provide valid feedback.²¹⁶ However, some of the feedback attorneys overall approved of the rule and thought that it would help by saving valuable time in cases and increase the admissibility of relevant evidence in a trial.²¹⁷ One problem that attorneys noted however, was that many attorneys were opting-in to the stricter standard of evidence for tactical reasons.²¹⁸ Some of these reasons were: “(1) exclude evidence that would be inadmissible under Rules of Evidence[;] (2) preference for the Rules of Evidence[;] (3) protection of client from false accusations[;] and (4) to protect from one judge’s ‘unfair prejudice or repeated misunderstandings of the law.’”²¹⁹ Other attorney concerns included the worry that self-represented litigants would bring in a large amount of evidence that might slow down the process.²²⁰

Judges’ feedback on the relaxed standard of evidence in family law cases included the concern that judges in more rural areas of Idaho may be “less receptive to the Relaxed Rules of Evidence as compared to those judges who reside only on family law cases in the larger counties.”²²¹ This is because judges in rural counties must hear a wider variety of civil cases and would not want a special standard for a small number of cases.²²² Judges also thought that perhaps the rule should be written so

213. *Id.*

214. Armstrong, *supra* note 85, at 32.

215. PILOT IDAHO RULES, *supra* note 92, at 13.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. PILOT IDAHO RULES, *supra* note 92, at 13.

222. *Id.* at 13–14.

that attorneys could opt-in to the relaxed standard of evidence instead of having the relaxed standard be the default rule.²²³ One judge commented: “This rule is going to be beneficial to the pro se people, but it’s gonna increase the workload, or the work effort, of the judges . . . you’re gonna have this huge volume of evidence that they’re gonna bring in and you’ve gotta sort through it.”²²⁴

In the recent survey,²²⁵ which asked whether the relaxed standard of evidence has made it easier to get relevant information to the judge, the majority of attorneys agreed that it did: 46.67% strongly agreed, 20% agreed, 6.67% were neutral, 20% disagreed, and 6.67% strongly disagreed. However, one attorney commented: “the rules of evidence exist for a reason and that the Idaho Rules of Evidence should apply in family law cases with the exception of informal custody.”²²⁶

d. Rule 119—Children’s Participation in Court Proceedings

The Group also drafted a new rule to provide uniform guidelines for attorneys and judges when children are involved in court proceedings. Prior to the implementation of the Idaho Rules of Family Law Procedure, there were no guiding standards about how and when children should participate in child custody proceedings, which left it entirely to the judge’s discretion.²²⁷ Children participate in child custody proceedings directly as a witness at trial, through an “in camera interview” by the court, or through the parties or third parties (i.e. hearsay).²²⁸ There is no rule in the Idaho Rules of Civil Procedure that applies to children and also, in regard to appointing an attorney for the child, there is no standard set out in Idaho Code 32-704 that provides any qualifications or required experience of the appointed attorney representing the child.²²⁹

The problem with the old system was the stress the process put on the family, especially the child, because a child could be brought to court with little or no advance notice.²³⁰ If the child was interviewed by the court the judge had sole discretion on how to conduct the interview.²³¹ The new rule establishes the minimum qualifications for attorneys appointed to represent the child and the procedural requirements, including notice, for using the child as a witness in court proceedings.²³² The advantages of this new rule are:

223. *Id.* at 14.

224. *Id.*

225. *See infra* Appendix B.

226. *See infra* Appendix B, p. 58.

227. Comstock & Day, *supra* note 4, at 41.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

(a) Children, when represented by an attorney, have one who possesses experience and skill at doing so; (b) Children can prepare for being heard in court; (c) Parties have time to consider and prepare for how their child will participate in court; and (d) The court, counsel, parties, and children are protected by the requirement that any “in camera” interview be recorded, while preserving some flexibility regarding other aspects of the manner of the interview.²³³

i. Arizona’s Rules Regarding Children’s Participation in the Courts

The Idaho rule guiding participation of children in child custody proceedings was modified from a similar Arizona rule. The Arizona Rule of Family Law Procedure Rule 11 provides that children may be excluded from Family Court proceedings under certain circumstances.²³⁴ Rule 12 also provides the procedures for interviews of children by the court.²³⁵ This new rule (Rule 12) “requires that, absent a stipulation of the parties to the contrary, any child interview must be recorded by a court reporter or electronic medium.”²³⁶

ii. Children’s Participation Rule’s Effect on Idaho Family Law

The Pilot Project surveyed judges and attorneys to determine whether this new rule improved party participation, decreased stress placed on a child, or increased the protection of due process.²³⁷ Overall, both judges and attorneys agreed that this rule would be beneficial and reduce conflict and time to resolution.²³⁸ However, some attorneys mentioned that they were concerned that the rule, while good, did not provide enough guidance, such as how to conduct the child interviews and attorneys’ roles in the child interviews.²³⁹

In the recent survey²⁴⁰ of attorneys which asked to what extent attorneys agree that “[t]he new rule guiding the participation of children in proceedings requiring advance notice has made the litigation process more consistent and easier on children,” 33% of attorneys strongly agreed with this statement, while 66% felt neutral. One attorney commented “I feel that NO child should be involved in the court process where custody is at issue, UNLESS the child is mature enough to handle the contentiousness of the litigation process. Although sometimes it is absolutely necessary for a child to testify (in cases of molestation or

233. Comstock & Day, *supra* note 4, at 41.

234. Ariz. R. Family L. P. 11.

235. Ariz. R. Family L. P. 12.

236. Davis, *supra* note 137 at 48.

237. PILOT IDAHO RULES, *supra* note 92, at 15.

238. *Id.*

239. *Id.*

240. *See infra* Appendix B.

other abuse), unless it is critical, children should be kept OUT of the process. I believe this encourages attorneys to utilize the children as leverage.” Another attorney commented that although he or she had not yet had experience using this rule, it is a positive thing, “although increasing costs with the attorney requirement.”

2. Rule Unique to Idaho

In addition to looking to other states for inspiration for drafting the new rules to address recurring problems in family law in Idaho, the Group drafted a rule unique to Idaho.²⁴¹ The rule that the group drafted is Rule 1001—Other Family Law Services and Resources.²⁴² The Pilot Project described the rule:

These rules set forth specific services and resources that may be ordered, if available, in family law cases where custody or parenting time is at issue including mental health services, substance abuse screening and testing, parent education, and family violence prevention service appropriate for victims and offenders.²⁴³

The Pilot Project surveyed attorneys about whether or not this rule increased referral to court services, increased evidence so that the court could make informed decisions, or contributed to the resolution of contested cases.²⁴⁴ The responses received from attorneys said that this rule was useful because it grants the judge the power to order certain services, instead of just suggesting them.²⁴⁵ However, attorneys did note that this rule was basically just putting in writing the general practice of the magistrate judges in Ada County, and was not a major change in family law practice.²⁴⁶ One attorney perceived that this rule was an over-stepping of the court to order parenting classes and was “outside the role of the court to interfere or presume poor parenting.”²⁴⁷

C. Standardized Forms to Comply with the Idaho Rules of Family Law Procedure

In addition to reorganizing the rules of procedure related to family law and drafting five new rules, the Group created standardized forms that comply with the rules.²⁴⁸ The new forms are intended to guide at-

241. PILOT IDAHO RULES, *supra* note 92, at 2.

242. *Id.*; the rule has been reproduced in its entirety in Appendix A for the reader's convenience.

243. PILOT IDAHO RULES, *supra* note 92, at 2.

244. *Id.* at 16.

245. *Id.*

246. *See id.*

247. *Id.*

248. STATE OF IDAHO JUDICIAL BRANCH, SUPREME COURT, <http://www.isc.idaho.gov/irflp> (last visited Mar. 24, 2016).

torneys and self-represented litigants in obtaining relevant information in a case and to provide forms that comply with the rules. These forms are intended to help in preparing an affidavit in support of motions for temporary orders, comply with mandatory disclosure, and prepare additional discovery, such as uniform interrogatories.²⁴⁹

In the Pilot Project, survey respondents were asked about three forms: Inventory of Property and Debts, Uniform Family Law Interrogatories, and Affidavit Re: Motions for Temporary Orders.²⁵⁰ The listed goal of the standard forms was “to provide attorneys with forms that are understandable, easy to use, and useful in preparing and managing their cases.”²⁵¹ The survey results showed that self-represented litigants who used the forms Inventory of Property and Debts and Uniform Family Law Interrogatories, found the forms easy to use.²⁵² However, the Court Assistance Officers noted in the survey that self-represented litigants were confused about when to use the forms and they often did not carefully read or fill out all of the portions of the forms.²⁵³

Attorneys were asked about whether the standard forms were easy to use and understand and if they saved time and provided sufficient information and improved the discovery process.²⁵⁴ With regards to Form 1, Inventory of Property and Debts, attorney feedback showed that attorneys did not believe this form saved time.²⁵⁵ Some suggestions mentioned that the form should provide that irrelevant information does not need to be disclosed and items within the parties’ joint possession or already disclosed do not need to be included, and there needs to be a space for clarifying the nature of the property—whether it is separate or community property.²⁵⁶

With the second form, the Uniform Family Law Interrogatories, attorneys’ feedback showed that the form did not include all of the questions needed, and in some cases had questions irrelevant in many cases. Attorneys noted that the form needed to be tailored based on the type of case, such as having a uniform interrogatory specific to divorce, divorce with children, modification of support and custody, and one for modification of just support.²⁵⁷

The third form, Affidavit Re: Motions for Temporary Orders, attorney feedback showed that the form needed tailoring because each case is unique, and the form included irrelevant questions. One attorney com-

249. *Frequently Asked Questions*, *supra* note 53, at 5.

250. PILOT IDAHO RULES, *supra* note 92, at 2.

251. *Id.* at 3.

252. *Id.* at 6.

253. *Id.* at 23.

254. *Id.*

255. *Id.*

256. PILOT IDAHO RULES, *supra* note 92, at 23.

257. *Id.* at 24.

mented that the form and Rule 504 “spends too much time on irrelevancies and not enough on the specifics of each case . . . cases are too specific to fit in these cookie cutters.”²⁵⁸

In the recent survey²⁵⁹ of family law attorneys in Idaho, when asked to what extent they agreed with the statement “The standard forms (i.e. Inventory of Property and Debts, Uniform Family Law Interrogatories, and Mandatory Disclosure) have been helpful and time-saving in most cases. The survey results were that 6.67% strongly agreed, 33.33% agreed, 46.67% felt neutral, and 13.33% disagreed (0% strongly disagreed). One attorney commented, “Every family law case is different. The Uniform Interrogatories don’t always address the relevant facts in a particular case. The same is true for the Mandatory Disclosure. Discovery is all about information gathering.”

Overall, the forms seem to be more beneficial for self-represented litigants than for attorneys. Many attorneys do not use the standard forms provided and instead used them as a guideline for creating their own forms and modifying the forms to fit the particular issues of their case. Additionally, many court assistance offices, while providing mixed reviews about whether the forms were helpful for self-represented litigants, agreed that for many people it was beneficial to at least have a place to start in their case. It seems that it is helpful to have standard forms that comply with the new Idaho Rules of Family Law Procedure, but because each case is unique in the issues it presents to an attorney, there is no way to draft a form that can be used or helpful in every case, and they are treated more as a starting point for both attorneys and self-represented litigants, but must be modified significantly in almost every case.²⁶⁰

IV. SUGGESTIONS FOR ADDITIONAL ADJUSTMENTS THAT SHOULD BE MADE TO THE IDAHO RULES OF FAMILY LAW PROCEDURE

Enactment of the new Idaho Rules of Family Law Procedure has brought significant change to the practice of family law in Idaho. The rules have been met with resistance by some judges and practitioners, however many believe the rules are a step in the right direction to solving some of the prevalent problems with the practice of family law in Idaho. Three of the new rules in Idaho seem to be working well. It seems to be beneficial in Idaho to have some standards in how and when chil-

258. *Id.* at 26.

259. *See infra* Appendix B.

260. The Idaho Supreme Court recently amended several rules, effective July 1, 2015, including Rule 126: Child Support Guidelines, which adds an affidavit verifying income and child support worksheets to the Appendix of the Child Support Guidelines. These forms can be found at http://www.isc.idaho.gov/rules/irflp/IRFLP_Rule126-7.1.15.pdf. IDAHO SUPREME COURT, ORDER AMENDING RULES (Apr. 23, 2015), http://www.isc.idaho.gov/orders/IRFLP_Order_April_7.15.pdf.

dren should participate in custody proceedings, instead of leaving it entirely within the discretion of the judge. Also, providing the judge with the ability to order services such as drug testing and parenting classes seems beneficial because it provides the judge with the authority to order services which was not expressly allowed under the prior rules. Additionally, the option to have a relaxed standard of evidence is beneficial because it allows more relevant and important information to get to the judge. The standard forms are also beneficial in that they provide the attorney and the pro se litigant with easy access to the exact information that needs to be exchanged in a case under the new rules.

Since the implementation of the rules, the Idaho Supreme Court amended rules 101, 112, 115, 210, 401, 413, 443, 504, 511, 811, and 812, and adopted rules 126 and 127.²⁶¹ Many of the rules were amended for grammatical or clarification purposes, or for consistency purposes in response to amendments made to the Idaho Rules of Civil Procedure. Some amendments however, were significant changes. Rule 101—Scope of the Rules was amended to extend the rules to include “legal separation.”²⁶² Rule 210—Third Party Practice regarding joinder and misjoinder was amended, as these rules were inadvertently left out of IRFLP.²⁶³ Rule 803—Judgments, modifies the rule from the strict application of its mirror rule, IRCP 54 to better fit family law cases.²⁶⁴ However, it appears that the rules still do not go far enough in tackling some of the major family law issues that are still prevalent throughout the state and additional adjustments to the Rules should be made.

A. Suggested Improvements to the Idaho Rules of Family Law Procedure

The reorganization of the Idaho Rules of Civil Procedure and some of the new rules in Idaho family law, while a step in the right direction, do not address all of the problems they were intended to address. Additionally, some of the new rules have created new problems that were not present under the old system, such as increasing client costs and adding new burdens on attorneys and judges. Some adjustments should be made to the organization of the rules and the brand new rules to increase efficiency and the effectiveness of the rules in Idaho.

261. *Id.*

262. *Id.*; see also Idaho R. Family L. P. 101.

263. Catherine Derden, *Highlights of Rule Amendments Effective July 1, 2015*, 58 THE ADVOCATE, at 54 (June/July 2015).

264. *Id.*

1. Reorganization and Modification of the Rules to Fit Family Law

The reorganization of the rules of procedure related to family law in one place that flows in numerical order appears to be very beneficial for attorneys and pro se litigants in Idaho. One of the benefits of the reorganization is that the rules now have room to grow, and for subparts to be added to rules in a way that is relevant and makes sense for that rule.²⁶⁵ Under the old system, the rules related to family law were added to sub-parts of other rules that apply in all civil cases, not necessarily family law, which led to confusion and difficulty finding the rules. Under the new system this is no longer a problem.²⁶⁶

Additionally, over time, the Idaho Rules of Family Law Procedure could begin to deviate significantly from the Idaho Rules of Civil Procedure if updates are made to one set of rules, but not to the corresponding rule in the other set of rules. It could potentially be difficult to keep up with the changes and either make changes consistent to both sets of rules of procedure, or accept that over time the two sets of rules could end up very different. This opens up the door for inconsistencies between the two sets of rules. To address this issue, perhaps there should be a position in the committee that is created to update the Idaho Rules of Family Law Procedure, who is also a member of the committee that updates the Idaho Rules of Civil Procedure, to keep up with the proposed changes made to both sets of rules and report to both committees to see how the change will affect the rules. The deviation between the two sets of rules may not necessarily be a bad thing though, since family law is evolving into a specialized area of law and the rules can be tailored to be relevant to family law, even if that means it differs significantly from the rules of procedure that apply to other types of civil cases.

Although the reorganization of the rules pertaining to family law makes the rules easier to find and to use, especially for self-represented litigants and attorneys who do not regularly practice family law, there need to be some additional adjustments made, especially to the modification of certain rules as they pertain to family law.²⁶⁷

265. See Comstock & Day, *supra* note 4, at 4.

266. This is evident by the fact that there have already been amendments to the rules and clarifications added as subparts to the Idaho Rules of Family Law Procedure, effective as of July 1, 2015. With the new organization, amendments and clarifications can be added in an organized fashion, which helps with the ease of reading and understanding the rules.

267. Also, if the purpose of the rules is to better serve the specialized area of family law, just pulling over the civil rules does not satisfy that purpose. All of the rules should be tailored to family law issues. For example, Rule 54 regarding final judgments was pulled into the Idaho Rules of Family Law Procedure directly from the Idaho Rules of Civil Procedure, with no changes made. However, pertaining to family law, the rule is written so that it is difficult to get the information necessary in divorce and custody cases into the final order under this rule. This issue blew-up statewide on February 6, 2015 when the Idaho Supreme Court issued an opinion for *Cook v. Arias* that essentially invalidated thousands of Idaho divorces because the Divorce Decrees did not comply with I.R.C.P. 54. See *Cook v. Arias*,

2. Mandatory Disclosure

Mandatory Disclosure is not being complied with in many cases.²⁶⁸ The intent behind the rule was to make sure that relevant information was being exchanged by the parties early in the cases so that there is more progression forward to get cases settled.²⁶⁹ However, many attorneys around the state are not filing Responses (previously Answers),²⁷⁰ which are considered a Responsive Pleading under the rule, and are instead filing Notices of Appearances²⁷¹ in order to avoid triggering the 35 day timeline for providing Mandatory Disclosure.²⁷² By doing this, many attorneys are trying to work together to resolve the case without having to exchange Mandatory Disclosures. If they cannot come to a resolution, then the petitioner's attorney can file a Three Day Notice of Intent to Take Default,²⁷³ which gives opposing counsel 3 days to file a Response, which then triggers the Mandatory Disclosure timeline. Filing a Notice of Appearance instead of a Response can extend the timeline significantly.

If the purpose of the rule was for Mandatory Disclosure to be done in every family law case, regardless if the attorneys believe they can negotiate without providing the information, then the rule is not effective enough at fulfilling that purpose. If the true intent behind Mandatory Disclosure is that it should be done in every single case, regardless of whether the parties have limited assets, then the hole that was built into the rule needs to be filled. Perhaps instead of a Responsive Pleading triggering the 35 day timeline, the rule could be tied to Notices of Appearances as also triggering the timeline for providing Mandatory Disclosure. However, if this hole was built into the rule on purpose, to provide an escape clause for parties to attempt to negotiate then there may be better ways to do so. In Ada County, the magistrate judges are more involved in the Mandatory Disclosure process, and inquire as to whether or not it has been done every time the parties are in front of the judge. In Ada County, because the judges are more involved and are requiring that the parties are exchanging the information, Mandatory

2015 Ida. LEXIS 41 (2015). A week later the Court had to issue an Order that recognized all of the divorces prior to this opinion. If the rules are going to be special to family law, this is further evidence that more care needs to be taken to tailor all of the rules as they pertain to family law.

268. Based on my survey results and conversations with family law practitioners around the state.

269. See Comstock & Day, *supra* note 4.

270. Under I.R.C.P., the Response was formally known as an Answer in civil cases. One of the changes made by the Idaho Rules of Family Law Procedure is that the parties' designations have changed and are now the "Petitioner" and "Respondent."

271. See I.R.C.P. 75(f); Idaho R. Family L. P. 206.

272. Idaho R. Family L. P. 401.

273. I.R.C.P. 55(a)(1); Idaho R. Family L. P. 301.

Disclosure is being done.²⁷⁴ This is not the same statewide, however. In order for the Mandatory Disclosure to be done early in the case, the judges will probably have to take more control over the process, as the judges do in Ada County. This puts additional burden on the judges to check in with the parties and make sure that in every case the parties are complying with Mandatory Disclosure, and explaining Mandatory Disclosure to pro se litigants who are unfamiliar with the process.

One way for the judge to control Mandatory Disclosure is to not sign the Final Judgment unless Mandatory Disclosure has been completed. This could potentially prolong a case because instead of the judge making a final determination and completing the Final Judgment, the judge will have to wait for the parties to exchange the required information, and then deal with any changes that come up if additional assets or information previously unknown is revealed. However, this is the exact type of problem that the purpose of having a mandatory disclosure rule was intended to prevent, so that all relevant information is provided to the parties and there are no surprises later. Therefore, there must be a balancing decision made about whether the additional time it takes to complete Mandatory Disclosure before the judge signs the Final Judgment is worth the possibility of revealing additional, potentially important, information.

Another way the judge could be more involved in Mandatory Disclosure is by creating a uniform Final Judgment that details what information is required to be disclosed by the parties under this rule once a family law case has been filed. The uniform Final Judgment could also provide a timeline for when the Mandatory Disclosure needs to be completed. The benefits of this would especially help self-represented litigants by providing the specific additional information about the rule, directly from the court, so that they know and understand they must provide this information, and that they are entitled to that information from the other party. It would also help explain the rule to self-represented litigants, who are benefited by the rule, but do not always understand the need to provide the information or that they are entitled to the same information from the opposing party.

Additionally, to enforce compliance with Mandatory Disclosure, Idaho could follow Florida's example. In Florida, under the Mandatory Disclosure rule, the parties must file a Certificate of Compliance with Mandatory Disclosure with the court.²⁷⁵ The form provided by the Court also includes a set of special instructions for self-represented litigants, to help them better understand Mandatory Disclosure.²⁷⁶

274. This information was obtained during my interviews with various practitioners in Ada County.

275. Instructions for Florida Family Law Rules of Procedure Form 12.932, Certificate of Compliance with Mandatory Disclosure, FL. COURTS, (Sept. 2012) <http://www.flcourts.org/core/fileparse.php/293/urlt/932.pdf>.

276. *Id.*

However, if the intent behind the rule is not to require disclosure of information early on in every case if there is a possibility that the parties can negotiate without disclosing the information, then there are more effective ways to do this. One option would be to actually include an opt-out clause in the rule, similar to the new relaxed standard of evidence that has an opt-out clause. The opt-out clause could provide that the parties opt-out of the Mandatory Disclosure but continue to apply the standard rules of Discovery. One problem with this method would be that the parties could opt-out of Mandatory Disclosures, even though Mandatory Disclosure would be beneficial to the parties, which defeats the purpose of having a mandatory disclosure rule entirely. One way to deal with that problem would be to require the parties to provide specific reasons why they believe Mandatory Disclosure does not need to be done in a particular case, and the judge makes the final determination. Alternatively, the rule could be altered to allow for parties to opt-out of Mandatory Disclosure when certain factors are present in the particular case, such as a limited number of assets, parties who do not have children or custody issues, etc. However, this method again puts more of a burden on the judge.

Another method to minimize the burden of Mandatory Disclosure in cases where there are fewer assets and extensive disclosure of the information is time-consuming and costly for parties who are represented by attorneys, is to follow what Florida initially did. Florida's mandatory disclosure rule originally had a form that required minimal disclosure of information in cases where the assets amounted to less than \$50,000.²⁷⁷ For cases where the assets amounted to more than \$50,000, more extensive disclosure was required.²⁷⁸ This could be beneficial because it would require less time and ultimately less cost on the client who does not have many assets and therefore the mandatory disclosure as it currently is requires providing too much information in cases where it is unnecessary. But under this system of allowing minimal disclosure for parties who possess fewer assets, disclosure of some information would still be done, but the burden of how much information to disclose is significantly less.

The Mandatory Disclosure rule, although beneficial when it works properly, and both parties comply, allows for information to be exchanged earlier in the process. To work more effectively statewide, some additional alterations should be made to make the rule fit family law and be applied more consistently.

277. Fla. Fam. L.R.P. 12.285.

278. *Id.*

3. Temporary Orders

The rule for Motions for Temporary Orders based primarily on affidavits has been beneficial for Idaho in that it appears to have helped cases move more quickly through the court system. It is helpful to the judge to have affidavits from each side regarding the motion for temporary order, and either be able to make a determination based on the information in the affidavit, or hold a short hearing to obtain additional information.²⁷⁹ This has not only helped the court docket, because not all motions require a hearing if a decision can be made on the affidavits, but it also allows for more efficient hearings because the judge has the relevant information about the case in the affidavit, instead of waiting to get the relevant information at the hearing.

However, this new system, while more time efficient, may have created some problems because it gives the judge a lot of discretion about whether or not to hold a hearing, which could be an essential part of making a better determination in a case. For example, deciding a case based purely on the affidavits does not give the judge the opportunity to see the parties in person and get a better sense of the person's character and demeanor.²⁸⁰ Also, it is difficult for attorneys to think of every potential question the judge may have, and without a hearing the judge may make a determination without being presented with all of the relevant and important information.²⁸¹ One potential solution to this problem is amend the rule to require a judge to issue a short opinion that says why he decided the way he did on the motion, that way if there is information that the judge did not consider and should have, or if something he decided on was not included in the affidavits that could have helped the decision, the party could request a hearing. An additional solution would be to require that affidavits be filed, but that there still be a short hearing that the parties would be present at. The benefits of this system would be that the judge still has all of the information contained in the affidavits, but can still conduct a hearing for clarification of some information, which still allows the trial to be efficient.

Although this rule overall seems to increase court efficiency, it should be tailored to address the new problems that basing a decision purely on affidavits creates.

279. See Comstock & Day, *supra* note 4.

280. Observations based on survey results and conversations with Family Law practitioners in Idaho.

281. Attorneys have commented that holding a hearing is preferred to merely submitting affidavits because with the affidavits, the attorney must include everything the judge needs to know, often resulting in long affidavits, when it would be easier to submit a shorter affidavit and hold a hearing where the judge can ask questions of the parties.

B. Suggestions for Consistent Application of the Rules in Idaho

The new Idaho Rules of Family Law Procedure, that are creating a new set of rules for a specialized area of law, is a fairly extreme change and is not a change that should be made lightly. Implementing the rules statewide without any evaluations about how each area will be affected, and with minimal training as to how to apply the rules, has created the potential problem that the rules can be applied inconsistently around the state. It also leads to some confusion about how certain rules should be applied in family law cases, as opposed to how the rule was being used under the previous system.

1. Additional Trainings

Because this is a major change for most of Idaho, there should be extensive trainings for attorneys, judges, and perhaps court assistance offices, to promote uniformity in application of the rules. There currently is a “Brown Bag Lunch” that takes place in Ada County, where the judges and attorneys get together occasionally to discuss the rules.²⁸² These conversations should probably be happening statewide, or at least for other attorneys to have access to them so that they know and can follow Ada County’s model for how to interpret and apply some of the rules, or address certain problems as they come up. Also, there have been some CLEs specific to the rules, and the Family Law Section does some telephonic CLEs to provide additional trainings regarding the rules to the members of the Section.²⁸³ By providing more training statewide, the rules are more likely to be applied consistently by the various districts. This will also allow the other districts in the state to hear how some districts are addressing certain problems as they come up.

2. Additional Evaluations

In addition to more training, conducting additional evaluations of attorneys, judges, and court assistance officers around the state over a longer period of time will help highlight problems the rules create so that the rules can be tailored even more to better fit family law in Idaho. The Planning and Research Department that conducted the Pilot Project in the Fourth Judicial District did so for four quarters (one year), and those results, although informative, were inconclusive.²⁸⁴ The De-

282. Information learned from conversations with family law attorneys who practice primarily in Ada County.

283. Additional information gathered based on survey results and conversations with attorneys in Idaho.

284. Comstock & Day, *supra* note 4.

partment recommended that more time be taken to evaluate the rules because one year was not enough time for many attorneys and judges to use all of the rules, especially those affecting trial, and could not provide accurate feedback about how they were functioning in practice.²⁸⁵ The Department recommended not only that they continue to evaluate the rules and conduct surveys, but that the rules not be enacted statewide until they had the opportunity to do so.²⁸⁶ They also recommended that more research be done in another county in Idaho to see how the rules would impact a smaller community.²⁸⁷

Ada County (which is within the Fourth Judicial District) has the largest population in Idaho, and because of the size and need, is able to have judges who specialize in family law and hear only family law cases.²⁸⁸ This is not the case throughout the rest of Idaho, where magistrate judges hear a wide variety of cases on a daily basis. Similarly with attorneys in Ada County and some of the larger counties in Idaho, there are more attorneys who specialize in family law; however, in rural areas it is much more common for attorneys to take cases in many different areas of practice. Functioning under two sets of civil rules for these judges and attorneys in much smaller communities could potentially be a problem, and is one area that additional evaluations would be beneficial.

Although the rules are already mandatory statewide, it would be beneficial to do some additional evaluations in all of the Idaho counties. Specifically, it would be helpful to find out how the rules are working in more rural counties for attorneys, judges, and pro se litigants. The Planning and Research Department has the resources necessary and already has a survey prepared for attorneys, judges, and pro se litigants, and therefore it would not be a huge burden to continue the evaluations statewide, or at the least in some of the smaller and medium-sized counties in Idaho.

However, the last district in Idaho to adopt the Idaho Rules of Family Law Procedure did so in September 2014.²⁸⁹ Because the rules have not been used for very long in some districts, the results of the evaluations could be inconclusive (as they were for the Fourth District) if the evaluations are only conducted for one year, since many family law practitioners may not have many cases reach the trial stage by that time. Instead, the surveys should be conducted over a longer period of time, perhaps two years minimum, to allow for the family law cases to develop and for judges and practitioners to have time to get a better

285. Comstock & Day, *supra* note 4.

286. Comstock & Day, *supra* note 4.

287. Comstock & Day, *supra* note 4.

288. See Fourth Judicial District Court, http://fourthjudicialcourt.idaho.gov/judges/comstock_russell.html (last visited Mar. 6, 2016).

289. In re: Implementation of Idaho Rules of Family Law Procedure in the Third Judicial District, Admin. Order, July 11, 2014, https://isc.idaho.gov/rules/irflp/District_3_IRFLP_Order.pdf.

sense of the rules and how they function in practice to be able to provide accurate and helpful feedback.

Although the Supreme Court had a period of time in which they accepted written comments on the rules, the comment period ended January 15, 2015.²⁹⁰ This was not enough time for many districts to have a significant period of time to use the rules and provide effective feedback. Therefore, additional evaluations, similar to the Pilot Project in the Fourth District, would be beneficial statewide and would help to identify and address problems around the state.

C. Proposed Additions to the Rules

The Idaho Rules of Family Law Procedure are beneficial in that they are evolving into a specialized area of law to better serve the family. However, there are areas of civil law that are very similar to family law, but fall outside of the scope of the new rules. The Idaho Rules of Family Law Procedure specifically exclude cases that involve adoption, termination of parental rights, guardianship, conservatorship, or petitions arising under the Child Protection Act.²⁹¹

The problems with excluding some of these types of cases are that they are similar to family law and face the same problems that are recurring in family law cases. Guardianship cases are similar to family law because these cases involve minor children or adults who do not have the capacity to care for themselves. Both groups of people deserve the same protections the family gets under the Idaho Rules of Family Law Procedure. For example, cases involving the guardianship of children (and mentally or physically incapacitated adults) benefit from a more relaxed standard of evidence where hearsay evidence and the person's wishes regarding the guardianship could be heard. Also, in guardianship cases it could often be helpful to bring in medical or school documents that would be difficult to allow under the stricter hearsay rule of the Idaho Rules of Evidence.

While it is understandable why termination of parental rights and child protection act cases are excluded from the rules due to the significant Constitutional safeguards involved in these issues, guardianship actions, particularly for minor children, could benefit from the family law rules.

V. CONCLUSION

Family law is continually evolving in our modern society to better serve the needs of the family and protect innocent children who are of-

290. IRFLP were available for public comment on the Idaho Supreme Court Website. Since the time period for public comment has passed, this option is no longer available.

291. Pilot Project, *supra* note 4, at 42.

ten brought in to sensitive and conflict-driven situations. Although many attorneys specialize in family law, there remain a large and continually growing number of people who choose not to be represented by an attorney for a number of reasons, including the cost of having an attorney in family law cases that tend to drag on for a long time. Decisions made by a judge in a family law case often do not end the case. Family law cases are often ongoing because issues such as those in child custody cases often change as the child grows older, which necessitates ongoing monitoring and involvement by the court.

Due to the sensitive and private nature of family law, and the fact that it is becoming a more specialized area of law, the Idaho Rules of Family Law Procedure are addressing the concerns unique to family law. These rules help to address prominent problems in many areas of family law and ultimately are designed to complement the special area of law and make the complicated process easier on families and self-represented litigants.

The new rules of procedure do not go far enough, however, in addressing all of the problems facing family law statewide, and they have created some additional issues that did not exist before. Some of the new rules, such as mandatory disclosure, add additional burdens on attorneys and judges to comply with the rule that did not exist under the old system. Additionally, the scope of the new rules of procedure do not go far enough in that they do not cover important areas of law that are very similar to family law and should be treated similarly, such as guardianship cases. However, because the majority of the rules of procedure remain the same under the Idaho Rules of Family Law Procedure as they were in the Idaho Rules of Civil Procedure, without additional modification to clarify the issues and give guidance to parties, attorneys, and the judges, the rules are not as effective as they could be. While a step in the right direction, some additional alterations must be made quickly so that the Idaho Rules of Family Law Procedure are a better fit for family law. It would be a shame to operate under a set of rules that are *almost* there, when they can be *wholly* there.

*Anja R. Rodriguez**

* J.D., University of Idaho College of Law, May 2016. The author would like to give a special thanks to Professor Brooke Hardy for her guidance and encouragement on this article. The author would also like to thank her parents for their advice and continual support.

APPENDIX A

Idaho Rules of Family Law Procedure

Rule 102. Applicability of Other Rules

A. Applicability of Idaho Rules of Civil Procedure. The Idaho Rules of Civil Procedure apply only when incorporated by reference in these rules. Appeals from family law cases shall be governed by the Idaho Rules of Civil Procedure.

B. Applicability of Idaho Rules of Evidence. 1. Upon notice to the court filed by any party within thirty (30) days after a response or other responsive pleading is filed, or, if none, within forty-two (42) days from the filing of the motion or petition, or such other date as may be established by the court, any party may require strict compliance with the Idaho Rules of Evidence, except as provided in Rule 102.B.3. 2. If no such notice is filed, all relevant evidence is admissible, provided, however, that the court shall exclude evidence if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, needless presentation of cumulative evidence, lack of reliability or failure to adequately and timely disclose same. This admissibility standard shall replace rules 403, 602, 801-806, 901-903 and 1002-1005, Idaho Rules of Evidence, except as provided in Rule 102.B.3. All remaining provisions of the Idaho Rules of Evidence apply. 3. Regardless of whether a notice is filed under Rule 102.B.1, records of regularly conducted activity as defined in Rule 803(6), Idaho Rules of Evidence, may be admitted into evidence without testimony of a custodian or other qualified witness as to its authenticity if such document (i) appears complete and accurate on its face, (ii) appears to be relevant and reliable, and (iii) is seasonably disclosed and copies are provided at time of disclosure to all other parties. C. Applicability of local rules. To the extent these rules are inconsistent with local rules, the provisions of these rules shall apply.

Rule 119. Participation of Children in Proceedings

A. Appointment of child's attorney. 1. Pursuant to Idaho Code 32-704(4), the court, in its discretion, may appoint a lawyer to represent a child in a custody or a visitation dispute and shall enter an order for costs, fees, and disbursements in favor of the child's attorney in compliance with that statute. 2. The order of appointment must clearly set forth the terms of the appoint-

ment, including the reasons for and duration of the appointment, rights of access as provided under this paragraph and applicable terms of compensation. 3. Qualifications of Child's Attorney. The court may appoint as a child's attorney only an individual who is qualified through training or experience in the type of proceeding in which the appointment is made, as determined by the court and according to any standards established by Idaho law or rule. 4. Access to Child and Information Relating to Child. a. Subject to subdivision 3 and any conditions imposed by the court that are required by law, rules of professional conduct, the child's needs, or the circumstances of the proceeding, the court shall issue an order of access at the time of an order of appointment, authorizing the child's attorney to have immediate access to the child and any otherwise privileged or confidential information relating to the child. b. The custodian of any relevant record relating to a child shall provide access to a person authorized by order issued pursuant to this rule to access the records. c. A child's record that is privileged or confidential under law other than this rule may be released to a person appointed under this rule only in accordance with that law. If necessary, either or both parents may be ordered to comply with this rule by signing any necessary releases of information that are in compliance with the Health Insurance Portability and Accountability Act (HIPAA). 5. Participation in Proceeding by Child's Attorney. a. A child's attorney shall participate in the conduct of the litigation to the same extent as an attorney for any party. b. A child's attorney may not engage in ex parte contact with the court except as authorized by law other than this rule. c. In a proceeding, a party, including a child's attorney may call any court-appointed expert witness as a witness for the purpose of cross-examination regarding the witness' report without the advisor's being listed as a witness by a party. d. An attorney appointed as a child's attorney may not be compelled to produce the attorney's work product developed during the appointment; be required to disclose the source of information obtained as a result of the appointment; submit a report into evidence; or testify in court. e. Subdivision d above does not alter the duty of an attorney to report child abuse or neglect under applicable law. B. Presence of child. Unless a minor child is represented by counsel as previously set forth in this Rule, and except in emergency situations, no minor child shall provide sworn testimony, either written or oral; be brought to court as a witness or to attend a hearing; or be subpoenaed to appear at a hearing without prior court order based on good cause shown. C. Court interview of a child. On motion of any party, or its own motion, the court may, in its discretion, conduct an in camera interview with a minor child who is the subject of a custody or parenting time

dispute, to ascertain any relevant information, including the child's wishes as to the child's custodian and as to parenting time. The interview may be conducted at any stage of the proceeding and shall be recorded by a court reporter or any electronic medium that is retrievable in perceivable form. The record of the interview may be sealed, in whole or in part, based upon good cause and after considering the best interests of the child. The parties may stipulate that the record of the interview shall not be provided to the parties or that the interview may be conducted off the record. D. Testimony of a child. A motion by one of the parties to offer the testimony of a minor child shall be in writing; and shall be filed with the clerk of court, provided to the court, and served on all parties not less than 28 days prior to the hearing or trial. The court shall rule upon such a motion no later than seven days prior to the hearing or trial in the matter. On reasonable notice under the circumstances, the court may, on its own motion, compel the testimony of a minor child.

Rule 401. Mandatory Disclosure in Contested Proceedings

The requirements of this rule are minimum disclosure requirements for every family law case. Unless otherwise provided for in this rule or agreed to in writing by the parties or ordered by the court, within thirty-five (35) days after the filing of a responsive pleading, each party shall disclose in writing, signed under oath, to every other party the information set forth in this rule. A. Child Support. In a case in which child support is an issue, each party (with the exception of the Idaho Department of Health and Welfare) shall disclose the following information to the other party: 1. a fully completed Affidavit Verifying Income on a form substantially in compliance with Rule 126.I and Appendix A and a Child Support Worksheet substantially in compliance with Rule 126.I and Appendix B or C; 2. proof of income of the party from all sources, specifically including W-2 forms, 1099 forms, and K-1 forms, for the prior two (2) completed calendar years, and year-to-date income information for the current calendar year, including, but not limited to, year-to-date pay stub, salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, recurring gifts, prizes, and spousal maintenance; 3. proof of the amount of court-ordered child support and spousal maintenance actually paid by the party in any case other than the one in which disclosure is being provided; 4. proof of the cost of all medical, dental, and vision insurance premiums paid by the party

for any child listed or referenced in the petition; 5. proof of the cost of any child care expenses paid by the party for any child listed or referenced in the petition; 6. proof of any expenses paid by the party for private or special schools or other particular education needs of a child listed or referenced in the petition; and 7. proof of any expenses paid by the party for the special needs of a gifted or handicapped child listed or referenced in the petition.

B. When Health and Welfare is a party. When the Idaho Department of Health and Welfare (IDHW) is a party to a case in which child support and/or other financial matters regarding the child(ren) are at issue, IDHW shall disclose all financial information at its disposal after redacting social security numbers to the other parties who have made an appearance in the case.

C. Spousal maintenance and attorneys' fees and costs. If either party has requested an award of spousal maintenance or an award of attorneys' fees and costs, each party shall disclose the following information to the other 1. a fully completed affidavit containing the information required by Rule 504.A.2 and 2. those documents set forth in subdivision A.2 above.

D. Property. Unless the parties have entered into a written agreement disposing of all property issues in the case or no property is at issue in the case, each party shall prepare a list of all items having a fair market value more than \$100 of real and personal property, including, but not limited to, household furniture, furnishings, antiques, artwork, vehicles, jewelry and similar items in which any party has an interest, together with the party's estimate of current fair market value (not replacement value) for each item. In addition, each party shall provide to the other party the following documents: 1. copies of all deeds, deeds of trust, purchase agreements, escrow documents, settlement sheets, and all other documents that disclose the ownership, legal description, purchase price and encumbrances of all real property owned by any party; 2. copies of all monthly or periodic bank, checking, savings, brokerage and security account statements in which any party has or had an interest for the period commencing six (6) months prior to the filing of the petition and through the date of the disclosure; 3. copies of all monthly or periodic statements and documents showing the value of all pension, retirement, stock option, and annuity balances, including Individual Retirement Accounts, 401(k) accounts, and all other retirement and employee benefits and accounts in which any party has or had an interest for the period commencing six (6) months prior to the filing of the petition and through the date of the disclosure, or if no monthly or quarterly statements are available during this time period, the most recent statements or documents that disclose the information; 4. copies of all monthly or periodic statements and documents showing the cash surrender value,

face value, and premiums charged for all life insurance policies in which any party has an interest for the period commencing six (6) months prior to the filing of the petition and through the date of the disclosure, or if no monthly or quarterly statements are available for this time period, the most recent statements or documents that disclose the information; 5. copies of all documents that may assist in identifying or valuing any item of real or personal property in which any party has or had an interest for the period commencing six (6) months prior to the filing of the petition, including any documents that the party may rely upon in placing a value on any item of real or personal property; 6. copies of all business tax returns, balance sheets, profit and loss statements, and all documents that may assist in identifying or valuing any business or business interest for the last two (2) completed calendar or fiscal years and through the latest available date prior to disclosure with respect to any business or entity in which any party has an interest or had an interest for the period commencing twenty-four (24) months prior to the filing of the petition; and 7. copies of any bankruptcy filings of the parties, or either of them. If a party does not possess a copy of any of the above documents, they shall provide the name, address and telephone number of the custodian of the documents.

E. Debts. Unless the parties have entered into a written agreement disposing of all debt issues in the case or no debts are at issue in the case, each party shall prepare a list of all debts identifying the creditors and the amounts owed. In addition, each party shall provide to the other party the following documents: 1. copies of all monthly or periodic statements and documents showing the balances owing on all mortgages, notes, liens, and encumbrances outstanding against all real property and personal property in which the party has or had an interest for the period commencing six (6) months prior to the filing of the petition and through the date of the disclosure, or if no monthly or quarterly statements are available during this time period, the most recent statements or documents that disclose the information; and 2. copies of credit card statements and debt statements for all months for the period commencing six (6) months prior to the filing of the petition and through the date of the disclosure.

F. Disclosure of witnesses. Forty-two (42) days before trial each party shall disclose the names, addresses, and telephone numbers of any witness whom the disclosing party expects to call at trial, along with a statement fairly describing the substance of each witness's expected testimony. A party shall not be allowed to call witnesses who have not been disclosed at least forty-two (42) days before trial, or such different

period as may be ordered by the court. G. Disclosure of expert witnesses. Forty-two (42) days before trial each party shall disclose the name, address and telephone number of any person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness, and the name and address of the custodian of copies of any reports prepared by the expert. A party shall not be allowed to call an expert witness who has not been disclosed at least forty-two (42) days before trial or such different period as may be ordered by the court. H. Continuing Duty to Disclose. The duty described in this rule shall be a continuing duty, and each party shall make additional or amended disclosures before a motion hearing or trial in the event new or different information is discovered or revealed. I. Not Filed with Court. The disclosures shall not be filed with the court. The party receiving disclosures shall retain the original of the disclosures with a copy of the notice of service affixed thereto until one (1) year after final disposition of the action. At that time, the originals may be destroyed unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period. J. Notice of Serving. The party serving disclosures shall file with the court a notice of when the disclosures were served and upon whom.

Rule 504. Motions for Temporary Orders – Mandatory Disclosure

A. Form of motion. A party seeking temporary orders pursuant to Idaho Code Sections 32-704 and 32-717 shall file a separate verified motion, or a motion and affidavit, with the court setting forth the legal and jurisdictional bases for the motion and the specific relief requested. The motion shall include the following information and documents where relevant: 1. Custody and parenting time. If a party seeks an order for temporary custody, parenting time or visitation, the motion shall set forth a proposed parenting plan specifically stating the custody, parenting time and visitation requested for all parties to the action. If not contained in a separate affidavit or pleading previously filed in the case, the motion shall set forth all facts that are required to be disclosed by Idaho Code Section 32-11-209. The motion shall further set forth the following additional information: a. the name and date of birth of each child who is subject to the motion; b. the nature and extent of any special needs of each child; c. a description of the manner in which the parents are currently caring for the child/ren. If the parties live separately, then include a description of the manner in which they have cared for the child/ren, both before and after separation; d. each parent's

current work schedule; e. the nature and extent of any circumstances known to the moving party that would subject the child/ren to a risk of neglect or abuse in either parent's custody including, but not limited to, substance abuse or dependence, and domestic violence. 2. Child support, spousal maintenance and attorney's fees. If a party seeks a temporary child support order, the motion shall be accompanied by a completed Affidavit Verifying Income and Child Support Worksheet setting forth the amount requested in accordance with the Idaho Child Support Guidelines set forth in Rule 126.I. All motions for temporary orders of child support, spousal maintenance, attorney's fees, and the division of community income shall set forth the specific amount requested and shall provide the following information to the best of the moving party's knowledge: a. the name of each party's employer; b. the amount of each party's monthly income, both gross and net supported by an accurate photocopy of the moving party's most recent pay stub; c. an itemization of the amount of each party's reasonable monthly living expenses; and d. if reasonable monthly expenses exceed the parties' combined net income, the identity of each and every community asset, including a statement of its fair market value, which is available to sell or borrow against in order to meet the reasonable needs of the parties and their children. B. Response to motion. A party who wishes to file a response to a verified motion for temporary orders shall file an affidavit containing the same information that is required of the motion. C. Motions for temporary orders. Motions for temporary orders shall be heard and decided exclusively on the motion and affidavits unless, at the hearing on the motion for temporary orders, the court determines that the parties should be allowed to present evidence. In such case, the court shall schedule an evidentiary hearing within a reasonable time. Service of the motion, affidavits, and legal memoranda, if any, shall be governed by Rule 501.C.1 – 6.

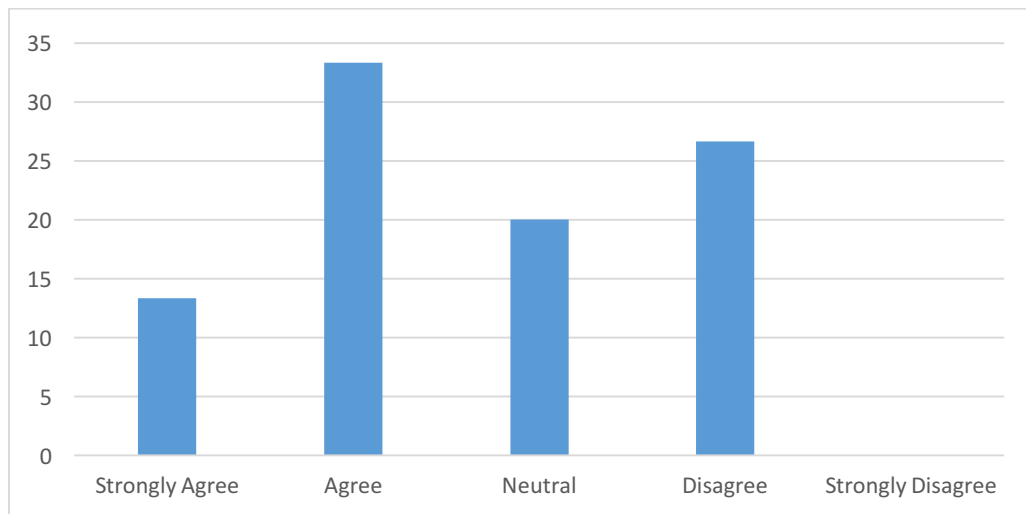
Rule 1001. Other Family Law Services and Resources

In addition to services prescribed elsewhere in these rules, the court may order the services set forth in this rule, if available, in a family law case. A. Mental health services. The court may order parties to engage in mental health services, including, but not limited to, counseling and other therapeutic interventions. B. Substance abuse screening and testing in cases where custody or parenting time are at issue. Upon an allegation or showing that a party has abused drugs or alcohol, including prescription medication, the court may order substance abuse screening and random testing of that party. The court shall designate the fre-

quency of testing and apportion responsibility for payment of screening and testing. C. Parent education. The court may order the parties to engage in parent education. The court may order supplemental or additional education, such as parenting skills classes and parental conflict resolution classes. D. Family violence prevention services; domestic violence shelters; advocacy services. Goals of the court include prevention of domestic violence and protection of parties and children from domestic violence. In pursuit of these goals, the court may implement family violence prevention services, including, but not limited to, family violence prevention centers and victim advocacy services. If the court finds evidence of an act or threat of domestic violence in a case, the court may refer the parties to services that the court deems appropriate for victims and batterers.

APPENDIX B²⁹²

1. The reorganization of the Idaho Rules of Procedure related to family law have made the rules easier to use in family law cases because the rules flow logically the way a family law case proceeds.

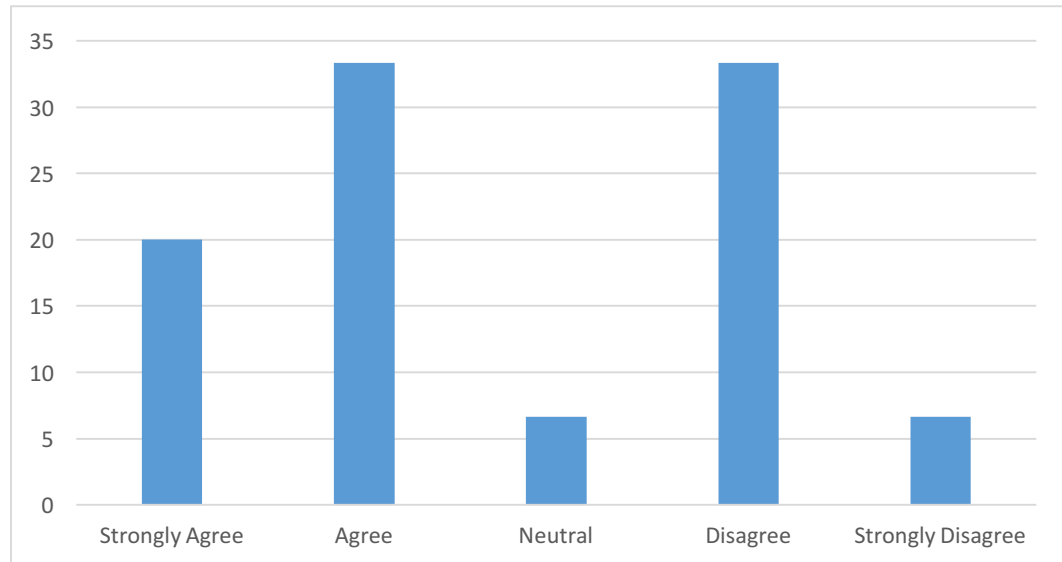


COMMENTS: Don't know yet about that. They are handy to have all in one place.

1/30/2015 1:29 PM

2. The rule implementing motions for temporary orders based on affidavits has saved time and costs in obtaining a temporary order.

²⁹². Survey results on file with author. Survey answers have not been altered from their original format.



COMMENTS: I believe this process encourages people to make false representations to the court because they do not have to appear in front of the Judge. Being able to determine someone's demeanor in court is often critical for a Judge to make a better decision.

1/30/2015 4:24 PM

Disagree clients are not happy with the process because they do not feel they have had their day in court kids are yanked away based on who prepares the best affidavit not necessarily the facts to support therefore attorneys are hired when pro se could handle themselves.

1/29/2015 2:46 PM

Also, this rule, properly utilized by a presiding magistrate, can prevent one party from unnecessarily dragging out a case for weeks longer than necessary.

1/29/2015 2:09 PM

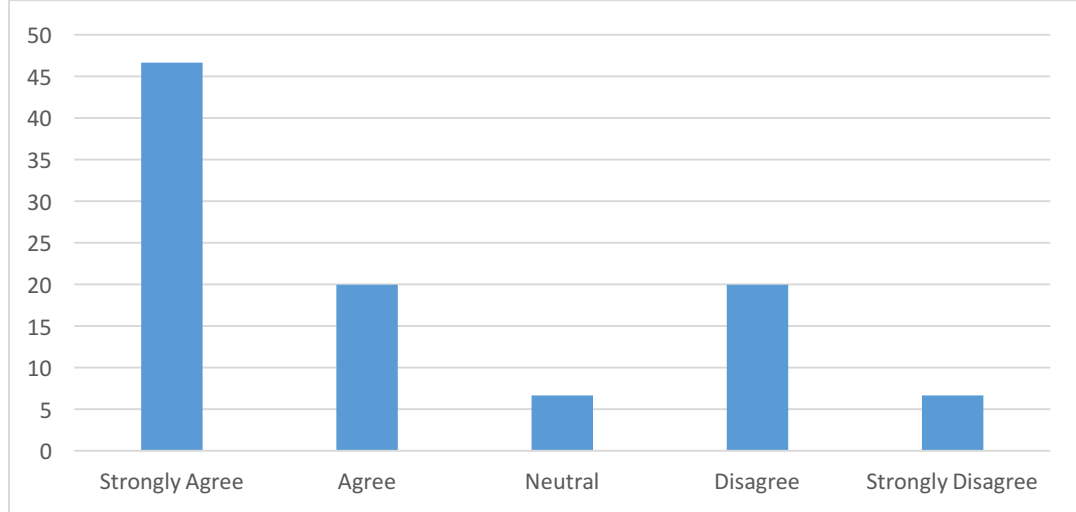
It is still a work in progress, but it absolutely has the potential to save time and costs.

1/27/2015 11:23 AM

The rules indicate that temporary motions will be decided on affidavits, but do not specify how many affidavits can be submitted in support/opposition, so it can (and has) lead to multiple affidavits from not just the parties but supporting witnesses as well. This increases costs and time.

1/27/2015 10:11 AM

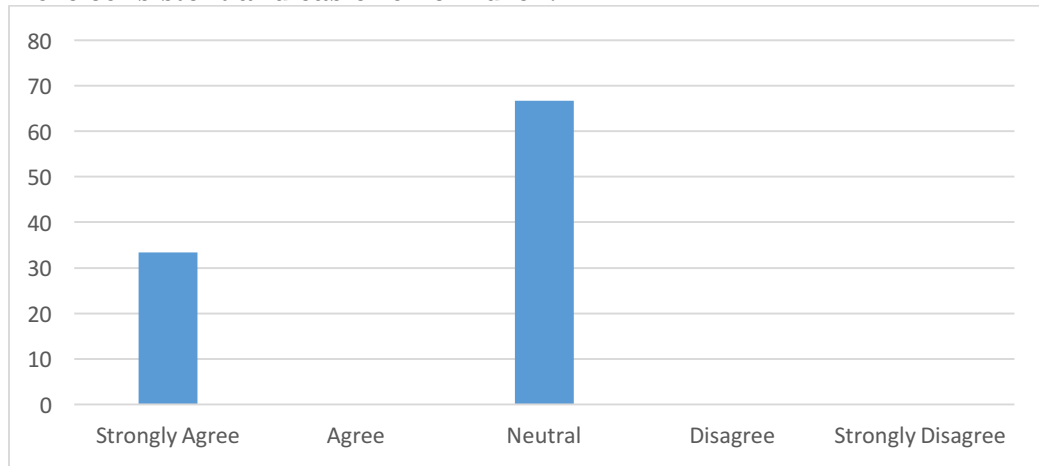
3. The new relaxed standard of evidence under IRFLP has made it easier to get relevant information to the judge.



COMMENTS: While I agree with this statement, it has created problems also.

1/27/2015 1:54 PM

4. The new rule guiding the participation of children in proceedings requiring advance notice has made the litigation process more consistent and easier on children.



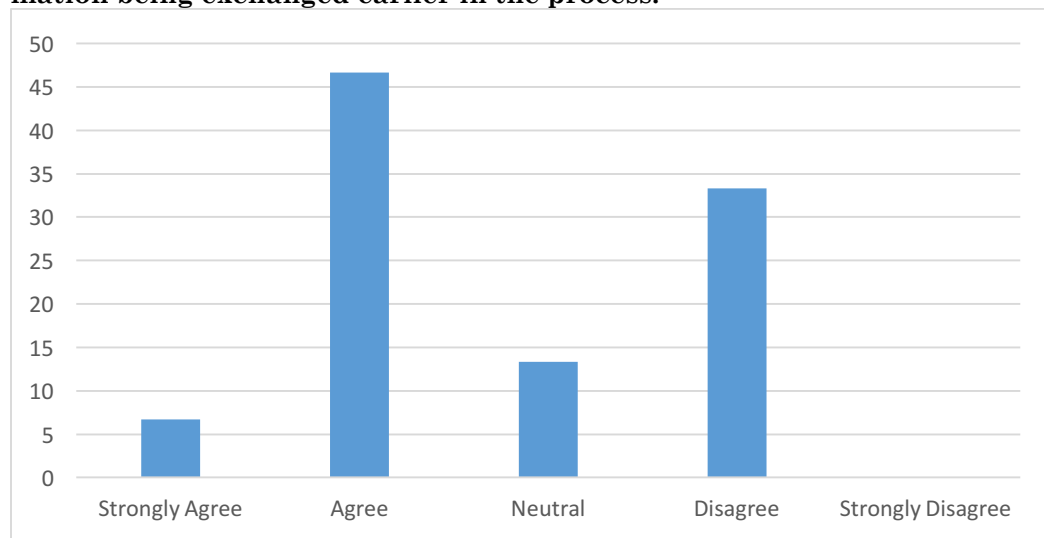
COMMENTS: I feel that NO child should be involved in the court process when custody is at issue, UNLESS the child is mature enough to handle the contentiousness of the litigation process. Although sometimes it is absolutely necessary for a child to testify (in cases of molestation or other abuse), unless it is critical, children should be kept OUT of the process. I believe this encourages attorneys to utilize the children as leverage.

1/30/2015 4:27 PM

Not sure about that.
1/30/2015 1:30 PM

I haven't had experience under this rule yet. I see it being a positive thing, although increasing costs with the attorney requirement.
1/27/2015 11:23 AM

5. The new mandatory disclosure rule has resulted in information being exchanged earlier in the process.



COMMENTS: Most attorneys are not complying with this rule yet, but this will likely change as the rules become more familiar.
2/8/2015 8:47 AM

But most of the time this mandatory disclosure does not give me all of the information I really need. People are very creative in "hiding" income. You need bank statements, financial statements, etc. to really determine a person's income.
1/30/2015 4:28 PM

Frankly, the old style discovery was more productive.
1/29/2015 2:47 PM

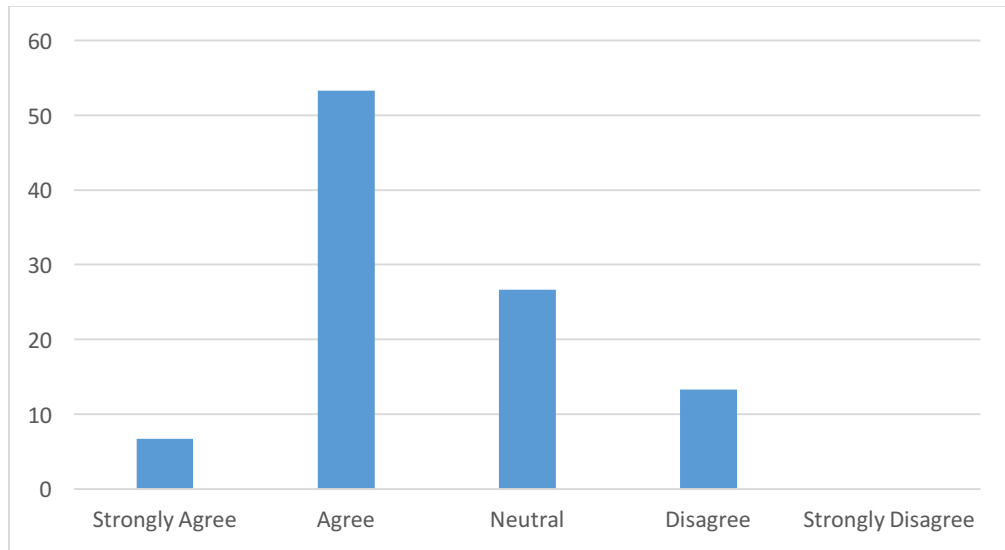
This is true, sometimes. But, overall it has created additional work and costs for the client.
1/27/2015 1:55 PM

The participants do not always comply with the timelines.
1/27/2015 11:29 AM

Could be tightened up more by also tying to filing of a notice of appearance.
1/27/2015 11:23 AM

The mandatory disclosure timeline often requires more cost up front when a case might be resolving, so it is my experience that attorneys will mutually agree to delay formally disclosing the mandatory disclosures in the interests of reaching a settlement and keeping costs down.
1/27/2015 10:19 AM

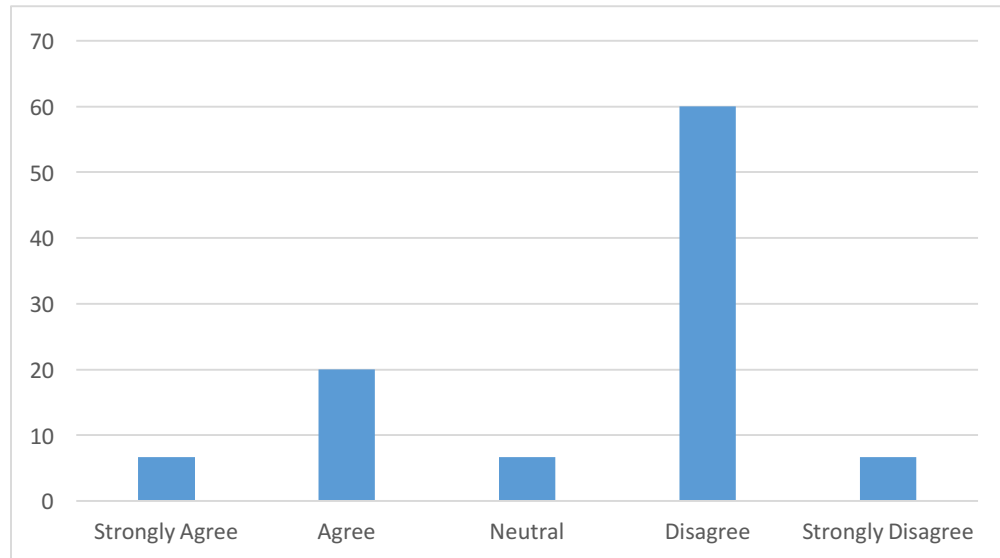
6. The deadline for supplying the mandatory disclosure information (35 days after a responsive pleading) is sufficient.



COMMENTS: if the parties will abide by the rule
1/27/2015 11:30 AM

This is true where attorneys are upfront with clients as to what needs to be collected. Self-represented litigants still have no clue as to this. Perhaps an automatic order in family law cases would assist with raising awareness.
1/27/2015 11:24 AM

7. The new Mandatory Disclosure rule has made the Discovery process more cost efficient and time saving.



COMMENTS: See my previous comments....

1/30/2015 4:29 PM

In addition to the mandatory disclosures, each case will have its own set of specific documents and/or interrogatories.

1/27/2015 10:20 AM

8. Any comments, concerns or suggestions regarding the Mandatory Disclosure rule?

The addition of sanctions for failure to comply will be helpful.

2/8/2015 8:48 AM

It's a good idea. It needs to be tweaked a bit.

1/30/2015 1:31 PM

it is long overdue

1/29/2015 2:10 PM

This Rule is not working the way it was intended to work. It creates additional work and costs for the clients.

1/27/2015 1:56 PM

15 - 20 days would be better.

1/27/2015 11:31 AM

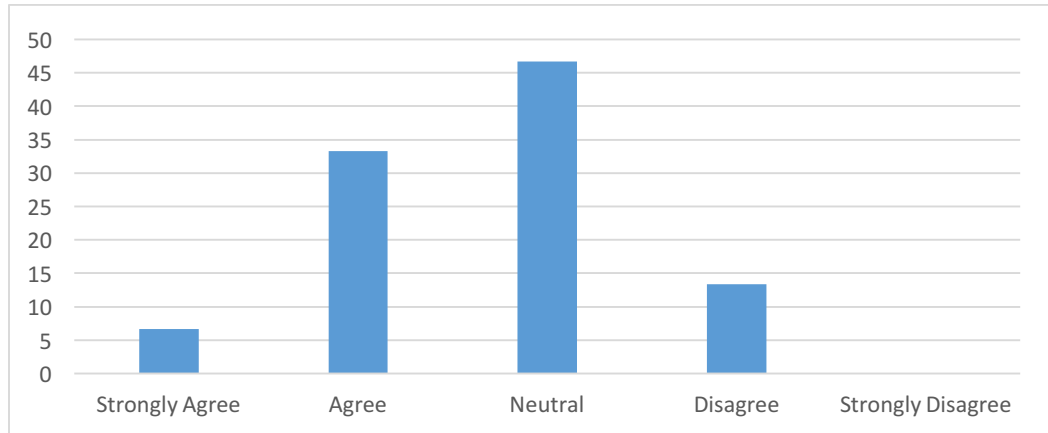
Extend the time for the disclosures to allow a chance for the parties to see if they can informally disclose information and resolve the case.

1/27/2015 10:20 AM

I think the timeline is too short and creates a lot of unnecessary work for the parties in cases that aren't overly contested. I also think the disclosure rules need to be tailored to the divorce vs. custody as different information is needed depending on the case.

1/26/2015 8:11 PM

9. The standard forms (i.e. Inventory of Property and Debts, Uniform Family Law Interrogatories, and Mandatory Disclosure) have been helpful and time-saving in most cases.



COMMENTS: Every family law case is different. The Uniform Interrogatories don't always address the relevant facts in a particular case. The same is true for the Mandatory Disclosure. Discovery is all about information gathering.

1/30/2015 4:31 PM

10. Do you have any additional comment, concerns, or suggestions regarding the IRFLP?

They have only been in use now since July 1, 2014 for my county. I think it will take a lot longer to really be able to effectively analyze the new rules. I strongly feel that there would be more effective ways of helping family law cases than the changing of all the rules. But no one asked me my opinion at the time....so I'll just go with the flow!! I will look forward to reading your article in the ILR. Good luck!

1/30/2015 4:33 PM

Fine job by the drafters. They are not perfect, but they are incredibly well done considering the enormity of the task.

1/29/2015 2:10 PM

I believe the rule of evidence exist for a reason and that the IRE should apply in family law cases with the exception of informal custody
1/27/2015 11:32 AM

The rules need to address emergency ex parte motions for custody/restraining orders -- are they supposed to be covered by the "temporary motions will be decided by affidavit" or a different rule? Also, IRCP 54's requirements make it impossible to have a decree of divorce be a "final" order.
1/27/2015 10:25 AM

I think there needs to be additional changes made to streamline the rules to family law, i.e. ex parte emergency motions need to be clarified and the rules shouldn't just restate the civil rules.
1/26/2015 8:12 PM