

UNITED STATES DISTRICT & BANKRUPTCY COURT
DISTRICT OF IDAHO

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NOTICE FOR PUBLIC COMMENT

The United States District Court's Local Rules Committee invites the public to review and provide comment on the amendment to the District Court's Local Rules of Civil Procedures 16.1 and the new proposed 47.2. Copies of the rules are attached to this notice.

The proposed Local Civil Rule 47.2 addresses the appropriate use of social media searches in regards to jurors or prospective jurors. The purpose of this proposed Rule is to provide guidance to Counsel in regards to what this District considers appropriate in the use of Social Media searches regarding jurors. There is a divergence of opinions regarding (1) the responsibility of attorneys to use social media to investigate the jury (*Cajamarca v. Regal Entertainment Group*), (2) the scope of a social media investigation and (3) where the line should be drawn between properly investigating jurors and improperly communicating with them. One divergence of the proposed Rule from the ABA Formal Opinion 466 issued on April 24, 2014 is whether or not the search needs to be done "anonymously." While the ABA came down on the side of not requiring anonymous searches, other groups have held that (1) you must know what technology exists (ABA Formal Opinion 466 @p5, last paragraph) and (2) must do any searches anonymously (Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2012-2.)

It is also contemplated under the proposed Rule that the Court instruct the jurors in their orientation session as to the potential use of social media and that the attorneys in the case may research them. This is a recommendation of the ABA Formal Opinion 466 @ p.3. fn.4.

There will also be a paper copy provided for reference at the United States Courthouses in Boise, Coeur d'Alene, Moscow and Pocatello. If you are unable to access the website, or not able to travel to a courthouse location, please call Kirsten Wilkinson, Chief Deputy of Operations at (208)334.9464.

All public comments are due by July 18, 2014 at 5 p.m. (MST). Please send your comments by email to local_rulesDC@id.uscourts.gov, or by mail at the following address:

United States District Court, District of Idaho
Attn: Kirsten Wilkinson, Chief Deputy of Operations
550 West Fort Street
Boise, ID 83724

If you have any question, you can send your question to local_rulesDC@id.uscourts.gov, or please call (208)334.9464. Thank you.

CIVIL RULE 16.1

SCHEDULING CONFERENCE, VOLUNTARY CASE MANAGEMENT CONFERENCE (VCMC) AND LITIGATION PLANS

As a general rule, scheduling conferences will not be held in the following type of cases, unless otherwise ordered by the Court:

- 1) A petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence.
- 2) An action to enforce or quash an administrative summons or subpoena.
- 3) An action by the United States to recover a benefit payment.
- 4) An action by the United States to collect on a student loan.
- 5) A proceeding ancillary to proceedings in other courts.
- 6) Petition to review a decision denying social security benefits.
- 7) Farm Service Administration Foreclosure Actions.

In all other civil cases, unless otherwise ordered by the Court, a scheduling conference will be conducted within ninety (90) days after the complaint has been filed. The Court, in its discretion, may use telephonic/video conferencing with the parties for this purpose. The Court will notify all parties of the date and time of the scheduling conference.

When the Clerk provides notice to the parties of the time and date of the scheduling conference, counsel will also be provided with a scheduling conference/litigation plan form used by the trial judge who has been assigned the case. This form also contains requests for discovery information that counsel will discuss at their Federal Rule of Procedure 26(f) conferences. Each judge's litigation plan form is available on the Court's website

At least twenty-one (21) days before the time and date set for the scheduling conference, counsel must confer and discuss each of the following items contained on the scheduling conference/litigation plan form. These include, but are not necessarily limited, to the following:

- 1) Discuss the requirement to make initial disclosures within fourteen (14) days.
- 2) Expert witness reports/testimony cutoff dates.
- 3) Number and length of depositions.
- 4) Discovery cutoff dates.
- 5) Joinder of parties and amendment of pleadings cutoff date.

- 6) Dispositive motions filing cutoff date.
- 7) Availability of Voluntary Case Management Conference (VCMC)
- 8) Alternative Dispute Resolution: (Dist. Idaho Loc. Civ. R. 16.4)
 - A) Settlement Conferences
 - B) Arbitration
 - C) Mediation
- 9) Status conference date, if counsel believes one will be necessary.
- 10) Pretrial conference date (to be entered by the Court).
- 11) Estimated length of trial.
- 12) Trial date (to be entered by the Court).

a) **Voluntary Case Management Conference.**

1) **Definition.** Voluntary Case Management Conference (VCMC) is a tool whereby a Magistrate Judge hosts an informal meeting with counsel in civil cases to identify areas of agreement, clarify and focus the issues, and encourage the parties to enter procedural and substantive stipulations. The VCMC conference is not a settlement conference; it is an effort to: (1) assist in the reduction of expense and delay; and (2) enhance direct communication between the parties about their claims.

2) **Timing.** During the Scheduling Conference, the trial judge will discuss with the parties whether the case would benefit from a VCMC conference before a designated Magistrate Judge. If the trial judge and the parties agree that a VCMC conference is warranted, the parties will be ordered to appear at a VCMC conference within 45 days after the Scheduling Conference.

A) Counsel for any party may request an earlier VCMC conference by contacting the court's ADR Coordinator. The ADR Coordinator will discuss the request with the assigned trial judge, who will determine whether it is appropriate to refer the action to an earlier VCMC conference.

B) The Magistrate Judge conducting the VCMC conference may order the VCMC conference be conducted by telephone upon request by counsel for any party.

3) **Process.** At the VCMC conference, the Magistrate Judge will discuss the parties' claims and defenses in order to suggest stipulations and pretrial procedures that may reduce the expense and delay in the case. The Magistrate Judge assigned to the VCMC conference will generally be the same Magistrate Judge assigned to conduct a judicially

supervised settlement conference in the case, although he or she will not be the trial judge assigned to the case or designated for referrals by a District Judge in the same case.

A) All communications during the VCMC conference shall be privileged and confidential.

B) If necessary, the Magistrate Judge conducting the VCMC conference may, after consultation with the trial judge, modify the scheduling order based on agreements reached at the VCMC conference.

Fourteen (14) days after counsel have conferred on the scheduling conference / litigation plan form, counsel must make their initial disclosures as required by Federal Rule of Civil Procedure 26(a)(1).

After counsel have conferred on the scheduling conference and litigation plan form, counsel must forward to the Court the scheduling conference and litigation plan form which they have jointly stipulated to or, in the event counsel are unable to agree, their proposed plan, within the time period prescribed by the judge conducting the scheduling conference.

After the scheduling conference, the Court will prepare and enter an order which will provide time frames and dates for the items contained on the scheduling/litigation plan form. Upon the Court's determination, certain cases can be exempted from these requirements and the parties will be so notified.

b) ~~(B)~~ **Electronically Stored Information**

The parties shall discuss the parameters of their anticipated e-discovery at the Rule 26(f) conference, as well as at the Rule 16 scheduling conference. More specifically, during the 26(f) conference, the parties shall exchange the following information and discuss the following e-discovery issues:

1) The names of the most likely custodians of relevant electronically stored information, as well as a brief description of each person's title and responsibilities;

2) A list of each relevant electronic device or system that has been in place at all relevant times and a general description of each device or system including, but not limited to, the nature, scope, character, organization, and formats employed in each device or system. The parties should also discuss whether their electronically stored information is reasonably accessible. Electronically stored information that is not reasonably accessible may include information created or used by electronic ~~storage~~ media no longer in use, maintained in redundant electronic storage media, or for which retrieval otherwise involves undue burden or substantial cost;

3) A brief description of the steps each party has taken to segregate and preserve all potentially relevant electronically stored information;

4) The potential for conducting discovery of electronically stored information in phases as a method for reducing costs and burden;

5) The methodology the parties shall employ to conduct an electronic search for relevant electronically stored information and any restrictions as to the scope and method of the search;

6) The format for production (e.g., text searchable image files such as pdf or tiff) of electronically stored information, ~~and,~~

6)7) The potential for entering into an agreement under Federal Rule of Evidence 502(d) regarding the disclosure of a communication or information covered by the attorney-client privilege or work-product protection, as well as the potential for moving the Court to enter an order that incorporates any such agreement under Federal Rule of Evidence 502(d), and

7)8) Any problems reasonably anticipated to arise in connection with e-discovery (e.g., email duplication).

If the parties fail to reach agreement on any of the e-discovery issues addressed in subparts (4) through (7)8) above prior to the Rule 16 scheduling conference the parties shall bring this fact to the Court's attention at the Rule 16 scheduling conference and discuss whether the Court's intervention on those topics is necessary.

RELATED AUTHORITY

Fed. R. Civ. P. 16, 16(f)

Dist. Idaho Loc. Civ. R. 16.4, 16.5

CIVIL RULE 47.2

SOCIAL MEDIA JUROR INQUIRIES¹

a) Attorneys may use websites available to the public, including social media websites, for juror or prospective juror research, so long as:

- 1) The website or information is available and accessible to the public;
- 2) The attorney does not send an access request to a juror's electronic social media;
- 3) No direct communication or contact occurs between the attorney and a juror or prospective juror as a result of the research, including, but not limited to Facebook "friend" requests, Twitter or Instagram "follow" requests, LinkedIn "connection" requests, or other forms of internet and social media contact;
- 4) Social media research is done anonymously. For example, a search on a social media site must not disclose to the juror who is making the inquiry, and it must only seek information available and accessible to the public and not the result of an attorney's account on said social media site;² and
- 5) Deception is not used to gain access to any website or to obtain any information.

b) Third parties working for the benefit of or on behalf of any attorney must comply with all the same restrictions as set forth above for attorneys.

c) If an attorney becomes aware of a juror's or prospective juror's conduct that is criminal or fraudulent, IRPC 3.3(b) requires the attorney to take remedial measures including, if necessary, reporting the matter to the court.

d) If an attorney becomes aware of a juror's posting on the internet about the case in which she or he is serving, the attorney shall report the posting to the court.

¹ Jurors will be advised during the orientation process that their backgrounds will be of interest to the litigants and that the attorneys in the case may investigate their backgrounds, including a review of internet websites and social media.

² If there is not a method of conducting the internet research in a manner which prevents the juror or prospective juror from discovering who is doing the research, the research shall not be done because it would constitute an inappropriate communication. Attorneys must be familiar with the technology and internet tools they use to be able to do searches, including automatic, subscriber-notification features so as to maintain anonymity in any search.