

PROPOSED PROTOCOL TO BE USED BY IDAHO JUDGES DURING HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS¹

COMMITTEE TO INCREASE ACCESS TO THE COURTS HON. JOEL HORTON, CHAIR

Idaho Judges are encouraged to use the following protocol when conducting hearings involving at least one self-represented party:

1. Verify that the party is not an attorney, that the party understands he or she is entitled to be represented by an attorney, and chooses to proceed pro se. Explain the risks and difficulty of self-representation. Suggest that the party contact the nearest Court Assistance Office for lawyer referral or other assistance.
2. Explain the process. “I will hear both sides in this matter. First I will listen to what the Plaintiff wants me to know about this case and then I will listen to what the Defendant wants me to know about this case. The witnesses for Plaintiff and Defendant will come up to the witness stand, be sworn, and then will provide their testimony in response to questions asked by the party who called them, by the other party, and perhaps by me. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence. Everything that is said in court is [recorded] [taken down by a court reporter] and in order to insure that the court record is accurate, only one person can talk at a time. Wait until the person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question.”
3. Explain the elements. For example, in summary proceedings for eviction cases: “Plaintiff is requesting a judgment for possession of rental property. If Plaintiff can show that she is the owner of the property and that the defendant has breached the lease by failing to pay rent or in some other respect, I will enter the judgment Plaintiff has asked for. Based on that judgment, a writ of restitution can be issued by the Court Clerk ordering the sheriff to remove the Defendant from Plaintiff’s property and to restore possession of the property to the Plaintiff.
4. Explain that the party bringing the action has the burden to present evidence in support of the relief sought. For example, in eviction cases: “Because the Plaintiff has requested this order, she has to present evidence to show that a court order is needed. I will not consider any of the statements in the complaint that has been filed in this matter. I can only consider evidence that is presented here in court today. If Plaintiff

¹ This proposed protocol is modeled after a protocol written by the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges. It was adapted to Idaho court practices by Prof. Patrick D. Costello, Director of the Idaho Court Assistance Offices Project.

is unable to present evidence that an order is needed, then I must dismiss this action. When I am done with this explanation, I will ask Plaintiff to call her first witness. The witness can be anyone who has first-hand knowledge of the facts of this case, Plaintiff, another person, or Defendant. ”

5. Explain the kind of evidence that may be presented. “Evidence can be in the form of testimony from the parties, testimony from other witnesses, or exhibits. Everyone who testifies will be placed under oath and will be subject to questioning by the other party. All exhibits must first be given an exhibit number by the court clerk and then the witness who is testifying and who can identify the exhibit must briefly describe it. The exhibit is then given to the other party who can look at the exhibit and let me know any reason why I should not consider that exhibit when I decide the case. I will then let you know whether the exhibit can be used as evidence.”
6. Explain the limits on the kind of evidence that can be considered. “I have to make my decision based upon the evidence that is admissible under the Rules of Evidence for courts in Idaho. If either party starts to present evidence that is not admissible, the other party may object. If I agree that the evidence is inadmissible I will sustain the objection, which means that I cannot consider that type of evidence. Some examples are irrelevant evidence and inadmissible hearsay. Irrelevant evidence is testimony or exhibits that do not help me understand or decide issues that are involved in this case. Hearsay is a statement made outside of court by a person who is not the opposing party which you want me to consider to be true; hearsay could be an oral statement that was overheard or a written statement such as a letter. Most hearsay is considered unreliable and is inadmissible.”
7. Ask both parties whether they understand the process and the procedure.
8. If non-attorneys are permitted to sit at counsel table with either party they may provide support but should not be permitted to argue on behalf of a party or to question witnesses.
9. Questioning by the judge should be directed at obtaining general information in order to avoid creating an appearance of advocacy. For example, in eviction cases: “Tell me why you believe the tenant has breached the lease. If you have specific incidents you want to tell me about, start with the most recent incident first and tell me when it happened, where it happened, who was present, and what happened.”
10. Whenever possible the matter should be decided and the order prepared immediately upon the conclusion of the hearing so it may be served on the parties.