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September 9, 2020

To the Members of the Idaho Appellate Rules Advisory Committee:

The Idaho State Bar Appellate Practice Section (“APS”) was invited to comment on proposed and possible changes to the Idaho Appellate Rules. In so doing, the APS formed a subcommittee to discuss and analyze whether any particular rules were in need of updating. The subcommittee reviewed those items identified in the 2020 Appellate Rules Advisory Committee Agenda Items. Further, the APS sent out a general request to its membership for any recommendations as to what rules could be altered or updated. The following list consists of the recommendations from the Subcommittee, along with recommendations received from members of the APS. The APS Governing Council has reviewed the comments and proposals made by the Subcommittee and APS members, and hereby provides such information as provided to the Council without any recommendation as to approval or rejection of such comments and proposals.

1. The Subcommittee had no suggestions, comments, or concerns regarding Agenda Items Nos. 1 and 2 (re.: changes to I.A.R. 13(a) and I.A.R. 29).
2. The Subcommittee had no objections to Agenda Item No. 3 (re.: I.A.R. 30(a)), but questioned whether such a change was actually necessary. The rule itself has no limitation on when such motion may be filed on appeal, and more clarity could be helpful. If the point was to prevent a motion to augment the record on rehearing, then such proposed change made sense.
3. The Subcommittee was not clear on what particular changes were being proposed in Agenda Item No. 4 (re.: I.A.R. 45). Adopting I.R.C.P. 11.3 in the appellate context may not be completely helpful. More uniformity could be good, but a direct translation of I.R.C.P. 11.3 into the appellate process may not be as helpful, particularly where there is already I.A.R. 48.
4. The Subcommittee had no objection to Agenda Item No. 5 (re.: I.A.R. 35(e)). To the extent formatting of briefing is being updated, the Subcommittee had several proposals to add to such updated, including:
 - a. A word limit to briefs, as opposed to a page limit. Examples include the rule on brief length before the Federal 9th Circuit Court of Appeals. To maintain the same approximate page length currently allowed by the I.A.R., this word limit would be approximately 16,000 words.
 - b. Cleaning up the appellate record, including:

- i. Modifying how the Record, Transcript, and Exhibits are paginated and referred to on appeal. Perhaps putting the entire record into one document, so that there are not multiple separate records each with a “p. 1”. Alternately, a model similar to the Federal 9th Circuit could be adopted where the parties are required to create their own Excerpts of the Record.
 - ii. Remove any reference to citations of “Vol. 1,” etc. As the Record and Transcripts are typically produced electronically, they are produced in one volume, meaning this rule is outdated.
5. The Subcommittee had no suggestions, comments, or concerns regarding Agenda Item No. 6 (re.: I.A.R. 5(c), 24, 27(b), and 34).
6. One APS member commented that Int. R. Sup. Court 15(f) (discussing citation to unpublished cases) does not specifically indicate whether it applies to appellate briefing, or to civil or criminal cases before the district court. It would be helpful, if it was the intent of the rule was to prevent citation to unpublished cases, to have a corollary rule in the I.A.R., the I.R.C.P., and the I.C.R.
7. One APS member proposed the following modification to I.A.R. 34(f)
 - a. “Before a decision is issued on a ground not briefed or argued by either party, the court shall provide notice to the parties that describes the ground, and the court shall give the parties the opportunity to submit supplemental briefing on that issues.”
 - b. This language appears to be based on a proposal by the American Academy of Appellate Lawyers. It was provided with a memorandum, a copy of which is attached.
8. One APS member recommended that I.A.R. 8 (addressing amicus curiae) be modified to specify the time for filing and criteria for granting motions for leave to file amicus briefs. The member suggested the adoption of Federal Rule of Appellate Procedure 29(a)(6), which states in relevant part:
 - a. “An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.”
 - b. The member also indicated that the adoption of F.R.A.P. 29 en toto may be the simplest course of action.

The APS Governing Council notes that some of these recommendations have been made without specifying exactly which rules may be affected by such changes. Members of the Subcommittee and the APS have volunteered to assist with drafting specific changes, should the Appellate Rules Advisory Committee express an interest in making such changes. If there is anything else we can assist with in this process, please let us know.

Sincerely,

Ben P. McGreevy, Chairperson