IDAHO STATE BAR APPELLATE PRACTICE SECTION

MEMBER MEETING—June 9, 2022, 12:00 p.m. MST

Location: ISB Law Center, 525 W. Jefferson St., Boise, ID and Zoom Video Conference
Meeting Link:
https://us02web.zoom.us/j/89425090193?pwd=SE5pUG5YWkN5eTNPZFNESVQra3oxUT09

Meeting ID: 894 2509 0193
Passcode: 754669
For Audio Only Dial: +1 253 215 8782
Join Zoom Meeting

1. **Welcome**
2. **Update on Financials**
3. **Action Item - Filling Secretary/Treasurer Position**
4. **Upcoming Meetings and Other Events**
    a. **Member Meetings:**
        i. **September 8, 2022**
        ii. **December 8, 2022**
5. **The Advocate**
    a. **Sponsoring the February, 2023 Issue**
    b. **Deadlines:**
        i. **Proposed articles to the Appellate Practice Board: June 30, 2022**
        ii. **Article Submissions: Dec. 24, 2022**
        iii. **EAB Meetings: Dec. 21, 2021**
        iv. **Final Revisions: Jan. 2, 2023**
    c. **Volunteers - Stephen Adams/Christopher Pooser ("The potential for interlocutory appeals in Idaho"), Ben McGreevy, Jennifer Jensen (Holland Hart, JMJensen@hollandhart.com), Leslie Hayes and Bryan Nickels (Appellate Mediation)**
6. **Other Business**
7. **CLE (0.5 hrs): Q&A Panel Discussion with Law Clerks at the Idaho Supreme Court**
8. **Adjourn Member Meeting**

ATTACHMENTS FOR MEMBER INFORMATION

1. **Meeting Minutes from the April 6, 2022 Meeting of the Appellate Rules Committee**

Appellate Rules Advisory Committee Meeting Minutes
Wednesday, April 6, 2022 at 1:00 p.m.

Present: Chief Justice G. Richard Bevan, Chair; Chief Judge Jessica Lorello, Judge Jason Scott (via Zoom), Christopher Pooser, Justin Curtis, Kenneth Jorgensen, Stephen Adams, Melanie Gagnepain, Michael Mehall (via Zoom), and Lori Fleming.

Rule 5. Special Writs and Proceedings. Idaho Appellate Rule 5 sets forth the procedures applicable to petitions for special writs. As currently drafted the rule states: "There shall be no response to applications filed pursuant to this rule unless the Supreme Court requests a party to respond to the application before granting or denying the same." I.A.R. 5(a). The Committee considered a proposal to amend the rule to allow, but not require, a response to a petition for a special writ, even if the Court does not specifically request one. (*See* Attachment A.) Mr. Jorgensen opposed the proposal to the extent it would place the onus on the opposing party to decide up front whether to file a response or waive that opportunity without having been given any indication whether the Court is seriously considering the petition. He suggested that, from a practitioner's perspective, the concern is that the Court will grant a petition for a special writ without receiving any input from the responding party. He recommended that any amendment be tailored to that concern and state that no writ will issue absent a response by the affected party. The Committee members agreed that fairness dictates a responding party be given an opportunity to respond to the petition before a writ is issued. There was also a consensus that there is no need to amend the rule to allow a response in every case, as doing so would not necessarily aid the Court and would create a delay of seven to 14 days before the Court could even act on a Petition. Following the discussion, Mr. Jorgensen moved that I.A.R. 5(a) be amended as follows:

> **Idaho Appellate Rule 5. Special writs and proceedings.**
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> (a) **Special Writs.** Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction. Except for petitions for writs filed by incarcerated persons and petitions for writs of habeas corpus, petitions for writs and motions seeking to intervene in such petitions shall contemporaneously be served by mail on all affected parties, including the real party in interest. There shall be no response to applications filed pursuant to this rule unless the Supreme Court requests a party to respond to the application before granting or denying the same. Provided, however, no writ shall issue absent a response by the Respondent(s). The Supreme Court shall process petitions for such special writs as are established by law in the manner provided in this rule.
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Judge Lorello seconded the motion, and the Committee members unanimously voted in favor of the proposed amendment. Following the vote, the Committee members clarified that the original proposal (Attachment A) was being rejected.

Rule 8. Amicus Curiae. Idaho Appellate Rule 8 governs the participation of amicus curiae in appellate proceedings. The Committee considered two separate proposals to amend the rule to more specifically set out the processes related to such requests. The first proposal, submitted by Christopher Pooser and supported by the Appellate Practice Section of the Idaho State Bar, is modeled after Federal Rule of Appellate Procedure 29. (*See* Attachment B.) The second proposal was drafted by Karlee Kirschner, an Idaho Supreme Court extern, after she researched the issue at Chief Justice Bevan's request. (*See* Attachment C.)

Mr. Pooser led the discussion regarding the proposals. He noted that, as currently drafted, Rule 8 does not give practitioners much guidance regarding how and when a request to appear as amicus curiae must be made. He stated that, since this issue was discussed at the last Appellate Rules Advisory Committee meeting, there continues to be confusion among the Bar about amicus curiae procedures. In particular, there is confusion about when a request for leave to appear as amicus curiae should be filed, what it should contain, and whether it should be accompanied by the proposed amicus brief. Mr. Pooser suggested that either of the proposals before the Committee would provide clarity on these issues, with the biggest difference between the two proposals being the timing of the filing of the amicus brief. Under Mr. Pooser's proposal, the proposed brief would have to be filed with the request for leave to appear as amicus curiae. Under Ms. Kirschner's proposal, the brief would have to be filed after leave is granted. Mr. Pooser noted that the former approach may be more beneficial to the Court, as the Court could better evaluate the proposed amicus's interests and arguments before deciding whether to grant leave. On the other hand, the latter approach would be less burdensome on practitioners and would only require them to draft and file a brief if the request for leave is granted.

The Committee discussed the proposals, with the discussion focusing primarily on the timing of the request for leave and filing of the amicus brief. One of the concerns raised was that the party whose interest is not being represented by the amicus have an adequate opportunity to review and respond to the amicus briefing, without having to file a special request to do so. Mr. Curtis noted that, as currently drafted, Rule 8 gives the Court wide discretion to allow a party to appear as an amicus at any time during the course of the appeal, and he advocated that the rule be left as it is to accommodate even late requests for leave in cases where such may be appropriate. As an example, Mr. Curtis recalled a criminal appeal in which an amicus did not request leave to appear until after the Supreme Court granted review of a Court of Appeals opinion. The request for leave was granted, and Mr. Curtis and Chief Justice Bevan both stated that the amicus briefing was helpful in that case. Mr. Curtis was not in favor of any amendment that would divest the Court of its discretion to entertain requests for leave to appear as amicus curiae, even late in the appeal process. Other members of the Committee were generally in favor of amending the rule and expressed a preference for the proposal modeled after F.R.A.P. 29, particularly the requirement that the request for leave be accompanied by the proposed amicus brief. Regarding the timing of such filing, subsection (d) of the proposal states: "An amicus must file its brief, accompanied by a motion for leave to file, no later than 7 days after the initial 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 initial brief is filed." Addressing Mr. Curtis' concerns, Mr. Pooser noted that the federal rule actually contains a provision that allows the Court to grant leave for a later filing. Specifically, F.R.A.P. 29(a)(6) states: "The court may grant leave for later filing, specifying the time within which an opposing party may answer." Mr. Curtis indicated that adding that language to the first proposal would address his concerns about the Court still having discretion to grant a late request for leave to appear as amicus curiae, and the Committee members agreed such would be a good addition to the rule. Following the discussion, Mr. Jorgensen moved that the Committee adopt the first proposal (Attachment B) and also add the language from F.R.A.P. 29(a)(6), so that Rule 8 would be amended as follows:

Idaho Appellate Rule 8. Amicus curiae.

(a) When Permitted. An attorney, or person or entity through an attorney, may appear as amicus curiae in any proceeding by request of the Supreme Court; or by leave of the Supreme Court upon written ~~application~~motion served upon all parties.~~,~~

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and set~~ting~~ forth ~~the particular employment, if any,~~ the interest of the ~~applicant~~movant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear. The ~~application~~motion shall also state whether leave is sought to file an amicus curiae brief or participate in oral argument, or both.

(c) Contents and Form. An amicus brief must comply with Rule 36. In addition to the requirements of Rule 36, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 35, but it must include the following:

(1) a table of contents, with page references;

(2) a table of cases (alphabetically arranged), statutes, and other authorities, with page references;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person or entity; and

(5) an argument, which may be preceded by a statement of the case and which need not include a statement of the applicable standard of review.

(d) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for leave to file, no later than 7 days after the initial 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 initial brief is filed. The court may grant leave for later filing, specifying the time within which an opposing party may answer.

(e) Objections. Any objection to the appearance of an amicus curiae must be made by motion within 14 days of service of the ~~application~~motion for leave to file in the manner provided for motions under Rule 32.

(f) Reply Brief. Except by the court's permission, an amicus curiae may not fie a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

(h) Order. Leave to appear as amicus curiae shall be by written order of the Supreme Court which shall specify the manner of appearance by the amicus curiae attorney~~ and state the time for filing of any amicus curiae brief~~.

Additionally, Rules 34(c) and 35(c), I.A.R., would be amended as follows:

Idaho Appellate Rule 34. Briefs on Appeal - Number - Length - Time for Filing - Extension - Augmentation.

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(c) Time for Filing. Appellant's brief shall be filed with the clerk of the Supreme Court within 35 days of the date that the reporter's transcript and the clerk's or agency's record have been filed with the Supreme Court. The respondent's and cross-appellant's brief, which may be joined in one brief, shall be filed within 28 days after the service of appellant's brief. The cross-respondent's brief, if any, shall be filed within 28 days after the cross-appellant's brief. Any reply brief shall be filed within 21 days after service of any respondent's brief.~~ Briefs of amicus curiae shall be filed within the time set in the order of the Supreme Court granting leave to file an amicus curiae brief.~~

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Idaho Appellate Rule 35. Content and Arrangement of Briefs.

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(c) Other Briefs. The appellant or cross-appellant may file a brief in reply to the brief of the respondent or cross-respondent within the time limit specified by Rule 34(c) which may contain additional argument in rebuttal to the contentions of the respondent. An amicus curiae brief may be permitted by order of the Court, pursuant to Rule 8~~ may contain a statement of the case, points and authorities, and additional argument on any issue raised by the parties in the appeal or as~~

~~allowed by order of the Supreme Court~~. If the respondent has filed a cross-appeal, the appellant shall file a cross-respondent's brief which shall contain all of the requirements of Rule 35(b), above, and, unless otherwise ordered by the court, it shall be combined with appellant's reply brief.

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Mr. Pooser seconded the motion, and the Committee members unanimously voted in favor of the proposed amendments.

Rule 9. Appearance of Attorneys not Licensed in Idaho. Idaho Appellate Rule 9 states that an attorney not licensed in Idaho may move for permission to appear and argue before the Supreme Court. The Clerk's Office proposed that the rule be amended to state that any motion filed pursuant to this rule must be in substantially the form required by Idaho Bar Commission Rule 227(j). Ms. Gagnepain addressed the Committee and explained that there have been many instances in which out-of-state attorneys seeking permission to appear under this rule have failed to comply with the Idaho State Bar Commission Rules governing *pro hac vice* admission. In those instances, the Clerk's Office has reached out to the attorneys and directed them to the Bar Commission Rules. Ms. Gagnepain suggested that amending the rule to include a requirement that the out-of-state attorney comply with I.B.C.R. 227(j) would make it clear to out-of-state counsel what the motion should contain. Ms. Gagnepain moved that I.A.R. 9 be amended as follows:

Idaho Appellate Rule 9. Appearance of attorneys not licensed in Idaho

Upon written motion of a licensed Idaho attorney, at least 14 days before a hearing or argument, and upon order of the Supreme Court an attorney not licensed in Idaho may be permitted to appear and argue before the Supreme Court in association with such Idaho licensed attorney. The motion, or a supporting statement, shall certify that the attorney not licensed in Idaho is a licensed attorney in good standing in another specific state or jurisdiction and shall otherwise be in substantially the form found in Idaho Bar Commission Rule 227(j). If an attorney ~~is~~has been granted pro hac vice admission pursuant to Idaho Bar Commission Rule to appear in any case, then the attorney may continue to appear in that case before the Supreme Court without obtaining an order pursuant to this rule.

Mr. Curtis seconded the motion, and the Committee members unanimously voted in favor of the proposed amendment.

Rule 11. Appealable Judgments and Orders. Idaho Appellate Rule 11 sets forth the orders and judgments that are appealable to the Supreme Court as a matter of right. The Committee considered a proposal to amend the rule to include partial decrees issued in water law cases adjudicated in the Snake River Basin Adjudication ("SRBA") as among the orders/judgments that are appealable as a matter of right. (No proposed language was offered.) Ms. Fleming explained that the SRBA Rules of Procedure make clear that partial decrees are appealable. However, there is some confusion whether a partial decree is itself a final judgment or whether the partial decree must be accompanied by a Rule 54(b) certificate in order to be appealed as a matter of right. The confusion stems from the SRBA Rules of Procedure themselves, as Rule

14.d. states that "Partial decrees are final judgments," but Rule 15.a. states "Appeals from a partial decree by a party to a subcase may be brought pursuant to I.R.C.P. 54(b) or I.A.R. 12." Because none of the Committee members were familiar with the procedural rules in water law cases, the consensus was that the proposal should be tabled. Chief Justice Bevan will reach out to Judge Wildman and solicit his thoughts about the issue.

Rules 13 and 13.4. Stay of District Court Proceedings during a Permissive Appeal. Idaho Appellate Rules 13(b)(18) and 13.4(a) currently provide that, during a permissive appeal under I.A.R. 12, the entirety of the district court case is stayed and the district court has no power to take action unless approved by the Supreme Court. Judge Scott proposed that these rules be amended so that the granting of a permissive appeal does not automatically result in a stay of the balance of the civil case and that the decision whether to enter a stay be made by the district court, rather than by the Supreme Court, in the first instance.

Judge Scott addressed the Committee and explained that this proposed amendment is similar to the 2021 amendment to I.A.R. 13 and 13.4 that put an end to the automatic divestiture of trial court jurisdiction after an appeal is taken from a Rule 54(b) judgment. The 2021 amendment had the effect of allowing the trial court to proceed with the balance of the litigation during the pendency of the appeal from a Rule 54(b) judgment, unless the trial court or the Supreme Court orders a stay. Judge Scott proposed that a similar rule should apply in cases in which a permissive appeal has been granted. He suggested the rationale underlying the proposal is largely the same as the rationale underlying 2021 amendment to the rules governing stays during an appeal of a Rule 54(b) judgment—that rationale being: (1) there is no inherent reason why, just because a part of the case has been appealed, nothing else in the case should make any forward progress during the course of the appeal, which may take months or years to resolve, and (2) the district court, not the Supreme Court, is actually in the best position to determine whether the balance of the case should proceed or be stayed. Based on this rationale, Judge Scott advocated that there really is no justification for requiring an automatic stay of the district court proceedings during the pendency of a permissive appeal. He also noted his proposed amendment is consistent with the statutory directive in the federal court system that an interlocutory appeal does not result in a stay of the trial court proceedings unless the trial court or appellate court so orders. *See* 28 U.S.C. 1292.

The Committee members discussed the proposal and agreed that, at least in civil cases, the granting a motion for permissive appeal should not result in an automatic stay, and that the district court is in a better position than the Supreme Court to decide whether the balance of the district court case should proceed or be stayed. Judge Scott suggested that, if the proposed changes to Rules 13(b)(18) and 13.4 are adopted, subsection (f) of Rule 13—which specifically addresses stays upon permissive appeals—should be eliminated, as motions for stay would now be governed by Rule 13.4(c). The Committee considered the suggestion but was not inclined to recommend that subsection (f) be removed from Rule 13. The Committee members, including Judge Scott, observed that subsection (f)(1) would still be relevant in both civil and criminal

cases because it states that the filing of a motion for permission to appeal under I.A.R. 12 does not automatically stay the trial court proceedings or enforcement of the interlocutory order. Mr. Jorgensen opined that subsection (f)(2) would also still be relevant in criminal cases in which a permissive appeal has been granted. Judge Scott's original proposal only addressed stays during the pendency of permissive appeals in civil actions. Mr. Jorgensen expressed concern that, if subsection (f)(2) of Rule 13 were eliminated, it would have the unintended effect of doing away with automatic stays during the pendency of a permissive appeal in a criminal action. Judge Scott was not convinced that the proposal to do away with an automatic stay during a permissive appeal should be limited to civil cases but, following further discussion regarding the differences between civil and criminal cases—including the double jeopardy concerns that exist in criminal actions—Judge Scott agreed that it would rarely make sense to go forward with a trial in a criminal case while a permissive appeal is pending. The Committee members agreed and discussed ways to make clear in Rule 13(f)(2) that there is an automatic stay upon the granting of a permissive appeal in criminal cases but not in civil cases. Ultimately, the Committee decided that, because the amendment to Rule 13(b)(18) will make clear that there is no automatic stay during the pendency of a permissive appeal in a civil case, the language in Rule 13(f)(2) that excepts Rule 13(b) from the automatic waiver rule is sufficient to convey that the automatic stay provision does not apply in civil cases. The Committee members agreed, however, that the Rule would be more clear if the exceptions listed in Rule 13(f)(2) were moved to the beginning of the sentence.

Following the discussion, Judge Lorello moved to approve the proposed amendments to Rules 13(b) and 13.4, and to recommend that Rule 13(f) be amended by moving the exceptions listed therein to the beginning of the subsection. Judge Scott seconded the motion, and the Committee members unanimously voted to approve the proposed amendments. As amended, the rules would read as follows:

Idaho Appellate Rule 13. Stay of Proceedings Upon Appeal or Certifications.

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(b) **Stay Upon Appeal - Powers of District Court - Civil Actions.** In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency of an appeal~~;~~:

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(18) ~~Take any action and rule upon all matters, including conduct of a trial, during a permissive appeal under Rule 12, I.A.R., if approved by the Supreme Court under Rule 13.4(a), I.A.R.~~ During a permissive appeal under Rule 12, I.A.R., take any actions and rule upon all matters unaffected by the permissive appeal, including conducting a trial, unless a stay is entered by either the district court or the Supreme Court under Rule 13.4(c), I.A.R.

(19) During an appeal from a partial judgment certified as final under Rule 54(b), I.R.C.P., take any actions and rule upon any matters unaffected by the Rule 54(b) judgment, including conducting a trial of the issues remaining in the case, unless a stay is entered by either the district court or the Supreme Court under Rule 13.4(~~b~~c), I.A.R.

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(f) **Stay Upon Permissive Appeal.**

(1) Stay during processing of motion for permission to appeal. The filing of a motion for permission to appeal under Rule 12 shall not automatically stay the action or proceeding nor the enforcement of the interlocutory judgment, order or decree. After a motion for permission to appeal has been filed, the district court or administrative agency, or the Supreme Court, may grant a stay in the manner provided in this Rule for a stay during an appeal.

(2) Stay after a motion for permission to appeal has been granted. Except as provided in subsections (a), (b), (c), (d) and (e) of this Rule, ~~T~~the granting of a motion for permission to appeal under Rule 12 by the Supreme Court automatically stays the entire action or proceeding until the appeal has terminated, and during that time the district court or administrative agency shall have no power or authority over the action or proceeding~~, except as provided in subsections (a), (b), (c), (d) and (e) of this Rule~~. Provided, the granting of the motion for permission to appeal does not stay the enforcement of any judgment, order or decree, but the district court or administrative agency, or the Supreme Court, may grant a stay in the manner provided in this Rule for a stay during an appeal.

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Idaho Appellate Rule 13.4. Delegation of Jurisdiction to District Court During an Appeal.

(a) **Permissive Appeal Under Rule 12, I.A.R.** During a permissive appeal under Rule 12, I.A.R., ~~the Supreme Court may, by order, delegate jurisdiction to~~ the district court retains jurisdiction to take ~~specific~~ actions and rule upon ~~specific~~ matters unaffected by the permissive appeal, which may include jurisdiction to conduct a trial of issues. ~~A motion for an order under this rule may be filed with the Supreme Court by any party in the district court action or the administrative proceeding.~~ Provided, however, that the district court may enter an order staying the remainder of the case pending final disposition of the permissive appeal, either on its own motion or on the motion of any party.

(b) **Appeal from a Partial Judgment Certified as Final under Rule 54(b), I.R.C.P.** During an appeal from a partial judgment certified as final under Rule 54(b), I.R.C.P., the district court retains jurisdiction to take actions and rule upon matters unaffected by the Rule 54(b) judgment, which may include jurisdiction to conduct a trial of the issues remaining in the case. Provided, however, that the district court may enter an order staying the remainder of the case pending an

appeal of the Rule 54(b) judgment, either on its own motion or on the motion of any party.

(c) **Motion for Stay.**

(1) **Motion to District Court.** A motion for stay under ~~this~~ subdivision (a) or (b) of this Rule may be filed with the district court at any time during the pendency of the permissive appeal or appeal of the Rule 54(b) judgment. The motion shall be filed, served, noticed for hearing and processed in the same manner as any other motion, and hearing of the motion shall be expedited. Within fourteen (14) days after the hearing, the district court shall enter an order granting or denying the motion for stay and setting forth the reasoning for its decision.

(2) **Motion to Supreme Court.** If the district court denies the motion for stay, or fails to rule upon the motion within twenty-one (21) days after the filing of the motion, the moving party may apply to the Supreme Court for a stay. If the district court grants a stay, any party may apply to the Supreme Court to modify or vacate the stay. A copy of the district court's order granting or denying the motion to stay must be attached to the motion filed with the Supreme Court. Any order of the Supreme Court shall take precedence over any order entered by the district court.

Rule 23(c) and (d). Waivers of Filing Fees in Original Actions. Idaho Appellate Rule 23(c) and (d) govern the waiver of appellate filing fees upon the application of a party. The Committee considered a proposal that the rules be amended to require that an application for waiver of the filing fee applicable to petitions for special writs be submitted to the Supreme Court contemporaneously with the petition. (*See* Attachment D.) Chief Justice Bevan addressed the Committee and explained that the proposal was being put forward because, as it is currently drafted, Rule 23 does not set forth any procedure for seeking a fee waiver in an original action. Ms. Gagnepain agreed that the rule needs to be amended to provide such procedure, but she voiced concern about proposed subsection (d)(1), which would require the Clerk to lodge, but not file, the application for fee waiver and petition for special writ until the Court entered an order granting the fee waiver. Ms. Gagnepain explained that the Clerk's Office does not currently have a mechanism by which it can "lodge" or otherwise accept filings without opening a case. She suggested it may be wise to table the proposal so that she can speak to the Court Management Division about whether the Supreme Court's electronic case management system can be configured to accommodate lodgings, perhaps by creating an "administrative case" designation like the one that exists in district courts. There being no objection from any of the other Committee members, the proposal was tabled.

Rule 23(e). Automatic Waiver of Filing Fee. Idaho Appellate Rule 23(e) provides for an automatic waiver of the appellate filing fee in any appeal in which the appellant or cross-appellant is represented by Idaho Legal Aid Services. The Committee considered a proposal to amend the rule to clarify that the automatic fee waiver does not apply to petitions for special writs. (*See* Attachment E.) Ms. Gagnepain addressed the Committee and explained that the issue recently came up when Idaho Legal Aid Services filed a petition for writ of mandate or

prohibition without submitting a filing fee. The Clerk's Office accepted the filing but, upon further reflection, realized that the automatic waiver provision of Rule 23(e) only specifically refers to appeals. At the direction of the Court, Idaho Legal Aid Services subsequently paid the filing fee. The discussion concerning the proposed amendment to specifically except petitions for special writs from the automatic waiver rule focused on the reason the automatic waiver rule exists. When an appellant is represented by a volunteer lawyer, there is a presumption that the appellant is not able to pay the filing fee. Some members of the Committee wondered why that same presumption should not also apply in original actions brought by a petitioner represented by Legal Aid. However, there was also discussion about whether it would be sound policy to exempt Legal Aid from the filing fee applicable to special writs when Legal Aid is not bringing the writ on behalf of any particular client. The Committee desired more information about the circumstances that led the Court to require Legal Aid to pay the filing fee in the special writ case mentioned above. The Committee agreed to table the issue and noted that, even as it stands now, a petitioner in an original action who is represented by Legal Aid may still petition the Court for a fee waiver.

Rule 24(c). Estimate of Fees for Reporter's Transcript. When requesting transcripts, parties are required by I.A.R. 25 to provide an estimate of the number of pages. As it is currently drafted, however, I.A.R. 24(c) only requires court reporters to provide a page number estimate for trials. The Committee considered a proposal that I.A.R. 24(c) be amended to provide a standard estimate for hearings other than trial and to require court reporters to provide an estimate to the district court clerk at the conclusion of any trial, or any proceeding where the number of pages in the transcript will exceed the standard page estimate. (No proposed language was offered.) Ms. Gagnepain addressed the Committee and explained that this issue primarily arises in civil appeals. The parties are tasked with providing a page estimate of the transcripts they request in their Notice of Appeal, but more often than not the electronically generated court minutes do not contain any page estimate, nor are court reporters required to provide estimates other than for trials. The Committee members generally agreed that there should be a standard page estimate for hearings other than trials, but they were unable to come to a consensus regarding how such standard page estimate should be calculated—*i.e.*, by type of hearing, by number of hours the hearing took, etc. Chief Justice Bevan suggested that the court reporters should have input on this issue, and the Committee members agreed. Ms. Gagnepain advised the Committee that she will be attending a court reporter conference in May and can solicit input from the court reporters then. The Committee agreed to table the proposal until Ms. Gagnepain has the opportunity to speak with the court reporters and report back with their comments.

Rule 27(c). Payment of Estimated Fees for Clerk's Record. Idaho Appellate Rule 27(c) currently requires payment of the estimated fee for the Clerk's or Agency's Record prior to the filing of the Notice of Appeal. Ms. Gagnepain addressed the Committee and explained that this requirement is problematic because iCourt is only configured to accept payment of the filing fee; it does not accept payment of fees for the Clerk's Record or Reporter's Transcript. Thus, even though appellants are required to certify in their Notices of Appeal that they have paid the estimated fees, they cannot actually do so until the Notice of Appeal has been filed and, even then, they have to pay the fees either by personally delivering them to the clerk's office, placing payment in the mail, or paying by credit card over the phone. As iCourt is not configured to

allow payment of the estimated fees prior to the filing of the Notice of Appeal, Ms. Gagnepain proposed that I.A.R. 27(c) be amended to give appellants three days from the filing of a notice of appeal to pay the estimated fees. Mr. Adams moved to approve the proposal that Rule 27(c) be amended as follows:

> **Idaho Appellate Rule 27. Clerk's or Agency's Record - Number - Clerk's Fees - Payment of Estimated Fees - Time for Preparation - Waiver of Clerk's Fee.**
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> (c) **Payment of Estimated Fees.** ~~Before a notice of appeal is filed~~Upon the filing of a notice of appeal, or within three (3) working days thereof, the appellant shall pay the clerk an estimated record fee as computed by the clerk of the district court or administrative agency in accordance with subparagraph (b) of this rule, provided, if the estimated fee has not been made within two (2) days after the conclusion of the trial or proceeding, the estimated fees for preparation of the record shall be deemed to be the sum of $100.00 until the actual fee has been computed.
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Mr. Curtis seconded the motion, and the Committee unanimously voted to approve the proposed amendment.

Rule 30(a). Augmentation or Deletions from Transcript or Record. Idaho Appellate Rule 30(a) provides: "Any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record. …" Judge Gratton proposed that the rule be amended to state that such motion may be made "at any time before the issuance of an opinion." Judge Lorello led the discussion regarding the proposal, explaining that the amendment would make the rule consistent with I.A.R. 34(e), which permits parties to augment their briefs "at any time before the issuance of an opinion." Following Judge Lorello's comments, Mr. Adams moved that Rule 30(a) be amended as follows:

> **Idaho Appellate Rule 30. Augmentation or Deletions From Transcript or Record.**
>
> (a) At any time before the issuance of an opinion, ~~A~~any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record. Such a motion shall be accompanied by a statement setting forth the specific grounds for the request and attaching a copy of any document sought to be augmented to the original motion which document must have a legible filing stamp of the clerk indicating the date of its filing, or the moving party must establish by citation to the record or transcript that the document was presented to the district court. In order for augmented pages to be easily identified whether the motion is granted entirely or in part, each page of any document attached to the motion must be separately and sequentially numbered in the following format: Aug. p. 1. Any request for augmentation with a transcript that has yet to be transcribed must identify the name of the court reporter(s) along with the date and title of the proceeding(s), and an estimated number of pages, and must contain a certificate of service on the names reporter(s). The motion and statement shall be served upon all parties. Any party

> may within fourteen (14) days after service of the motion, file a brief or memorandum in opposition thereto. Unless otherwise expressly ordered by the Supreme Court such motion shall be determined without oral argument. The reporter's transcript and clerk's or agency's record may also be augmented or portions deleted by stipulation of the parties and order of the Supreme Court. The filing of a motion to augment shall not suspend or stay the appellate process or the briefing schedule.
>
> ***

Mr. Pooser seconded the motion, and the Committee members unanimously voted to approve the proposed amendment.

Rule 32(d). Motions. Idaho Appellate Rule 32(d) governs the filing of motions and currently states: "If the opposing party has been contacted and has no objection to the motion," the moving party may so indicate by attaching a Certificate of Uncontested Motion. The Committee considered a proposal that the rule be amended to require the moving party to contact the opposing party and to indicate in the motion whether the opposing party objects. (*See* Attachment F.) Judge Lorello led the discussion regarding the proposal. She explained that she proposed the amendment because there is no reason to hold a motion for 14 days if the opposing party does not object to it. She also stated that requiring a moving party to contact the opposing party and indicate whether there is an objection is consistent with the practice in federal appellate court. Mr. Curtis voiced concerns about the proposal. He suggested the requirement may be too onerous, particularly given the number of motions that are filed in criminal appeals. He also suggested that the SAPD files a number of motions in which the state has no interest and, so, should not be permitted to object—*e.g.*, motions to withdraw as counsel in post-conviction appeals. Mr. Jorgensen agreed with Mr. Curtis' comments, although he suggested the SAPD and AG's offices may be able to reach some standing agreements regarding specific types of motions. He noted, however, that his office generally likes to see a motion before deciding whether to object because a party's oral representation about what the motion contains sometimes differs from the actual contents of the written motion. Addressing Mr. Curtis' and Mr. Jorgensen's concerns, Judge Lorello suggested as an alternative to the original proposal that the rule be amended to encourage the opposing party to file a notice of non-objection before the expiration of the 14-day response period. Mr. Pooser noted that the local federal district court rule actually requires the non-moving party to immediately file a non-opposition if the party does not intend to object. The Committee members discussed both approaches and favored a hybrid standard that would require a non-moving party to file a notice of non-objection as soon as possible but would not penalize the non-moving party for failing to do so. The Committee members agreed that such a rule would benefit both the Court and the parties, as motions will get resolved more quickly if the Clerk does not have to hold them for 14 days. There was also agreement that no notice of non-objection would need to be filed if the moving party already certified that the motion was uncontested. Following the discussion, Judge Lorello moved that, in lieu of the original proposal (Attachment F), Rule 32(d) be amended as follows:

Idaho Appellate Rule 32. Motions - Time for Filing - Briefs.

***

(d) **Briefs or Statements to Accompany Motions.** All motions shall include or be accompanied by a brief, statement, or affidavit in support thereof and service shall be made upon all parties to the appeal. Absent a certificate that the motion is uncontested, the non-moving party shall, as soon as practicable, file a notice of non-objection if the party does not intend to object. Any party may file a brief or statement in opposition to the motion within 14 days from service of the motion. Any application for an extension of time to perform an act under this rule must be accompanied by an affidavit setting forth the reasons or grounds in support thereof. If the opposing party has been contacted and has no objection to the motion the following certificate may be attached:

***

Mr. Adams seconded the motion, and the Committee members unanimously voted to approve the proposed amendment.

Rule 34(b). Length of Briefs. Idaho Appellate Rule 34(b) states: "No brief in excess of 50 pages, excluding covers, the caption page, the table of contents, the table of authorities, the certificate of service, and any addendums or exhibits, shall be filed without consent of the Supreme Court." The SAPD proposed that the rule be amended to increase the page limit for briefs filed in death penalty appeals to 100 pages. (*See* Attachment G.) Mr. Curtis led the discussion and explained that an increase in the page limit is warranted because death penalty appeals encompass both the direct appeal and the appeal from the post-conviction action. He also stated he was unaware of any death penalty case in which the briefs on appeal did not exceed 50 pages. Mr. Jorgensen voiced two concerns about the proposal. First, he suggested that the proposed language is too broad and that the increased page limit should only apply to initial appeals in death penalty cases, not to successive appeals brought after additional state or federal proceedings. Second, he suggested that amending the rule as proposed would not actually reduce the number of requests to file overlength briefs because appellate briefs in death penalty cases already regularly exceed 100 pages. Mr. Curtis clarified that the SAPD's intent was that the 100-page limit only apply to briefs filed in the initial appeal. The Committee members discussed whether the page limit for briefs in initial death penalty appeals should be increased beyond 100 pages, or even whether such briefs should be exempt from any page limit at all. Ultimately, the Committee members agreed that increasing the page limit to 100 pages would be sufficient. While there still may be motions to file briefs in excess of 100 pages, practitioners may try harder to keep their briefs more concise with a 100-page limit as opposed to a 150-page limit or no limit at all. Following the discussion, Mr. Jorgensen suggested that, in lieu of the original proposal (Attachment G), Rule 34(b) be amended as follows:

Idaho Appellate Rule 34. Briefs on Appeal - Number - Length - Time for Filing - Extension - Augmentation.

***

(b) **Length of Briefs.** No brief in excess of 50 pages, excluding covers, the caption page, the table of contents, the table of authorities, the certificate of service, and any addendums or exhibits, shall be filed without consent of the

Supreme Court. In an appeal on unitary review of a capital criminal and post-conviction case, no brief in excess of 100 pages, excluding covers, the caption page, the table of contents, the table of authorities, the certificate of service, and any addendums or exhibits, shall be filed without consent of the Supreme Court.

***

Mr. Curtis moved to adopt the above amendment, and Mr. Jorgensen seconded the motion. The Committee members unanimously voted to approve the amendment.

Rule 35(b)(6). Argument Section of Respondent's Brief. Idaho Appellate Rule 35(b)(6) states that a Respondent's brief "shall" include argument and citation to authorities. In *Allen v. Campbell*, 169 Idaho 125 (2021), the Court rejected the appellant's argument that the respondent waived an argument by failing to cite any legal authorities. The Court reiterated that, unlike an appellant, a respondent bears no burden of proving error and, as such, "enforcing a waiver against a respondent and striking its brief would be erroneous." *Id.* at 130. Based on *Allen* and the cases cite therein, Chief Justice Bevan proposed that Rule 35(b)(6) be amended by changing the word "shall" to "should." The Committee members discussed whether changing "shall" to "should" would really make much difference in the way the rule is enforced. Even with the "shall" language, the Court has held that the failure of a respondent to comply with the rule does not result in an automatic win for the appellant. That said, the Committee members recognized that the use of the word "should" instead of "shall" would more closely conform to the Court's precedent. Accordingly, Mr. Adams moved to adopt the proposal that Rule 35(b)(6) be amended as follows:

Idaho Appellate Rule 35. Content and Arrangement of Briefs.

***

(b) **Respondent's Brief.** The brief of the respondent shall contain the following divisions under appropriate headings:

***

(6) **Argument.** The argument ~~shall~~should contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

***

Mr. Pooser seconded the motion, and the Committee unanimously voted to approve the proposed amendment.

Rule 35(e). Citations to the Clerk's Record and Transcripts. Idaho Appellate Rule 35(e) governs references in briefs to Reporter's Transcripts and the Clerk's or Agency's Record. Senior Justice Horton proposed that the rule be amended to state that references to the Reporter's Transcripts and the Clerk's or Agency's Record must be contained within the body of the brief,

and shall not be included as footnotes or endnotes. There was no discussion. Mr. Jorgensen moved to adopt the proposal to amend Rule 35(e) as follows:

Idaho Appellate Rule 35. Content and Arrangement of Briefs.

***

(e) **References in Briefs to the Reporter's Transcript and Clerk's or Agency's Record.** References to the reporter's transcript on appeal shall be made by the designation "Tr" followed by the volume, page and line number abbreviated "Vol. I, p. 14, L. 16". References to the clerk's or agency's record on appeal shall be made by the designation "R" followed by the volume, page and line number abbreviated "Vol. I, p. 14, L. 16". References to the reporter's transcript and clerk's record must be within the body of the brief, and shall not be included as footnotes or endnotes.

***

Mr. Curtis seconded the motion, and the Committee members unanimously voted to approve the proposed amendment.

Rule 40(b)(4). Costs on Appeal. Idaho Appellate Rule 40(b)(4) states that the cost of appellate briefing is recoverable at $6.00 per page. By rule, most briefs are now required to be filed electronically. The Committee considered a proposal is to amend I.A.R. 40(b)(4) to provide that the $6.00 per page cost is recoverable only for briefs that are conventionally filed as permitted by the electronic filing rules. The Committee members clarified that the electronic filing rules define a conventionally filed brief as a paper brief, and that conventional filings are only permitted under limited circumstances. Following those clarifications, Mr. Pooser moved to adopt the proposal to amend Rule 40(b)(4) as follows:

Idaho Appellate Rule 40. Taxation of Costs.

***

(b) **Items of Costs.** Costs shall, unless otherwise ordered, include the following items:

(1) Filing fees.

(2) Cost of reporter's transcript including the cost of computer-searchable disks filed with the Supreme Court under Rule 26.1(c), but excluding the cost of all other disks.

(3) Cost of clerk's or agency's record.

(4) Cost for the production of ~~all~~conventionally filed appellant's briefs, respondent's briefs, reply briefs and briefs in support of or in opposition to petitions for rehearing or review, including covers but excluding appendixes, at the rate of $6.00 per page. Recovery of this cost applies ~~to only the~~only to original briefs that are conventionally filed as permitted by the Idaho Rules for Electronic Filing and Service and does not include copies.

(5) Cost of premiums of a supersedeas bond, unless the party taxed with costs had agreed in writing, within seven (7) days of the filing of the notice of appeal, not to execute pending appeal as provided in Rule 16(b).

***

Mr. Adams seconded the motion, and the Committee unanimously voted to approve the amendments.

Technical Revisions to Rules Governing Permissive Appeals in Custody Cases. As currently drafted, I.A.R. 11.1(b)(1), I.A.R. 12.1(a)(1), and I.R.C.P. 83(a)(1)(B)(i) all state that permissive appeals in custody cases may be taken from "a final judgment, as defined in Rule 803 of the Idaho Rules of Family Law Procedure." Effective July 1, 2021, however, the Court adopted a new set of Family Law Rules in which a final judgment is now defined in Rule 802, I.R.F.L.P., not in Rule 803. The members of the Appellate Rules Advisory Committee unanimously voted to recommend that I.A.R. 11.1(b)(1), I.A.R. 12.1(a)(1), and I.R.C.P. 83(a)(1)(B)(i) be amended to cite the correct family law rule, as follows:

Idaho Appellate Rule 11.1. Appealable Judgments and Orders from the Magistrate Court. The following appeals from the magistrate court are expedited pursuant to Rule 12.2.

***

(b) **By Permission.** When permission has been granted pursuant to Rule 12.1, an appeal from the following may be taken to the Supreme Court:

(1) a final judgment, as defined in Rule ~~803~~802 of the Idaho Rules of Family Law Procedure, or an order made after final judgment, involving the custody of a minor, or

(2) a final judgment or order after judgment in a Child Protective Act proceeding.

***

Idaho Appellate Rule 12.1 Permissive Appeal in Custody Cases.

(a) **Motion for permission to appeal.** Whenever the best interest of a child would be served by an immediate appeal to the Supreme Court, any party may move the magistrate court for permission to seek an immediate appeal to the Supreme Court from the following:

(1) a final judgment, as defined in Rule ~~803~~802 of the Idaho Rules of Family Law Procedure, or an order entered after final judgment, involving the custody of a minor, or

(2) a final judgment or an order entered after final judgment in a Child Protective Act proceeding.

***

Idaho Rules of Civil Procedure Rule 83. Appeals From Decisions of Magistrates.

(a) **Where an Appeal Must be Taken.**

(1) *Appeals Taken from Magistrate Court to the Supreme Court*.

***

(B) By Permission. When permission has been granted pursuant to Rule 12.1, Idaho Appellate Rules, an appeal from the following may be taken to the Supreme Court:

(i) a final judgment, as defined in Rule ~~803~~802 of the Idaho Rules of Family Law Procedure, or an order made after final judgment, involving the custody of a minor, or

(ii) a final judgment in a Child Protective Act proceeding.

***

The meeting of the Appellate Rules Advisory Committee adjourned at 3:30 p.m.

Attachment A

[Proposed Amendments to IAR 5 - REJECTED]

Idaho Appellate Rule 5. Special writs and proceedings.

(a) **Special Writs.** Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction. Except for petitions for writs filed by incarcerated persons and petitions for writs of habeas corpus, petitions for writs and motions seeking to intervene in such petitions shall contemporaneously be served by mail on all affected parties, including the real party in interest. ~~There shall be no response to applications filed pursuant to this rule unless the Supreme Court requests a party to respond to the application before granting or denying the same.~~ The Supreme Court shall process petitions for such special writs as are established by law in the manner provided in this rule.

(b) **Challenge to a final redistricting plan.** In accord with Article III, Section 2(5) of the Idaho Constitution, any registered voter, any incorporated city or any county in this state, may file an original action challenging a congressional or legislative redistricting plan adopted by the Commission on Reapportionment. Such challenges shall be filed within 35 days of the filing of the final report with the office of the Secretary of State by the Commission.

(c) **Filing Fee—Briefs.** Special writs shall issue only upon petitions verified by the party beneficially interested therein and upon briefs in support thereof filed with the Clerk of the Supreme Court with payment of the appropriate filing fee. No filing fee shall be required with a petition for writ of habeas corpus which is filed in connection with a criminal case or post-conviction relief proceeding. Petitioner shall file the original petition and brief with the Clerk of the Supreme Court. No copies are required.

(d) **Brief(s) in Opposition.** A brief in opposition to a petition for a special writ may be filed by the respondent(s) in any case, but the filing of such brief is not mandatory, unless the Supreme Court requests a party to respond to the petition before granting or denying the same. Unless the Court orders otherwise, any brief in opposition shall be filed within [7 or 14?] days of the filing of the petition.

~~(d)~~(e) **Procedure for Issuance of Writs.** Special writs, except writs of habeas corpus, shall issue as herein provided. The Supreme Court acting through three (3) or more members, or by two (2) or more members when the Court is in recess, may issue a writ directing the respondent to act in accordance with the writ, or to appear or respond at the time fixed in the writ to show cause why the relief requested in the petition should not be granted. The court may enter an order providing for briefing and oral argument prior to issuance of a writ or an order to show cause. If such an order is

entered, briefing shall be conducted in the manner outlined in the order as supplemented by these rules. The briefs shall be in the form prescribed by Rule 32(e). A majority of the entire Court, may also direct the respondent to so act, or to refrain from acting, as directed in the writ, pending hearing and upon such conditions as the Court may impose. Upon its issuance, a copy of the petition, brief and writ shall immediately be served upon all affected parties including the real party in interest as concerns the requested relief, which real party must be named in the petition and the writ. Service shall be made in the manner and within the time limit set by the Court. Appearance in response to the writ by any interested party shall be by verified answer and by brief. If no appearance is made, the Court may grant any requested relief justified by the petition. If appearance is made, the Court may schedule the matter for oral argument or decide the matter on the record. Issues of fact, if any, shall be determined in the manner ordered by the Court.

~~(e)~~(f) **Denial of Writ or Issuance of Peremptory Writ.** If the Court denies a petition for a writ of mandamus or prohibition or issues a peremptory writ, the order denying the petition or the peremptory writ, as the case may be, shall be a separate document that only states the relief ordered. It shall not include a record of prior proceedings; the Court's legal reasoning, findings of fact, or conclusions of law; or the report of a master.

~~(f)~~(g) **Memorandum of Costs.** No later than fourteen (14) days after the issuance of an order denying the petition or granting a peremptory writ, the prevailing party may file a memorandum of costs. Such memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. A memorandum of costs mailed to the Court shall be deemed filed upon the date of mailing. Failure to file a memorandum of costs within the period prescribed by this rule shall be a waiver of the right to costs.

~~(g)~~(h) **Costs Allowed.** Unless otherwise ordered by the Court, the costs allowed shall include:

1. Court filing fee.
2. Actual fees for service of the petition or any document in the action whether served by a public officer or other person.
3. Expenses or charges of certified copies of documents admitted as evidence in a hearing or the trial of the action.
4. The cost of a master appointed by the Court.
5. Reasonable costs of the preparation of exhibits admitted in evidence in a hearing or trial of the action, but not to exceed the sum of $500 for all of such exhibits of each party.
6. Witness fees of $20.00 per day for each day in which a witness, other than a

party or expert, testifies in the trial of the action.

7. Travel expenses of witnesses who travel by private transportation, other than a party, who testify in the trial of the action, computed at the rate of $.30 per mile, one way, from the place of residence, whether it be within or without the state of Idaho; travel expenses of witnesses who travel other than by private transportation, other than a party, computed as the actual travel expenses of the witness not to exceed $.30 per mile, one way, from the place of residence of the witness, whether it be within or without the state of Idaho.

8. Cost of reporter's transcript of a trial before a master in the action, including the cost of computer-searchable disks filed with the Supreme Court under Rule 26.1(c), but excluding the cost of all other disks.

9. Reasonable expert witness fees for an expert who testifies at a deposition or at the trial of the action not to exceed the sum of $2,000 for each expert witness for all appearances.

10. Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action.

11. Reasonable attorney's fees, which may include paralegal fees and the reasonable cost of automated legal research (Computer Assisted Legal Research). The claim for attorney fees as costs shall be supported by a statement of the legal basis for the award and an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed. The allowance of attorney fees by the court under this rule is not to be construed as fixing the fees between attorney and client.

~~(h)~~(i) **Objections to Costs.** No later than fourteen (14) days after the date of service of the memorandum of costs, any party may object to the claim for costs of another party by filing and serving on the adverse party an objection to part or all of such costs, stating the reasons in support thereof. An objection to costs shall be deemed filed upon mailing and shall be heard and determined by the Court as an objection to the application for costs.

~~(i)~~(j) **Petitions for Writ of Habeas Corpus.** Petitions for writs of habeas corpus shall be processed as provided by law.

Attachment B

[Proposed Amendments to IAR 8 – Proposal #1 – APPROVED with additional amendment]

Idaho Appellate Rule 8. Amicus curiae.

(a) When Permitted. An attorney, or person or entity through an attorney, may appear as amicus curiae in any proceeding by request of the Supreme Court; or by leave of the Supreme Court upon written motion served upon all parties.

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and set forth the interest of the movant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear. The motion shall also state whether leave is sought to file an amicus curiae brief or participate in oral argument, or both.

(c) Contents and Form. An amicus brief must comply with Rule 36. In addition to the requirements of Rule 36, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 35, but must include the following:

(1) a table of contents, with page references;

(2) a table of cases (alphabetically arranged), statutes, and other authorities, with page references;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person or entity—other than the amicus curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person or entity; and

(5) an argument, which may be preceded by a statement of the case and which need not include a statement of the applicable standard of review.

(d) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for leave to file, no later than 7 days after the initial 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 initial brief is filed.

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(e) Objections. Any objection to the appearance of an amicus curiae must be made by motion within 14 days of service of the motion for leave to file in the manner provided for motions under Rule 32.

(f) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

(h) Order. Leave to appear as amicus curiae shall be by written order of the Supreme Court which shall specify the manner of appearance by the amicus curiae attorney.

Idaho Appellate Rule 34. Briefs on Appeal - Number - Length - Time for Filing - Extension - Augmentation.

***

(c) Time for Filing. Appellant's brief shall be filed with the clerk of the Supreme Court within 35 days of the date that the reporter's transcript and the clerk's or agency's record have been filed with the Supreme Court. The respondent's and cross-appellant's brief, which may be joined in one brief, shall be filed within 28 days after the service of appellant's brief. The cross-respondent's brief, if any, shall be filed within 28 days after the cross-appellant's brief. Any reply brief shall be filed within 21 days after service of any respondent's brief.
***

Idaho Appellate Rule 35. Content and Arrangement of Briefs.

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(c) Other Briefs. The appellant or cross-appellant may file a brief in reply to the brief of the respondent or cross-respondent within the time limit specified by Rule 34(c) which may contain additional argument in rebuttal to the contentions of the respondent. An amicus curiae brief may be permitted by order of the Court pursuant to Rule 8. If the respondent has filed a cross-appeal, the appellant shall file a cross-respondent's brief which shall contain all of the requirements of Rule 35(b), above, and, unless otherwise ordered by the court, it shall be combined with appellant's reply brief.

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Deleted: Briefs of amicus curiae shall be filed within the time set in the order of the Supreme Court granting leave to file an amicus curiae brief.¶

Deleted: may contain a statement of the case, points and authorities, and additional argument on any issue raised by the parties in the appeal or as allowed by order of the Supreme Court

Attachment C

[Proposed Amendments to IAR 8 – Proposal #2 - REJECTED]

Idaho Appellate Rule (8) & (34) – Amicus Curiae Briefs

Current Rule:

Idaho Appellate Rules 8 & 34. Amicus curiae.

> An attorney, or person or entity through an attorney, may appear as amicus curiae in any proceeding by request of the Supreme Court; or by leave of the Supreme Court upon written application served upon all parties, setting forth the particular employment, if any, the interest of the applicant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear. The application shall also state whether leave is sought to file an amicus curiae brief or participate in oral argument, or both. Any objection to the appearance of an amicus curiae must be made by motion within 14 days of service of the application in the manner provided for motions under Rule 32. Leave to appear as amicus curiae shall be by written order of the Supreme Court which shall specify the manner of appearance by the amicus curiae attorney and state the time for filing of any amicus curiae brief. I.A.R. 8.

Idaho Appellate Rule 34(c): . . . "Briefs of amicus curiae shall be filed within the time set in the order of the Supreme Court granting leave to file an amicus curiae brief."

Idaho Appellate Rule 34(d): Extensions of time for filing briefs shall not be favored and will be granted by the Supreme Court only upon a clear showing of good cause and as provided in Rule 46. [silent on time extensions for amicus briefs]

*Edits to follow: Changed Rule 8 entirely; edited the last sentence of Rule 34(c); added one sentence to the end of 34(d).

Proposed Rule:

Rule 8 – Amicus Curiae.

(a) When permitted. An attorney, or person or entity through an attorney, may appear as amicus curiae in any proceeding by request of the Supreme Court, or by leave of the Supreme Court upon written application served upon all parties. The application shall

also state whether leave is sought to file an amicus curiae brief or participate in oral argument, or both.

(b) Application for Leave to File. The application to file an amicus brief must be served upon all parties and it must set forth the particular employment of the applicant and the name of the party in whose support the amicus would appear. The application for leave shall be filed at least 21 days prior to the date on which the brief of the party being supported is due, unless the court orders otherwise. If there is no party being supported, the application shall be filed at least 21 days prior to the date on which the petitioner's or appellant's brief is due, irrespective of when it is actually filed.

(c) Disclosure of Sponsor. An amicus curiae's brief must clearly identify the group or organization sponsoring the brief and the interests of the sponsoring entity in the outcome of the appeal or proceeding. The brief must also identify persons or entities other than members of the sponsoring group or organization that provided financial resources for the brief's preparation.

(d) Time to File Amicus Brief if Leave is Granted.

(1) An amicus curiae must file its brief within 7 days after the deadline for the brief of the party being supported.

(2) If the amicus brief is in support of multiple parties, the due date is within 7 days after the last timely-filed brief of a party being supported.

(3) If the amicus brief is in support of neither party, the deadline is 7 days after the time allowed for filing the petitioner's or appellant's brief, irrespective of when party briefs are actually filed.

(e) No Time Extension to File Amicus Brief. There will be no extensions of time for filing an amicus brief.

(f) Objecting to an Amicus Curiae. Any objection to the appearance of an amicus curiae must be made by motion within 14 days of service of the application in the manner provided for motions under Rule 32.

(g) Other Requirements. Except as otherwise provided by these Rules, briefs and motions filed by amicus curiae, and other documents filed by amicus curiae, must comply with the form, formatting, filing, certification and service requirements applicable to briefs, motions, and other documents filed by the parties.

Rule 34 – Briefs on Appeal

(c) Time for Filing. . . . Amicus curiae briefs shall be filed within the time set in Rule 8.

(d) Extension of Time for Filing Brief

. . .

Extensions of time for filing briefs shall not be favored and will be granted by the Supreme Court only upon a clear showing of good cause and as provided in Rule 46. There will be no extensions of time granted for filing an amicus curiae brief.

Attachment D

[Proposed Amendments to IAR 23(c) and (d) - TABLED]

Idaho Appellate Rule 23. Filing Fees and Clerk's Certificate of Appeal - Waiver of Appellate Filing Fee.

(a) **Filing Fees.** The Clerk of the Supreme Court shall charge the following filing fees for appeals and petitions:

***

(b) **Collection and Transmittal to the Clerk of the Supreme Court.** The Clerk of the Supreme Court shall charge and collect the appropriate fee for any petitions initially filed with the Supreme Court. Upon the filing of a notice of appeal, or notice of cross-appeal, the clerk of the district court or administrative agency where the document is filed shall charge and collect the appropriate filing fee and the clerk shall forthwith forward a certified copy of the notice of appeal together with the filing fee to the Clerk of the Supreme Court; provided, an administrative agency may forward the filing fee to the Clerk of the Supreme Court with the Certificate of Appeal. The Clerk of the Supreme Court shall forward all such fees to the state treasurer for deposit in the appropriate fund.

(c) **Waiver of Appellate Filing Fee.** Any appellate filing fee set forth under subsection (a) of this rule may be waived pursuant to section 31-3220, Idaho Code, if such waiver is approved by the Supreme Court. Any party desiring a waiver of the filing fee applicable to petitions for a special writ under the original jurisdiction of the Supreme Court must make application for such directly with the Supreme Court. Any party desiring waiver of the appellate filing fee in a civil appeal shall first make application to the district court or administrative agency from which the appeal is taken in accordance with the rules of procedure adopted by the judicial district of the district court or the administrative agency from which the appeal is taken. The order of the district court or administrative agency recommending waiver or no waiver of the appellate filing fee shall be filed by the appellant with the notice of appeal. The appellant shall also file with the notice of appeal a verified petition, motion or affidavit sworn to be the appellant stating:

(1) The name and address of the applicant.

(2) A request for the waiver of the appellate filing fee.

(3) A statement of the factual basis showing the indigency of the applicant to pay such filing fee.

(4) A certification by the applicant that the applicant believes that the applicant is entitled to waiver of the filing fee.

(d) **Request for Waiver.** (1) **Petitions for special writs.** An application for waiver of the filing fee applicable to petitions for special writs under the original jurisdiction of the Supreme Court must be submitted contemporaneously with the petition. The Clerk of the Supreme Court, upon receiving the petition, any supporting documents, and request for the waiver of the filing fee shall mark all documents as "lodged" indicating the date and time received. The Supreme Court will rule upon the request for waiver of the filing fee without further briefs or arguments unless otherwise ordered by the Court. If the Supreme Court grants the waiver of the filing fee, it will enter an order to that effect and the Clerk of the Court shall thereupon file the petition, any supporting documents, and the application for waiver of the filing fee, all of which shall be deemed filed on the date and time they were initially lodged with the Supreme Court. In the event the Supreme Court denies the waiver of the filing fee the Clerk shall so notify the petitioner and the petition, supporting documents, and application for fee waiver shall be lodged with the Supreme Court but not filed, and no original action shall be pending with the Supreme Court unless and until the filing fee is paid by the petitioner.

(2) Appellate filing fee. All of ~~said~~the documents filed with the district court with the notice of appeal requesting a waiver of the appellate filing fee shall be forwarded by the clerk of the district court to the Supreme Court at the same time and with the notice of appeal. The Clerk of the Supreme Court, upon receiving the notice of appeal and the request for the waiver of the appellate filing fee shall mark all documents as "lodged" indicating the date and time received. The Supreme Court will rule upon the request for waiver of the appellate filing fee without further briefs or arguments unless otherwise ordered by the Court. If the Supreme Court grants the waiver of the appellate filing fee, it will enter an order to that effect and the Clerk of the Court shall thereupon file the notice of appeal and all other documents relating to the waiver of the appellate filing fee which shall be deemed filed on the date and time they were initially lodged with the Supreme Court. In the event the Supreme Court denies the waiver of the appellate filing fee the Clerk shall so notify the appellant and the notice of appeal and all documents relating to the waiver of the appellate filing fee shall be lodged with the Supreme Court but not filed, and no appeal shall be pending with the Supreme Court unless and until the appellate filing fee is paid by the appellant.

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Attachment E

[Proposed Amendment to IAR 23(e) – TABLED]

Idaho Appellate Rule 23. Filing Fees and Clerk's Certificate of Appeal - Waiver of Appellate Filing Fee.

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(e) **Automatic Waiver.** In any appeal in which the appellant or cross-appellant is represented by the Idaho Legal Aid Services, the appellate filing fee shall automatically be waived and the clerk of the district court and the Clerk of the Idaho Supreme Court shall accept the notice of appeal or notice of cross-appeal without the payment of the appellate filing fee. <u>There shall be no automatic waiver of the filing fee applicable to a petition for a special writ under the original jurisdiction of the Supreme Court.</u>

Attachment F

[Proposed Amendment to IAR 32(d) - REJECTED]

Idaho Appellate Rule 32. Motions - Time for Filing - Briefs.

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(d) **Briefs or Statements to Accompany Motions.** All motions shall include or be accompanied by a brief, statement, or affidavit in support thereof and service shall be made upon all parties to the appeal. Additionally, the moving party must contact the opposing party in advance of filing the motion and must indicate in the motion whether the opposing party objects. Any party may file a brief or statement in opposition to the motion within 14 days from service of the motion. Any application for an extension of time to perform an act under this rule must be accompanied by an affidavit setting forth the reasons or grounds in support thereof. If the opposing party has been contacted and has no objection to the motion the following certificate may be attached:

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Attachment G

[Proposed Amendment to IAR 34(b) - REJECTED]

Idaho Appellate Rule 34. Briefs on Appeal - Number - Length - Time for Filing - Extension - Augmentation.

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(b) **Length of Briefs.** No brief in excess of 50 pages, excluding covers, the caption page, the table of contents, the table of authorities, the certificate of service, and any addendums or exhibits, shall be filed without consent of the Supreme Court. In cases where the court has imposed a sentence of death, no brief in excess of 100 pages, excluding covers, the caption page, the table of contents, the table of authorities, the certificate of service, and any addendums or exhibits, shall be filed without consent of the Supreme Court.