



Effective and
Ethical
Appellate
Advocacy

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Preparing for an Appeal

- Read the Rules
- Know what you are Appealing
- Designate/Review the Record

Frequent Mistakes

- Improper Appeals -- IAR 11
- Inadequate Record
- Failure to Cite Authority AND Make Cogent Argument
- New Issues Being Raised for First Time on Appeal

What is Appealable – Scope of Rule 11

(1) Final judgments

(2) Decisions by the district court dismissing, affirming, reversing or remanding an appeal.

Scope of Rule 11 Cont'd

(3) Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

Scope of Rule 11 Cont'd

(4) Any order or judgment of contempt.

(5) An order granting or refusing a new trial

Scope of Rule 11 – cont'd

- (6) An order granting or denying a motion for judgment notwithstanding the verdict.

- (7) Any order made after final judgment (e.g., order denying a motion to set aside a default judgment)

Scope of Rule 11 Cont'd

(8) Any order appealable under the Uniform Arbitration Act, Title Seven, Chapter 9 of the Idaho Code.

Notice of Appeal -- Rule 17 Requirements

- Designation of judgment or order being appealed.
- Transcript requested
- Designation of clerk's record
- Designation of exhibits

Your Responsibility for the Record

Record. A designation of documents, if any, to be included in the clerk's or agency's record in addition to those automatically included pursuant to the following Rule 28.

- * Include Prior Briefing?
- * Other side's documents?

Your Responsibility for the Record

Failure to include documents:
presumption that record supports the
other side's position:

"[A]n appellant bears the burden of providing a record that is sufficient to substantiate his or her claims on appeal. Indeed, not only is error not presumed, but if a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the trial court." *Poole v. Davis*, 153 Idaho 604, 607-08, 288 P.3d 821, 824-25 (2012) (citations omitted).

Briefing

- Picking up the box for the first time
 - Process I use
 - Let a lay person read your brief

Briefing Cont'd

- Type of case and procedural posture
 - Standard of review
 - What are objectives

Standard of Review: Abuse of Discretion

“To determine whether a trial court has abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion **consistent with applicable legal standards**; and (3) reached its decision through the exercise of reason.” *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Abuse of Discretion

“We note that this Court has seen an increasing number of cases where a party completely fails to address the factors we consider when evaluating a claimed abuse of discretion. We emphasize that when a party “does not contend that the district court failed to perceive the issue as one of discretion, that the district court failed to act within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it or that the district court did not reach its decision by an exercise of reason,” such a conclusory argument is “fatally deficient” to the party's case. Cummings v. Stephens, 160 Idaho 849, 855, 380 P.3d 168, 174 (2016). “We will not consider assignments of error not supported by argument and authority in the opening brief.” Id.

State v. Kralovek, 161 Idaho 569, 577 fn 1, 388 P.3d 583, 591 fn 1 (2017).

Substantial Right Effectuated – Why does it matter?

“The Idaho Rules of Civil Procedure provide that “[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” [I.R.C.P. 61](#). **Consequently, we have held that when an appellant fails to present argument that a substantial right was implicated she waives the issue.** Here, although Palmer argues that the grant of additur in the amount of \$50,000 was an abuse of discretion, she offers no argument that the error affected a substantial right. We therefore decline to address the issue for this reason as well.”

Ellefson v. Palmer, 162 Idaho 393, 398, 397 P.3d 1152, 1157 (2017).

Briefing Cont'd

- Style/Length/Tone
- Photos/document snapshots
- Embedded Links – Rule 34.1
(Electronic Copies of Briefs)

New Arguments on Appeal

- Important distinction between affirming/reversing lower court
- New argument vs. new authority

How to Handle Bad Law – Rule 3.3

- Shall not knowingly make false statement of law or fact or fail to correct a false statement of law or fact
- Shall not fail to disclose directly adverse controlling authority

How to Handle Bad Law Cont'd

- Don't be afraid to advocate for a change in the law
- Carefully lay out the steps necessary to show where the court went wrong
- Public policy arguments – last resort

Oral Argument

- Never waive it
 - Important for your client and the system
 - Oral learning
 - One sentence may sway an opinion

Oral Argument Cont'd

- Preparation
 - Know the record (including the ROA)
 - Precision in language

Oral Argument Cont'd

- Tone/style
 - No one style is best -- conversation
 - Bringing the court back to your message
 - Watch the bench

Oral Argument Cont'd

- Rebuttal – make it meaningful
- Don't be afraid to sit down early

Oral Argument Cont'd

- Can you conclude the result from the questioning?
 - Decision-making process
 - No case conference prior to hearing
 - Sometimes exploring issues raised in Court's prehearing memorandum

Back in the Trenches

- Judicial culture – reviewing the work of your colleagues
 - Framing arguments – “the district court’s analysis went wrong”
 - Expert advice
- Slow down, speak up and annunciate

Back in the Trenches

- Throat clearing
- Would not be afraid to advocate for changing the law
- Respect is a two way street – little things make a difference