

## Excerpts from *Idaho Appellate Handbook*

This fall, the Idaho Appellate Practice Section will publish a new edition of the *Idaho Appellate Handbook*. In fourteen chapters, the new edition outlines the basics of practice before Idaho's appellate courts. Authored by a mix of appellate practitioners, law professors, appellate court staff, and appellate and district court judges, the *Handbook* speaks to the practical, everyday issues confronting Idaho's appellate attorneys. Below is a preview of the *Handbook's* content, introduced by some of these very issues.

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Have you ever wondered how Idaho appellate courts set their hearing schedule? Chapter 1 of the *Handbook* (authored by Judge David W. Gratton of the Idaho Court of Appeals) is an introduction to the Idaho Supreme Court and Idaho Court of Appeals, and it discusses, among other things, the courts' structure and decision-making process, as well as how cases are set for and prepared for hearing. The following selection discusses how hearings are set:

### HEARINGS

#### 1. Setting Cases for Hearing

- a. **Supreme Court.** Cases are ordinarily set for argument in the order of the dates they came at issue, unless the Court for either good cause shown or on its own motion, expedites the hearing. Approximately four months before a term of Court, the Clerk's office prepares a proposed calendar of cases then at issue and ready for argument. After the schedule is determined and cases selected, the Clerk's office notifies counsel of the date and time set.
- b. **Court of Appeals.** Approximately two months before a term of Court, the Court will choose the number of cases necessary to fill the hearing calendar for that term and will notify counsel, by telephone or email, of the available dates and times. Each case scheduled for oral argument is assigned to a three-judge panel based on a pre-set rotation schedule, taking into account cases upon which individual judges must be recused.
- c. **Accommodation.** In scheduling arguments before both Courts, an effort is made to accommodate counsels' schedules if practicable. If the Courts are traveling to a particular geographical area of the state, they will hear the cases from that region.

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Though they do not occur in every case, occasionally a party will need to know how to file a pre-decision motion. These can include anything from a request to augment the record to a petition for leave to file an amicus curiae brief. Chapter 7 (authored by Cathy Derden, Staff Attorney for the Idaho Supreme Court) addresses the most common pre-decision motions filed with the Idaho

Supreme Court and addressed by the Idaho Appellate Rules (“I.A.R.”). The chapter also addresses the most common motions that are filed with a trial court or administrative agency after the notice of appeal has been filed, but before any decision has been made by the appellate court. Here are selections from the chapter discussing filing amicus briefs, motions to stay, and motions to consolidate:

### **AMICUS CURIAE – I.A.R. 8**

Any attorney may apply for leave of the Supreme Court to appear as an amicus curiae in a proceeding, generally on behalf of a specific interested client.

**PRACTICE TIP:** This application should be made as soon as possible after the filing of the notice of appeal so any brief can be scheduled in the briefing process. If the application is not filed until after the normal briefing has been completed, it is more likely to be denied because it will delay the appeal.

The application must set forth the particular employment of the attorney making the application, the specific interest of the applicant in the proceeding, the name of the party in whose support the amicus curiae would appear, and whether leave is sought to appear for the purpose of filing an amicus curiae brief only or to participate in oral argument as well. No filing fee is required. The application is processed as a motion, so all of the provisions for the filing of briefs, statements, and affidavits and the standard fourteen-day period for the filing of opposition apply. The rule does not appear to permit the filing of a pro se application to appear as amicus curiae. The ruling of the Supreme Court on an application to appear as amicus curiae is in the form of an order that specifies the time limit for the filing of any amicus curiae brief and also states whether leave is granted to participate in oral argument.

**PRACTICE TIP:** There are no specific criteria set forth in the rule, but the applicant should state how the applicant will be indirectly affected or have an interest in the outcome of the appeal or proceeding. In particular, the Court is looking for a demonstration that the applicant has a different or unique perspective or will present the Court with information that otherwise is not likely to be presented by the parties. If a brief is permitted, it should not simply reiterate the same arguments made by the parties.

### **STAY BY SUPREME COURT DURING AN APPEAL – I.A.R. 13(g)**

The Supreme Court has broad authority to determine whether there should be a stay of a proposed act, a pending action or proceeding, or the enforcement of any judgment, order, or decree during an appeal, but I.A.R. 13(g) contains an absolute requirement that the party first apply to the district court or administrative agency for a stay before making application to the Supreme Court. If the district court or administrative agency denies the application for stay, or fails to rule upon it for fourteen days, the party may then make application to the Supreme Court. The application to the Supreme Court may be in the form of a request for stay during appeal after a stay has been denied by the district court or agency, or it may be in the form of a request to dissolve a stay that was granted by the district court or administrative agency. The standard procedure for processing a motion, including the fourteen-day period for objection, applies to this application.

**PRACTICE TIP:** If the motion is urgent—for example, a motion to stay a sale—advise the Clerk when the motion is filed so that the motion is not held for fourteen days waiting for a possible objection.

## **MOTION TO CONSOLIDATE**

Consolidation of cases can be done by the Court on its own initiative or upon a motion of any party. A party may request by motion the consolidation of various appeals involving the same proceeding below, or occasionally separate appeals will be consolidated because they involve the same legal issue. A party filing a motion for consolidation should specify the purposes for which the cases are requested to be consolidated. Separate appeals regarding the same proceeding below can be consolidated for the purpose of preparing the transcript and record, as well as for the filing of briefs and oral argument. If separate cases are consolidated, generally they are consolidated only for the purpose of presenting oral argument. A similar motion can be made asking that similar cases involving common questions of law be set for consecutive oral argument on the same day before the Court.

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Sometimes it seems that mysterious and magical things happen behind the Idaho Supreme Court’s closed doors. Most often, it is a very simple process that appears strange only because the procedure is not widely understood. For example, how appellate judges are assigned cases may seem mysterious because the public is not invited to watch. But a display case in the lobby of the Supreme Court building shows how the process works: cases are assigned numbers which are written on slips of paper, the papers are placed in a hopper, and the slips are then drawn out of the hopper by law clerks. In other words, case assignment is done almost literally by pulling numbers from a hat. This process is mentioned in Chapter 1 of the *Handbook*.

But what about another seemingly-mysterious protocol: which court will hear the appeal? The following selections from Chapter 10 (written by Justice Daniel Eismann) address this question, in addition to providing explanations related to oral arguments and post-argument issues.

## **LOGISTICS**

### **1. Which Court Will Hear My Appeal?**

All appeals from the district court and from the magistrate court pursuant to Idaho Appellate Rules 11.1 and 12.1 go initially to the Supreme Court. The majority of those appeals are then assigned to the Court of Appeals. The basis for determining which court will hear the appeal is set forth in Idaho Appellate Rule 108. Once the assignment is made, the Clerk of the Supreme Court will notify you of which court will hear your appeal. If your appeal is assigned to the Court of Appeals, you can request retransfer to the Supreme Court pursuant to Idaho Appellate Rule 114. Appeals to the Supreme Court from the imposition of a sentence in a capital case and from the Industrial Commission or the Public Utilities Commission will not be assigned to the Court of Appeals.

### **2. Will My Case Be Set for Oral Argument?**

All appeals retained by the Supreme Court will be set for oral argument unless: (1) all parties stipulate to submission on the briefs and the Court approves the stipulation, or (2) the Court orders submission on the briefs without oral argument. If the Court orders that the appeal will be submitted on the briefs, any party may file a written objection within twenty-one days of the order, setting forth the reasons why the party desires oral argument. That motion will be decided without oral argument. I.A.R. 37(a).

The Court of Appeals may, in its discretion, likewise order submission on the briefs without oral argument. If it does so, any party may file a written objection within twenty-one days of the order, setting forth the reasons why the party desires oral argument. That motion will be decided without oral argument. I.A.R. 109.

## THE DAY OF ORAL ARGUMENT

### 1. Before Argument

- a. **Be in the Courtroom Before Your Hearing Will Start.** Be in the courtroom at least ten minutes before oral argument in your case is scheduled to begin. If argument on another case is ongoing when you arrive, you can enter the courtroom and sit down. There will be a break of about ten minutes between arguments.
- b. **Allocate Your Time.** Before your argument begins, tell the court Clerk in the courtroom who you are and, if applicable, the party you represent. If you are co-counsel, tell the Clerk who will be presenting the argument. Each side will have thirty minutes for oral argument. The appellant may divide that time between the opening argument and the rebuttal argument. Before the argument begins, the appellant must tell the Clerk how that time should be divided.

Make sure that your cell phone or other electronic device is silenced.

### 4. After Argument

- a. **What if I Misstated Something During My Argument?** You should file a letter with the court correcting your misstatement as soon as possible.
- b. **What if I Discover Additional Authority or Want to Present Additional Argument?** At any time before the issuance of the opinion, you may supplement your brief with additional authority in accordance with Idaho Appellate Rule 34(f)(1). You do not need leave of court to do so. At any time before the issuance of the opinion, you may also augment the authority and argument presented in your brief in accordance with Idaho Appellate Rule 34(f)(2). However, such augmentation requires permission from the court, which will only be granted upon a motion showing good cause why the material was not included in your brief.

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Often, one of the most important issues in a case is attorney fees. The following is a selection from Chapter 12 (edited by Brett DeLange of the Idaho Attorney General's Office)<sup>1</sup> discussing how attorney fees must be raised on appeal.

## **PROCEDURE FOR CLAIMING ATTORNEY FEES**

### **1. A Claim for Attorney Fees on Appeal Must Be Made in the First Appellate Brief.**

Idaho Appellate Rule 41 establishes the procedure for requesting attorney fees on appeal. It does not create a right to attorney fees. Any party claiming attorney fees on appeal must assert the claim for attorney fees as an issue on appeal in the first appellate brief filed and state the legal basis for that claim in the argument section of the brief, although the appellate court may allow a later claim for attorney fees under conditions it deems appropriate. I.A.R. 35(a)(5), (b)(5). At oral argument, the parties may argue the legal entitlement to attorney fees.

### **2. The Failure to Timely Claim Attorney Fees Constitutes Waiver.**

If a party does not request attorney fees in its first appellate brief or does not brief or provide support for a claim to attorney fees, it will be deemed to have waived any attorney fee claims. *Ball v. City of Blackfoot*, 152 Idaho 673, 678, 273 P.3d 1266, 1271 (2012) (prevailing party waived any claim to attorney fees as a result of failing to present any argument in support of its request); *Bingham v. Montane Res. Assocs.*, 133 Idaho 420, 427, 987 P.2d 1035, 1042 (1999) (because party did not raise the issue of attorney fees in first appellate brief as required by I.A.R. 41, the request would not be considered on appeal). Where an incorrect statutory basis for an attorney fee claim is cited initially, but attorney fees are later requested on correct statutory grounds and the opposing party has adequate notice of the claim to defend against it, it is not error to award fees. *BECO Constr. Co. v. J-U-B Eng'rs, Inc.*, 145 Idaho 719, 725-26, 184 P.3d 844, 850-51 (2008).

## **STATUTORY AUTHORITY FOR AWARDS OF ATTORNEY FEES**

### **1. Various Statutes Authorize Attorney Fees.**

There are various statutes authorizing the award of attorney fees for specific causes of action, such as Idaho Code § 6-918A (the Idaho Tort Claims Act), Idaho Code § 12-117 (awards for and against certain state or local government agencies), and Idaho Code § 12-120 (civil actions for open accounts, certain commercial actions and cases where damages of less than \$35,000 are pled). In those cases where more than one statute authorizes or mandates the award of attorney fees, the more specific statute applies. *Tomich v. City of Pocatello*, 127 Idaho 394, 400, 901 P.2d 501, 507 (1995). However, where no specific statute applies, the statute most often relied on by litigants for authorizing an award is Idaho Code § 12-121, because it allows the court to award attorney fees to the prevailing party in any civil action.

The *Handbook* represents many hours of hard work by authors, editors, and various subcommittees of the Appellate Practice Section. We hope the Handbook will be a useful

resource to the Idaho legal community. Available in the fall of this year, it may be purchased through the Idaho State Bar

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<sup>1</sup> The views and analysis expressed in this chapter are solely the author's and should not be considered an expression of a legal position, either formal or informal, of the Office of Attorney General or the Attorney General.