

**Appellate Rules Advisory Committee
Minutes of November 3, 2008 Meeting**

Present: Chief Justice Daniel Eismann, Chair, Judge Karen Lansing, Mike Gilmore, Judge Earl Blower, James Arnold, Judge Kathryn Sticklen, Sara Thomas, Lori Fleming, Steve Kenyon and Cathy Derden. Court reporter, Susan Gambee, also attended.

1. Transcripts. Rule 24 addresses the number of transcripts prepared. There was a proposal to have one hard copy and one electronic copy sent to the court along with the original hard copy and to allow the parties to designate whether they wanted the transcript in hard copy, electronic copy or both. While there is a chance an electronic copy could be altered, the court would always have the original hard copy in case of a dispute. It was also recognized that parties may want both a hard copy and an electronic copy and that with current technology it is very easy to make the additional electronic copy such that the per page charge in Rule 26.1 is outdated. Once a party has paid the per page rate for the work of transcribing, an additional electronic copy should be made available at a nominal rate. Thus, a new subsection (b) was proposed to address the cost of an additional electronic copy. The reference to discs in ASCII format was also eliminated for the more general term "electronic format". It was also proposed that Rule 26.1 be eliminated as no longer necessary.

The proposed amendments are:

Rule 24. Reporter's transcript--Number--Estimate of fees--Payment to clerk in trust--Time for preparation--Waiver of reporter's fee

(a) Number and Use of Transcripts. The reporter shall prepare an original hard copy, one additional hard copy and one electronic copy ~~three copies~~ of the reporter's transcript for the Supreme Court. ~~The reporter shall maintain the ability to make computer-searchable disks in ASCII format until the remittitur is issued, and on request of the Supreme Court the reporter shall furnish two computer-searchable disks in ASCII format to the Court. The original and one copy of the transcript and any requested copies on computer-searchable disks~~ which shall be lodged with the district court and filed with the Supreme Court following settlement. In addition, the reporter shall prepare ~~The remaining copies of the reporter's transcript shall be~~ one copy of the reporter's transcript for the appellant and one copy for the respondent with each party electing whether to receive it in electronic format or in hard copy or both. If there are multiple ~~parties~~ appellants or respondents, they shall determine by stipulation which appellant or respondent party shall be served with the transcript by the clerk and the manner and time and use of the transcript by each appellant or respondent party. In the absence of such stipulation the determination shall be made by the trial court or agency upon the application of any party or the clerk. ~~Any party may also request and pay for a copy of computer-searchable disk in ASCII format from the reporter.~~ If a reporter's transcript has already been prepared for the appellant and/or respondent in an Idaho Public Utilities Commission appeal, when requested by the Supreme Court the reporter shall furnish two computer-searchable transcripts in electronic format ~~disks in ASCII format~~ to the Court, but additional copies need not be made for the parties.

(b) Additional electronic transcript. Once an original transcript in either hard copy or electronic format has been paid for, any party may request an additional electronic copy of the transcript upon payment of \$20.00 to the court reporter.

The proposed amendments to Rule 24 require other amendments for consistency.

Rule 29. Settlement and filing of reporter's transcript and clerk's or agency's record.

b) Filing Transcript and Record with Supreme Court. Upon settlement of the reporter's transcript and clerk's or agency's record, the clerk of the district court or administrative agency shall, within seven (7) days, file the original hard copy, one additional hard copy and one electronic copy of the transcript ~~and any requested copies on computer-searchable disks in ASCII format~~ and three copies of the clerk's or agency's record with the Clerk of the Supreme Court. The Clerk of the Supreme Court shall notify all attorneys of record, or parties appearing in person, of the date of such filing. Such notification shall also state when the briefs of the parties are required to be filed.

Rule 17 on the notice of appeal, Rule 18 on the notice of cross-appeal and Rule 19 on additional transcripts will also need amending to require the parties to elect the format of the transcript within a certain time frame. If no election is made the default will be that the transcript will be prepared in hard copy. Currently the reporters are preparing the transcript in compressed format so the sentence in Rule 17 and 19 about requesting compressed format will be eliminated. The amendments to subsection (h) on transcripts are proposed as follows:

Rule 17- Notice of appeal - contents

(h) Transcript. A designation as to whether a transcript is requested . . . The notice shall also state whether the appellant's copy of ~~requests that the transcript be prepared in compressed format as described in Rule 25.~~ shall be provided in hard copy or electronic format or both. If no election is made within 21 days of filing the notice of appeal, the appellant will receive a hard copy of the transcript.

Rule 18, Notice of cross –appeal - contents

(h) Transcript. A designation as to what portion, if any, . . . The notice shall also state whether the cross-appellant's copy of this additional transcript shall be provided in hard copy or electronic format or both. If no election is made within 21 days of filing the notice of cross-appeal, the cross-appellant shall receive a hard copy of the transcript.

Rule 19. Request for additional transcript or clerk's or agency's record –payment.

(b) No transcript requested. If the appellant does not request . . . The request shall also state whether the respondent's copy of the transcript shall be provided in hard copy or electronic format or both. If no election is made within 21 days of filing the request for transcript, the respondent shall receive a hard copy of the transcript.

(e) ~~Compressed format.~~ ELIMINATED.

2. Compressed format. Rule 26 (m) currently provides that transcripts will be provided in compressed format upon request when in reality most reporters use the compressed format. It also allows for 12 pages on one compressed page, using front and back, in three columns and it was agreed that more than 8 pages, using front and back, makes the pages too small. It was proposed eliminating the need for a request and designating that no more than 8 pages front and back and 2 columns be used. It was also noted that reading a transcript when it is compressed and in an electronic format is difficult with the pages being numbered down the first column and then going back up to the second column. Susan Gambee indicated the software allows reporters to designate how the pages will be numbered in the compressed format and it was agreed they should flow horizontally.

The proposed amendment to Rule 26(m) is as follows:

(m) Compressed Transcript. ~~Upon the written request of the party ordering the transcript, or this court, t~~The reporter's transcript shall be prepared in compressed format in the same arrangement as specified in this rule with the following requirements:

A. The cover page . . .

B. The compressed format shall have no more than ~~12~~ 8 pages of regular transcript on one page of compressed format, using both the front and back of each page and having no more than ~~three~~ two columns of text on a page. The pagination shall be horizontal as follows:

1	2
3	4.

3. Filing notice of lodging of transcripts. Currently the reporter files a notice that the requested transcripts have been lodged with the district court and this begins the settlement period. It would be helpful if in this notice the reporter specifically identified the transcripts lodged by date and title of the proceeding and if this notice were file stamped and included in the record. In some appeals the transcripts are prepared by more than one reporter. This amendment would allow the parties to see what transcripts were actually lodged and note if anything requested was missing. It was also proposed that the rule prohibit a reporter from lodging transcripts requested of that individual reporter until he or she has completed all transcripts requested of him or her as this can cause confusion.

The proposal was a new subsection in Rule 26 that would be designated as (o) with the current (o) being redesignated.

26(o). Filing notice of lodging with the district court. Upon lodging one or more transcripts with the district court or administrative agency the court reporter shall file a notice of lodging with the district court, a copy of which shall be sent to the Supreme Court by email, fax or letter. The notice shall state that the court reporter has lodged all assigned appellate transcript(s) requested in that appeal and shall list each transcript lodged by date and title of proceeding. If more than one transcript is requested from a

court reporter within the same appeal the court reporter shall not file this notice until all transcripts due from that court reporter have been lodged. The notice of lodging shall be file stamped by the district clerk and included in the clerk's record on appeal.

This proposal also requires adding this notice to Rule 28 as part of the standard record on appeal.

Rule 28 (b) Content- Standard Record.

(1) In civil cases . . .

M. ~~A court reporter's notice of lodging with the district court. Table of contents and index, which shall be placed at the beginning of each volume of the record.~~

N. Table of contents and index, which shall be placed at the beginning of each volume of the record.

(2) In criminal cases

N. ~~A court reporter's notice of lodging with the district court. In criminal appeals in which the death penalty was imposed, all documents in the trial court file of every nature, kind and description, except that the presentence investigation report shall be forwarded as an exhibit to the record.~~

O. In criminal appeals in which the death penalty was imposed, all documents in the trial court file of every nature, kind and description, except that the presentence investigation report shall be forwarded as an exhibit to the record.

4. Expedited Appeals in custody cases. Currently Rule 12.1 allows for a motion for permission to appeal a custody order from the magistrate division directly to the Supreme Court in an effort to expedite these appeals. However, the rule does not address the manner in which these appeals are to be expedited once the appeal is granted. The Committee discussed a proposal to allow for direct appeal to the Supreme Court as a matter of right in cases involving the termination of parental rights that would include any adoption involving the same children. The Committee was in favor of this but had questions as to whether the time for such an appeal should be shorter than 42 days and whether this provision would preclude a party being able to appeal to the district court if the party so desired. An appeal to the district court costs less than an appeal to the Supreme Court. The Committee had before it a draft of a proposed rule to expedite appeals in custody cases once a permissive appeal is granted or filed as a matter of right. The proposal was to have the record and transcript filed within 21 days of the notice of appeal and input was sought from Susan Gambiae and other reporters as to whether this time frame was realistic. One problem is that proceedings before the magistrate court are transcribed from a digital recording. This means the TCA has to find a reporter, the reporter has to do an estimate, get paid and then transcribe from the recording, which in itself takes longer. The TCA would have to find a reporter able to work within the shortened time frame but it was believed a reporter could be assigned within two days

and an estimate prepared from the length of the recording. There was still a question of how long a party should be given to pay the estimate.

The proposal also involved a shortened time frame for briefing with 21 days for the appellant's brief, 14 days for the respondent's and 7 days for a reply brief. No extensions would be allowed except for the most compelling of circumstances. Oral argument and the decision would also be expedited with the goal of resolving these cases within 120 days from filing the notice of appeal. Many other states do handle these appeals on such an expedited basis.

The Committee recommended a subcommittee be appointed to further study this proposal and that a TCA, a public defender and someone from the Dept. of Health and Welfare be included along with a court reporter. Judge Blower volunteered to also be on the subcommittee as well as Chief Justice Eismann and Cathy Derden.

5. Filing Fees. Rule 23 sets out different filing fees for the Supreme Court that vary by \$10 to \$15. The \$86 for an appeal is set by statute, but no reason could be articulated for the differences in the other amounts. It was agreed that a recommendation be made that all cases filed with the Supreme Court that require a fee be set the same at \$86.00. (I STILL NEED TO DOUBLE CHECK STATUTES ON THIS)

6. Paralegal Fees. The Committee recommended amending Rule 41 (d) on the amount of attorney fees to include a reference to paralegal fees similar to Rule 54 of the Civil Rules of Procedure. The proposed amendment reads as follows:

Rule 41. Attorney fees on appeal.

- d) Amount of Attorney Fees. If the Court determines that a party is entitled to attorney fees on appeal, the party claiming attorney fees shall file a claim concurrently with, or as part of, the memorandum of costs provided for by Rule 40. The claim for attorney fees, which at the discretion of the court may include paralegal fees, shall be accompanied by an affidavit setting forth the method of computation of the attorney fees claimed. Attorney fees may also include the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing the party's case. . .

7. Email addresses. Steve Kenyon submitted a proposal from the clerk's office that all persons, except those who are incarcerated, be required to provide an email address so that notices may be sent by email. The Committee agreed attorneys should have to provide an email address but did not think all persons appearing *pro se* should be required to do so as some may not have access to Internet. The proposed amendments are recommended to Rule 47 and Rule 17 as follows:

Rule 47. Service of court opinions, orders and other documents by the clerk.

The Clerk of the Supreme Court shall serve by mail, electronic mail (e-mail), personal service or delivery, . . .

(d) Remittiturs.

With the exception of persons appearing pro se, all parties participating in an appeal must provide an email address that the Clerk of the Supreme Court may use for service and are responsible for updating this information. An attorney representing a party on appeal must provide a current email address to the Idaho State Bar.

17. Notice of appeal--Contents

A notice of appeal shall contain substantially the following information:

(d) Parties. The name of the appealing party and the party's attorney and the name of the adverse party and that party's attorney. An address, phone number and email address must also be given, except no email address is required for persons appearing pro se.

The form for a notice of appeal will also need to be amended to reflect this change.

8. Augmentations and Judicial Notice. It was noted that the sentence in Rule 30 on augmentations as to the number of copies required in rule 32(e) should be deleted since the number of copies for motions to augment is different than other motions. In addition, there are times when a party wants the Supreme Court to take judicial notice of a local ordinance and the problem is being sure that the ordinance submitted is actually the ordinance that was in effect at the time of the action at issue. A new rule on ordinances was proposed and recommended. The proposed amendments read as follows:

Rule 30. Augmentation or deletions from transcript or record.

(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. ... ~~Any motion for augmentation and any response thereto shall be filed with the Clerk of the Supreme Court with the number of copies specified in Rule 32(e).~~ The filing of a motion to augment shall not suspend or stay the appellate process or the briefing schedule.

Rule 30.2. Augmentation of record on appeal with copy of an ordinance.

(a) By motion. Any party may move the Supreme Court to augment the record on appeal with a copy of an ordinance. A certified copy of the ordinance shall be attached to the motion, and the motion shall be accompanied by a statement setting forth the specific grounds for the request, including that the ordinance was in effect at the time of the action or occurrence at issue in the appeal. The party shall file an original and two copies of the motion and statement and shall serve a copy of the motion and statement 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 filing of a motion to augment shall not suspend or stay the appellate process or the briefing schedule.

(b) By stipulation. The parties may augment the record on appeal by filing with the Court a stipulation stating that the copy of the ordinance attached to the stipulation was in effect at the time of the action or occurrence at issue in the appeal.

9. Transcribing Recorded Testimony. Rule 25 addresses transcribing recorded testimony and some confusion has arisen as to what this includes. The Committee noted that the rule is referring only to previous testimony taken under oath such as from a preliminary hearing or deposition and does not refer to recorded evidence such as a traffic stop or recorded drug buys. The Committee also discussed the fact that this recorded testimony given under oath is often not transcribed as the parties often waive having it reported. This can become a problem on appeal when only portions of the deposition or other recorded testimony is played for the jury. It is important when only portions are played that the record clearly identifies these portions; thus, it was recommended such a requirement be added to the Idaho Rules of Evidence. To clarify this rule the Committee recommended amending Rule 25 as follows:

Rule 25. (f) Recorded Testimony. ~~Any recorded testimony offered into evidence by an audio recording or audio-visual recording and~~ Any audio recording or audio-visual recording of testimony given under oath and played during the proceeding shall be reported by the reporter and included in the reporter's standard transcript in the same manner as other testimony of the trial or hearing.

10. Service of Petitions for Original Writs. Currently Rule 5 addresses filing an original petition for a writ and does not require service on any other parties. Although no response is required unless requested by the court, in some cases it is important that the affected parties be given notice. The Committee examined when service should be required and in what manner. The Committee recommended that except for petitions filed by prisoners, service by mail be required on all the affected parties. This requirement should also apply to those seeking to intervene in a petition for a special writ. Rule 43 outlines what happens once the court issues a writ or when the court wants a response to a petition. The Committee believed this rule should be incorporated into Rule 5. The amendments would read as follows:

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, and such application shall be made as provided in these rules. 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) Filing Fee--Briefs--Number. 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 an original and six copies of the petition and brief with the Clerk of the Supreme Court.

(c) 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 vacation, 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.

(d) Petitions for Writ of Habeas Corpus. Petitions for writs of habeas corpus shall be processed as provided by law.

Note: Rule 43 will be eliminated.

11. Supersedeas Bonds. After a recent petition filed with the Supreme Court concerning return of a supersedeas bond, a question was raised as to whether the rules should address what happens to a bond or cash deposit when the award itself is upheld but the case is remanded for a new determination of the amount owed. In that case the person who posted the bond argued that, since the respondent no longer had a judgment with a set amount on which he could execute, the bond should be returned. The other side argued the bond should remain as it was since it was clear an amount was owed. The court in that case denied the petition asking for return of the bond. The Committee agreed that the bond should remain posted on remand and proposed making it clear that the amount owed may be paid out of any cash deposit that has been posted. The Committee recommended amending the rule to read as follows:

Rule 13(b)(15):

15) Stay execution or enforcement of a money judgment upon the posting of a cash deposit or supersedeas bond by a fidelity, surety, guaranty, title or trust company authorized to do business in the state and to be a surety on undertakings and bonds, either of which must be in the amount of the judgment or order, plus 36% of such amount. Provided, an agreement not to execute on the judgment made pursuant to Rule 16(b) may be filed in lieu of such bond or cash deposit. Any bond filed pursuant to this rule shall state that the company issuing or executing the same agrees to pay on behalf of the appellant all sums found to be due and owing by the appellant by reason of the outcome of the appeal, within 30 days of the filing of the remittitur from the Supreme Court, up to the full amount of the bond or undertaking. A copy of the bond, agreement not to execute, or notification of a cash deposit shall be served upon all parties to the appeal at the time of the application for the stay of execution. Any objection to the sufficiency of a cash deposit or bond posted under this rule shall be waived unless a written objection is made in the form of a motion and filed with the district court within 21 days of the filing of such bond or cash deposit. The district court shall rule upon such objection in the same manner as any other motion under the I.R.C.P. If the district court stays execution or enforcement of a money judgment upon the posting of a cash deposit or supersedeas bond, the court may, upon motion or application, cause or direct any judgment lien filed to be released. If the appellate court has vacated any money judgment and remanded only for a determination of the amount of the judgment, the district court may continue or modify the amount of any cash deposit or supersedeas bond posted in connection with the appeal. Any cash deposit may be applied to the judgment upon filing of the remittitur from the Supreme Court.

12. Costs of exhibits. Rule 31 was recently amended so that copies of all exhibits would be sent to the Supreme Court rather than the original exhibits. Since many cases have numerous documentary exhibits this is raising the cost of the record when not every exhibit may be relevant to the appeal. While all exhibits may be needed in criminal cases, the number in those cases is usually smaller. The Committee recommended having the parties designate the exhibits requested for the appeal in civil cases just as they designate other parts of the record. In addition, just as child pornography in a PSI is not to be sent to the appellate court, there is no need to send trial exhibits of child pornography to the appellate court unless it is specifically ordered by the court. The following amendment was recommended.

Rule 31. Exhibits, recordings and documents.

(1) Copies of all requested documents, charts and pictures offered or admitted as exhibits in a trial or hearing in a civil case and copies of all documents, charts and pictures offered or admitted as exhibits in a trial or hearing in a criminal case, except that pictures or depictions of child pornography shall not be copied and sent to the parties or the Supreme Court unless specifically ordered by the court. All other exhibits shall be retained by the clerk of the district court or administrative agency, unless otherwise ordered by the Supreme Court. The clerk shall forward to the Supreme Court photographs of all other exhibits in death penalty cases. Upon the request of a party in other cases, the clerk shall forward to the Supreme Court photographs of designated exhibits.

This amendment will also require an amendment to Rule 17 and the form for a notice of appeal.

Rule 17. Notice of appeal.

i) 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.

(j) Exhibits- civil cases. A designation of documents, charts, or pictures offered or admitted as exhibits in a trial or hearing to be copied and sent to the Supreme Court.

(j k) Sealed Record