

IDAHO SHERIFFS CIVIL PROCESS MANUAL

On behalf of

IDAHO SHERIFFS ASSOCIATION

Version 2.6.2018

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Table of Contents

CHAPTER 1

1.1	SERVICE OF PROCESS	
1.1.1	Background	10
1.2	Sheriff's Duties	
1.2.1	Sheriff a Party to Suit	
1.2.2	Diligence	
1.2.3	Process Regular on its Face	
1.2.4	Process Received by Mail	
1.2.5	Written Instructions	
1.3	Fees and Expenses	
1.3.1	Receipt for Fees and Deposits	
1.3.2	Advance Fees for Expenses	
1.3.3	Deposit for Taking and Keeping Personal Property	
1.3.4	Fees for Governmental Agencies	
1.3.5	Civil Fees	
1.3.6	Civil Process	
1.3.7	Personal Service	
1.3.8	Time of Service	
1.3.9	Entry to Land, Buildings, and Dwellings	
1.3.10	Out of State Process	
1.3.11	Service Out of County	
1.3.12	Federal Process	
1.4	Methods of Serving Specific Process	
1.4.1	Summons and Complaint	
1.4.2	Order to Show Cause	
1.4.3	Subpoena	
1.4.4	Restraining Order	
1.4.5	3-day Notice to Quit or Pay Rent	
1.4.6	Affidavit of Claim	
1.4.7	Notice of Trustee Sale	
1.4.8	Writ of Attachments	
1.4.9	Writ of Restitution	
1.4.10	Writ of Assistance	
1.4.11	Writ of Execution: - Wage and Banks	
1.4.12	Writs of Execution: - Personal Property	
1.4.13	Warrant of Dstraint	
1.4.14	Civil Protective Orders	
1.4.15	Checklist for Process Service	

CHAPTER 2

2.1	SUMMONS AND COMPLAINT	
2.1.1	Complaint.....	20
2.1.2	Summons.....	
2.1.3	Who May Serve a Summons.....	
2.1.4	Sheriff Must Receive	
2.1.5	Types of Service	
2.1.6	Process Exhibited.....	
2.1.7	Return of Service	
2.1.8	Summons and Complaint: Service on Individuals.....	
2.1.9	Criminal Summons on an Individual	
2.1.10	Service Upon a Minor Under Fourteen (14) Years of Age.....	
2.1.11	Service Upon a Person the Court Has Declared to Be of Unsound Mind	
2.1.12	Service of Process on Domestic or Foreign Corporations	
2.1.13	Service of Process on Foreign Corporation	
2.1.14	Partnership, Unincorporated Association Who May Be Party Defendants	
2.1.15	Foreign Limited Partnership	
2.1.16	Criminal Summons Against a Corporation.....	
2.1.17	Service on State Agencies Generally	
2.1.18	Service on Any County, City, or Other Governmental Subdivision, or Quasi-Municipal Corporation.....	
2.1.19	Director of Department of Insurance - Unregistered Insurance Companies.....	
2.1.20	State Tort Claim.....	
2.1.21	Motor Vehicles Long Arm Statute.....	
2.1.22	Small Claims Court: Claim of Plaintiff	
2.1.23	Small Claims Court: Claim of Defendant.....	
2.1.24	Service by Publication	
2.1.25	Juvenile Corrections Act - Service of Summons or Notice	
2.1.26	Youth Rehabilitation Act - Service of Summons or Notice	
2.2	Subpoena.....	
2.2.1	Definitions.....	
2.2.2	Concealed Witness.....	
2.2.3	Issuance of Civil Subpoena.....	
2.2.4	Witness Fees	
2.2.5	Limitations on Distance	
2.2.6	Service of Civil Subpoena	
2.2.7	Return of Service	
2.2.8	Criminal Subpoena, Issuance.....	
2.2.9	Out-of-State Actions or Witnesses.....	
2.2.10	Return.....	
2.2.11	Service of Peace Officers.....	
2.2.12	Telegraphic or Fax Copy Subpoena.....	
2.2.13	Grand Jury Subpoena.....	
2.2.14	Juvenile Court Subpoena	

CHAPTER 2 (continued)

2.3	Order to Show Cause
2.3.1	Definition
2.3.2	Sheriff Must Receive
2.3.3	Method of Service
2.3.4	Timing of Service
2.4	Notice of Entry of Sister State Judgment - Foreign Judgment
2.4.1	Definition
2.4.2	Sheriff Must Receive
2.4.3	Method of Service
2.5	Cross-Complaint
2.5.1	Definition
2.5.2	Sheriff Must Receive
2.5.3	Method of Service
2.6	Temporary Restraining Order/Preliminary Injunction/ Injunction Pendente Lite/Injunction
2.6.1	Definition
2.6.2	Sheriff Must Receive
2.6.3	Method of Service
2.6.4	Last Day for Service
2.7	Notice to Vacate/Notice to Quit/Three-Day Notice to Quit/ Three Day Notice to Pay Rent or Quit/Notice to Pay Rent or Quit
2.7.1	Definition
2.7.2	The Sheriff Must Receive
2.8	Tenant Three-Day Notice for Specific Performance to Landlord
2.8.1	Definition
2.8.2	Sheriff Must Receive
2.8.3	Method of Service
2.9	Federal Court Process
2.9.1	Definition
2.9.2	Service of Process
2.9.3	Service of Subpoena
2.9.4	Service of Summons
2.10	Legislators: Exemption from Service
2.11	Uniform Infraction and Citation Rule of Service
2.12	Military Affidavit
2.13	Sheriff's Return -- Proof of Service
2.13.1	Preparation of Return
2.13.2	Return When Summons Lost
2.13.3	Return of Summons from Another State

CHAPTER 3

3.1 WRITS OF EXECUTION

3.1.1	Introduction.....	42
3.1.2	Basic Requirements	
3.1.3	Time Within Which Execution Must Issue.....	
3.1.4	Contents of Writ of Execution	
3.1.5	Contents of Specific Writs	
3.1.6	Specific Instructions.....	
3.1.7	Method of Service.....	
3.1.8	Documents to Be Served.....	
3.1.9	Execution of Writ.....	
3.1.10	Sheriff's Return on Writ	
3.1.11	Writ for Delinquent Child Support Obligations.....	
3.1.12	Proceeding Supplementary to Execution	
3.1.13	Exemption of Property from Attachment or Levy	
3.1.14	Property Liable to Seizure	
3.1.15	Claim of Exemption.....	
3.1.16	Writs of Execution Issued on Criminal Orders.....	

CHAPTER 4

4.1 GARNISHMENTS

4.1.1	Introduction.....	50
4.1.2	Basic Requirements	
4.1.3	Fees Charged to Plaintiff	
4.1.4	Service of Garnishment.....	
4.1.5	Who to Serve When Garnishee Is a Business	
4.1.6	Service on Defendant.....	
4.1.7	Jurisdiction.....	
4.1.8	Property Subject to Garnishment.....	
4.1.9	Continuous Garnishment	
4.1.10	Child Support Garnishment	
4.1.11	Wage Assignment for Child Support.....	
4.1.12	Interim Return.....	
4.1.13	Second Creditor Requests	
4.1.14	One Time Garnishment.....	
4.1.15	Re-garnishment	
4.1.16	Garnishment for Spousal Support.....	
4.1.17	Garnishment for Support of Any Other Person	
4.1.18	Employer's Return.....	
4.1.19	Garnishment of Money in Escrow	
4.1.20	Garnishment of Pledges	
4.1.21	Property in Possession of the Clerk of Court.....	
4.1.22	Partnership Property	
4.1.23	Tenancy in Common or Joint Tenancy Personal Property	

CHAPTER 4 CONTINUED

4.1.24	Goods in Bailee's Possession	
4.1.25	Chattel Paper	
4.1.26	Instruments	
4.1.27	Negotiable Document of Title	
4.1.28	Accounts Receivable or General Intangibles	
4.1.29	Estates	
4.1.30	Community Property	
4.1.31	Earnings of Elected Officials	
4.1.32	Earnings of Federal Employees	
4.1.33	Exemption of Pension Money and Retirement or Profit-Sharing Benefits from Legal Process	
4.1.34	State Retirement Benefits	
4.1.35	Unemployment Benefits, Workmen's Compensation, Social Security Benefits	
4.1.36	Debts Owing by the State of Idaho	
4.1.36	Claim of Exemption	

CHAPTER 5

5.1	SHERIFF'S SALE	
5.1.1	Introduction	61
5.1.2	Execution of Writ	
5.1.3	Sale of Property Notice	
5.1.4	Conduct of Sale	
5.1.5	Payment by Bidder	
5.1.6	Delivery of Property/Certificate of Sale/Sheriff's Deed	
5.1.7	Sheriff's Deed	

CHAPTER 6

6.1	WRIT OF RESTITUTION	
6.1.1	Introduction	64
6.1.2	Complaint and Summons in Unlawful Detainer Action for Failure to Pay Rent	
6.1.3	Writ of Restitution/Judgment of Restitution	
6.1.4	Procedures Regarding Service	

CHAPTER 7

7.1	WRITS OF POSSESSION	
7.1.1	Introduction	66
7.2	Writs of Possession of Personal Property Before Judgment	
7.2.1	Claim and Delivery	
7.2.2	Method of Obtaining Writ of Possession	

CHAPTER 7 CONTINUED

7.2.3	Sheriff's Duties.....	
7.2.4	Seizure by Sheriff	
7.2.5	Keepers	
7.2.6	Description.....	
7.2.7	No Payoff by Defendant	
7.2.8	Custody Requirements	
7.2.9	Procedures Regarding Service	
7.2.10	Process Exhibited.....	
7.2.11	Sheriffs Receipt of Writ.....	
7.2.12	Third Party Claims.....	
7.2.13	Sale of the Property.....	
7.2.14	Defendant's Recourse.....	
7.2.15	Disposition of the Property	
7.2.16	Claim and Delivery Check List.....	
7.3	Writs of Possession (Post Judgment).....	
7.3.1	Issuance of Writ	
7.3.2	Sheriff Must Receive	
7.3.3	Real or Personal Property	

CHAPTER 8

8.1	WRITS OF HABEAS CORPUS, MANDATE, AND PROHIBITION	
8.2	Habeas Corpus	75
8.2.1	Application for Writ.....	
8.2.2	Issuance and Return	
8.2.3	Service and Return of the Writ	
8.2.4	Nature of Proceeding	
8.2.5	Fees	
8.3.1	Writs of Mandate	
8.3.2	Service and Return.....	
8.3.3	Arrest and Fine.....	
8.4	Writs of Prohibition	
8.4.1	Service and Return.....	

CHAPTER 9

9.1	THIRD PARTY CLAIMS	
9.1.1	Introduction.....	78
9.1.2	Third Party Claim Making a Claim	
9.1.3	Third Party Claim Receiving the Claim	
9.1.4	Third Party Claim Contents	
9.1.5	Third Party Claim Processing Duties to Sheriff	
9.1.6	Secured Lien Holder Third Party Claim Contents.....	
9.1.7	Secured Lien Holder Third Party Claim Processing Duties of Sheriff.....	

9.1.8	Secured Lien Holder Third Party Claim (In Default) Processing Duties of Sheriff	
9.1.9	Releasing Third Party Claim and Property	

CHAPTER 10

10.1	EXEMPTIONS	
10.1.1	Background	82
10.1.2	Key Points When Dealing with the Three Types of Exemptions	
10.1.3	Property Is Exempt for All Purposes	
10.1.4	Property Exempt Because Reasonably Necessary for Support.....	
10.1.5	Property Exempt Because of a Certain Value.....	
10.1.6	Exceptions to the Exemptions.....	
10.1.7	Miscellaneous Exemptions	

CHAPTER 11

11.1	STAY OF EXECUTION	
11.1.1	Introduction.....	88

CHAPTER 12

12.1	BONDS AND UNDERTAKINGS	
12.1.1	Introduction.....	90
12.1.2	Frequently Encountered Undertakings	
12.1.3	Types of Undertakings.....	
12.1.4	Undertaking Format	
12.1.5	Objection to Sureties.....	
12.1.6	Fee for Taking Bond	
12.1.7	Actions Against Sheriffs Notice to Indemnitors.....	
12.1.8	Governmental Exemption	
12.1.9	Attorney Cannot Act as Surety	

CHAPTER 13

13.1	BANKRUPTCY AUTOMATIC STAY	
13.1.1	Introduction.....	93
13.1.2	Property of the Estate.....	
13.1.3	Automatic Stay.....	
13.1.4	Notice of Bankruptcy Proceeding.....	
13.1.5	Notice of Bankruptcy after Levy	
13.1.6	Return.....	

CHAPTER 14

14.1 CIVIL ARRESTS

14.1.1	Civil Arrests Generally	95
14.1.2	Arrest for Contempt of Court.....	

CHAPTER 15

15.1 WARRANTS OF DISTRAINT

15.1.1	Introduction.....	98
15.1.2	Definition	
15.1.3	Notice to Owners and Mortgagees.....	
15.1.4	Contents of Warrant.....	
15.1.5	Service and Execution.....	
15.1.6	Fees, Mileage and Commissions.....	
15.1.7	Return of No Property Found - Second Warrant - Issuance, Service and Return	
15.1.8	Removal or Sale of Property Prior to Payment of Tax - Delinquent Personal Property Taxes on Real Property Rolls.....	
15.1.9	Removal of Property from County to Avoid Tax - Penalty.....	

CHAPTER 16

16.1 SHERIFF'S FEES

16.1.1	Code Sections Controlling Sheriff's Fees	100
16.1.2	Table of Fees - Officers to Publish Penalty for Neglect	
16.1.3	Receipt for Fees	
16.1.4	Fees to Be Prepaid - Exemption Penalty for Official Dereliction	
16.1.5	Execution for Fees	
16.1.6	Limitation on Mileage of Officer.....	
16.1.7	Commission with Levy.....	
16.1.8	Commission Without Levy	
16.1.9	Garnishment Fees.....	
16.1.10	Persons Imprisoned on Civil Process.....	
16.2	Fees and Advance Fee Deposit Schedule	

CHAPTER 1

1.1 SERVICE OF PROCESS.

1.1.1 BACKGROUND.

References to the Sheriff. References to the sheriff in this manual are to be considered a reference to the undersheriff and all deputies. This is also in accordance with Idaho law. Whenever the official name of the sheriff is used in any statute conferring power, or imposing duties or liabilities, it includes his deputies. See Idaho Code § 31-2008. Consequently, a deputy sheriff is allowed to undertake tasks in the name of the sheriff if he has been so authorized by the sheriff.

Process. In Idaho law, process is the pieces of paper wherein the court exercises its authority. Process includes writs, warrants, summons, and orders of courts. Idaho Code § 31-2201.

Notice Process. Include such items as:

- a. summons and complaint
- b. notice of claim
- c. subpoena
- d. writ of review
- e. restraining order
- f. order to show cause
- g. other types of orders and notices

Enforcement Process. Include such items as:

- a. attachments
- b. executions
- c. garnishments
- d. writs of restitution
- e. foreclosures
- f. executions claim and delivery

Return of Process. The return of the sheriff is the document that shows what actions the sheriff took to serve the process. The return must be in writing specifying the manner of service, the date and place of service, and if served by a deputy in Idaho, certify the process was served consistent with the Idaho Rules of Civil Procedure. The

return must also identify the documents served. I.R.C.P. 4(g). Idaho law presumes that the facts written on the return are true. Idaho Code § 31-2204.

The sheriff is required to certify upon process or legal notices the manner, time, and address of service, or if he fails to make service, the reason for the failure, and return the papers to the court without delay. If the sheriff does not file the return without delay, he is liable to the damaged party for the sum of \$200 plus all damages sustained. Idaho Code § 31-2205.

Executing Process. The person executing process needs not have in his possession the original process, summons, writ, order, or subpoena at the time of service of the document. I.R.C.P. 4(c)(2). However, where there is a conflict between this rule and a statute requiring original process, insist upon receipt of the original process.

1.2 SHERIFF'S DUTIES. The sheriff is required to serve all process and notices in the manner prescribed by law. Idaho Code § 31-2202(8). Upon receipt of papers for service, he is required to endorse thereon the year, month, day, hour, and minute of receipt. When the payment of fees is made, the sheriff is then required to issue to the person delivering the process a certificate showing the names of the parties, title of the paper, and time of reception by the sheriff. Idaho Code § 31-2202(7).

1.2.1 SHERIFF - A PARTY TO SUIT. When the sheriff is a named party to an action or proceeding, the process, notices, or orders, which it would otherwise be the duty of the sheriff to serve or execute, may not be served by the sheriff or any deputy sheriff of the same office. In this instance, process shall be served by the coroner or person appointed by the court. Idaho Code § 31-2217.

The sheriff or deputy shall not attempt to serve any process of any type in which the sheriff is a named party. If the department receives such process, it is suggested that the deputy shall call the attorney responsible for sending such process and advise him the sheriff's department is going to return the paperwork un-served because the sheriff/deputy is a named party. A written return should be attached stating why the process could not lawfully be served.

1.2.2 DILIGENCE. In most cases the sheriff is not required to serve process the instant it is received, but must act with reasonable speed and diligence.

The sheriff is responsible for reasonable diligence in service of process and may be held liable to the party injured by his lack of diligence. If he fails to make proper return without delay, he is liable to the person aggrieved for the sum of \$200.00 plus all actual damages. Idaho Code § 31-2205.

The sheriff must act immediately to serve a writ of possession, attachment, or restitution. Any order issued by the court containing the word forthwith also requires the sheriff to act immediately.

It is suggested that domestic violence papers take precedence over other civil process and should be served in an immediate fashion.

If the sheriff receives any writ process and is given information that the goods are in imminent danger of being lost, concealed, or removed from his jurisdiction, it is suggested that the sheriff must take immediate action to serve such process.

1.2.3 PROCESS REGULAR ON ITS FACE. The sheriff must execute all process and orders regular on their face and issued by competent authority, regardless of any defect in the proceedings upon which they were issued. Idaho Code § 31-2213. A process is regular on its face, if it is from a court with jurisdiction, and contains nothing which ought to apprise the sheriff that it was issued without authority or was mistakenly issued. In the event you have any questions whether or not process is fair on its face, you should immediately contact your prosecuting attorney.

In determining whether or not process is valid on its face, the sheriff is not required to search the court records or to confirm specific statements which are recited in a court order directing him to perform his duty. (See Peasley Transfer & Storage Co. v. Smith, 132 Idaho 732, 738-9 (1999)). If the court has jurisdiction over the subject matter of the process and the process is fair on its face, the sheriff is justified in executing the process even though it later proves to be void from some cause not apparent on its face. Verify that the process has all names, dates, signatures and seals.

1.2.4 PROCESS RECEIVED BY MAIL. Process received by mail is handled like process received over the counter, except:

- a. Process received without fees or with insufficient fees is mailed back to the sender with a request for the proper fees.
- b. Attorney generated process or instructions that require correction, clarification, or interpretation should generally be returned with a request for the appropriate action. However, if you receive court generated process that is unclear, etc., you should telephone the court clerk for clarification instead of mailing the process back to the court. Also, in cases where you have been advised time is of the essence you should call the attorney and request that written clarification be prepared.

1.2.5 WRITTEN INSTRUCTIONS. It is essential that the sheriff act pursuant to signed written instructions. The sheriff has no responsibility to act until instructions are received. Idaho Code § 31-2211 provides that no direction or authority by a party or his attorney to a sheriff, with respect to the execution of process or the return thereof or to any act or omission relating thereto, will excuse the sheriff from liability for neglect or misconduct, unless it is contained in writing, signed by the attorney of the party, or by the party, if he has no attorney. Written instructions can be received by facsimile.

The sheriff may be held liable for damages caused by his acts if he was orally instructed to perform the act by the person damaged and such act later turns out to be wrongful. (See Applebaum v. Stanton, 47 Idaho 395 (1929)).

This requirement for written instructions includes all supplemental instructions, amendments, and cancellations.

In addition to the process to be served, it is Idaho law that the sheriff shall receive written instructions signed by the party or their attorney requesting service, Idaho Code § 31-2211, and shall receive advance fees if requested to prepay the fees and expenses incurred in serving the process.

1.3 FEES AND EXPENSES

1.3.1 RECEIPT FOR FEES AND DEPOSITS. The form and number of copies of the receipt required normally will be governed by county rules and requirements set forth by the county auditor. Certain minimum information should be included on the receipt:

- a. Date the money was received.
- b. Whether by check or cash.
- c. Person received from (if a corporation or partnership, the name of the business should be used, not the name of the officer or agent tendering the money).
- d. The amount received.
- e. Case number and title.
- f. What the money was received for, such as fees, cash bond, payment, or collection on execution, payment of third party claim, etc.
- g. Signature of person issuing receipt.

The original receipt is given to the person making the payment if he is present. One copy should be retained by the office and one copy should be given to the bookkeeper to be used for posting money to the case. Failure to provide a receipt when required will make the officer liable to the persons paying the fees in three (3) times the amount paid. Idaho Code § 31-3218.

1.3.2 ADVANCE FEES FOR EXPENSES. The sheriff may also demand an advance deposit for expenses. The sheriff is entitled to collect from the litigant or person requiring his service his actual expenses for impounding and storage fees. The sheriff may refuse to serve process or impound any items until the fees are paid for in advance. Idaho Code § 31-3211.

1.3.3 DEPOSIT FOR TAKING AND KEEPING PERSONAL PROPERTY. When the sheriff is instructed to take possession of personal property, the sheriff should require that in addition to written instructions, the plaintiff or his attorney of record deposit with the sheriff a sum of money sufficient to pay the expenses of taking and keeping safely the property for a period not to exceed 15 days for vehicles, and 30 days for items placed in a warehouse. In the event that a further detention of the property is required, the sheriff may, from time to time, make written or oral demand upon the plaintiff or his attorney for further deposits to cover estimated expenses for a period not to exceed 30 days.

1.3.4 FEES FOR GOVERNMENTAL AGENCIES. The sheriff is not entitled to collect fees for the following services:

- a. Service of criminal process (warrants, subpoenas, or summons).
- b. Service of writ of Habeas Corpus.
- c. Any services rendered in any action or proceeding in which the state of Idaho, or any state board, or state officer in his official capacity, or any county of Idaho, or county officer in his official capacity, is a party. Idaho Code § 31-3212(2).
 1. It should be noted that impound and storage costs are costs that can and will be passed on to the state or county agencies.
 2. In accordance with Idaho Code § 31-3220, there may occasionally be instances where the court orders that process be served without the payment of fees.

1.3.5 CIVIL FEES. The fees to be collected by the sheriff as required by the Idaho Code are set forth in Idaho Code § 31-3203. For ease of reference, these statutory fees are listed in Chapter 16 alphabetically by the type of process or service involved. Accordingly, there is some duplication, where a process has two or more common names.

1.3.6 SERVING CIVIL PROCESS

1.3.7 PERSONAL SERVICE. Personal service means the delivery of the process (usually a copy) to the person to be served personally. Personal service does not mean and does not allow substitute service. Personal service means serve the named person only.

1.3.8 TIME OF SERVICE. Civil process may legally be served at any time of the day or night, however, warrants of arrest may specify daytime only service.

1.3.9 ENTRY TO LAND, BUILDINGS, AND DWELLINGS. A sheriff may peaceably enter private buildings and dwellings to effect execution of process, but may not

break and enter against the owner's wishes, except where specifically authorized by the court to do so.

- 1.3.10 OUT OF STATE PROCESS.** An Idaho sheriff is not bound by and must not execute or enforce by levy any process issued by a court of a sister state. Such process is beyond the jurisdiction of the out-of-state court and is thus not fair on its face.

When any plaintiff or attorney presents any out-of-state process for enforcement, all papers must be returned to them. One might also send a copy of Idaho's Enforcement of Foreign Judgments Act, Idaho Code § 10-1301 through 10-1308, so that the requirements are made clear to the person seeking to enforce an out-of-state process.

- 1.3.11 SERVICE OUT OF COUNTY.** Generally, the sheriff has no power to act outside of his own county; and such acts are unofficial and void unless expressly authorized or implied by statute. One exception is Idaho Code § 6-105, Execution under foreclosure on property in more than one county. This statute provides that: In all actions to foreclose a mortgage or other lien upon real property, where such real property is situated partly in one county and partly in another county, within the state of Idaho, the sheriff of the county in which such action is commenced and where the decree therein is rendered and entered, shall have the power and it is hereby made his duty to enforce execution issued upon such decree in the same manner as if the whole of such real property was situated in the county in which such action was commenced and where the decree therein was rendered and entered.

It can be assumed that if there were two parcels of land owned by the defendant that were not connected, the sheriff of each county would have to sell the property at separate real property sales within their own counties.

- 1.3.12 FEDERAL PROCESS.** An Idaho sheriff should not serve any process (i.e., writs of execution) issued from a federal court. If a federal writ is presented to the sheriff for service, the sheriff should request that the presenting party have an Idaho district clerk issue an Idaho writ. The reason for such a request is because not all Idaho laws apply to federal writs. The Federal Rules of Civil Procedure require that a marshal serve writ process, and the judge must endorse and authorize in the court records the authority for someone other than a federal marshal to serve the writ. (F.R.C.P. 4.1). Therefore, an Idaho sheriff would normally have no knowledge as to what the federal statutes and possible exemptions are, and also whether or not a federal judge has authorized the sheriff's service of the writ.

1.4 METHODS OF SERVING SPECIFIC PROCESS.

- 1.4.1 SUMMONS AND COMPLAINT.** A copy of the complaint shall be served with the summons. I.R.C.P. 4(d)(1). Service upon an individual is by personal service or by

leaving a copy at the individual's home with someone living there who is over the age of 18. I.R.C.P. 4(d)(2).

- a. Upon a minor named in the summons and complaint. Serve the guardian, the father or mother, or caregiver if no parent can be located. The minor must also be served unless the court orders otherwise. I.R.C.P. 4(d)(2).
- b. Upon an Idaho corporation or partnership named in the summons and complaint. Serve the copy of the summons and complaint upon an officer such as the president, vice president, secretary, or treasurer. Serve the general agent, i.e., local manager, if no officer is found in your county. I.R.C.P. 4(d)(3).
- c. Upon a foreign corporation. See I.R.C.P. 4(d)(3).
- d. Upon State agencies or governmental subdivisions. Serve the state by serving the attorney general or any assistant attorney general. To serve any county, city, health district, etc., serve the chief executive officer, the secretary, or the clerk. Rule 4(d)(4).

1.4.2 ORDER TO SHOW CAUSE. An order to show cause must be personally served upon the party to whom it is directed or upon the party's attorney of record in the action at least seven (7) days before the date of the show cause hearing. I.R.C.P. 72.

1.4.3 SUBPOENA.

- a. **Civil Subpoena.** Must be issued by the clerk of the district court under seal, in the form specified in I.R.C.P. 45(a). However, an attorney licensed in Idaho may also issue and sign a subpoena. Service is by personal service upon the person named. I.R.C.P. 45(b)(2)(A) states that the person who is named in the subpoena must first demand fees for one day's attendance and mileage before any fees are required to be paid to them. However, I.R.C.P. 45(b)(2)(C) states that no prepayment of fees or mileage is necessary when the Attorney General's Office or any prosecutor has subpoenaed the witness. The same rule is also true with regard to the State of Idaho or any officer thereof.
- b. **Criminal Subpoena.** Must be issued by the clerk of the district court under seal, in the form specified in I.C.R. 17. Service is by personal service upon the person named.

1.4.4 RESTRAINING ORDER. Personal service only.

1.4.5 3-DAY NOTICE TO QUIT OR PAY RENT. Personal service. Substitute service allowed in certain circumstances. See Idaho Code § 6-304.

1.4.6 AFFIDAVIT OF CLAIM. This is known as a small claims action. This document can be served by personal service or by substitute service on anyone living at the residence over the age of 18 and of sound mind.

1.4.7 NOTICE OF TRUSTEE SALE. At least three (3) good faith attempts shall be made on different days over a period of not less than seven (7) days each.

Example: If you post the property first time on a Monday, next week post it on Tuesday, and the next week post it on Wednesday. Remember at any time you should catch someone there you can serve the notice and post, and you do not have to do the other postings. Always get the person's name for the civil deputy in office. Idaho Code § 45-1506.

1.4.8 WRIT OF ATTACHMENTS. A deputy must act on a writ of attachment right away. If the property is removed or disposed of while he is delaying, he can be held liable to the plaintiff for the total amount due on the judgment. Any property capable of being delivered, must be attached by the sheriff and held.

Personal service if at all possible, substitute at the residence if the person is over the age of 18 and of sound mind.

We may be holding whatever we have to take for a long time. We cannot release it without a court order.

1.4.9 WRIT OF RESTITUTION. Personal service.

1.4.10 WRIT OF ASSISTANCE. Personal service.

1.4.11 WRIT OF EXECUTION - WAGE AND BANKS.

a. Bank Accounts. Service on banking or trust corporations is addressed in Idaho Code § 11-703(2).

If a banking or trust corporation operates more than one branch office in the state of Idaho, the banking or trust corporation may, by notifying the Idaho department of finance, designate a particular office for the service of attachment, execution and garnishment papers. The Idaho Department of Finance is required to publish a list of all such designated offices on its website (<http://finance.idaho.gov/Banking/BankGarnishments.aspx>). This designated office may be outside the state of Idaho, and service on the designated office is effective as to any of the defendant's money held in any of the bank's branches or offices, whether in or outside the state of Idaho.

If service of the attachment, execution or garnishment papers is not made on the designated office of the banking or trust corporation, but instead is made on another office of the banking or trust corporation located in the state of Idaho, then service of such papers shall only be valid and effective as to moneys to the defendant's assets held in the possession or control of that particular office. The bank or trust corporation is not required to transmit the paperwork to the designated office.

If the garnishment fails to sufficiently distinguish the banking or trust corporation from any affiliate, parent or subsidiary thereof, such that it is not clear which entity is intended to be the garnishee, the garnishment may be returned unsatisfied. Service on any banking or trust corporation is effective as against the moneys and other personal property to the defendant's credit which are in the possession or control of the banking or trust corporation named in the garnishment, but not any affiliate, parent or subsidiary not named.

A search fee of five dollars (\$5.00), last known address of debtor, and tax identification number, if available, must be served with the writ. Idaho Code § 11-703(1)(f). The sheriff must also serve the bank with the appropriate forms as set forth in Idaho Code § 11-707.

- b. Wages.** Served on the Defendant's Employer. Do not serve the defendant. Idaho Code § 11-704.

If the person whose wages are being garnished does not work there, have the payroll person write in the interrogatories that they do not work there and that they do not owe them any money, and return it back to your office. They must do this in writing.

1.4.12 WRITS OF EXECUTION - PERSONAL PROPERTY. Personal service on the person or corporation that has the property in its possession or control, and hand delivery or mail to the defendant and any co-owners of the property. Idaho Code § 11-703.

- a. Service on Private Corporation.** To any officer, manager, or designated agent thereof.
- b. Service on a Public or Municipal Corporation.** To the mayor, president of the council or board of trustees or any presiding officer, or the secretary or clerk thereof. For further instructions see Chapter 3.

1.4.13 WARRANT OF DISTRRAINT. Serve the defendant personally and collect money due. If you have to levy and sell for back taxes, you levy on what is on the tax roll, but at the sale, if what you have sold does not cover all the taxes due, you can sell other things at that time. Idaho Code 63-1012 and 63-1013.

1.4.14 CIVIL PROTECTIVE ORDERS. Personal service only. This paper has to be served forthwith. If the protection order came out of your court then as soon as you have served it, you should radio that information in. Idaho Code § 39-6310, 39-6311, 39-6314.

Violation of Order. When respondent has been served, he can be immediately arrested without a warrant for seeing him in violation or in the event you have probable cause to believe so. Idaho Code § 39-6312(2).

1.4.15 CHECKLIST FOR PROCESS SERVICE.

- a. Log in the process. See Section 1.2.
- b. Is it regular on its face? See Section 1.2.3.
- c. Have proper fees been paid (see Chapter 16) and have all advance fees for expenses been paid? See Section 1.3.2.
- d. Verify that the instructions are signed, and are full and complete. See Section 1.2.5.
- e. Issue Certificate and/or receipt to person paying the fees. See Sections 1.2 and 1.3.1.
- f. Determine if personal or substituted service is appropriate. See Section 1.4.
- g. Act with reasonable diligence or forthwith? See Section 1.2.2.

Rev. 7/01

CHAPTER 2

2.1 SUMMONS AND COMPLAINT.

2.1.1 COMPLAINT. A civil action is commenced by the filing of a complaint with the court, I.R.C.P. 3(a), which may be denominated as a complaint, petition, or application, and the party filing the same shall be designated as the plaintiff or petitioner, and the party against whom the same is filed shall be designated as the defendant or respondent. No judgment or decree can be entered unless service of process has been accomplished upon all parties affected by the court's judgment.

2.1.2 SUMMONS. A summons is a process issued by the court to acquire jurisdiction of the defendant. Once a summons is issued, the plaintiff has six (6) months to serve the defendant or the action is subject to dismissal. I.R.C.P. 4(b) (2).

a. General Proceedings. The summons shall be signed by the clerk of the district court, be under the seal of the court, contain the name of the court, the assigned number of the case, and the names of the parties and the county in which the action is brought, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to file a written answer or written motion in defense to the complaint, and shall notify him that, in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the complaint; and where service is to be made by publication the summons shall also contain in general terms a statement of the nature of the claim. I.R.C.P. 4(a). The form of summons shall be substantially the same as the form contained in I.R.C.P. 4(a)(3)(B).

b. Eviction Proceedings. In an action exclusively for eviction, the summons shall be substantially in the same form as contained in I.R.C.P. 4(a)(3)(A).

2.1.3 WHO MAY SERVE A SUMMONS. Service of this process shall be made by an officer authorized by law or by any person who is at least 18 years of age and not a party to the action. Thus, the plaintiff may not serve a summons. A deputy may not serve the sheriff if the sheriff is named in the summons. I.R.C.P. 4(c)(2). (See Chapter 1, Section 1.003.)

2.1.4 SHERIFF MUST RECEIVE.

a. Process. One copy of the summons and complaint for each person to be served.

b. Instructions. Instructions must be signed and dated by the plaintiff or his attorney, specifying who is to be served and the address for service. Instructions should be followed very closely as the initiating party may have good reason for not wanting service made as to all defendants but rather only as directed.

c. Fees. See Chapter 16 for fees.

2.1.5 TYPES OF SERVICE.

- a. **Summons and Complaint - Personal Service.** Personal service is the handing of the process to the subject to be served. If the subject refuses to accept the process by the handing of it to him, it has been held by courts in California, Oregon, and Washington that if the deputy is able to positively identify the subject and the process is left or dropped at the subject's feet, it is considered a good service.
- b. **Summons and Complaint - Substitute Service.** Substitute service where allowed by rule or statute is the serving of a summons and complaint by leaving it at the individual's dwelling house or usual place of abode with someone other than the defendant. There appears to be no Idaho case law that defines dwelling house or usual place of abode. The deputy serving the summons and complaint by substitute service should make inquiries to ensure that the location is in fact either the dwelling house or usual place of abode of the person to be served. Care should be further taken to ensure that the person being served is over eighteen (18) years of age, and that the person resides in the dwelling house or usual place of abode of the person to be served.

2.1.6 PROCESS EXHIBITED. The officer, or other person, executing process must then, and at all times subsequent so long as he retains it, upon request, show the same, with all papers attached, to any persons interested therein. Idaho Code § 31-2214.

2.1.7 RETURN OF SERVICE. Return of service must be made to the plaintiff or his attorney and specify the time, date, and manner of service, and include a list of the documents served. I.R.C.P. 4(g).

2.1.8 SUMMONS AND COMPLAINT - SERVICE ON INDIVIDUALS.

a. Sheriff Must Receive:

1. One copy of summons and complaint for each person to be served.
2. Instruction letter signed and dated by the plaintiff or plaintiff's attorney and specifying who to serve his place of residence or business and any special instructions.
3. Fees. See Chapter 16.

b. Method of Service.

1. Personal service by delivery to person to be served.
2. Substitute service by leaving copies at his dwelling house or usual place of abode with some person over the age of 18 years then residing therein.

Substitute service may be made only at the dwelling house or place of abode. Under no circumstances may substitute service be made at a business.

3. Substitute service by serving an agent authorized by appointment or by law to receive service.

2.1.9 CRIMINAL SUMMONS ON AN INDIVIDUAL. The summons shall be signed by either the magistrate or the clerk of the court and shall contain the name of the defendant or a description identifying the defendant with reasonable certainty, shall identify the offense charged in the complaint and shall summon the defendant to appear before a magistrate at a stated time and place and advise the defendant that if he fails to appear at the said time and place that a warrant will issue for his arrest. Idaho Criminal Rule 4(d)(3).

a. Sheriff Must Receive:

1. Original summons and one copy.
2. Copy of complaint (which may be a uniform citation for a misdemeanor offense).
3. Instructions signed and dated by the state agency specifying who is to be served and the address for service.
4. No fees are charged when state agency is the plaintiff.

b. Method of Service. The summons shall be served upon a defendant by delivering a copy of the summons and complaint to defendant personally, or by leaving copies thereof at defendant's dwelling house or usual place of abode with some person over the age of eighteen (18) years then residing therein or by mailing it to the defendant's last known address. Idaho Criminal Rule 4(e)(4).

c. Return of Service. The return of service is the same as in a civil summons except it must be sent to the judge that issued it or before the magistrate before whom the defendant is brought. Idaho Criminal Rule 4(e)(6).

d. Time Restraints. There appears to be no time restraints on when the summons can be served. Use the same time limits as when serving a subpoena. If you have any concerns, contact the prosecuting attorney in your county.

2.1.10 SERVICE UPON A MINOR UNDER FOURTEEN (14) YEARS OF AGE. Serve the minor unless the court orders not to and also upon the father or mother of the subject. Serve the guardian if one is appointed. If none of these people are found, then upon the person with whom the minor (under 14) is staying. I.R.C.P. 4(d)(2).

Practice Tip: This service requires two services, one upon the minor under fourteen (14) and the other upon an adult.

2.1.11 SERVICE UPON A PERSON THE COURT HAS DECLARED TO BE OF UNSOUND MIND. Serve the incompetent subject and his guardian or upon competent adult member of the family with whom the subject lives. If he is in a nursing home or an institution, service should be made upon the chief executive officer of such nursing home or institution. If any of the above shall be the plaintiff, then service shall be upon whomever the court orders. I.R.C.P. 4(b)(2).

If a divorce action is started against an insane person, the summons and complaint shall be served upon the guardian of such person and also upon the prosecuting attorney of the county in which the action is filed. Idaho Code § 32-802.

2.1.12 SERVICE OF PROCESS ON DOMESTIC OR FOREIGN CORPORATIONS.

- a. A summons may be served on a domestic or foreign corporation by delivery of a copy of the summons and complaint to one of the following officers or agents by personal service:
 1. President or other head of the corporation.
 2. Vice President.
 3. Corporate Secretary or Assistant Corporate Secretary.
 4. Treasurer or Assistant Treasurer.
 5. General Manager or Managing Agent (NOT office manager).
 6. Person authorized by the corporation to receive service of process.
 7. Person or corporation designed by the corporation as agent for service of process by filing with the Secretary of State.
- b. Whenever a corporation shall fail to appoint or maintain a registered agent in this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then any process, notice, or demand required or permitted by law to be served upon the corporation may be served by mailing copies of the process, notice or demand by registered or certified mail to the corporation addressed to its registered office and to the secretary of the corporation at the addresses shown on the most recent annual statement filed with the Secretary of State. I.R.C.P 4(d)(3)(C)(i).

Practice Tip: Before this type of service is attempted, contact the plaintiff's attorney for his permission to serve the process as outlined above.
- c. Return. The sheriff's return must reflect the person served and his capacity to accept service.

2.1.13 SERVICE OF PROCESS ON FOREIGN CORPORATION. Whenever a foreign corporation authorized to transact business in the state shall fail to appoint or maintain a registered agent in this state, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign corporation shall be suspended, revoked, or withdrawn, then any process, notice, or demand required or permitted by law to be served upon the corporation may be served by mailing copies of the process, notice, or demand by registered or certified mail to the corporation addressed to its registered office and to the president or secretary of the corporation at the addresses shown on the most current annual report filed with the Secretary of State as shown on any application for withdrawal of the corporation that has withdrawn from Idaho. I.R.C.P. 4(d)(3)(C).

Where judgment has been entered against a corporation prior to forfeiture, an execution may be issued thereon and the property of the corporation; or that which may come into the hands of any trustee for it, may be levied upon, seized and sold to satisfy the same with alike force and effect as though no forfeiture had occurred.

2.1.14 PARTNERSHIP, UNINCORPORATED ASSOCIATION. WHO MAY BE PARTY DEFENDANTS.

- a. A partnership or association may be sued in its business name and served through its members, or its members may be sued and served in their individual capacity. Care should be taken in what capacity someone is being served.

If the partners are being sued personally, each must be served individually.

- b. Notice of Capacity of Service Must Be Given. If the association is a general or limited partnership, the process should be delivered to the person designated as agent for service of process as provided in Idaho Code § 30-21-404, 405, or to a general partner or the general manager of the partnership.

Practice Tip: If delivered to a partner, it must be a general partner, not a limited or silent partner.

If the association is not a general or limited partnership, the process should be delivered to the person designated as agent for service of process or to the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager (not office manager) or a person authorized by the association to receive service of process.

Service of a single copy of the summons and complaint on a partner is sufficient to bind both the partnership and the partner served where both the partnership and the partner are named defendants and proper notice of capacity of service is given.

Practice Tip: The return of this type of service must show a separate return for the partnership and also a return showing the partner served in his individual capacity.

2.1.15 FOREIGN LIMITED PARTNERSHIP. Notice of capacity of service must be given on call sheet and return.

Person who may be served: The foreign limited partnership must record with the Secretary of State a registered agent with its address upon whom process can be served. Idaho Code § 30-21-404.

Service of process is accomplished by serving the registered agent. If the agent cannot be found by reasonable diligence or is no longer in the state, then process can be served by mailing copies to the limited partnership addressed to its principal office in its state of organization as registered at the Secretary of State's Office. The mailing must be by registered or certified mail. Idaho Code 30-21-412.

2.1.16 CRIMINAL SUMMONS AGAINST A CORPORATION. A criminal summons issued under the Criminal Code (Idaho Code §§ 19-3601 through 19-3608) is served in a different manner than a civil summons in several respects.

a. Sheriff Must Receive:

1. Original summons and one copy.
2. Complaint.
3. Instructions signed and dated by the plaintiff (state) specifying who is to be served and the address for service.
4. No fees are charged for a state agency.

b. Method of Service. The summons must be served at least five (5) working days, (do not count weekends or holidays) before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president or other head of the corporation, or to the secretary, cashier, managing agent, or an agent of the corporation designated for service of civil process. Idaho Code § 19-3603.

The original summons must be shown at the time of service and the list of persons who may be served on behalf of the corporation is limited to five (5). Service may be made only by personal delivery to the person to be served.

c. Return of Service. The return of service on a criminal summons must show that the summons was served in the manner prescribed by Idaho Code § 19-3603, quoted above. If a civil case return form is used, the certificate must be modified by adding a statement that the original summons had been shown. The original summons, with the appropriate return attached, must be returned promptly to the clerk of the court.

Practice Tip: When a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it by the sheriff of the county, out of

its real and personal property, in the same manner as upon an execution in a civil action. Idaho Code § 19-3608.

2.1.17 SERVICE ON STATE AGENCIES GENERALLY. Service of summons and complaint on the State of Idaho, or any agency thereof will be by serving two (2) copies of the summons and complaint on the Attorney General or any Deputy Attorney General.

2.1.18 SERVICE ON ANY COUNTY, CITY, OR OTHER GOVERNMENTAL SUBDIVISION, OR QUASI-MUNICIPAL CORPORATION. May be affected by serving the summons and complaint upon the chief executive officer, secretary, or clerk.

In all actions brought under specific statutes requiring summons and complaint to be served upon specific individuals or officials, service will be done as the statute requires and also as set forth above. I.R.C.P. 4(d)(4)(C).

2.1.19 DIRECTOR OF DEPARTMENT OF INSURANCE - UNREGISTERED INSURANCE COMPANIES. Personally serve the director agent two (2) copies of process and mail two (2) copies of process to director's office. The return by the sheriff on this type of service should be expedited and/or the attorney contacted by phone so they can meet the ten (10) day requirement. Idaho Code § 41-1207.

2.1.20 STATE TORT CLAIM. Serve copy of tort claim upon the Secretary of State by personal service, and two (2) copies upon attorney general. Pay close attention to plaintiff's letter of instruction for additional service requirements.

2.1.21 MOTOR VEHICLES LONG ARM STATUTE. Personal service upon the secretary of state or deputy with fee.

2.1.22 SMALL CLAIMS COURT - CLAIM OF PLAINTIFF. A civil action is commenced in the Small Claims Court by the plaintiff's filing of a claim (complaint) with the court. The summons, a copy of the claim, form of answer and instructions to the defendant shall be served upon the defendant in the same manner as all other summons and complaints. Idaho Code § 1-2304(1). However, there is a process whereby the plaintiff may submit a written request asking the court to serve the defendant by mail. In this case, the court will handle service. Idaho Code § 1-2304(2).

a. Contents of Notice of Claim. A claim shall contain the name of the plaintiff and the name of the defendant, followed by a statement, in brief and concise form, of the nature and amount of the claim and the time the claim accrued, and shall also state the address of the defendant, if known to the plaintiff.

b. Sheriff Must Receive:

1. The original summons, a copy of the claim, form of answer, and instructions to the defendant for each person to be served.
 2. A letter of instruction which must be signed and dated by the plaintiff specifying who is to be served and the address for service.
 3. See Chapter 16 for fees.
- c. Method of Service.** By personal delivery to the person to be served, or by substitute service, unless the plaintiff submits a written request asking the court to serve the defendant by mail, in which case the court will affect service in this manner.

2.1.23 SMALL CLAIMS COURT - CLAIM OF DEFENDANT. A defendant on a Small Claims Court action may sue the plaintiff for an amount not to exceed \$5,000.00 by filing a claim with the court and having a copy of the claim served on the plaintiff. There can be no counterclaim action filed to a claim. The defendant must begin a separate claim against the plaintiff. However, both matters may then be decided by the court at one hearing if the same court date is obtained for both actions. I.R.S.C.A. 5.

a. Sheriff Must Receive:

1. The original summons, a copy of the claim, form of answer, and instructions to the defendant for each person to be served. If substitute service is desired, then two copies of the claim for each person to be served would be required.
 2. A letter of instruction which must be signed and dated by the defendant, specifying who is to be served and the address for service.
 3. See Chapter 16 for fees.
- b. Method of Service.** Service shall be made by personal delivery to the person to be served, or by substitute service, unless the defendant submits a written request asking the court to serve the defendant by mail, in which case the court will affect service in this manner.

2.1.24 SERVICE BY PUBLICATION. If service may not be affected by another method, the court may order service made by publication in the manner ordered by the court. Since this method of service is seldom, if ever, done by the sheriff, the procedures will not be discussed here.

2.1.25 CHILD PROTECTIVE ACT - SERVICE OF SUMMONS OR NOTICE.

a. Sheriff Must Receive:

1. Original summons and one copy. A copy of the petition shall be attached to each summons. Summons shall notify parents, guardian, or legal custodian of their right to be represented by an attorney.
2. Signed and dated instructions by the plaintiff specifying who is to be served and the address for service.
3. No fees required when the state is the plaintiff.

b. Method of Service. Service of summons shall be made personally by delivery of an attested copy thereof to the person summoned. Service must be upon the person or persons who have custody of the child. Service must be affected at least forty-eight (48) hours before the time fixed in the summons for the hearing.

Notice of a shelter care hearing shall be given to the parents or custodian from whom the child was removed by personal service. This notice shall be given at least twenty-four (24) hours before the shelter care hearing.

The court may also order service by registered mail or publication upon a finding of the impracticability of personal service.

c. Return of Service. The return of service shall be filed with the court. Idaho Code § 16-1612.

2.1.26 JUVENILE CORRECTIONS ACT - SERVICE OF SUMMONS OR NOTICE.

a. Sheriff Must Receive:

1. Original summons and one copy. A copy of the petition shall be attached to each summons.
2. Signed and dated instructions by the plaintiff specifying who is to be served and the address for service.
3. No fees required when the state is the plaintiff.

b. Method of Service. Service of summons shall be made personally by delivery of an attested copy thereof to the person summoned. Service must be upon the person or persons who have custody of the child. Service must be affected at least forty-eight (48) hours before the time fixed in the summons for the hearing.

The court may order service by registered mail or publication upon a finding of impracticability of personal service.

Notice of a shelter care hearing shall be given to the parents or custodian from whom the child was removed by personal service. The notice shall be given at least twenty-four (24) hours before the shelter care hearing.

- c. **Return of Service.** The return of service shall be filed with the court. Idaho Code § 20-513.

2.2 SUBPOENA.

2.2.1 DEFINITIONS.

- a. **Subpoena.** A subpoena is a process by which the attendance and testimony of a witness may be compelled in a civil or criminal action. It is a writ or order directed to a person and requires his attendance at a particular time and place to testify as a witness.
- b. **Subpoena Duces Tecum.** A process which requires the production of any books, documents, or other things under the subpoenaed person's control which he is bound by law to produce at a specific time and place. It must also state intelligibly the book, paper, or documents required. It may require the custodian of the records to appear personally with the records or merely require the submission of the documents.
- c. **Subpoena for Deposition.** A subpoena for deposition is issued to require the attendance of a witness out of court to give evidence before a judge, justice, commissioner, notary public, or other officer authorized to take testimony in any matter under the laws of this state.

Subpoenas shall only be used to require attendance of a witness at trial, a deposition or a hearing. I.R.C.P. 45(a).

- 2.2.2 **CONCEALED WITNESS.** The old Idaho statute (Idaho Code § 9-704) that allowed a sheriff to forcibly enter a building to serve a subpoena has been repealed. This is no longer allowed by Idaho law.

- 2.2.3 **ISSUANCE OF CIVIL SUBPOENA.** A civil subpoena or subpoena duces tecum must be issued by the clerk of the court (except where issued by an administrative agency), under the seal of the court, or by the judge of such court, stating the name of the court, title of the action and shall command the person to attend a proceeding at a specific time and place. The clerk, or if there be no clerk, the judge, shall issue a subpoena or subpoena duces tecum signed and sealed but otherwise blank to a party requesting it, who shall fill it in before service. However, an attorney licensed in Idaho may also issue and sign a subpoena in a civil case. It shall be in substantially the form as contained at I.R.C.P. 45(a).

Various governmental entities and state agencies (Labor Commissioner, County Board of Commissioners, Industrial Commission, Department of Motor Vehicles, etc.) also have subpoena powers and may issue their own subpoenas. Their authorization is contained in the codes regulating these bodies. These subpoenas require no seals.

2.2.4 WITNESS FEES. Witnesses in civil actions in district court or magistrate's division or before any referee, master, or commissioner thereof, are entitled to receive such witness fees and travel expenses as determined by the trial court pursuant to the Idaho Rules of Civil Procedure. Idaho Code § 67-2008. I.R.C.P. 54(d)(1)(c).

However, in civil cases, when the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. I.R.C.P. 45(b)(2)(C).

Attorneys Are Not Entitled to Witness Fees. No counselor or attorney at law in any case shall be allowed any fees for attendance as a witness in any such cause. Idaho Code § 9-1604.

State Need Not Prepay Fees. The attorney general or any prosecuting attorney is authorized to cause subpoenas to be issued, and to compel the attendance of witnesses on behalf of the state, without paying or tendering fees in advance to any witnesses; and any witness failing or neglecting to attend after being served with a subpoena may be proceeded against and shall be liable in the same manner as provided by law in other cases when fees have been tendered or paid. Idaho Code § 9-1605.

A witness subpoenaed for a deposition is entitled to the same witness fees as if required to appear in court.

Federal Civil Subpoenas. When subpoenaed to attend any federal court of the United States, a witness is entitled to certain fees as set by federal statute U.S.C. 28-1821. It should be the attorney or subpoenaing party's responsibility to determine the fees necessary for a subpoena.

2.2.5 LIMITATIONS ON DISTANCE. A witness is not obligated to attend as a witness before any court, judge, or any other state officer unless the witness is a resident within the state at the time of service. This limitation does not apply when a subpoena duces tecum is served upon a custodian of records or other qualified witness, and his personal attendance is not required by the terms of the subpoena. Deposition for federal process limitation is 100 miles.

Depositions - Attendance Where Required. A resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the state may be required to attend in any county of the state wherein he is served with a subpoena. I.R.C.P. 45(f)(2).

2.2.6 SERVICE OF CIVIL SUBPOENA.

The Sheriff Must Receive:

- a. The original subpoena and a copy for each person to be served.

- b. Instructions must be signed and dated by the person requiring service and must specify who is to be served and the address for service.
- c. See Chapter 16 for fees.

Method of Service. In criminal proceedings, subpoenas are served by showing the original to the witness personally and informing him of its contents. Idaho Code § 19-3007. A copy of the subpoena is given to the witness personally, and fees only if demanded by him, for which he is entitled for travel to and from the place designated, and one day's attendance there. I.R.C.P. 45.

Last Day for Service. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

Practice Tip: A reasonable time may be interpreted to mean the length of time that would take a person to reasonably drive from the point of service to the place where the testimony is to be taken.

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by giving or offering him at the same time, if demanded the fees for one (1) day's attendance and the mileage allowed by law, I.R.C.P. 54(d)(1), except that no prepayment tender of fees and mileage shall be necessary to witnesses subpoenaed by the attorney general or any prosecuting attorney on behalf of the state. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. I.R.C.P. 45(b)(2)(C).

Department of Motor Vehicles. All subpoenas for the production of Department of Motor Vehicle records must be served on the director of the department or his appointed representative at the department's headquarters in Boise.

2.2.7 RETURN OF SERVICE. When service of a subpoena is made by a deputy, the original subpoena must be returned with the officer's certificate of service showing the time, date, and location of service. Idaho Code § 19-3007.

2.2.8 CRIMINAL SUBPOENA, ISSUANCE. The process by which the attendance of a witness before a court or magistrate in a criminal proceeding is a subpoena. It must be signed and issued by a magistrate or district judge, prosecuting attorney, or the clerk of the court. Idaho Code § 19-3004.

The subpoena must be in substantially the form as contained in Idaho Code § 19-3006.

The Sheriff Must Receive:

- a. The original subpoena and a copy for each person to be served.

- b. Instructions must be signed and dated by the person requiring service and must specify who is to be served and the address for service.
- c. See Chapter 16 for fees.

METHOD OF SERVICE.

- a. **Personal Service.** A subpoena may be served by personal delivery to the individual by showing the original to the witness personally and informing him of its contents. Idaho Code § 19-3007. A copy of the subpoena is given to the witness personally. The officer is required to serve in his county any subpoena delivered to him. The attorney general or any prosecuting attorney does not have to pay fees in advance to any witnesses.
- b. **Alternate Service.** A criminal subpoena may also be served by mail. Service is affected when the witness acknowledges receipt of the subpoena to the sender by the telephone, mail, or in person and identifies himself by reference to his date of birth, driver's license number, or social security number. The sender must make written notation on the return of the identifying information. A subpoena served in this manner possesses the force and effect as if personally served. Idaho Code § 19-3007A.

Last Day for Service. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

Practice Tip: A reasonable time may be interpreted to mean the length of time that it would take a person to reasonably drive from the point of service to the place where the testimony is to be taken.

Witness Fees. Witness fees are computed at the rate established by Idaho Code § 67-2008.

Practice Tip: In a criminal subpoena the witness may not request advance witness fees under any circumstances.

2.2.9 OUT-OF-STATE ACTIONS OR WITNESSES. Procedures are established in Title 19, Chapter 30 of the Criminal Code to require the attendance of a witness within this state to appear in a court in another state, to require an out-of-state witness to appear within this state, and to require a prisoner to appear before the court as a witness. In essence, the deputy should follow the terms of a court order in these situations.

Exemption from Arrest and Service of Process. If a witness from another state comes into or passes through this state under an order directing him to attend and testify in this or another state, he shall not while in this state pursuant to the order be

subject to arrest, or the service of process, civil or criminal, because of any act committed prior to his arrival in this state under the order. Idaho Code § 19-3020.

2.2.10 RETURN. The officer must without delay make a written return of the service subscribed by him stating the time, date, and place of service.

2.2.11 SERVICE OF PEACE OFFICERS. A peace officer who is subpoenaed in a matter pertaining to his duties may be served personally, or by delivery of the subpoena to the officer's immediate superior, or an agent who has been designated by his superior to receive service by delivery of a copy of the subpoena to the officer.

The peace officer's superior (or his agent) may refuse service in this manner if he knows that he will be unable to complete the service prior to the hearing date.

When service is made upon an officer's immediate superior or designated agent, the return of service should show substitute service and be forwarded to the issuing court. If notification is received that the immediate superior or designated agent has not been able to serve the subpoena, an amended return shall immediately be made to the court, and the court and the party requesting service should also be notified by the telephone that the officer has not been served. It is the server's responsibility to prepare the return of service and any amended return, and to forward it to the proper court.

2.2.12 TELEGRAPHIC OR FAX COPY SUBPOENA. <Repealed>

2.2.13 GRAND JURY SUBPOENA. A process to require the appearance of a witness before the Grand Jury. In most respects it is treated and served as a criminal subpoena. Idaho Code § 19-1120.

2.2.14 JUVENILE COURT SUBPOENA. A process issued by the juvenile court to require the appearance of a witness before it. In most respects, it is treated and served a criminal subpoena.

2.3 ORDER TO SHOW CAUSE.

2.3.1 DEFINITION. An order to show cause is a notice of motion and an order for the party to appear at a stated time and place to show cause why the motion should not be granted.

When the court finds that an application for an order to show cause makes prima facie showing for an order commanding a person to do or refrain from doing specific acts or to pay a sum of money, the court shall enter an order to show cause to the opposing party to comply with the request or show cause before the court at a time and place certain why such order should not be entered. I.R.C.P. 72.

2.3.2 SHERIFF MUST RECEIVE.

- a. **Process.** A copy of the order to show cause for each person to be served.
- b. **Instructions.** Signed and dated, specifying who is to be served and the address for service. If service is desired regardless of the last day for service, the instructions should so state. The return should point out it was not a good service.
- c. **Fees.** See Chapter 16.

2.3.3 METHOD OF SERVICE. Personal service of an order to show cause is required except it may be served on the attorney of record for the individual.

2.3.4 TIMING OF SERVICE. An order to show cause must be served at least seven (7) days before the date of the hearing, unless the time has been shortened by the court, or the sheriff is instructed to serve regardless of the hearing date. I.R.C.P. 72.

The order must be served seven (7) working days prior to the date of hearing. Saturdays, Sundays, holidays can be counted towards the seven (7) day requirement. If the last day to serve the order falls on a holiday, Saturday, or Sunday, the time within which the service must be made is extended. It is required to be served at least the given number of days before the hearing. The day of the hearing cannot be counted as one day. I.R.C.P. 72.

If a service is made that is not timely or upon an improper person, those facts must be set out in the court return.

Practice Tip: Sometimes an attorney will request the order to show cause be served after the seven (7) working day period. If this is done always explicitly set out in the sheriff's return of service that service was not timely and was served after the expiration date at the request of the initiating attorney.

2.4 NOTICE OF ENTRY OF SISTER STATE JUDGMENT-FOREIGN JUDGMENT.

2.4.1 DEFINITION. A Notice of Foreign Judgment is a document which advises a judgment debtor that a foreign judgment has been filed in the state. To obtain an Idaho judgment based on a sister state judgment (foreign judgment), a creditor must file an application with the clerk of any district court. The clerk then issues the notice, which the creditor must serve promptly on the debtor (Idaho Code § 10-1301 et. seq.).

No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until five (5) days after the date the judgment is filed Idaho Code § 10-1303).

2.4.2 SHERIFF MUST RECEIVE:

- a. **Process.** One copy of notice for each person to be served.
- b. **Instructions.** Signed and dated by creditor or attorney, specifying who is to be served and address for service.
- c. **Fees.** See Chapter 16.

2.4.3 METHOD OF SERVICE. (Same as Summons, see Summons this chapter.) Personal delivery, substitute service or mail (Idaho Code § 10-1303). Use only personal or substitute service unless specifically instructed otherwise.

2.5 CROSS-COMPLAINT.

2.5.1 DEFINITION. Similar to a complaint, a cross claim is generally used by a defendant in suit to make a claim against another defendant already a party to the suit. A defendant in a civil action may file a cross claim against another defendant or against other persons whom he has a cause of action against which is part and substance of the original action (I.R.C.P. 13(g)). Such cross claim may be filed prior to, or at the time of filing his answer to the complaint. A summons need not be issued against parties who have appeared in the action but would be required for persons who have not made an appearance (I.R.C.P. 5(a)).

2.5.2 SHERIFF MUST RECEIVE:

- a. **Process.** A copy of the cross complaint for each party who has appeared in the action who is to be served. And a copy of the summons and of the cross complaint for each person to be served if they have not appeared in the action.
- b. **Instructions.** Signed and dated by the defendant or his attorney specifying who is to be served and the address for service.
- c. **Fees.** See Chapter 16.

2.5.3 METHOD OF SERVICE. If the person to be served has not appeared in the action, the copy of summons and cross complaint must be served in the manner in which a summons and complaint may be served.

If the party to be served has appeared in the action, the cross complaint shall be served on his attorney, or upon the party if he has appeared without an attorney, in the manner provided for service of a summons and complaint or by following the procedure set out in I.R.C.P. 5(b).

2.6 TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION/ INJUNCTION PENDENTE LITE/INJUNCTION.

2.6.1 DEFINITION.

Temporary Restraining Order. A temporary restraining order is issued in an action to prohibit certain acts until a hearing may be held to determine if a preliminary injunction should be issued. It may be issued either ex parte or after a noticed hearing. If issued ex parte, it must contain, or be accompanied by, an order to show cause which directs the party restrained to appear in court on a given date to show cause why a preliminary injunction should not be issued.

Preliminary Injunction. A preliminary injunction, sometimes denominated an injunction pendente lite, may be issued in an action only after a noticed hearing and may restrain or mandate certain acts pending the court's final determination of the cause of action.

Injunctions. An injunction may be issued upon the court's final determination of the cause of action. It is an order which permanently restrains or mandates the acts designated therein. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise (I.R.C.P. 65(d)).

2.6.2 SHERIFF MUST RECEIVE:

- a. A copy of the process for each party to be served must be received by the sheriff. If it is a temporary restraining order issued ex parte, a copy of the order to show cause must also be received for service.
- b. Signed and dated instructions by the party requesting service, or his attorney, specifying who is to be served and the address for service. If an order to show cause is included and service is desired regardless of the last day for service, the instructions should so state.
- c. Current allowable fees for each party served the restraining order or injunction. If an order to show cause is included in the body of the restraining order, it should be served without an additional charge. If it is a separate document, an additional fee shall be charged for service.

2.6.3 METHOD OF SERVICE. By personal delivery of copies of the process to the person to be served.

2.6.4 LAST DAY FOR SERVICE. There is no last day for service of a restraining order or injunction. If the order itself gives an expiration date, service after the order expires would be ineffectual. If an order to show cause is included, it must be served at least 5 working days prior to the hearing date, unless the time has been shortened by the court, or the sheriff is instructed to serve it regardless of the hearing date.

Service after the last day would be ineffectual except for its effect on the adverse party. If the service was made after the last day for service, that fact must be shown on the return.

2.7 NOTICE TO VACATE/ NOTICE TO QUIT/THREE DAY NOTICE TO QUIT/ THREE DAY NOTICE TO PAY RENT OR QUIT/NOTICE TO PAY RENT OR QUIT.

2.7.1 DEFINITION. All of the above are variations of the notice required to terminate tenancy or force compliance (landlord-tenant) under a rental agreement between a landlord and his tenant (Idaho Code § 6-301 et seq.)

2.7.2 SHERIFF MUST RECEIVE:

- a. Process.** One copy of the notice for each person to be served. Subtenants must also receive a copy of the notice. The method of service which may be employed depends upon any limitations given in the instructions.
- b. Instructions.** Signed, dated and specifying who is to be served and address for service. The residence and business address of each person to be served and the address of the property involved must be given.
- c. Fees.** See Chapter 16.

Method of Service. By delivery of a copy of the notice to the tenant personally; or, if unable to locate the tenant at his residence or business address, by delivery of a copy to some person of suitable age and discretion at either place and mailing a copy to the tenant at his residence. The mailing of a copy to the tenant must be accomplished the same day the posting was done (Idaho Code § 6-304).

If such residence and business cannot be found, or a person of suitable age and discretion cannot be located, by posting a notice on the property, and by delivery of a copy to a person there residing if such person can be found, and by mailing a copy to the tenant at the address of the property. The mailing of a copy to the tenant must be accomplished the same day the posting was done (Idaho Code § 6-304).

If personal service is not affected, the notice must be turned in to the civil clerk the same day as it is posted so the mail requirements can be completed.

2.8 TENANT THREE DAY NOTICE FOR SPECIFIC PERFORMANCE TO LANDLORD.

2.8.1 DEFINITION. This notice is utilized by a tenant to advise a landlord of his default under a lease agreement and is generally a pre-condition to suit. A tenant may file an action against a landlord for damages and specific performance for certain types of

defaults in the lease agreement. These generally concern the habitability or safety of the premises.

2.8.2 SHERIFF MUST RECEIVE:

- a. Process.** Original and one copy of the notice.
- b. Instructions.** Signed and dated and specifying who is to be served and address for service.

2.8.3 METHOD OF SERVICE. The notice must be served by leaving a copy with the landlord or his agent personally. It can be served by leaving a copy with an employee at the landlord's usual place of business or his agent if either one is absent. The notice may be mailed to either address by certified mail, return receipt requested (Idaho Code § 6-323).

2.9 FEDERAL COURT PROCESS.

2.9.1 DEFINITION. As in state court, federal courts issue process to provide notice to individuals or to command performance of an act or prevent acts by an individual in the nature of writs or orders. Under certain federal statutes, federal courts, unlike state courts, have nationwide jurisdiction. Unless expressly so provided, however, federal jurisdiction extends, like state court jurisdiction, only to the boundaries of the state in which the court issuing the process sits (FRCP Rule 4(e)).

2.9.2 SERVICE OF PROCESS. Service of federal process may be made by any person authorized to serve process issued by a state court in the state where the district court is held or the process is served. The sheriff, therefore, may serve federal process. However, the sheriff cannot serve writ process. FRCP 4(c).

Practice Tip: Federal rules require the judge to appoint another person if the writ is not enforced by a federal marshal. If this appointment has not been made all of the sheriff's actions could be illegal.

Federal rules also say that state laws will control writ process unless federal rule or statute controls. Idaho sheriffs will not know all federal statutes or court rules. Federal writ process will not be served.

Return the writ process to the attorney so a federal marshal can serve it or tell the attorney to have the writ issued by an Idaho court.

2.9.3 SERVICE OF SUBPOENA. A federal subpoena must be served by personal delivery. A witness served with a federal court civil subpoena is entitled to witness fees in the amount of \$40 per day and a mileage fee of 34.5 cents per mile each way. 28 U.S.C. 1821. Since the federal courts do not require the filing of an affidavit for a subpoena duces tecum to issue, service of a subpoena is valid without an affidavit copy being attached. F.R.C.P. 45

2.9.4 SERVICE OF SUMMONS. A federal summons may be served by service of a copy of the summons and of the complaint as follows:

- a. On an individual, infant, incompetent, corporation, partnership or unincorporated association, in the manner provided for service of a summons issued by an Idaho court, including substitute service.
- b. On the United States, by delivery to the United States Attorney, his assistant, or designated clerical employee; and by mailing by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by mailing by registered or certified mail to such officer or agency.
- c. On an officer or agency of the United States, by serving the United States and by delivery to such officer or agency.

Proof of service of federal process must be made by affidavit.

2.10 LEGISLATORS - EXEMPTION FROM SERVICE.

A member of the legislature is not subject to civil process during a session of the legislature.

During such time as any attorney shall be serving as a legislator or legislative attaché while the legislature is in general or special session, he/she shall not be required to attend in court at any trial or other proceeding, and in any pending matter in which he/she appears an attorney of record, the time within which he/she would normally be required to file any pleading or other paper shall be extended for a period of ten days following adjournment of such session of the legislature, provided that such extension of time is not intended to, and shall not, toll or otherwise extend the running of any limitation period provided by statute (I.R.C.P. 5.1).

Practice Tip: This rule does not prohibit the service of process, it merely extends the filing dates when process is served.

2.11 UNIFORM INFRACTION AND CITATION RULE OF SERVICE.

A peace officer may issue a uniform citation for a citable offense in which he shall certify that he has reasonable grounds to believe, and does believe, that the person cited committed the offense contrary to law. The citation shall require the defendant to appear in court on the citation at a time certain which shall not be less than five (5) nor more than twenty-one (21) days after the date of the citation.

2.12 MILITARY AFFIDAVIT.

The Soldiers' and Sailors' Relief Act (50 U.S.C. App. § 520) provides certain protections for military personnel against default judgments. In compliance with this act, plaintiffs will often instruct the sheriff to obtain certain information as to the defendant's military status.

If the instructions to the sheriff include a request for a military affidavit, the sheriff shall inquire of the person served to attempt to ascertain the information required (age, sex, and whether or not the defendant is in the military service) to execute an affidavit as prescribed by the act setting forth the facts as ascertained by him.

In those instances where the sheriff is requested to execute this military affidavit at a later date, it is necessary to re-serve the defendant, unless the information as to military status was obtained at the time of the original service.

2.13 SHERIFF'S RETURN PROOF OF SERVICE.

Proof of service of process shall always be in writing specifying the manner of service, the date and place of service (I.R.C.P. 4(g)).

When service is by a sheriff or his deputy anywhere within the state, then by certificate of the officer indicating service as required by these rules.

Practice Tip: The Supreme Court has stated “in our view the purpose for requiring a proper affidavit is to assure the court that service in fact occurred and that the court has jurisdiction.” It is the fact of service not the proof of service which gives the court jurisdiction. Workman v. Brown, 103 Idaho 946, 655 P.2d 462 (1982).

Amendment to I.R.C.P. 4. At any time in its discretion and upon such terms as it deems just, the court may allow any process (Rule 4(a)(2)) or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial right (rights) of the party against whom the process issued. Rule 4(g)(2).

2.13.1 PREPARATION OF RETURN.

- a. A separate proof of service should be prepared for each defendant served.
- b. State the full name of the defendant served, as shown on the summons. If a defendant is sued under a fictitious name, state his true and fictitious names.
- c. If served on an agent, state agent's name and official title or position, e.g., Richard Roe, President, or Richard Roe, General Partner.

- d. When delivery is made to a parent, guardian, conservator, or similar fiduciary, state their name and title or relationship to the defendant, e.g., Mary Roe, mother of Richard Roe (Minor), or Mary Roe, Guardian of Richard Roe (Incompetent).

2.13.2 RETURN WHEN SUMMONS LOST. If a summons is lost after service has been made but before it is returned, an affidavit of the person who made the service (or sheriff's certificate) showing the time, place, and manner of service, and facts showing that such service was made, may be returned with the same effect as if the summons itself was returned.

2.13.3 RETURN OF SUMMONS FROM ANOTHER STATE. In general, the return on a summons or citation issued from another state must comply with the laws of that state. Execute the affidavit of service in accordance with the attorney's instructions, if any. Obtain the county clerk's authentication of the authority of the notary public whenever requested by the attorney or shown on an affidavit of service furnished by the attorney to be necessary.

Use the affidavit of service form furnished by the attorney. Unless specifically instructed to the contrary, always make personal delivery of an out-of-state summons.

When a court clerk is authorized to take the affidavit, it may be sworn to before a clerk of any court of record; however, there may be exceptions in allowing municipal or justice courts to perform this function.

CHAPTER 3

3.1 WRITS OF EXECUTION.

3.1.1 INTRODUCTION. A writ of execution is a direct command from the court to the sheriff to levy on and sell property of the debtor to satisfy a judgment.

After service of the writ of execution, the sheriff shall make his return to the clerk of the court and indicate thereon the amount of his service fees and whether all of such fees were collected by him upon the service of the writ of execution.

A writ has no legal effect unless it is properly executed. Also, the officer may be liable in damages for improper execution. As to enforcing writs, the methods vary depending on what is to be accomplished with the writ. Volumes would be required to cover every situation, so only the main points that are most common and applicable to the field deputy will be discussed.

3.1.2 BASIC REQUIREMENTS.

a. A Sheriff Must Receive:

1. The original writ of execution and sufficient copies.
2. Instructions. Must be:
 - (a) In writing
 - (b) Signed by the plaintiff or the attorney
 - (c) Specifying who is to be served and the address of the individual to be served
3. Notice of Exemption.
4. Instructions for asserting a claim of exemption.
5. Form for making a claim of exemption (Idaho Code § 11-203).
6. Envelopes addressed to each person required to be served.

b. Fees Charged to Plaintiff:

1. Charges for service, return, interim return, and mileage as per Idaho Code or your adopted county ordinance. (Idaho Code § 31-3203)

c. Service of Writ of Execution.

1. Generally, a writ of execution is served by:

- (a) A law enforcement officer
- (b) Hand delivered (personal service)
- (c) Upon the debtor

d. Last Date for Service. Prior to the expiration date contained within the body of the writ. This time frame begins to run from the date the sheriff receives the writ. NOTE: A writ of execution is good for not less than ten (10) nor more than sixty (60) days from the date the sheriff received the writ.

3.1.3 TIME WITHIN WHICH EXECUTION MUST ISSUE. Ten (10) years after entry of judgment, subject to stay by court order. Idaho Code § 11-101.

Issuance and Enforcement Period. A writ of execution shall be issued by the clerk of the court upon application of the judgment creditor and shall be directed to the levying officer in the county where the levy is to be made. Idaho Code § 11-107.

A separate writ shall be issued to each county where a levy is to be made, and writs may be issued successively until the money judgment is satisfied, except that a new writ may not be issued to the same county until the expiration of sixty (60) days (or for any period that it was issued for that is less than sixty (60) days) after the issuance of a prior writ for that county and the prior writ is returned.

Upon the expiration of ten (10) years after the date of entry of a judgment, the judgment may not be enforced by a writ of execution except by separate order of the court. All enforcement procedures pursuant to the judgment or to the writ or order issued pursuant to the judgment shall cease. Any levy that was accomplished prior to the expiration of the ten (10) year period may be continued to sale. Idaho Code § 11-105.

3.1.4 CONTENTS OF WRIT OF EXECUTION.

Process. Where the writ of execution requires the sheriff to deliver real or personal property, the writ must be issued to the sheriff of the county where the property or some part thereof is situated. Writs of execution may be issued at the same time to different county's sheriffs. Generally, the writ of execution shall require the levying officer to whom it is directed, to enforce the judgment and it shall include the following: Idaho Code § 11-102

- a. The writ of execution must be issued in the name of the people (State of Idaho).
- b. It must be sealed with the seal of the court. Idaho Code § 73-111.
- c. It must be subscribed (signed) by the clerk.
- d. It must be directed to the sheriff.

- e. It must intelligently refer to the judgment, stating the court and the county where the judgment roll is filed.
- f. It must identify the court where the judgment was issued.
- g. It must identify the County where the judgment was filed.

3.1.5 CONTENTS OF SPECIFIC WRITS.

- a. **Money.** If the writ is for money, the amount thereof, and the amount actually due thereon must be on the writ.

Practice Tip: Refer to money amounts that appear on face of writ. Where money is either added or subtracted in long hand, the clerk should initial the changes. If the clerk has not done so, the officer must call the issuing court clerk to confirm the document is the same as the one on file in their office.

- b. **Property.**

- 1. If it be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor.
- 2. If sufficient personal property cannot be found, then it must be satisfied out of the debtor's real property.
 - (a) If the judgment be a lien upon real property (foreclosure), then it must be satisfied out of the real property belonging to the debtor on the day when the judgment was docketed, or at any time thereafter; or
 - (b) If the execution be issued to a county other than the one in which the judgment was recovered, it must be satisfied on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter.
- 3. **Person.** If the writ of execution is against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the county jail until he pays the judgment, with interest, or is discharged according to law. Idaho Code § 11-102(3).
- 4. **Specific Kind of Money.**
 - (a) If the writ of execution is issued on a judgment made payable in a specified kind of money or currency, as provided in Idaho Code § 10-1104, it must also require the sheriff to satisfy the same in the kind of

money or currency in which the judgment is made payable. Idaho Code § 11-102(4) (first part).

- (b) In the case of levy and sale of property of the judgment debtor, the sheriff must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution.

5. Delivery of Possession.

- (a) If the writ of execution is for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, describing it, to the party entitled thereto.
- (b) The writ of execution may at the same time require the sheriff to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered. Idaho Code § 11-102(5).

3.1.6 SPECIFIC INSTRUCTIONS. It is essential that written instructions accompany all writs to be served. The names contained in the instructions for service and levy purposes must match the names of those individuals contained in the writ.

- a. Real Property Levy.** Instructions must be directed to the sheriff and describe the judgment debtor's, right, title, and interest in the property to be levied upon and describe such property by metes and bounds. The street address must also be listed when levying upon real property per Idaho Code § 60-113. If the property to be levied is in another individual's name, instructions must include their names and addresses. For special instructions required for sale of real property, see Chapter 5, Sheriff's Sales.
- b. Personal Property Levy.** If specific personal property is to be levied on, the instructions should describe the property to be seized and its location in such a manner no other property could reasonably be mistaken for the wanted property.

Practice Tip: Never hesitate to contact the attorney of record for additional written instruction if questions arise concerning location, description, or the ownership of property.

- c. Business Levy.** Instructions must contain all information as needed for personal property, plus:
 - 1. Deviations (if any) from normal procedures to be allowed debtor.
 - 2. Amount to satisfy the creditor's demand if less than that shown on the writ.
 - 3. Specify the type of property to be levied upon, e.g., stock in trade, fixtures, equipment, till, etc.

3.1.7 METHOD OF SERVICE.

- a. **Personal Service.** By hand delivery of a copy of the writ of execution upon the defendant.
- b. **Time.** The execution must be served prior to the expiration date contained within the body of the execution. This time frame begins to run from the date the sheriff receives the execution.

3.1.8 DOCUMENTS TO BE SERVED.

- a. A copy of the writ.
- b. A notice that such credits, or other property, or debts, as the case may be, are attached in pursuance of such writ.
- c. A notice of exemptions available under federal and state law.
- d. Instructions to debtors and third parties for asserting a claim of exemption.
- e. A form for making a claim of exemption.

Practice Tip: At times plaintiffs will have executions issued for more than the legal sixty (60) day limit. Under no circumstances should a sheriff levy upon property after sixty (60) days from receipt of the writ.

3.1.9 EXECUTION OF WRIT.

- a. The sheriff must execute the writ against the property of the judgment debtor by:
 1. Levying on a sufficient amount of property if there be a sufficient amount of property.
 2. Collecting or selling the things in action (specified), and selling the other property.
 3. Paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment.

Any excess in the proceeds over the judgment and costs must be returned to the debtor unless otherwise directed by the court.

The sheriff must only levy on amounts of property sufficient to satisfy the judgment. Idaho Code § 11-301.

3.1.10 SHERIFF'S RETURN ON WRIT.

- a. The execution may be returnable at any time not less than ten (10) nor more than sixty (60) days after its receipt by the sheriff, to the clerk with whom judgment roll is filed (Idaho Code § 11-103). The levying officer to whom the writ of execution is delivered must return the original writ to the court that issued the writ together with a report of the levying officer's actions and an accounting of amounts collected and costs incurred, at the earliest of the following times:
 1. Promptly after all of the duties under the writ are performed.
 2. When return is requested in writing by the judgment creditor.
 3. If no levy takes place under the writ and the writ has expired, the return shall be made promptly.
 4. Upon expiration of the time for enforcement of the judgment.
 5. A copy of the return must be sent to the attorney or plaintiff that initiated the action.

3.1.11 WRIT FOR DELINQUENT CHILD SUPPORT OBLIGATIONS.

- a. As is the case with garnishments, when the writ is for delinquent child support obligations and the person upon whom the writ is served is in possession of earnings or unemployment benefits of the judgment debtor, the execution shall operate continuously and shall require such person or the State of Idaho to withhold the nonexempt portions of the earnings or unemployment benefits at each succeeding earnings or unemployment benefits disbursement interval until released by the sheriff at the written request of the judgment creditor or until the amount specifically set forth in the writ is discharged or satisfied in full.
- b. The sheriff shall file all interim returns of such continuous execution at intervals not to exceed fourteen (14) days, whenever the amount collected in the fourteen (14) day period is at least equal to \$50.00. In all other cases, the sheriff must file interim returns in intervals that do not exceed thirty (30) days. Idaho Code § 11-103.

3.1.12 PROCEEDING SUPPLEMENTARY TO EXECUTION. The judgment debtor may pay the amount of the debt, or the amount sufficient to satisfy the execution, to the sheriff. The sheriff's receipt for payment is sufficient discharge of the debt.

3.1.13 EXEMPTION OF PROPERTY FROM ATTACHMENT OR LEVY. The debtor or a third-party creditor may claim an exemption in property levied upon, but must do so within fourteen (14) days. (See Chapter 10 of this manual for additional details with regard to Exemptions.)

3.1.14 PROPERTY LIABLE TO SEIZURE.

- a. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution. Shares and interest in any corporation or company, and debts and credits, and all other property both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution. Idaho Code § 11-201
- b. Debts owing by state of Idaho subject to execution or garnishment after judgment except when owed to an elected official of the state. Service must be made by the Ada County Sheriff upon the state auditor of the state of Idaho. See Idaho Code § 11-718 for further details.)
- c. Exemptions -- holding and police property by sheriff. Third party or defendant exemption claims may only be filed if the property in question has been levied upon.

3.1.15 CLAIM OF EXEMPTION (Idaho Code § 11-203).

- a. Within fourteen (14) calendar days from the date the sheriff mails or hand delivers the writ and other documents, the sheriff must receive from defendant or third party the claim of exemption. If defendant or third party mails the claim, it must be received by the sheriff before the fourteen calendar day period ends. In computing the fourteen (14) day period, intervening weekends and legal holidays shall be counted, but if the last day of the period falls on a weekend or legal holiday, the period shall be deemed to run until the close of business on the first business day following the weekend or holiday.
- b. The sheriff shall not deliver to the plaintiff or sell the property, except if perishable, until the period for filing a claim has expired. The sheriff must refuse to accept a claim not filed timely, and must proceed to sell or deliver the property to the plaintiff unless ordered otherwise by the court. If a claim of exemption is timely filed, the levying officer may not sell the property or deliver the property to the creditor until the claim is resolved.
- c. The sheriff, upon receipt of a claim of exemption, must mail or deliver a copy of the claim to the plaintiff within one business day of receipt. The sheriff can notify the plaintiff, or person who was issued the writ, by telephone, but still must mail the claim within one (1) day.
- d. The plaintiff then has five (5) business days from the date the claim is delivered or mailed by the sheriff to file a motion contesting the claim and to set a hearing.

- e. Within the five-day period for filing a motion to contest, the plaintiff or moving party must notify the sheriff that a motion has been filed and provide a copy of the motion and notice of hearing to the sheriff.
- f. If plaintiff notifies the sheriff that the claim will be uncontested or fails to notify the sheriff that the claim is being contested within the five-day period for filing a motion to contest, the sheriff must release the property to the defendant or his agent. See Idaho Code § 11-203.

3.1.17 WRITS OF EXECUTION ISSUED ON CRIMINAL ORDERS

- a. **Criminal Fines and Costs.** If the judgment in a criminal case includes the payment of a fine, or costs, or fine and costs, or other monetary sums, execution may be issued thereon for such sums as on a judgment in a civil action. (Idaho Code § 19-2702)
- b. **Victims' Restitution.** The laws applicable to the enforcement of civil judgments also apply to orders from a criminal court requiring a criminal defendant to pay restitution to his or her crime victim(s).
 - 1. **Criminal Restitution Orders -** After forty-two days from the entry of the order of restitution or at the conclusion of a hearing to reconsider an order of restitution, whichever occurs later, an order of restitution may be recorded as a judgment and the victim may execute as provided by law for civil judgments. (Idaho Code § 19-5305(1)). Under this statute, once recorded, a criminal restitution order is treated as if it is a civil judgment for the amount indicated and a writ of execution may be issued.
 - 2. **Juvenile Criminal Restitution Orders -** In juvenile criminal cases, a judge can order restitution to be paid to the victim by the juvenile defendant, the defendant's parents, or both. Idaho Code § 19-5305 is applicable to these orders as well, allowing the victim to record the order of restitution as a judgment and execute as provided by law for civil judgments. (Idaho Code § 20-520(3)).
 - 3. **Judicial Enforcement of Restitution Orders by a Court Clerk -** Previously, Idaho law allowed cities or other political subdivisions of the state to contract with collection agencies to collect debts arising from victims' restitution orders. (Idaho Code § 67-2358(1)(a)). This option was not given to the courts until 2009 when the legislature amended Idaho Code § 19-4708(2)(c) to include "restitution" as one of the "debts owed to courts" that could be sent to collection, and amended Idaho Code § 19-5305 to expressly authorized this practice. When this happened, it created an argument that courts could now also pursue post-judgment remedies on behalf of a crime victim under 19-2702. As this practice has not been tested in the Idaho courts, you will need to consult your prosecuting attorney for advice on how to proceed if a court clerk presents a writ of execution to enforce a restitution order on a victim's behalf.

CHAPTER 4

4.1 GARNISHMENTS.

4.1.1 INTRODUCTION. Generally, a garnishment is a means by which money or personal property held by a third person and owed to a debtor is collected by the sheriff. (See I.C. § 11-701(6). Service of the writ and other documents constitutes the sheriff's levy procedure to impound the debtor's personal property or assets that are in the control or custody of third parties. Until service of the writ and other documents, no assets are affected.

The serving deputy must record the name, time, and capacity of the person served as evidence of proper service.

4.1.2 BASIC REQUIREMENTS.

a. Sheriff Must Receive.

1. The original writ of execution for continuing garnishment and sufficient copies.
2. Notice of Garnishment for each garnishee to be served and sufficient copies.
3. Instructions. Must be:
 - (a) In writing.
 - (b) Signed by the plaintiff or the attorney.
 - (c) Specifying:
 - (i) Who is to be served.
 - (ii) The address for service of garnishment. The address of the defendant for personal service or mailing of the exemption forms must be included.

For provisions regarding copies and postage, see Idaho Code § 11-706.

4. Notice of exemption.
5. Instructions for asserting claim of exemption.
6. Form for making a claim of exemption, Idaho Code § 11-707.
7. Envelopes addressed to each person required to be served, Idaho Code § 11-706.

8. If the garnishee is a bank or depository institution, a search fee of five dollars (\$5.00) and the last known mailing address of the defendant and, if known, a tax identification number, that will enable the garnishee to identify the defendant on its records. Idaho Code § 11-703(1)(f).

4.1.3 FEES CHARGED TO PLAINTIFF. In 2017, Sheriff's fees for garnishments were removed from the general Sheriff's fee statute (I.C. § 31-3203) and moved to Idaho Code § 11-729. Your county commissioners can set fee amounts by resolution for serving the order of garnishment and writ of execution as well as for the interim and final returns. These fees cannot exceed the actual cost of these services. Also, at the time of adoption, the board shall publish the fee on the county website and include the criteria used to calculate the fee, with a breakdown of each separate cost element included in the fee.

4.1.4 SERVICE OF GARNISHMENT. The sheriff must serve the documents on debtor if an execution, on third party if garnishment.

a. Generally. A garnishment is served (levied) by:

1. A law enforcement officer.
2. Hand delivered (personal service). The sheriff can accomplish service by U.S. mail with a facsimile acknowledgment of such service by the employer. Idaho Code § 11-706.
3. Upon the third party who holds assets or personal property of the debtor (garnishee) (if an execution, on third party if garnishment).
4. A copy of the writ and other documents to levy upon any credits, debts, or other personal property of the debtor in garnishee's possession or under his control, Idaho Code § 11-703. The levy only affects funds in the account as of the time of the levy unless the writ is continuous as discussed herein which may affect funds that enter the account after the levy. Yacht Club v. First National Bank, 101 Idaho 852, 623 P.2d 464 (1980).
5. Last Day for Service. Prior to the expiration date contained within the body of the writ. This time frame begins to run from the date the sheriff received the writ.

Note: A writ of Execution for a garnishment is good for not less than 10 nor more than ninety (90) days from the date the sheriff received the writ. (See Idaho Code § 11-702). This writ has a longer life than a regular writ of Execution which is returnable not more than sixty (60) days after received by the sheriff. Idaho Code § 11-103.

4.1.5 WHO TO SERVE WHEN GARNISHEE IS A BUSINESS:

- a. **Sole Proprietorship.** Owner/manager.
- b. **Banks or Depository Institution.** Service on banking or trust corporations is addressed in Idaho Code § 11-703(3).

If a banking or trust corporation operates more than one branch office in the state of Idaho, the banking or trust corporation may, by notifying the Idaho department of finance, designate a particular office for the service of attachment, execution and garnishment papers. The Idaho Department of Finance is required to publish a list of all such designated offices on its website (<http://finance.idaho.gov/Banking/BankGarnishments.aspx>). This designated office may be outside the state of Idaho, and service on the designated office is effective as to any of the defendant's money held in any of the bank's branches or offices, whether in or outside the state of Idaho.

If service of the attachment, execution or garnishment papers is not made on the designated office of the banking or trust corporation, but instead is made on another office of the banking or trust corporation located in the state of Idaho, then service of such papers shall only be valid and effective as to moneys to the defendant's assets held in the possession or control of that particular office. The bank or trust corporation is not required to transmit the paperwork to the designated office.

If the garnishment fails to sufficiently distinguish the banking or trust corporation from any affiliate, parent or subsidiary thereof, such that it is not clear which entity is intended to be the garnishee, the garnishment may be returned unsatisfied. Service on any banking or trust corporation is effective as against the moneys and other personal property to the defendant's credit which are in the possession or control of the banking or trust corporation named in the garnishment, but not any affiliate, parent or subsidiary not named.

- c. **Partnership.** A partner or authorized agent.
- d. **Service When Garnishing Public Employees' Wages.**
 - 1. **City.** The City Clerk, or in large cities, the Payroll Office.
 - 2. **County.** The Clerk/Auditor/Recorder's Office.
 - 3. **State of Idaho.** Only through the Ada County Sheriff's Office. They serve the State Auditor.

4. **University/College Employees.** Boise State University, Lewis & Clark Community College, and Eastern Idaho Tech employees, through the office of the State Auditor.
5. **Department of Insurance.** The Director of the Department of Insurance for an insurance company when the Director is their registered agent. See Idaho Code § 41-334(1) for requirements.

No proceedings will take place against the insurer and the insurer will not be required to appear, plead or answer the writ and documents until thirty (30) days after the date of service of such upon the Director, Idaho Code § 41-334(3).
6. **U.S. Postal Employees** are subject to process of any type of wage garnishments; they are not exempt from any type of service. See Section 4.1.33 of this chapter.
7. **Federal Employees** are subject to process of any type of wage garnishment. (See Section 4.1.33 of this chapter.)

4.1.6 SERVICE ON DEFENDANT.

- a. **Depository Garnishee.** Within one business day of service on a depository institution, the sheriff shall hand deliver or mail to the defendant or any other person instructed by the plaintiff, a copy of the aforementioned documents.
- b. **Employer of Garnishee.** Within two (2) business days of service on an employer, the sheriff shall hand deliver or mail to the defendant, and any other person instructed by the plaintiff, a copy of the aforementioned writ and documents. The plaintiff must provide defendant's last known address in his letter of instructions to the sheriff.

The sheriff shall indicate on the return filed with the Court the date, manner of service, and documents served upon the defendant or third party, Idaho Code § 11-709.

If at the time of service, the levying officer receives written answer stating that no money or other personal property is owing the defendant, service on defendant is not required, Idaho Code § 11-709.

4.1.7 JURISDICTION. Can only serve in Idaho.

4.1.8 PROPERTY SUBJECT TO GARNISHMENT. The garnishment process may be used to levy upon the following types of property: personal property, credits or debts in the custody or control of a third party.

4.1.9 CONTINUOUS GARNISHMENT.

- a. **Description.** A continuous garnishment does not have an automatic termination date after legal service is made. The withholding period commences upon service and continues until the writ is satisfied or is terminated by the sheriff on the plaintiff's instructions.
- b. **Procedure.** The Order must have the judge's signature or signature stamp ordering that a continuing garnishment is allowed. If the body of the writ sets forth that it is for continuing garnishment, it can be accepted as a continuing garnishment service and levy.

4.1.10 CHILD SUPPORT GARNISHMENT. A wage garnishment for child support is automatically a continuing garnishment. Interim returns on such continuous execution or garnishment shall be filed by the sheriff at intervals not to exceed fourteen (14) days, whenever the amount collected in the fourteen (14) day period is at least equal to fifty dollars (\$50.00), but in any event, interim returns on such continuous garnishment shall be filed by the sheriff at intervals not to exceed thirty (30) days. Idaho Code § 11-705(2).

4.1.11 WAGE ASSIGNMENT FOR CHILD SUPPORT. A court ordered wage assignment for child support has priority over any garnishment, attachment, execution, or other assignment. Upon service, the employer is required to send the money to whomever the court has ordered, Idaho Code § 8-704.

4.1.12 INTERIM RETURN. In the case of continuing garnishment for wages, the sheriff shall file interim returns at intervals not to exceed fourteen (14) days, whenever the amount collected in the fourteen (14) day period is at least one hundred dollars (\$100.00), but in any event, interim returns on such continuous garnishment shall be filed at intervals not to exceed sixty (60) days. (See Idaho Code § 11-705.)

4.1.13 SECOND CREDITOR REQUESTS. The law provides that writs must be served in the order they are received by the sheriff. If a continuing garnishment is in force and another writ and garnishment comes into the sheriff's hands, the sheriff **shall not serve** the new writ and garnishment. They must be held until they expire. If the first garnishment will be satisfied before the second writ expires, the second one may be served at the time the first expires. The second writ will continue in force until fully satisfied.

No continuing garnishment being held can be served after the expiration date of the writ. Idaho Code § 11-702 does not allow for a writ of garnishment to be issued with an expiration date of over ninety (90) days, with the exception of tax garnishments which are addressed in I.C. § 11-718.

Practice Tip: There is no such thing as a continuous writ of execution. Treat this type of writ the same as a sixty (60) day writ for levy purposes. (See Idaho Code § 11-103). Return the writ at the end of sixty (60) days if no levy has been made.

4.1.14 ONE TIME GARNISHMENT. Only affects the wages due at the time of service of documents. The garnishee/employer has five (5) working days in which to answer the garnishment. (Everson v. Atlas Tie Co., 73 Idaho 91, 245 P.2d 773 (1952)).

4.1.15 RE-GARNISHMENT. The plaintiff may instruct the sheriff to levy upon the wages of the defendant as many times as possible before the writ expires.

4.1.16 GARNISHMENT FOR SPOUSAL SUPPORT. Is not continuous garnishment unless set up by a continuous garnishment order.

4.1.17 GARNISHMENT FOR SUPPORT OF ANY OTHER PERSON. Is not a continuous garnishment unless set up by a continuous garnishment order, Idaho Code § 11-712.

4.1.18 EMPLOYER'S RETURN. Within five (5) days of the date of service. The sheriff is not legally responsible in making sure the employer completes and returns the Notice of Garnishment.

4.1.19 GARNISHMENT OF MONEY IN ESCROW. Where the debtor is a seller of an item, he holds no interest in escrow monies deposited by the purchaser until the escrow instructions have been completed. In such a case, service of garnishment on escrow holders is ineffective unless served prior to the disbursement of funds. The funds must be on hand at the time of service.

Practice Tip: If the funds come in after the service of the garnishment, no funds are levied upon. If the escrow holder calls and tells you funds came in after your service and they still have the funds, you must serve another garnishment.

Where the debtor is the purchaser and has deposited funds in the escrow, garnishment would be effective only if served prior to the closing of escrow.

4.1.20 GARNISHMENT OF PLEDGES. The interest of a pledgor is subject to execution and is accomplished by serving a garnishment on the pledgee, not by seizure of the pledge, Treadwell v. Davis, 34 Cal. 601 (1868).

4.1.21 PROPERTY IN POSSESSION OF THE CLERK OF COURT. Are not subject to garnishment until after the bail has been exonerated. However, since the sheriff would normally not be aware of its exact status, instructions to garnish such property should be followed.

4.1.22 PARTNERSHIP PROPERTY. Is not subject to attachment or execution for an individual partner's obligation. A creditor's remedy is to apply to a competent court

for a **charging order**. If the partnership is paying wages or other forms of income to the partner, those funds or credits may be garnished.

4.1.23 TENANCY IN COMMON OR JOINT TENANCY PERSONAL PROPERTY.

In levying on the debtor's interest in personal property held in tenancy in common or joint tenancy, the levying officer may take the whole of the property into his possession for the purpose of the writ.

4.1.24 GOODS IN BAILEE'S POSSESSION. Bailee means a person who by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.

a. Negotiable Document of Title Has Not Been Issued. To levy upon goods in the possession of a bailee, other than one who has issued a negotiable document of title, the levying officer shall personally serve a copy of the documents on the bailee. If goods are subject to a security interest, and the judgment creditor instructs the levying officer to serve the secured party, the levying officer shall serve a copy of the documents on the secured party personally.

b. Negotiable Document of Title Has Been Issued. If goods are in the possession of a bailee who has issued a negotiable document of title, the goods may not be levied upon, but the negotiable document of title may be levied upon.

1. If the negotiable document of title is in the possession of the judgment debtor, take the document of title into custody.

2. If the negotiable document of title is in the possession of a third person, personally serve a copy of the documents on the third person.

4.1.25 CHATTEL PAPER.

a. A writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, Idaho Code § 28-9-105(b).

b. To levy on chattel paper, in possession of the judgment debtor, the levying officer shall take the chattel paper into custody.

c. If in the possession of a third person, the officer shall personally serve a copy of the writ and notice on the third person.

d. If the levying officer obtains custody of the chattel paper or if pursuant to a security agreement, the judgment debtor has liberty to collect or compromise the chattel paper or to accept the return of goods or make repossession, the levying officer shall, serve a copy of the writ and notice on the account debtor personally, if instructed by the judgment creditor.

4.1.26 INSTRUMENTS.

- a. Defined in Idaho Code § 28-9-105(1).
- b. To levy on an instrument, the levying officer shall take the instrument into custody if it is in possession of the judgment debtor, or, if it is in the possession of a third person, personally serve a copy of the writ and documents on the third person.
- c. If the levying officer obtains custody of the instrument, the levying officer shall, if instructed by the judgment creditor, serve a copy of the writ and documents on the obligor personally.

4.1.27 NEGOTIABLE DOCUMENT OF TITLE.

- a. Means any document which evidences that the person entitled under the document has the right to receive, hold, or dispose of the goods covered therein.
- b. To levy upon a negotiable instrument of title the levying officer shall take the document into custody if it is in the possession of the judgment debtor, or, if in the possession of a third person, personally serve a copy of the documents on the third person.

4.1.28 ACCOUNTS RECEIVABLE OR GENERAL INTANGIBLES.

- a. Accounts means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper whether or not it has been earned by performance, Idaho Code § 28-9-102(2).
- b. General intangible means the person who is obligated on an account, chattel paper, or general intangible, Idaho Code § 28-9-102(42).
- c. To levy upon an account receivable or general intangible, the levying officer shall personally serve a copy of the writ and documents on the account debtor. If payments are made to a person other than the judgment debtor, whether pursuant to a security agreement, assignment for collection, or otherwise, and if instructed by the judgment creditor, the levying officer shall personally serve a copy of the writ and notice, which constitute a levy on any amounts owed, on any third person or persons.

4.1.29 ESTATES. To attach a debtor's interest in personal property belonging to the estate of a decedent, the levying officer shall serve the personal representative of the decedent with a copy of the writ and documents.

COMMUNITY PROPERTY.

- a. The separate property of a spouse is not subject to enforcement for debts of the other spouse unless the spouse is made a party to the judgment for purposes of liability; except that separate property is liable for debts incurred for the necessities of life. Idaho Code § 11-204 specifically provides “All real and personal property of any married person at the time of his or her marriage, or which he or she subsequently acquires as separate property, and all non-community rents, issues and profits thereof, are exempt from execution for any separate debts incurred by his or her spouse.” See the chapter on exemptions.
- b. Exemptions may be claimed, in the case of community property, by the spouse of the judgment debtor whether or not the spouse is also a judgment debtor.

4.1.30 EARNINGS OF ELECTED OFFICIALS. The earnings of state elected officials are not subject to garnishment, Idaho Code § 11-718.

4.1.31 EARNINGS OF FEDERAL EMPLOYEES (Including Military Personnel).

- a. **Process Required.** The earnings of individuals employed by all branches of the federal government may be garnished by means of court order or writ.
- b. **Procedure.** Service may be made by either personal service or registered mail (return receipt requested) upon the agency head or upon the agent designated by regulation to accept service. See 5 U.S.C. 5520a.
- c. **Federal Agencies.** Creditors must provide sheriff with: address of the agency to be served, full name, social security number, and date of birth, if available. In the case of military personnel, branch of service, rank or grade, and if known, the name and location of current duty station.

4.1.32 EXEMPTION OF PENSION MONEY AND RETIREMENT OR PROFIT-SHARING BENEFITS FROM LEGAL PROCESS. With certain exceptions, money or other assets payable to a participant or beneficiary from or any interest of any participant or beneficiary in, a retirement or profit-sharing plan that is qualified under sections 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code, as amended, is exempt from all claims of judgment creditors of the beneficiary or participant arising out of a negligent or otherwise wrongful act or omission of the beneficiary or participant resulting in monetary damages to the judgment creditor. The exemption provided by this subsection shall be in addition to that provided in this chapter, Idaho Code § 55-1011.

4.1.33 STATE RETIREMENT BENEFITS.

- a. Are not subject to execution, garnishment or attachment except for the enforcement of an order for the support of a minor child, Idaho Code § 59-1317.

- b. Should a court order distribution of these benefits to a spouse or former spouse, the benefits in their entirety will be forwarded to the court for distribution, Idaho Code § 59-1317.

4.1.34 UNEMPLOYMENT BENEFITS, WORKMEN'S COMPENSATION, SOCIAL SECURITY BENEFITS.

- a. **Unemployment Benefits.** Except for the enforcement of an order for child support or spousal support, unemployment benefits are not subject to garnishment. Idaho Code § 72-1365 states only the Department of Health & Welfare, Bureau of Child Support Enforcement, or its designated agent, can pursue garnishment of unemployment benefits.
- b. **Workmen's Compensation.** Except for the enforcement of an order for child support, spousal support, or other support order, workmen's compensation is not subject to garnishment, Idaho Code § 72-802.
- c. **Social Security Benefits.** Except for the enforcement of an order for child support, spousal support, or other support order, social security benefits are not subject to garnishment, Idaho Code § 11-603.

4.1.35 DEBTS OWING BY STATE OF IDAHO. Debts, moneys and credits due or owing by the state of Idaho to any person (except an elected official) are subject to garnishment under the procedure set forth in Idaho Code § 11-718. Since the state controller's office is located in Ada County, it is the Ada county sheriff who shall serve the writ of execution and notice of garnishment on the state controller. For tax refunds, the judgment creditor shall provide the debtor's full name and social security number in the letter of instruction. The state controller is required to hold the writ open until the tax refund is issued, but no longer than a period of one hundred fifty (150) days. The controller has thirty (30) days to file an answer after the tax refund is issued or the writ expires, whichever occurs first. The Ada county sheriff shall thereafter file a return as soon as practicable, but no later than one hundred ninety (190) days after service. (See I.C. § 11-718).

4.1.36 CLAIM OF EXEMPTION (Idaho Code § 11-203).

- a. Within fourteen (14) calendar days from the date mailed by the sheriff, the sheriff must receive from defendant or third party the claim of exemption. If defendant or third party mails the claim, it must be received by the sheriff before the fourteen calendar day period ends. In computing the fourteen (14) day period, intervening weekends and legal holidays shall be counted, but if the last day of the period falls on a weekend or legal holiday, the period shall be deemed to run until the close of business on the first business day following the weekend or holiday.

- b. The sheriff shall not deliver to the plaintiff or sell the property, except if perishable, until the period for filing a claim has expired. The sheriff must refuse to accept a claim not filed timely, and must proceed to sell or deliver the property to the plaintiff unless ordered otherwise by the court. If a claim of exemption is timely filed, the levying officer may not sell the property or deliver the property to the creditor until the claim is resolved.
- c. The sheriff, upon receipt of a claim of exemption, must mail or deliver a copy of the claim to the plaintiff within one business day of receipt. The sheriff can notify the plaintiff, or person who was issued the writ, by telephone, but still must mail the claim within one (1) day.
- d. The plaintiff then has five (5) business days from the date the claim is delivered or mailed by the sheriff to file a motion contesting the claim and to set a hearing.
- e. Within the five-day period for filing a motion to contest, the plaintiff or moving party must notify the sheriff that a motion has been filed and provide a copy of the motion and notice of hearing to the sheriff.
- f. If plaintiff notifies the sheriff that the claim will be uncontested or fails to notify the sheriff that the claim is being contested within the five-day period for filing a motion to contest, the sheriff must release the property to the defendant or his agent. See Idaho Code § 11-203.
- g. In some cases, the issue of a judgment debtor's claim of exemption may be addressed at trial and, if any property, or part thereof, is found to be exempt or not liable for the debt, this can be reflected in the judgment. See Idaho Code § 11-711.

CHAPTER 5

5.1 SHERIFF'S SALE.

5.1.1 INTRODUCTION: Pursuant to the sheriff's duty to levy upon property to satisfy a writ of execution, the sheriff may also be obligated to sell said property to satisfy a creditor's judgment pursuant to said writ of execution. The sheriff may also be required to sell property which is subject to a writ of attachment. The procedures are the same. However, the sheriff should not attempt to sell the property until the time within which to make a claim of exemption has expired. See Exemptions, Chapter 10.

5.1.2 EXECUTION OF WRIT. The sheriff must execute a writ of execution against the property of the judgment debtor by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. Idaho Code § 11-301.

5.1.3 SALE OF PROPERTY - NOTICE. The sheriff is obligated to provide different types of notice depending upon the nature of the property to effectuate its sale. Idaho Code § 11-302.

- a. **Perishable Property.** The sheriff must provide notice for the sale of perishable property by posting a written notice of the time and place of sale in three (3) public places of the precinct or city where the sale is to take place. Notice must be placed for a reasonable time considering the character and condition of the property. Idaho Code § 11-302(1).
- b. **Personal Property.** The sheriff must provide notice of the sale of personal property by posting a notice in three (3) public places where the sale is to take place for not less than five (5) days, nor more than ten (10) days, before the time set for sale. Rather than posting, the sheriff may also publish a copy in the newspaper at least one (1) week, but no more than two (2) weeks, prior to the sale in a newspaper publishing within the county. Idaho Code § 11-302(2).
- c. **Real Property.** The sale of real property requires the posting of notice particularly describing the property for twenty (20) days in three (3) public places where the property is situated and also where the property is to be sold and by publishing a copy once a week for the same period before the time of sale in a newspaper published in the county, if there be one. Idaho Code § 11-302(3).
- d. **Nature of Notice.** The state statute does not specifically review the nature of the notice which is required for the sale of personal property. However, it is reasonable to conclude that the notice should as closely as possible describe all

items for sale. The sale of real property requires a specific review of the property to be sold. When the judgment under which the property is to be sold is made payable in a specific kind of money or currency, it must be so specified in the notice. Idaho Code § 11-302(3).

- e. **Selling Without Notice.** A sheriff or officer selling without the notice prescribed by said section forfeits Five Hundred Dollars (\$500.00) to the aggrieved party in addition to his actual damages. Idaho Code § 11-303.

5.1.4 CONDUCT OF SALE. The sale of property under execution must be made at a public auction to the highest bidder between the hours of 9:00 a.m. and 5:00 p.m. Neither the officer holding the execution, nor his deputy, can become a purchaser or be interested in any purchase at such sale. The sale of personal property capable of manual delivery must be within view of those who attend the same. The sale of real or personal property must be grouped or sold in such a fashion as to bring the highest price. Real property consisting of several lots must be sold separately. After sufficient property has been sold to satisfy the execution, no more can be sold. Idaho Code § 11-304.

- a. A sale may be conducted on a weekend or holiday. Ketterer v. Billings, 106 Idaho 832 (1984).

5.1.5 PAYMENT BY BIDDER. If a purchaser at the sale fails or refuses to pay the amount bid, the sheriff may again sell the property to the highest bidder with any loss forming the basis for an action by the sheriff against the original bidder. Idaho Code § 11-305. Further, the sheriff may reject any subsequent bids of such a person. Idaho Code § 11-306.

5.1.6 DELIVERY OF PROPERTY/CERTIFICATE OF SALE/SHERIFF'S DEED.

- a. **Delivery.** Personal property which is capable of manual delivery which has been sold and paid for at auction may be simply delivered to the highest bidder. The sheriff, at the request of the purchaser, should prepare a certificate of sale for said property. Idaho Code § 11-308.
- b. **Personal Property Not Capable of Manual Delivery.** The sheriff must execute a certificate of sale upon the payment at auction for the purchase of personal property which is not capable of manual delivery. Idaho Code § 11-309.
- c. **Real Property.** Upon the sale of real property at auction to the highest bidder, the sheriff must prepare a certificate of sale. It must provide: (1) a particular description of the real property; (2) the price bid for each distinct lot or parcel; (3) the whole purchase price paid; (4) when subject to redemption, it must be so stated (property is subject to redemption when the debtor's interest/estate is more than a leasehold for a two-year unexpired term); and (5) the certificate must also show if a specific kind of money was paid as set forth in the judgment. A

duplicate of the certificate must be filed for record by the officer in the office of the recorder of the county. Idaho Code § 11-310.

5.1.7 SHERIFF'S DEED. The judgment debtor, or another redemptioner, may redeem the property through payment of the amount paid by the bidder. Said redemption must occur within one (1) year from the date of the sheriff's certificate for property containing more than twenty (20) acres and within six (6) months from the date of the sheriff's certificate for property consisting of less than twenty (20) acres. A party intending to redeem the property must provide written notice of redemption to the sheriff. The original party purchasing the property at the auction, or redemptioner, is entitled to a sheriff's deed upon the expiration of the redemption period. Idaho Code § 11-403.

Rev. 6/01

CHAPTER 6

6.1 WRIT OF RESTITUTION.

6.1.1 INTRODUCTION. Writs of restitution and judgments of restitution are court orders or process generated in an unlawful detainer action. An unlawful detainer action generally involves a landlord's effort to evict a tenant from leased premises. A judgment of restitution is issued by a court and a writ of restitution is issued by the clerk based upon the judgment at the conclusion of an unlawful detainer action where a landlord has prevailed in establishing a default in the lease agreement and is entitled to regain possession of the leased premises. Idaho Code § 6-301 et. seq.

6.1.2 COMPLAINT AND SUMMONS IN UNLAWFUL DETAINER ACTION FOR FAILURE TO PAY RENT.

In an unlawful detainer action exclusively for a tenant's failure to pay rent, the landlord is entitled to an accelerated eviction proceeding. In this accelerated proceeding after all notices have been served upon the defendant in the manner required by law, the plaintiff will file his complaint for unlawful detainer and obtain the issuance of a summons in the form set forth in I.R.C.P. 4(b)(2). (For notices involved in these actions and their service, see Section 2.7.) The complaint and summons are served and returned as in other actions. In this accelerated proceeding, the court will schedule a trial within twelve (12) days from the filing of the complaint; however, the service of the summons and complaint and the trial setting on the defendant must not be less than five (5) days before the day of trial set by the court. Idaho Code § 6-310.

6.1.3 WRIT OF RESTITUTION/JUDGMENT OF RESTITUTION. If a landlord prevails in an unlawful detainer action, the judge will enter a judgment of restitution and the court clerk will issue a writ of restitution. These documents will order the sheriff to cause the defendant and his goods to be removed from the premises.

a. Contents. A writ of restitution form is reproduced at Idaho Code § 6-311C. A writ of restitution must generally:

1. Be issued to the sheriff where the property is located;
2. Contain a description of the premises which is the subject of the unlawful detainer action;
3. Contain the name of the plaintiff and the defendant;
4. Contain the date the judgment was rendered;

5. Review the amount of costs and fees recovered;
6. Command the sheriff to cause the defendant and his goods and chattels to be forthwith removed from the premises;
7. Provide that the sheriff is empowered to cause the defendants goods and chattels to be removed to a safe place for storage in the event they are not promptly removed; and
8. Command the sheriff to levy on the goods and chattel of the defendant and pay the costs and disbursements incurred in the action as reviewed in the writ.

Idaho Code § 6-311C.

6.1.4 PROCEDURES REGARDING SERVICE.

a. Sheriff Must Receive:

1. Original writ of restitution along with a copy of the writ for each party to be served.
2. Instruction letter signed and dated by the plaintiff or the plaintiff's attorney identifying the defendant and the property's location.
3. Fees: see Chapter 16.

- b. Timing of Service.** Generally, a writ of restitution by its language commands the sheriff to cause the defendant and his goods and chattels to be forthwith removed from the premises. A writ contains forthwith language generally requiring its service and action to be undertaken immediately.

Practice Tip: It is generally appropriate for the sheriff upon receiving a writ of restitution which requires its service forthwith, to contact the plaintiff or plaintiff's attorney to seek directions as to how much time the defendant may be given to vacate the premises and remove his property. Giving the defendant a full day within which to vacate the property would not appear to be unreasonable.

CHAPTER 7

7.1 WRITS OF POSSESSION.

7.1.1 INTRODUCTION. Unlike other writs, writs of possession for personal property pertain to possessory rights to certain specified and identified personal property. Such writs issue from a lawsuit to determine the right to possession of the described property.

Anyone who claims a right to the immediate and exclusive possession of the property may sue. Idaho Code § 8-301.

Most frequently, such an action arises under a conditional sales contract wherein the seller retains title to the personal property until the purchase price is paid. Failure of an individual to meet his contract payment then leads to the plaintiff's attempt to recover the subject's personal property, either before or after judgment.

7.2 WRITS OF POSSESSION OF PERSONAL PROPERTY BEFORE JUDGMENT.

7.2.1 CLAIM AND DELIVERY. The claim and delivery statutes (Idaho Code § 8-301, *et seq.*) permit the plaintiff to obtain a writ of possession prior to judgment but after a hearing on a noticed motion where the defendant has an opportunity to be heard. In limited instances the writ may be obtained *ex parte*, i.e., prior to any notification to the defendant.

7.2.2 METHOD OF OBTAINING WRIT OF POSSESSION.

Application for Writ of Possession. The plaintiff files a verified (sworn) complaint or an affidavit that meets the who, what, when, where, and why requirements set forth in detail in Idaho Code § 8-302. The court can either order the property seized immediately or set a show cause hearing for the defendant to show cause why the property should not be delivered to the plaintiff. In either case, a writ of possession (sometimes called a prejudgment writ of possession) may issue.

The court can also issue a temporary restraining order to prevent the defendant from moving, selling, destroying, etc. the property. Idaho Code § 8-302(4).

7.2.3 SHERIFF'S DUTIES. As set forth in Idaho Code § 8-304, the writ of possession is directed to the sheriff in whose jurisdiction the personal property is located. The writ will describe the property and specify the location where it might probably be found. The writ will order the sheriff to seize the property forthwith, i.e., immediately.

Before seizing anything, the sheriff should do the following:

- a. Examine the writ to see that it is fair on its face. Are all blanks completed? Is the writ properly signed and dated? Does the writ apply to property within the sheriff's jurisdiction? In the event you have any concerns or questions, you should immediately contact your prosecutor.
- b. Verify that you have the original writ or a certified copy and a copy for each defendant to be served.
- c. Verify that you have the instruction letter signed by the plaintiff or his attorney.
- d. Verify that an undertaking (bond) was filed by plaintiff and signed by two sureties. (Idaho Code § 8-303.)
- e. Verify that the sheriff's fee deposit has been made which should be sufficient to cover his expenses. Remember, packing, moving, and storage expenses should be considered.

7.2.4 SEIZURE BY SHERIFF SERVICE OF WRIT. The sheriff shall forthwith (immediately) take possession of the property and remove it to a safe place or safeguard it by installing a keeper. If the property is in a building or enclosure, the sheriff must:

- a. Announce his identity.
- b. State his purpose and the authority under which he acts.
- c. Demand the delivery of the property.

If the property is not delivered, then the sheriff may gain entry into the building or enclosure in the manner he reasonably believes will cause the least damage to the building or enclosure. Then the sheriff shall take the property. Depending on the circumstances, this may be by waiting until a key arrives, hiring a locksmith, cutting a lock, or breaking down the door. Call your prosecutor if you are unsure of how to proceed. (Idaho Code § 8-305.)

Without delay, i.e., forthwith, the sheriff shall serve the defendant a copy of the writ of possession and the written undertaking (bonds) by delivering the copies to the defendant personally, if he can be found, or to his agent from whose possession the property is removed.

If neither the defendant nor his agent can be found, the statute (Idaho Code § 8-305) allows the copy of the writ of possession and the written undertaking to be left at either persons' usual place of abode with a person of suitable age and discretion (usually a family member over the age of 18) or if neither have a place of abode, by mailing them to both persons last known address.

7.2.5 **KEEPERS.** Idaho Code § 8-305 permits the sheriff to use a keeper. A keeper is the sheriff's agent who acts as a caretaker over the property while it is located away from the sheriff's physical control to safeguard it from being removed or damaged.

7.2.6 **DESCRIPTION.** Since a writ of possession pertains only to certain specified property, and the sheriff has no authority to levy upon other property, identification of the specific property is critical. Some property may be sufficiently described by the writ (e.g., a description including make, model, and serial number) so that the officer may identify it. Other property can only be identified at the scene of the seizure by the parties. The plaintiff or his agent may meet the officer at the scene and point out the specific property as being the property described in the writ. In this event, a signed writing from him on the sheriff's inventory stating that he identified the property seized as being the property described in the writ must be prepared. Often the defendant can be persuaded to identify the subject property to the officer. These methods of identification should be sufficient to prevent the sheriff from being liable but only your prosecutor can make such a decision. In no event should property not described on the writ be seized, even if claimed by the plaintiff at the scene.

7.2.7 **NO PAYOFF BY DEFENDANT.** The sheriff does not have the authority to accept a payoff from the defendant in lieu of seizing the property. Any inquiry by the defendant in this regard should be referred to the plaintiff. If the defendant and plaintiff reach a mutual agreement, the plaintiff might try to instruct the officer to release the property back to the defendant. However, since the writ is a court order, before any noncompliance with the writ occurs, the sheriff should require that the plaintiff obtain a court order quashing the writ.

7.2.8 **CUSTODY REQUIREMENTS.** When the sheriff has obtained control over the described property, he must protect it from damage or loss and deliver to the person named in the writ after he has been paid his fees and expenses and after five (5) days have passed from the time the defendant was served with the writ of possession, and the written undertaking. See Idaho Code § 8-308. Note also that the defendant can file a written undertaking for redelivery of the property back to him. See Idaho Code § 8-306.

7.2.9 **PROCEDURES REGARDING SERVICE:**

Sheriff Must Receive:

- a. The original writ of possession (or certified copy) along with one (1) copy of the writ with the undertaking attached for service upon each defendant to be served.
- b. Instruction letter signed and dated by plaintiff or plaintiff's attorney.
- c. Fees: See Chapter 16.

- 7.2.10 PROCESS EXHIBITED.** The officer, or other person, executing process must then, and at all times subsequent, so long as he retains it, upon request, display the same with all papers attached. Idaho Code § 31-2214.
- 7.2.11 SHERIFFS RECEIPT OF WRIT.** The writ of possession, undertaking, and instruction must be timely received by the officer so that he may execute and return the writ to the court within twenty (20) days after he has taken the property and within sixty (60) days from the date the writ was issued.
- 7.2.12 THIRD PARTY CLAIMS.** Any person not a party to the claim and delivery action claiming an interest in the property may file a third party claim with the sheriff pursuant to Idaho Code § 11-203. Requirements for such claim and the sheriff's procedure upon receipt are discussed in the chapter dealing with third party claims in this manual.
- 7.2.13 SALE OF THE PROPERTY.** If an undertaking for redelivery has not been filed, upon a showing that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason that the interest of the parties will be best served thereby, the court may order that the property be sold and the proceeds deposited in the court to abide the judgment in the action.
- 7.2.14 DEFENDANT'S RECOURSE.** At every stage during the claim and delivery proceedings, the defendant has available to him procedures which he may take to protect his interest. A detailed discussion of these rights is not appropriate in this manual; however, a listing of some of the actions he can take which affect the sheriff follows.

The defendant may at any time, before or after levy, file an undertaking with the court to stay delivery or to regain possession of the property. Idaho Code § 8-306. A copy of the undertaking must be served on the levying officer and the plaintiff.

No later than two (2) days after service of a copy of the plaintiff's undertaking, the defendant must object to the plaintiff's undertaking by filing a notice of exception with the court and filing a copy with the plaintiff and the levying officer. If he fails to do so within the two (2) day time frame, he is deemed by statute to have waived his right to take exception to the undertaking.

- 7.2.15 DISPOSITION OF THE PROPERTY.** Unless earlier released by court order, the seized property must be held in the sheriff's custody for five (5) days after the date of service of a copy of the plaintiff's undertaking is served upon the defendant. During this period, the sheriff may receive either:
- a. Notice of filing of an undertaking with the court by the defendant. The sheriff should then continue to hold the property pending the following:

The plaintiff must, within two (2) days of the date of filing of the defendant's undertaking with the court, except to the defendant's sureties by filing notice of

exception with the court, the defendant and the sheriff. If the sheriff does not receive notice of exception within the five (5) day period, the property will be returned to the defendant five (5) days after filing of the redelivery bond.

If, within five (5) days of the date of the filing of defendant's undertaking with the court, the sheriff does receive notice of plaintiff's exception to the sureties on the defendant's undertaking, he will continue to hold the property pending receipt of an order from the court to deliver the property to the plaintiff or redeliver it to the defendant.

The property may be immediately redelivered to the defendant upon receipt of the plaintiff's written instruction to do so, or upon his written waiver of his right to except to the defendant's sureties.

- b. Notice of filing with the court by the defendant of a notice of exception to the sureties on the plaintiff's undertaking. Upon receipt of this notice of exception to sureties, the sheriff must continue to hold the property pending receipt of an order from the court to deliver the property to the plaintiff or redeliver it to the defendant.

If neither the defendant's notice of exception to sureties nor defendant's notice of filing of undertaking is received by the sheriff within the five (5) day period following the date of service of the copy of undertaking upon defendant, the property should be delivered to the plaintiff.

If the property is in storage, it is normally delivered to the plaintiff or redelivered to the defendant.

7.2.16 CLAIM AND DELIVERY CHECK LIST. The following outline is presented to assist the knowledgeable deputy in processing claim and delivery cases. It includes the major requirements of the law.

a. Process to Be Served:

- 1. Prior to Noticed Hearing.** Prior to the hearing on issuance of writ, the defendant must be served with, and the sheriff may receive, any or all of the following process for service:
 - (a) Summons and complaint.
 - (b) Notice of application for writ and notice of hearing.
 - (c) Application for writ and affidavits in support thereof.
 - (d) Temporary restraining order (optional).

2. **Ex Parte Writ.** If claim and delivery requested under a writ issued prior to hearing:
 - (a) The Sheriff Must Receive:
 - (1) Writ of possession and copies.
 - (2) Copies of undertaking.
 - (b) Sheriff should receive (or plaintiff's instructions that they have been or are being served):
 - (1) Copies of summons and complaint.
 - (2) Copies of application of writ and any affidavits in support thereof.
3. **Writ Issued after Noticed Hearing:** If claim and delivery requested under a writ issued after noticed hearing:
 - (a) Sheriff Must Receive:
 - (1) Original writ of possession and copies (may be certified or teletype).
 - (2) Copies of plaintiff's undertaking under Idaho Code § 8-303.

b. Valid Writ and Undertaking:

1. **Writ of Possession Must:**
 - (a) Be directed to the enforcing officer.
 - (b) Describe the specific property to be seized.
 - (c) Specify the place (if any) that may be entered to take possession of the property.
 - (d) Direct the officer to levy on the property pursuant to Idaho Code § 8-304 if found, and to retain it in his custody until released or sold pursuant to Idaho Code § 8-308.
 - (e) Be accompanied by copies of the plaintiff's undertaking if it is to be served on defendant.
2. **Undertaking Must:**
 - (a) Indemnify the defendants.

- (b) In lieu of a written undertaking, the sheriff may receive a court clerk's certificate that an undertaking in the form of cash or bearer bonds has been filed with the court, or a copy of check on file at clerk's office.
- c. Prepaid Fees.** These fees should be obtained sufficient to cover the following possible expenses, as required: (Idaho Code § 31-3211)
1. Process serving charges.
 2. Keeper fees.
 3. Packing, moving, and storage costs.
 4. Locksmith services.
 5. Insurance and other unusual costs.
- d. Plaintiff's Instructions.** The plaintiff must provide detailed written instructions which:
1. Identify the action.
 2. Are directed to the enforcing officer.
 3. Direct him to take the action desired.
 4. Are dated and signed by the plaintiff or his attorney.
- e. Seizure of Property:**
- 1. Code Requirements:**
 - (a) Take custody of the property either by taking it into personal possession or by installing keeper. Idaho Code § 8-305.
 - (b) Levy may be made as directed by the writ of possession.
 - (c) If the writ directs that the property is within a building or enclosure specifically described in the writ, the officer shall demand its delivery, announcing his: (Idaho Code § 8-305)
 - (1) Identity: (Deputy sheriff, County of _____.)
 - (2) Purpose: (To obtain possession of described personal property.)

- (3) Authority: (Provisions of Idaho Code § 8-305 and writ of possession issued by court, case number, and title of action.)
- (d) If the property is not then delivered to the officer, he may forcibly enter the place designated in the writ, in such a manner as he reasonably believes will cause the least damage, to search for and levy upon the property if found.
- (e) If the property is used as a dwelling, such as a boat or trailer, then a keeper may be installed before the occupants are evicted if allowed by the plaintiff.

7.3 WRITS OF POSSESSION (POST JUDGMENT).

7.3.1 ISSUANCE OF WRIT:

- a. Application for Writ.** After entry of a judgment for possession, a writ of possession shall be issued by the clerk of the court directed to the levying officer in the county where the judgment is to be enforced. Idaho Code § 11-102(5). This writ can cover real or personal property.
- b. Contents of Writ.** The writ shall contain:
 - 1. The date of issuance.
 - 2. The title of the court where judgment is entered and the cause and number of the action.
 - 3. The names of the plaintiff and judgment debtor.
 - 4. The date the judgment was entered.
 - 5. The date of any subsequent renewals.
 - 6. If the judgment includes a money judgment, the amount required to satisfy the money judgment on the date the writ is issued and the amount of interest accruing from the date of issuance of the writ.

It may contain any other information required to be included in any particular writ such as the description of the real property or personal property.

Verify that the writ has a seal and is also signed by the clerk, i.e., that it is fair on its face.

7.3.2 SHERIFF MUST RECEIVE:

The original (or a certified copy) and one (1) copy of writ of possession with undertaking attached for service upon each defendant to be served.

- a. Instructions.** Instruction letter signed and dated by plaintiff or plaintiff's attorney.
- b. Fees.** See Chapter 16.
- c. Method of Service.** Personal service if possible or upon defendant's agent or person having custody of the property.
- d. Process Exhibited:** The officer, or other person, executing process must then, and at all times subsequent, so long as he retains it, upon request, display the same with all papers attached. Idaho Code § 31-2214.

7.3.3 REAL OR PERSONAL PROPERTY. It is unlikely that a writ of possession will require the sheriff to deliver real property in the form of buildings or land although Idaho Code § 11-102(5) states so. Not only is such a requirement impossible or impractical, but the court can always command the losing party to convey the real property by deed or court can issue the deed itself.

It may be that the sheriff is ordered to deliver that real property that can effectively be severed from the remaining real property, or other fixtures attached to the reality.

Note that Idaho Code § 11-102(1) requires that the sheriff satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, then out of his real property. This section is dealing with a money judgment, i.e., writ of execution, not a writ of possession. The exception to this rule is when the judgment is a lien upon the real property, then the real property is subject to the writ of execution.

Regardless, the complexities of the laws in this area require that the sheriff try to simplify his tasks. Accordingly, one should review the writ to be sure it is fair on its face and require detailed instruction letters from the attorney. In the event any aspect of your duties required by the writ is contrary to the requirements of this manual, or appears improper in any way, you should contact your local prosecutor for assistance. Do not try to determine the legal requirements on your own.

CHAPTER 8

8.1 WRITS OF HABEAS CORPUS, MANDATE, AND PROHIBITION.

8.2 **HABEAS CORPUS.** Habeas corpus cases are governed by the Idaho Habeas Corpus and Institutional Litigation Procedures Act. (Idaho Code § 19-4201, et seq.) which contains the Idaho statutes concerning the writ of habeas corpus.

BACKGROUND. Idaho Code § 19-4203 provides that: (1) a person not a prisoner as defined by Idaho Code § 19-4201A, may file a writ of habeas corpus to request a court to inquire into the cause and/or legality of his restraint; (2) an in-state prisoner, as defined by Idaho Code § 19-4201A, may file a writ of habeas corpus to request a court to inquire into state or federal constitutional questions concerning the conditions of his confinement, revocation of his parole, miscalculation of his sentence, loss of good time credits, or a detainer lodged against him; and, (3) an out-of-state prisoner, as defined by Idaho Code § 19-4201A, may file a writ of habeas corpus only to request an Idaho court to inquire into a state or federal constitutional question concerning the conditions of his confinement, subject to certain limitations. (Idaho Code § 19-4203.)

8.2.1 **APPLICATION FOR WRIT.** Idaho Code §§ 19-4204, 19-4205 and 19-4207, provide that the writ may be made by petition, signed by either the imprisoned party, or some person on his behalf, specifying the name of the person who is imprisoned or restrained of his liberty, the officer or department by whom he is confined, the place where he is confined, and the basis of the alleged illegality. This petition must be signed under oath by the party making the application.

8.2.2 **ISSUANCE AND RETURN.** Idaho Code § 19-4202 provides that the writ may be issued by the Supreme Court or by the District Court. It is important to note that the Supreme Court has the authority to make the writ returnable to any court.

8.2.3 **SERVICE AND RETURN OF THE WRIT.** In most cases, the writ will be directed to the sheriff. The clerk must deliver the writ to the sheriff without delay. This is an instance wherein a deputy sheriff may not serve the sheriff. See Section 1.2.1 of this manual. In the event the writ is directed to any party other than the sheriff, such as a warden at the state penitentiary or the director of a state hospital or juvenile center, the sheriff or his deputy will be delivered the writ and the sheriff or the deputy must serve the individual named personally and without delay, i.e., forthwith.

8.2.4 **NATURE OF PROCEEDINGS.** Idaho Code § 19-4208 provides that a habeas corpus proceeding is a civil action and is governed by the Idaho Rules of Civil

Procedure to the extent that these rules are not inconsistent with the Idaho Habeas Corpus and Institutional Litigation Procedures Act.

8.2.5 FEES. Idaho Code § 31-3212 provides that no filing or recording fee of any kind shall be charged or received by any county officer for duties performed or services rendered in proceedings in habeas corpus matters, unless the petitioner is a prisoner as defined in Idaho Code § 31-3220A. If the petitioner is a prisoner as defined in Idaho Code § 31-3220A, they are required to pay all or part of the filing fees as set forth in Idaho Code §§ 31-3201 and 31-3201A.

8.3 WRITS OF MANDATE.

8.3.1 WRITS OF MANDATE. Idaho Code § 7-301, et seq. sets forth the Idaho statutory scheme regarding writs of mandate, also known as writs of mandamus. Essentially this is a writ issuing from a court of competent jurisdiction which commands a private or municipal corporation or any of its officers, including a judicial officer, to perform a duty clearly imposed by law. A writ of mandate commands action.

In accordance with Idaho Code § 7-303, the writ is issued upon an affidavit based on the application of the party who is interested in the relief sought.

8.3.2 SERVICE AND RETURN. In accordance with Idaho Code § 7-313, the writ is served in the same manner as a summons in a civil action except that the court may expressly direct otherwise. Service upon a majority of the members of any board or body is service upon the entire board or body whether at the time of the service the board or body was in session or not. See Chapter 2 of this manual for methods of service of a summons and complaint. The return is made in the same way as a return for a complaint; See Section 2.1.7 of this manual.

8.3.3 ARREST AND FINE. In accordance with Idaho Code § 7-314, when a person upon whom the writ has been personally served has, without lawful excuse, refused or neglected to obey the court order, the court may impose a fine not exceeding \$1,000.00. The court also may order the party to be imprisoned until the writ is obeyed.

8.4 WRITS OF PROHIBITION. In accordance with Idaho Code § 7-401, et seq., a writ of prohibition is the opposite of a writ of mandate. It serves to stop the proceedings of any tribunal, corporation, board, or person, when such proceedings are in excess of the jurisdiction of such tribunal, corporation, board, or person. Mandamus commands action; prohibition stops action.

Like the writ of mandate, the writ of prohibition in accordance with Idaho Code § 7-402 provides that the writ may be issued to any tribunal, corporation, board, or person upon an affidavit of a person beneficially interested in the action.

8.4.1 SERVICE AND RETURN. Idaho Code § 7-404 requires that the same actions be taken in the service of the writ of prohibition as with the writ of mandate. Thus, the writ is served in the same manner as a summons in a civil action, except where otherwise expressly directed by order of the court. See Chapter 2 of this manual. Service upon a majority of the members of any board or body is service upon the board or body whether at the time of the service the board or body was in session or not. Additionally, after personal service in the event the board or person has failed to obey the writ, the court may impose a fine not exceeding \$1,000.00 or may order the party to be imprisoned until the writ is obeyed. The return is made in the same way as a return for a complaint; See Section 2.1.7 of this manual.

Rev. 6/01

CHAPTER 9

9.1 THIRD PARTY CLAIMS.

9.1.1 INTRODUCTION.

Third Party Claim Procedure: Where a person who is not a party to an action may assert a claim of ownership or right to possession to real property and/or personal property, a security interest, or lien on personal property upon which the sheriff has levied and which is in the actual or constructive possession of the sheriff.

9.1.2 THIRD PARTY CLAIM - MAKING A CLAIM. The sheriff's office must receive a written claim, setting forth its grounds, within fourteen (14) days from the date the sheriff hand delivers or mails the documents to the defendant and third parties. Idaho Code § 11-203.

Practice Tip: The sheriff may telephone the plaintiff but must fax or mail by first class mail a copy of the claim within one day.

9.1.3 THIRD PARTY CLAIM - RECEIVING THE CLAIM. A third-party claim will be stamped to indicate the time and date of receipt. Each claim must be matched with the relevant file and be reviewed to determine that the property claimed is under levy. The levying officer has the responsibility to determine if the claim is timely filed and applies to property the sheriff has levied upon. He does not have the authority to pass on the merits of the claim, which is solely within the authority of the appropriate court. The form should:

- a. Be the original claim.
- b. Apply to property under levy at the time of receipt of the claim.

9.1.4 THIRD PARTY CLAIM - CONTENTS. Should include:

- a. The name of the third-party claimant.
- b. The address for correspondence.
- c. Claimant's phone number.

If the claim is rejected, a copy shall be made for the file and the claimant's papers returned together with a letter of explanation. Notation should be made in the file of the reasons for the rejection.

9.1.5 THIRD PARTY CLAIM PROCESSING DUTIES TO SHERIFF.

- a. Within fourteen (14) calendar days from the date mailed by the sheriff, the sheriff must receive a third party the claim of exemption. If the third party mails the claim, it must be received by the sheriff before the fourteen calendar day period ends. In computing the fourteen (14) day period, intervening weekends and legal holidays shall be counted, but if the last day of the period falls on a weekend or legal holiday, the period shall be deemed to run until the close of business on the first business day following the weekend or holiday.
- b. The sheriff shall not deliver to the plaintiff or sell the property, except if perishable, until the period for filing a claim has expired. The sheriff must refuse to accept a claim not filed timely, and must proceed to sell or deliver the property to the plaintiff unless ordered otherwise by the court. If a third-party claim is timely filed, the levying officer may not sell the property or deliver the property to the creditor until the claim is resolved.
- c. The sheriff, upon receipt of a claim of exemption, must mail or deliver a copy of the claim to the plaintiff within one business day of receipt. The sheriff can notify the plaintiff, or person who was issued the writ, by telephone, but still must mail the claim within one (1) day.
- d. The plaintiff then has five (5) business days from the date the claim is delivered or mailed by the sheriff to file a motion contesting the claim and to set a hearing.
- e. Within the five-day period for filing a motion to contest, the plaintiff or moving party must notify the sheriff that a motion has been filed and provide a copy of the motion and notice of hearing to the sheriff.
- f. If plaintiff notifies the sheriff that the claim will be uncontested or fails to notify the sheriff that the claim is being contested within the five-day period for filing a motion to contest, the sheriff must release the property to the defendant or his agent. See Idaho Code § 11-203.

9.1.6 SECURED LIEN HOLDER THIRD PARTY CLAIM CONTENTS.

- a. The claim must include the name, address, and telephone number of the claimant.
- b. The claim must include a description of the property and a description of the secured interest claimed, including a statement of the facts upon which the claim is based or a detailed description of the security interest or lien claimed, and the money amount of claim. Idaho Code § 11-203.
- c. A copy of any writing upon which the claim is based should be attached as well as a copy of the security agreement and any financing statements.
- d. If the claim does not meet all of the requirements, the court will determine if it will be accepted.

9.1.7 SECURED LIEN HOLDER THIRD PARTY CLAIM PROCESSING DUTIES OF SHERIFF.

- a. Within fourteen (14) calendar days from the date mailed by the sheriff, the sheriff must receive a third party the claim of exemption. If the third party mails the claim, it must be received by the sheriff before the fourteen calendar day period ends. In computing the fourteen (14) day period, intervening weekends and legal holidays shall be counted, but if the last day of the period falls on a weekend or legal holiday, the period shall be deemed to run until the close of business on the first business day following the weekend or holiday.
- b. The sheriff shall not deliver to the plaintiff or sell the property, except if perishable, until the period for filing a claim has expired. The sheriff must refuse to accept a claim not filed timely, and must proceed to sell or deliver the property to the plaintiff unless ordered otherwise by the court. If a third-party claim is timely filed, the levying officer may not sell the property or deliver the property to the creditor until the claim is resolved.
- c. The sheriff, upon receipt of a claim of exemption, must mail or deliver a copy of the claim to the plaintiff within one business day of receipt. The sheriff can notify the plaintiff, or person who was issued the writ, by telephone, but still must mail the claim within one (1) day.
- d. The plaintiff then has five (5) business days from the date the claim is delivered or mailed by the sheriff to file a motion contesting the claim and to set a hearing.
- e. Within the five-day period for filing a motion to contest, the plaintiff or moving party must notify the sheriff that a motion has been filed and provide a copy of the motion and notice of hearing to the sheriff.
- f. If plaintiff notifies the sheriff that the claim will be uncontested or fails to notify the sheriff that the claim is being contested within the five-day period for filing a motion to contest, the sheriff must release the property to the defendant or his agent. See Idaho Code § 11-203.

9.1.8 SECURED LIEN HOLDER THIRD PARTY CLAIM (IN DEFAULT) PROCESSING DUTIES OF SHERIFF.

- a. Stamp the claim indicating date and time received.
- b. If a security agreement to the third party is in default, the claimant may file with the sheriff:
 1. an affidavit of release signed by defendant; or

2. an affidavit setting forth the default claiming possession and a hold harmless agreement in favor of the sheriff supported by a bond indemnifying the sheriff for double the actual value of the property set forth in the claim. Idaho Code § 11-203(e).
3. Upon receipt of (a) or (b) above, the sheriff shall release the property to the third-party claimant, take receipt, and make return to the court. Idaho Code § 11-203(e).

9.1.9 RELEASING THIRD PARTY CLAIM AND PROPERTY.

- a. All costs of the levy and storage are chargeable to plaintiff. If funds are not available for sheriff's fees and expenses, the property is not released.

Rev. 6/01

CHAPTER 10

10.1 EXEMPTIONS.

10.1.1 BACKGROUND. An exemption is simply a privilege allowed by the law to an individual judgment debtor. The exemption may allow the judgment debtor to hold property in a certain amount, or a certain type of property, free from levy and sale on execution or attachment.

The main exemptions in Idaho are of three (3) separate types:

- a. Property that is absolutely exempt.
- b. Property exempt to the extent reasonably necessary for the support of the debtor and his dependents.
- c. Property exempt only to the extent of a certain value.

The Idaho Code section dealing with exemptions is found at Idaho Code § 11-601, et seq.

10.1.2 KEY POINTS WHEN DEALING WITH THE THREE TYPES OF EXEMPTIONS:

- a. Only individuals who are residents of the state of Idaho are entitled to exemptions. No corporations, partnerships, or non-residents are entitled to the Idaho exemptions. Non-residents, whether corporations or individuals, are entitled to the exemptions of the law of their own state of residency.

A resident, as used in the exemption statutes, means an individual who intends to maintain his home in this state. Presumably, an individual must first have a home in the state of Idaho before he can be a resident.

- b. A claim of exemption or third-party claim may be filed only if property has been levied upon. (Idaho Code § 11-203).
- c. The exemption process is explained in Idaho Code § 11-203 and contains the following series of steps and timelines that must be strictly adhered to.
 1. Within fourteen (14) calendar days from the date the sheriff mails or hand delivers the writ and other documents, the sheriff must receive from defendant or third party the claim of exemption. If defendant or third party mails the claim, it must be received by the sheriff before the fourteen calendar day period ends. In computing the fourteen (14) day period, intervening weekends and legal holidays shall be counted, but if the last day of the period

falls on a weekend or legal holiday, the period shall be deemed to run until the close of business on the first business day following the weekend or holiday.

2. The sheriff shall not deliver to the plaintiff or sell the property, except if perishable, until the period for filing a claim has expired. The sheriff must refuse to accept a claim not filed timely, and must proceed to sell or deliver the property to the plaintiff unless ordered otherwise by the court. If a claim of exemption is timely filed, the levying officer may not sell the property or deliver the property to the creditor until the claim is resolved.
 3. The sheriff, upon receipt of a claim of exemption, must mail or deliver a copy of the claim to the plaintiff within one business day of receipt. The sheriff can notify the plaintiff, or person who was issued the writ, by telephone, but still must mail the claim within one (1) day.
 4. The plaintiff then has five (5) business days from the date the claim is delivered or mailed by the sheriff to file a motion contesting the claim and to set a hearing.
 5. Within the five-day period for filing a motion to contest, the plaintiff or moving party must notify the sheriff that a motion has been filed and provide a copy of the motion and notice of hearing to the sheriff.
 6. If plaintiff notifies the sheriff that the claim will be uncontested or fails to notify the sheriff that the claim is being contested within the five-day period for filing a motion to contest, the sheriff must release the property to the defendant or his agent. See Idaho Code § 11-203 (c).
- d. The field deputies, who are actually involved in the levy or attachment of the judgment debtor's property should be familiar with the exemptions so that sufficient property is seized to satisfy the judgment.

Note that the same types of property may be exempt under different categories depending upon how the judgment debtor categorizes the item.

Most often the field deputy is involved with those exemptions set forth in Section 10.1.5 below and should not seize those items that are obviously exempt as a matter of law. For example, seize the expensive firearm and leave the cheaper one, otherwise the debtor will claim the expensive one as the exempt item, thus leaving the deputy with a partially satisfied judgment. Note also that a husband and wife debtor can aggregate their exemptions so that their \$7,000.00 individual exemption for a car results in a \$14,000.00 exemption for a car.

- e. As discussed below, certain creditors can still levy upon property sought to be claimed as exempt within the reasonably necessary for support and certain value; Nos. 2 and 3 above.

10.1.3 PROPERTY IS EXEMPT FOR ALL PURPOSES. As set forth in Idaho Code § 11-603, an individual is entitled to exemption for:

- a. A burial plot for the individual and his family.
- b. Health aids reasonably necessary to enable the individual or a dependent to work or to sustain health.
- c. Federal social security benefits, and veteran's benefits. Note, those child support orders issued in accordance with Idaho Code § 7-1201, et seq. by way of execution, garnishment, or wage withholding are not subject to this exemption. In other words, support orders will be enforced against social security or veteran's benefits.
- d. Federal, state, or local public assistance or welfare legislation.
- e. Benefits that were payable for medical, surgical, hospital care and the amount in a medical savings account.
- f. State unemployment compensation.

10.1.4 PROPERTY EXEMPT BECAUSE REASONABLY NECESSARY FOR SUPPORT. In Idaho, an individual is entitled to an exemption for the following property to the extent reasonably necessary for the support of him and his dependents:

- a. Benefits paid and yet to be paid by reason of disability or illness.
- b. Money or personal property received for alimony, support, or separate maintenance.
- c. Insurance proceeds, a judgment, or settlement resulting from bodily injury or death to the individual or dependent.
- d. Spousal death benefits or insurance or life insurance proceeds, payments under a stock bonus pension profit sharing annuity which provides benefits because of age, illness, disability, or the length of service.
- e. Pension money (See Idaho Code § 11-604A).

The court will determine whether or not the present and anticipated needs of the individual and his dependents require the above-noted property. The court will determine whether or not the property should be wholly or partially exempt based

upon the amount of property needed to be reasonably necessary for the support of the individual and his dependents.

These reasonably necessary exemptions are immediately lost when the monies or property are commingled with other nonexempt funds.

10.1.5 PROPERTY EXEMPT BECAUSE OF A CERTAIN VALUE. An individual is entitled to an exemption not exceeding \$750.00 on any one item and not exceeding a total value of \$7,500.00 per household for all items. Idaho Code § 11-605.

- a. Furnishings and appliances reasonably necessary for one household.
- b. Wearing apparel, household pets, books, and musical instruments reasonably held for the personal use of the individual or dependent.
- c. Family portraits and frames and heirlooms of a particular sentimental value to the individual.
- d. Jewelry not exceeding \$1,000.00 in the aggregate if held for personal use of the individual.
- e. Implements, professional books, and tools of the trade not exceeding \$2,500.00 per individual and one automobile or motor vehicle not exceeding \$7,000.00.
- f. All arms or weapons, uniforms, and accouterments required for the use of an individual as a peace officer, a member of the National Guard or other military service.
- g. A water right not exceeding 160 inches of water used for irrigation of lands actually cultivated by the individual, and crops growing on fifty (50) acres of land owned or leased by the individual not exceeding the value of \$1,000.00.
- h. One (1) firearm valued at \$750.00 or less.
- i. Unmatured life insurance contracts owned by an individual, other than a credit life insurance contract.
- j. Aggregate interest in any accrued dividend or interest under, or loan value of, any unexpired life insurance contract owned by the individual under which the insured is the individual or a person whom the individual is a dependent.
- k. An individual's aggregate interest in any tangible personal property, not to exceed the value of \$800.00.

10.1.6 EXCEPTIONS TO THE EXEMPTIONS. The property claimed to be exempt because reasonably necessary for support, and the property claimed to be exempt

depending on its value, can still be levied upon by a creditor. The creditor may make a levy against the exempt property in these two classes to enforce a claim for:

- a. Alimony, support, or maintenance.
- b. Unpaid earnings of up to one month's compensation for personal services.
- c. State or local taxes.
- d. Civil damages for felonies or for malicious or intentional injury to persons or property, reckless driving damages, DUI damages, driving while suspended damages, damages stemming from obtaining money or property under false pretenses or on credit which stem from intentionally making materially false statements in writing which respect financial condition.
- e. Rent or dwelling place, claims for food and lodging.
- f. A creditor may also levy against the two classes of exempt property to enforce a claim for the purchase price of the property, a loan made for the express purpose of enabling an individual to buy property, together with labor or materials furnished to make, repair, improve, preserve, store, or transport the property.

10.1.7 MISCELLANEOUS EXEMPTIONS.

- a. **Married Person Exemption.** As set forth in Idaho Code § 11-204, all real and personal property belonging to any married person at the time of his or her marriage, or which he or she later acquires as separate property, and all non-community rents, issues, and profits of this property, are exempt from execution for any separate debts incurred by his or her spouse.
- b. **Homestead Exemption.** Homestead may consist of lands regardless of area, but the exemption amount shall not exceed the lesser of (i) the total net value of the lands, mobile home, and improvements as described in Idaho Code § 55-1001, if less than \$100,000.00. (Idaho Code § 55-1003.)

The homestead exemption described above occurs automatically and begins from the time the property is occupied as the principle residence of the owner or after the written declaration is filed wherein it states that the property is intended to be occupied as a homestead.

- c. **Homestead Is Subject to Certain Judgments.** The homestead is subject to execution or sale in satisfaction of judgments obtained before the homestead was in effect, or when the attachment was levied upon the premises before the homestead was in effect, on mechanic's, laborer's, or vender's liens upon the premises, on debts by way of mortgage or deed of trust which were executed and acknowledged by the husband and wife, or by an unmarried claimant, and on

debts secured by mortgages and deeds of trusts which were executed and recorded before the homestead became effective.

- d. Judgment Against Homestead Owner.** The judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption from the time the judgment creditor records the judgment with the recorder of the county where the property is located.

For information on how homesteads can be abandoned, conveyed, encumbered, etc., please examine Idaho Code § 55-1001, et seq.

Rev. 8/01

CHAPTER 11

11.1 STAY OF EXECUTION.

11.1.1 INTRODUCTION. As discussed in Chapter 3 of this manual, Writs of Execution, a writ of execution is a direct command from the court to the sheriff to levy on, and sell property of the debtor, to satisfy a judgment. A stay of execution is the stopping of execution on a judgment for a limited period.

Idaho Code § 11-101 states that the judgment creditor has ten (10) years from the entry of judgment to have a writ of execution issued for the enforcement of the judgment. Any time within this ten (10) year period, the court is empowered to stay execution of the judgment.

The stay of the judgment is discretionary with the court and conditions are required to be met by the judgment debtor before a stay is ordered. The following rules are those most often used to obtain a stay of execution:

- a. Motion for a New Trial.** In accordance with Rule 59(b), I.R.C.P., the motion for new trial must be served not later than fourteen (14) days after the judgment was entered. The judgment is deemed entered when it is signed by the judge and has been file stamped by the clerk. In accordance with Rule 58(a), I.R.C.P., no judgment is effective before it has been file stamped. The fourteen (14) day period may be extended for an additional twenty-one (21) days if good cause is found by the court or the parties file a written agreement to extend the time.
- b. A Judgment Notwithstanding the Verdict.** In accordance with Rule 60(b), I.R.C.P., this motion shall be served not later than fourteen (14) days after the entry of judgment. A motion in accordance with Rule 60(b), I.R.C.P., is to relieve a party from a final judgment by reason of mistake, inadvertence, neglect, fraud, etc.
- c. Notice of Appeal.** Rule 13, Idaho Appellate Rules (I.A.R.), provides that, unless otherwise ordered by the District Court, upon the filing of a notice of appeal or cross-appeal, all proceedings and execution of all judgment in a civil action in the District Court are automatically stayed for a period of fourteen (14) days. Any further stay shall only be upon order of the District Court or the Supreme Court. This stay is both automatic and temporary. It arises automatically and disappears at the end of the fourteenth day unless the defendant obtains an order specifically extending the stay beyond the fourteen-day period.
- d. Agreement Not to Execute.** Rule 16, I.A.R., provides that the party in whose favor an execution has issued may agree in writing that it will not execute upon the judgment pending the appeal. In such an instance, no supersedeas bond is necessary to stay the execution and the District Court will issue a stay.

- e. **Posting of a Bond.** Rule 13, I.A.R., also provides that when an appeal has been filed with the Supreme Court, the District Court is still authorized to stay an execution or enforcement of a money judgment upon the posting of a cash deposit or bond by a fidelity, surety, guaranty, title, or trust company, authorized to do business in the state, which shall be in the amount of the judgment or order plus thirty-six percent (36%) of such amount. In the event the District Court stays execution or enforcement of the money judgment upon the posting of a cash deposit or bond, the court also may cause any judgment lien that has been filed to be released.

- f. **Bankruptcy Stay.** Please see Chapter 13 of this manual for the automatic stay provisions of the Federal Bankruptcy Code.

Rev. 6/01

CHAPTER 12

12.1 BONDS AND UNDERTAKINGS.

12.1.1 INTRODUCTION. In certain types of civil litigation, the court will require a plaintiff or a defendant to post a bond or a written undertaking to protect the other party or third parties that the litigation could wrongfully injure.

Note: The sheriff needs to refer to the statute providing for the bond to determine the requirements for that specific bond. The sheriff must insure that the bond or undertaking he receives is in the proper form, is for the correct amount, is accompanied by any required affidavits, references the required code sections, and indemnifies the proper parties. A security which is defective in any of these areas is not a bond or undertaking, and the sheriff may be held liable for accepting it as such if any party is damaged thereby.

12.1.2 FREQUENTLY ENCOUNTERED UNDERTAKINGS.

a. Writs of Attachment and Temporary Restraining Orders.

Generally speaking, when a plaintiff files a lawsuit against someone, he has the option to simultaneously seek a writ of attachment or a temporary restraining order. If the plaintiff is successful in seeking this writ or order, it will attach to the defendant's property to secure it, i.e., to secure the payment of any judgment awarded to plaintiff. Idaho Code § 8-501.

The Court directs and delivers the writ to the sheriff. The sheriff must execute the same without delay, i.e., the sheriff must attach and safely keep all the property of such defendant found within his county that is not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demands. Idaho Code § 8-504.

Before executing on the writ, the sheriff should verify that a written undertaking accompanies the writ in the amount determined proper by the court. Idaho Code § 8-503.

b. Writ of Possession. This manual discusses writs of possession in Chapter 7. At part 7.103, the manual warns that the Sheriff should not seize anything until he verifies that the plaintiff has filed an undertaking. The undertaking must meet the following requirements: two or more sufficient sureties have to execute it and the sureties have to promise to pay the defendant double the value of the property. Idaho Code § 8-303.

c. Third Party Claims. This manual discusses third party claims in Chapter 9. At Section 9.1.8, the manual describes the steps the sheriff must take if someone

holds a defaulted lien on the property in question. Part of the process is obtaining an undertaking from the lien holder. The undertaking must indemnify the sheriff for double the actual value of the property set forth in the claim. Idaho Code § 11-203(e).

- d. Exemptions.** This manual discusses exemptions in Chapter 10. As described in Section 10.1.2, the only way the sheriff can continue to hold property that is exempt is if the plaintiff posts a bond, which indemnifies the sheriff, in an amount equal to the value of the claimed exemption. Idaho Code § 11-203(e).

12.1.3 TYPES OF UNDERTAKINGS. Normally, statutes require an undertaking with two or more personal sureties, or in lieu thereof, a corporate undertaking. Idaho Code § 41-2604.

12.1.4 UNDERTAKING FORMAT. The form of the undertaking (personal bond) should be similar to the following:

Whereas, the _____ desires to give an undertaking for (state what) _____, now, therefore, we the undersigned sureties, do hereby obligate ourselves jointly and severally, to (name who) _____ under said statutory obligation in the sum of _____ dollars.

Idaho Code § 12-613.

12.1.5 OBJECTION TO SURETIES. If the opposing party files a written statement with the sheriff stating that she objects to the sufficiency of the sureties, the sheriff should retain custody of the property until he receives an affidavit from the sureties stating that they are:

- a Residents, and either own real property or are householders, within the state; and
- b Worth the sum specified in the undertaking.
- c If the amount specified in the undertaking exceeds \$2000.00, and there are more than two (2) sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount is equivalent to that of two (2) sufficient sureties. Idaho Code § 12-614.

Note: If the sureties fail to file the affidavits within five days after the objection has been filed, the writ fails and the sheriff must return the property to the defendant. Idaho Code § 8-506D.

12.1.6 FEE FOR TAKING BOND. The sheriff is allowed and may demand and receive a \$10.00 fee for taking a bond or undertaking. Idaho Code § 31-3203.

- 12.1.7 ACTIONS AGAINST SHERIFFS - NOTICE TO INDEMNITORS.** If an action is brought against a sheriff for an act done by virtue of his office, e.g. levying on property, the sheriff needs to give written notice of the action to the surety on the undertaking. If the plaintiff thereafter recovers a judgment against the sheriff, the sheriff has a right to recover against the sureties the amount of the judgment, including costs. Idaho Code § 12-612.
- 12.1.8 GOVERNMENTAL EXEMPTION.** In any civil action where the sheriff or a deputy sheriff, in their official capacities, or the sheriff's department is a party plaintiff or defendant, the law does not require them to file a bond or written undertaking. Idaho Code § 12-615.
- 12.1.9 ATTORNEY CANNOT ACT AS SURETY.** No attorney can act as surety upon any bond or undertaking furnished in any action or proceeding in which the attorney appears as an attorney of record, or is a member or associate of a firm or corporation which appears as the attorneys of record. I.R.C.P. 66(b).

Rev. 6/01

CHAPTER 13

13.1 BANKRUPTCY AUTOMATIC STAYS.

13.1.1 INTRODUCTION. Under federal law, individuals, partnerships, and corporations are entitled to file a petition in bankruptcy seeking relief from their obligations towards their creditors. (11 U.S.C. 101 et seq.) If a debtor files a petition under Chapter 7 of the Bankruptcy Code, the debtor seeks to liquidate his assets in an effort to repay as many and as much of his creditor debts as possible. If a debtor files a petition under Chapter 13 of the United States Bankruptcy Code, the debtor seeks to enter into an agreement with his creditors to pay them over a term of approximately three (3) years. If a debtor files a petition under Chapter 11 of the United States Bankruptcy Code, the debtor will most likely be a business and will again seek to arrive at an agreement whereby he will repay his creditors over a number of years.

13.1.2 PROPERTY OF THE ESTATE. Upon an individual's filing of a bankruptcy petition, such action creates an estate. Such estate is comprised of essentially all of the debtor's property or property which the debtor possesses an interest in. 11 U.S.C §. 541. This would include all legal or equitable interests of the debtor in the property as of the date of filing of the petition. The sheriff must assume that if the debtor is in possession of property following bankruptcy, it is part of the bankruptcy estate.

13.1.3 AUTOMATIC STAY. Upon the debtor's filing of a bankruptcy petition, said act operates as a stay against almost all legal actions regarding property of the estate. The stay is applicable to all entities regarding:

- a. The commencement or continuation, including an issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor.
- b. The enforcement against the debtor or against property of the estate of a judgment obtained before the commencement of the case.
- c. Any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate.
- d. Any act to create, perfect, or enforce any lien against property of the estate.
- e. Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case.
- f. The set-off of any debt owing to the debtor that arose before the commencement of the case.

11 U.S.C. § 362.

The sheriff must assume once a debtor has filed bankruptcy that the stay affects any and all actions to which the sheriff was directed to perform, whether it be service of process in the nature of any notice, or a writ.

13.1.4 NOTICE OF BANKRUPTCY PROCEEDING. If, during the sheriff's duties in serving process or executing upon a writ, the debtor notifies the sheriff that he has filed bankruptcy, the sheriff shall immediately stop undertaking his duties and attempt to verify that a bankruptcy action has been filed by the debtor. This inquiry should be undertaken if at all possible from the debtor's residence or from the scene. The sheriff should request a copy of the petition the debtor filed in bankruptcy, or a copy of the notice of filing petition for verification. The sheriff should further inquire as to whether the debtor is represented by legal counsel. If the debtor fails to provide a copy of the petition which was filed in United States Bankruptcy Court, or the notice of petition generated by the Bankruptcy Court, the sheriff should attempt to contact the debtor's attorney to verify that a bankruptcy action has been filed. The sheriff must further follow up with the United States Bankruptcy Court to verify that the debtor has filed a petition in bankruptcy, the date the petition was filed, the bankruptcy case number, and whether the case is still active.

13.1.5 NOTICE OF BANKRUPTCY AFTER LEVY. If, after the sheriff has levied upon property of the debtor and is subsequently notified that the debtor has filed a petition in United States Bankruptcy Court, he should immediately stop any further action in regards to said property. The sheriff should then verify that a petition in bankruptcy has been filed. If the sheriff verifies that a petition in bankruptcy by the debtor has been filed, he should immediately contact the bankruptcy trustee assigned to said case to determine the trustee's desires regarding the property.

13.1.6 RETURN. If the sheriff is notified and verifies that the debtor has filed a bankruptcy petition, he should make a return upon a writ describing that a bankruptcy action has been filed with as much information on the bankruptcy proceeding as he is aware of.

CHAPTER 14

14.1 CIVIL ARRESTS.

14.1.1 CIVIL ARRESTS GENERALLY. Courts seldom order the arrest of parties to civil actions. In certain situations, however, the court may order the arrest of a defendant, e.g., when the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. Idaho Code § 8-102. The procedures the sheriff must follow are outlined below. *Note:* There are special procedures for arrests arising in child support cases and in contempt cases. These procedures are outlined in Section 14.1.2.

- a. **Court Order Required.** The sheriff should only arrest a civil defendant, pursuant to an order from a judge of the court in which the action is pending. (Idaho Code § 8-103.)
- b. **Content of Order.** The sheriff receives the order of arrest, along with the affidavit upon which it is made. (Idaho Code § 8-107.) The order will require the sheriff to immediately arrest the defendant and hold him to bail in a specified sum. (Idaho Code § 8-106.)
- c. **Delivery to Defendant.** When the sheriff makes the arrest, he must deliver a copy of the affidavit upon which the court based its arrest order to the defendant. If the defendant desires, the sheriff must also give the defendant a copy of the order of arrest. (Idaho Code § 8-107.)
- d. **Discharge of Defendant.** The sheriff must keep the defendant in custody until:
 1. The defendant gives bail or deposits the amount mentioned in the order of arrest (Idaho Code § 8-109);
 2. A judge issues an order discharging the prisoner from custody (Idaho Code § 8-207);
 3. The plaintiff orders the prisoners discharge (Idaho Code § 8-211); or
 4. The plaintiff does not advance the costs of confinement. (Idaho Code § 8-212.)
- e. **Bail.** Upon his arrest, the defendant may give bail by causing a written undertaking to be executed by two (2) or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest. (Idaho Code § 8-110.)

- f. Routing of Arrest Orders.** Thereafter, the sheriff must indorse his return on the order and attach a copy (not the original) of the bail undertaking. The sheriff needs to file these documents with the clerk of the court within the time specified in the arrest order for return. (Idaho Code § 8-115.)
- g. Objections to Bond.** After the sheriff files the return with the court, the plaintiff has ten days to object to the bail. If there is no objection, the sheriff needs to file the original undertaking with the clerk of the court. Idaho Code § 8-115. If the plaintiff objects, the sheriff or the defendant may give the plaintiff notice of justification or other bail. (Idaho Code § 8-116.)
- h. Justification.** Each of the bail (bondsmen) must attend before the judge at the time and place mentioned in the notice for the plaintiff to examine them regarding their sufficiency to post bond. (Idaho Code § 8-118.) If the judge finds the bail sufficient, he will annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed. The sheriff is thereupon exonerated from liability. (Idaho Code § 8-119.)
- i. Cost of Confinement.** When a sheriff confines a defendant, the creditor/plaintiff must advance to the sheriff sufficient money for the prisoner's board, at the rate provided by law, for one week, and must make the like advance for every successive week of his imprisonment. (Idaho Code § 8-212.)
- j. Exoneration.** The bail, within ten (10) days after judgment against the defendant, may, by a written authority indorsed on a certified copy of the undertaking, empower the sheriff to re-arrest the defendant. (Idaho Code § 8-112.)
- k. Deposit with Sheriff.** Instead of giving bail, the defendant may deposit with the sheriff the amount mentioned in the order. If the defendant does this, the sheriff must give the defendant a certificate of deposit made. (Idaho Code § 8-120.)
- l. Payment into Court by Sheriff.** The sheriff must, immediately after the deposit, pay the same into court and take from the clerk receiving the same, two (2) certificates of such payment, the one of which he shall deliver to the person who made the deposit on behalf of the defendant. (Idaho Code § 8-121.)

14.1.2 ARREST FOR CONTEMPT OF COURT. If a person is in contempt of court, for other than failure to pay child support, a judge may order the Sheriff to imprison the individual. Idaho Code § 7-610. The procedure the Sheriff must follow depends upon whether the court enters a warrant (order) of commitment or a warrant of attachment.

- a. Warrant of Commitment.** A court will issue this warrant if the contempt is in the Court's immediate presence. It generally will require the Sheriff to imprison the person for up to five days. Idaho Code § 7-603. Alternatively, it may require

the Sheriff to hold the person in custody until he performs a certain act, which act will be specified in the warrant of commitment. (Idaho Code § 7-611.)

- b. Warrant of Attachment.** A court will issue a warrant of attachment if the contemptuous act occurred outside the court's presence. This warrant requires the Sheriff to arrest the person, keep him in custody, bring him before the court, and detain him until the court issues an order, e.g., a warrant of commitment. (Idaho Code § 7-606.)
 - 1. Affidavit.** The Sheriff must, upon arresting the person, give him or her a copy of an affidavit notifying the person of the charge of contempt, the specific order of the court allegedly violated, and other important facts surrounding the alleged contempt. Idaho Code § 8-107; Matter of Williams, 120 Idaho 473, 817 P.2d 139 (1991).
 - 2. Bail.** The warrant of attachment will allow the person charged to post bail. Idaho Code § 7-605. The Sheriff must discharge the defendant if he executes and delivers a written undertaking with two sufficient sureties that state that the person arrested will appear on the return of the warrant and abide the order of the court thereupon or that they will pay the sum specified in the warrant. (Idaho Code § 7-607.)
 - 3. Return of Warrant.** After arresting the person, the Sheriff must return the warrant and undertaking, if the arrested person posts bail, by the return day specified in the warrant of attachment. (Idaho Code § 7-608.)

CHAPTER 15

15.1 WARRANTS OF DISTRAINT.

15.1.1 INTRODUCTION: Warrants of Distraint are used by the Federal Government, State of Idaho, and the counties for the collection of delinquent taxes. These warrants are not issued by a court of law. They are issued by the County Treasurer or the State Tax Commission. They are issued to the sheriff of the county where the assets or the owner of the property is located.

15.1.2 DEFINITION. The Idaho Code defines a warrant of distraint as a warrant ordering the seizure of personal property to enforce payment of property tax, special assessment, expense, fee, collection cost or charge collected in the same manner as personal property tax. (Idaho Code § 63-201(31)).

15.1.3 NOTICE TO OWNERS AND MORTGAGEES. Upon the failure to pay personal taxes upon notice, the tax collector issues a warrant of distraint for their collection.

15.1.4 CONTENTS OF WARRANT. (Idaho Code § 63-1012.) The warrant of distraint shall contain the following:

- a. The date of its issuance.
- b. It shall be directed to the sheriff of the county.
- c. The warrant shall give the name of the delinquent taxpayer and his mailing address.
- d. The warrant shall also describe generally the personal property upon which the tax is delinquent and give the amount of each delinquency.
- e. The warrant shall contain a direction to the sheriff to seize and sell a sufficient amount of the property, or any other personal property of the delinquent taxpayer to be found within the county, to pay the delinquent tax, together with interest thereon and together with all fees, mileage and costs accruing thereon, in the manner provided for the sale of personal property upon a writ of execution. See Chapter 5.

15.1.5 SERVICE AND EXECUTION. All warrants of distraint shall be served and executed by the sheriff in the manner provided, or as provided for the service of writs of execution upon personal property. (Idaho Code § 63-1013(1)).

The sheriff must make return of the warrant of distraint to the tax collector of the county within ninety (90) days from the date of its receipt with a statement as to the

taxes, together with interest and costs collected. Or that, no property could be found to seize under the warrant.

For making a false return the sheriff is liable to the county for double the amount of the taxes, with interest and costs. (Idaho Code § 63-1013(1)).

- 15.1.6 FEES, MILEAGE AND COMMISSIONS.** The fee allowed for the collection, levy and return of a warrant of distraint is ten dollars (\$10.00) for each warrant. When levying on a warrant of distraint, Idaho Code § 31-3203, Sheriff's Fees applies in determining service fees. (Idaho Code § 63-1013(2)).
- 15.1.7 RETURN OF NO PROPERTY FOUND - SECOND WARRANT - ISSUANCE, SERVICE AND RETURN.** If the sheriff returns the warrant of distraint showing that no property could be found, he must note in the return the county in this state where the taxpayer may have moved, his mailing address, and the date of his departure. (Idaho Code § 63-1013(3)).
- 15.1.8 REMOVAL OR SALE OF PROPERTY PRIOR TO PAYMENT OF TAX - DELINQUENT PERSONAL PROPERTY TAXES ON REAL PROPERTY ROLLS.** If the personal property upon which delinquent taxes are owed is in danger of sale or removal from the county, the Board of Commissioners may direct the issuance of a warrant of distraint. The warrant of distraint must be served and executed by the sheriff.
- 15.1.9 REMOVAL OF PROPERTY FROM COUNTY TO AVOID TAX - PENALTY.** It is unlawful for any person, firm or corporation to move from the county or sell any personal property with the intent of avoiding the payment of the current year's personal property taxes or without paying the taxes as provided for in Idaho Code § 63-1014. Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Rev. 7/01

CHAPTER 16

16.1 SHERIFF'S FEES.

16.1.1 CODE SECTIONS CONTROLLING SHERIFF'S FEES.

16.1.2 TABLE OF FEES - OFFICERS TO PUBLISH PENALTY FOR NEGLECT.

Every officer whose fees are determined by Idaho Code § 31-3201 et seq. must publish and set up in his office fair tables of his fees, within one (1) month after he enters duties of his office, in some conspicuous place, for inspection of all persons who have business in his office. If this is not done he may have to forfeit for each day a sum exceeding twenty dollars (\$20.00), which may be recovered by any person by action before any judge of the same county, with costs (Idaho Code § 31-3214).

16.1.3 RECEIPT FOR FEES. Every officer upon receiving any fees for official duty or services, may be required by the person making the same to make out in writing and deliver to such person a particular account of such fees, specifying for what they respectively accrued, and shall receipt for the same; and if he refuses or neglects to do so, when required, or shall receive illegal fees, he shall be liable to the party paying for three (3) times the amount so paid (Idaho Code § 31-3218).

16.1.4 FEES TO BE PREPAID – EXEMPTION PENALTY FOR OFFICIAL DERELICTION. The officers mentioned in this title are not in any case, except for the state or county, to perform any official services unless upon prepayment of the fees prescribed for such services by law. The attorney general or any prosecuting attorney may cause subpoenas to be issued on behalf of the state, without paying or tendering fees in advance to any officers. The officer must perform the services required once he or she has received proper payment.

For every failure or refusal to perform official duty when the fees are tendered, the officer is liable on his official bond (Idaho Code § 31-3211).

16.1.5 EXECUTION FOR FEES. If any clerk, sheriff, justice of the peace, or constable, shall not have received any fees which may be due him for services rendered in any suit or proceeding, he may have execution therefore, in his own name, against the party from whom they are due, to be issued from the court in which the action is pending (Idaho Code § 31-3215).

16.1.6 LIMITATION ON MILEAGE OF OFFICER. When any sheriff, constable or coroner serves more than one (1) process in the same case, not requiring more than one (1) journey from his office, he shall receive mileage only for the most distant service (Idaho Code § 31-3217).

16.1.7 COMMISSION WITH LEVY. For commissions for receiving and paying over money on execution or other process, when land or personal property has been levied

on and sold, on the first one thousand dollars (\$1,000), two percent (2%); on all sums above that amount, one percent (1%); but in no case of sale of real estate shall his commission exceed the sum of one hundred dollars (\$100.00) (Idaho Code § 31-3203).

16.1.8 COMMISSION WITHOUT LEVY. For commissions for receiving and paying over money on execution without levy, or where lands or goods levied on are not sold, on the first one thousand dollars (\$1,000), one and one-half percent (1-1/2%); and one-half (1/2) of one percent (1%) on all over the sum, but not to exceed in any case seventy-five dollars (\$75) (Idaho Code § 31-3203).

16.1.9 GARNISHMENT FEES. In 2017, Sheriff's fees for garnishments were removed from the general Sheriff's fee statute (I.C. § 31-3203) and moved to Idaho Code § 11-729. Your county commissioners can set fee amounts by resolution for serving the order of garnishment and writ of execution as well as for the interim and final returns. These fees cannot exceed the actual cost of these services. Also, at the time of adoption, the board shall publish the fee on the county website and include the criteria used to calculate the fee, with a breakdown of each separate cost element included in the fee.

16.1.10 PERSONS IMPRISONED ON CIVIL PROCESS. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the judgment creditor must pay the sheriff in advance the amount provided by law for one (1) week of incarceration. This fee must be paid in advance every successive week of imprisonment and if the judgment creditor fails to remit any such payment, the sheriff shall release the prisoner from custody. Idaho Code § 8-212.

**16.2 FEE AND ADVANCE
FEE DEPOSIT SCHEDULE**

(See Idaho Code § 31-3203)

PROCESS	SERVICE FEE	RETURN FEE	ADVANCE FEE
Affidavit and Order	\$10.00	\$10.00	
Assistance, Writ of	\$10.00	\$10.00	
Attachment, Writ of	\$10.00	\$10.00	
Arrest in Criminal Proceeding	\$5.00		
Bond, For Taking of	\$10.00		
Bench Warrant	\$10.00	\$10.00	
Cancellation of Service Before Attempt		\$10.00	
Cancellation of Service After Attempt		\$10.00	
Certificate of Redemption		\$1.00	
Certificate of Sale; Personal Property		\$5.00	
Certificate of Sale; Real Property		\$5.00	
Certified Mail	Actual cost		
Claim & Delivery/Writ of Possession			
Serve Writ & Undertaking	\$10.00	\$10.00	
Serve S/C with Writ	\$10.00	\$10.00	
Support Affidavits and/or Notices	No charge		
Temporary Restraining Order	\$10.00	\$10.00	
Moving & Storage Costs; see Court Order (not more than \$5/day <u>or</u> the reasonable costs incurred by the keeper)			
Commission with Levy	Not to Exceed \$100		

PROCESS	SERVICE FEE	RETURN FEE	ADVANCE FEE
Commission Without Levy	Not to Exceed \$75		
Commissioner of Insurance (S/C) (requires \$25 fee payable to Director of Insurance)	\$10.00	\$10.00	
Complaint	\$10.00	\$10.00	
Criminal Summons	No charge		
Cross-Complaint	\$10.00	\$10.00	
Deed, Sheriff's	\$10.00		
Earnings Withholding Order	\$10.00	\$10.00	
Eviction (Writ of Possession R/P)	\$10.00	\$10.00	
Execution, Writ of	\$10.00	\$10.00	
Federal Court Process (individuals)	\$10.00	\$10.00	
Federal County Process (government)	No charge		
Garnishments (Amount set by Board resolution – See <u>Idaho Code</u> § 11-729).			
Injunction Pendente Lite	\$10.00	\$10.00	
Injunction	\$10.00	\$10.00	
Keeper's Receipt	\$5.00		
Keeper's Fees; see Court Order (not more than \$5/day <u>or</u> the reasonable costs incurred by the keeper)			
Levy (Commission on receiving and paying over money on execution regarding land or personal property when levied and sold. On first \$1,000, it is 2%; on all amounts over \$1,000, it is 1% more; if no sale, it is \$100)			
Mileage (for travel to serve any summons & complaint, or any other service by which an action or proceeding is commenced, notice, rule, order, subpoena, venire, attachment on property, to levy an execution, to post notice of sale, to sell property under execution or other order of sale, or execute an order of arrest, or order for delivery of personal	First 25 miles, no charge allowed; any miles over 25, even if process not served, charge .40 per		

PROCESS	SERVICE FEE	RETURN FEE	ADVANCE FEE
property, writ of possession or restitution, to hold inquest or trial of right of property)	mile going to attempt or complete service (i.e., one direction only)		
Mileage (for travel to execute any warrant of arrest, subpoena, venire or other process in criminal cases, or for taking a prisoner from prison, before a court or magistrate, or for taking a prisoner from the place of arrest to prison, or before a court or magistrate)	.40 per mile in going only (i.e., one direction only); for each additional prisoner taken at the same time, an additional .25 per mile		
Not Found Return		\$10.00	
Notice of Levy	\$3.00		
Record Notice of Levy (Real Property)	Actual cost		
Notice of Entry of Sister State Judgment	\$10.00	\$10.00	
Notice of Sale - First Notice	\$3.00		
Posting Each Additional Notice	\$3.00		
Notice - Landlord Tenant	\$10.00	\$10.00	
Notice to Pay Rent or Quit	\$10.00	\$10.00	
Notice to Quit	\$10.00	\$10.00	
Notice to Vacate	\$10.00	\$10.00	
Order for Appearance or Examination	\$10.00	\$10.00	
Order to Show Cause	\$10.00	\$10.00	
Posting (Sale Notices)	\$3.00 each		
Possession, Writ of (Real Property)	\$10.00	\$10.00	
Possession, Writ of (Personal Property)	\$10.00	\$10.00	
Possession, Writ of (Claim & Delivery)	\$10.00	\$10.00	
Personal Property Only:			

PROCESS	SERVICE FEE	RETURN FEE	ADVANCE FEE
Serve Undertaking	No charge		
Serve S/C with Writ	\$10.00	\$10.00	
Serve Temp. Rest. Order with Writ	\$10.00	\$10.00	
Serve Affidavits and/or Notices	\$10.00	\$10.00	
Preliminary Injunction	\$5.00	\$5.00	
Real Property - Levy and Sell	\$10.00	\$10.00	
Serve Notice of Levy on Recorder	\$10.00		
Registered Mail	Actual cost		
Return		\$10.00	
Restitution, Writ of	\$10.00	\$10.00	
Restraining Order	\$10.00	\$10.00	
Sale Notice	\$3.00		
Posting each additional Notice	\$3.00		
Sheriff's Deed	\$5.00		
Subpoena - Civil	\$10.00	\$10.00	
Subpoena - Criminal	\$10.00	\$10.00	
Small Claims Court S/C	\$10.00	\$10.00	
Summons and Complaint	\$10.00	\$10.00	
Summons and Petition	\$10.00	\$10.00	
Summons - Juror	\$1.00		
Temporary Restraining Order	\$10.00	\$10.00	
Tenant Three Day Notice	\$10.00	\$10.00	
Three Day Notice to Quit	\$10.00	\$10.00	
Three Day Notice to Pay Rent or Quit	\$10.00	\$10.00	

PROCESS	SERVICE FEE	RETURN FEE	ADVANCE FEE
Undertaking/Bond	\$10.00		
Vehicle Inspection (VIN)	\$3.00		
Warrant, Bench (unless Def. represented by State)	\$10.00	\$10.00	
Warrant of Distrainment	\$10.00	\$10.00	
Writ of Assistance	\$10.00	\$10.00	
Writ of Attachment	\$10.00	\$10.00	
Writ of Execution	\$10.00	\$10.00	
Writ of Possession - Personal Property	\$10.00	\$10.00	
Writ of Possession Real Property	\$10.00	\$10.00	
Writ of Restitution	\$10.00	\$10.00	

Rev. 7/01