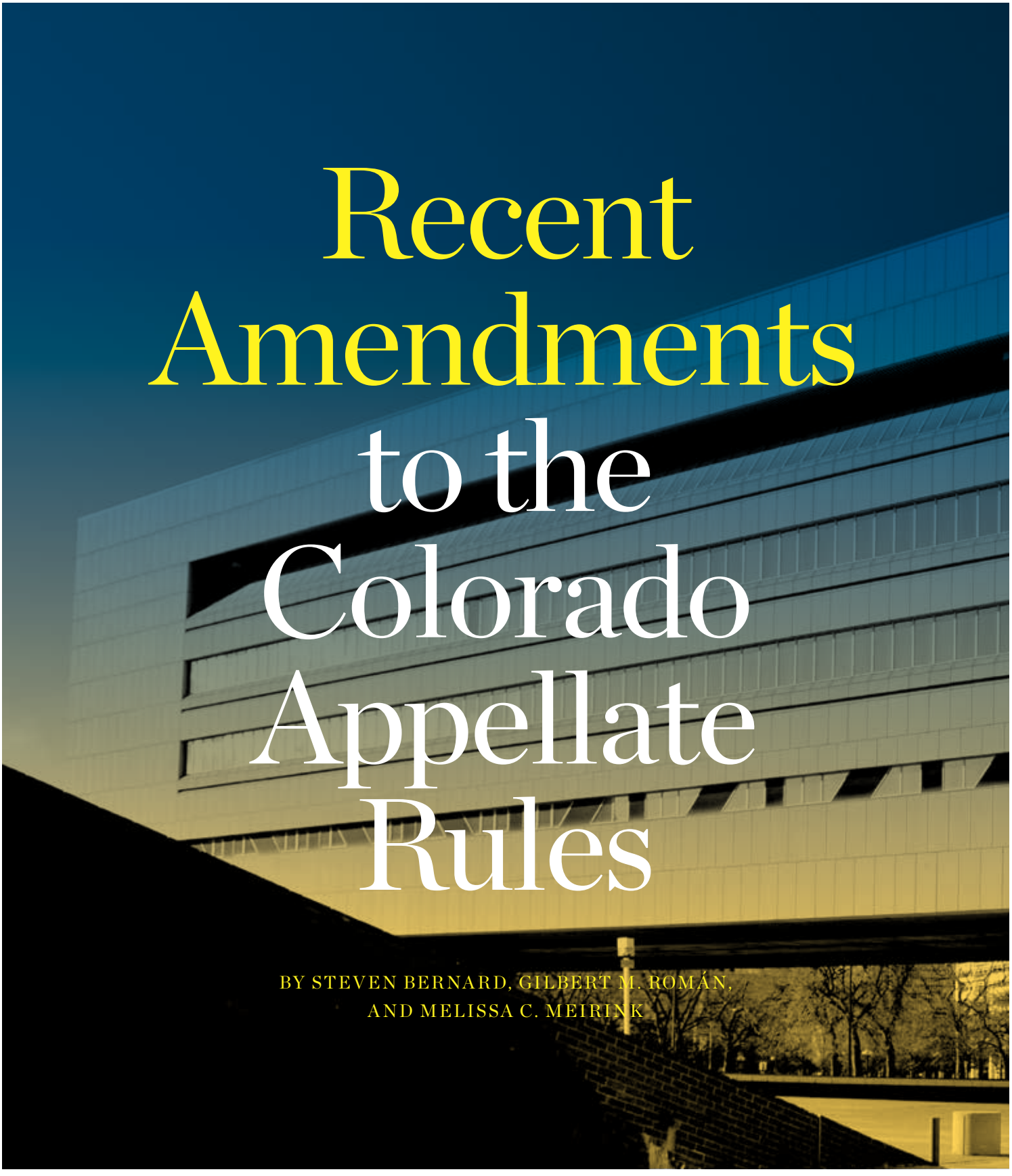

Recent Amendments to the Colorado Appellate Rules

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This article discusses the appellate rules amendments that became effective on July 1, 2022.

In 2014, the Colorado Supreme Court asked the Rules of Appellate Procedure Committee (Committee) to revise and recommend changes to the Colorado Appellate Rules (Rules).[1] Between 2014 and 2019, the Committee proposed several revisions to the Rules, which the Court approved.[2] When the COVID-19 pandemic struck in 2020, the Committee began meeting remotely to continue analyzing potential Rules amendments but postponed submitting further changes to the Supreme Court so the Court could focus on changes to other rules that were critical to trial court operations during the pandemic (e.g., the Rules of Criminal Procedure).

The Committee submitted proposed changes to over 20 Rules in December 2021, and the Supreme Court adopted the Committee's recommended revisions in February 2022.[3] Although practitioners might find it daunting to familiarize themselves with so many Rules changes, appellate lawyers should breathe easy; for the most part, the changes are not substantive. Rather, the Committee revised the Rules for clarity and readability, to reflect current appellate practice, and, when appropriate, to make them consistent with other Colorado court rules and the Federal Rules of Appellate Procedure. Though the revisions will not drastically impact appellate practice in Colorado, the Supreme Court wanted to allow practitioners and the public ample time to become familiar with the changes, so it delayed the effective date of the revisions until July 1, 2022. This article summarizes the revisions.

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Overview of the Amendments

The Rules revisions affect a broad range of topics, including entry of appearance and withdrawal, motions and briefing, oral argument, direct appeals, case dismissal, amicus curiae participation, certiorari review, and original proceedings in the Supreme Court. The revisions are aimed at promoting efficiency, providing parties with clear guidance, and making the Rules more understandable to attorneys and the public alike.

Scope and Applicability

Rules 1 and 2 address the scope and applicability of the appellate rules. The Court made minor clarifying and organizational changes to these rules.

Rule 1

Rule 1 discusses the scope of the Rules. Subsection (f) was added to clarify that matters involving the Supreme Court's original jurisdiction are governed by the Rules. A new comment explains that a portion of Rule 1(d), addressing briefing requirements, was moved to Rule 28(a)(7)(b), and that another portion of Rule 1(d), concerning motions to dismiss appeals, was relocated to Rule 42(b).

Rule 2

Rule 2 addresses the appellate courts' authority to suspend the Rules. The Supreme Court made a minor stylistic revision to this rule.

Direct Appeals

Amendments regarding direct appeals were made to Rules 3, 3.4, 4, and 4.1.

Rule 3

Rule 3 discusses how appeals as of right are taken. The changes to Rule 3 were not substantive but make the Rule more readable, and the Comment section was updated to identify the changes.

Rule 3.4

Rule 3.4 addresses appeals in dependency and neglect proceedings. Subsection (l) was revised to clarify that, consistent with the Supreme Court's traditional practice of adhering to strict deadlines in dependency and neglect proceedings, reply briefs in support of petitions for writ of certiorari are not permitted. A parallel change was made to Rule 53(d), which discusses petitions for writs of certiorari filed in dependency and neglect proceedings.

Rule 4

Rule 4, concerning the timing of appeals taken as a matter of right, previously contained dense

paragraphs that were not reader friendly. As revised, Rule 4 maintains the distinct procedures for civil and criminal appeals, but the Supreme Court made structural changes and added subheadings and paragraphs within these sections for greater clarity and searchability.

Subsection (a) still applies to general appeals in civil cases. The Supreme Court added headings for timing and multiple appeals filed for the same proceeding, along with a section to better explain the effect of a CRCP 59 motion on the deadline to file an appeal. At the suggestion of the Court of Appeals' Clerk's Office, the Supreme Court streamlined the language in subsection (a) pertaining to CRCP 59 and clarified in subsection (a)(3) that the lower court retains jurisdiction to decide a timely filed CRCP 59 motion regardless of whether a notice of appeal is filed in the appellate court. The Supreme Court also highlighted in subsection (a)(4) when appellate courts may grant an extension of time to file a notice of appeal and clarified in subsection (a)(5) when a judgement or order is "entered" within the meaning of Rule 4.

Subsection (b) continues to pertain to criminal appeals. As it did with subsection (a), the Supreme Court compartmentalized the Rule's previous paragraph format and added subheadings to make it easier to understand and search. The changes to subsection (b)(1)–(4) are not substantive but are intended to provide the reader with a cleaner visual structure.

The Supreme Court also rearranged the placement of prior subsection (c), titled "Appellate Review of Felony Sentences." Because review of felony sentences falls under the broader umbrella of criminal appeals, the content of prior subsection (c) was imported into new subsection (b)(5). Additionally, the Supreme Court streamlined the language concerning appellate review of felony sentences and added language to subsection (b)(5)(C) confirming that there is no right to appellate review of the propriety of a sentence that is within the parties' agreed-upon range in a plea agreement.[4]

Lastly, separate headings were added to subsection (b)(6), which applies to both prosecutorial appeals in general and those in which one or more but fewer than all counts of a charging document were dismissed before trial.

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Rule 4.1

Rule 4.1 governs interlocutory appeals in criminal cases. The Supreme Court deleted portions that were repetitive or unnecessary along with dated references to documents that should be included in the record on appeal. Rule 4.1 now also specifies that the record for an interlocutory appeal must be filed in accordance with Rule 10.

Attorney Appearances and Withdrawals

Rule 5 governs attorney appearances and withdrawals in appellate court proceedings. It was revised for clarity and to conform to the practice of the appellate clerks' offices. Subsection (a) now clarifies that an attorney enters an appearance in a proceeding when the attorney files a signed document in the appellate case and that any attorney who has entered an appearance must comply with subsection (b) or (c) to withdraw from the case. Subsection (a) also now explains that multiple appearances from members or employees of the same law firm, corporation, or clinic are unnecessary in the same proceeding; one entry of appearance by a member or employee is sufficient.

The withdrawal requirements of previous Rule 5 caused confusion, which the Supreme Court attempted to alleviate by deleting the reference to a separate "written notification certificate" and creating subsections (b) and (c). Subsection (b) applies to the three instances in which an attorney may withdraw without the court's permission by simply providing the court with notice of withdrawal (i.e., where the client remains represented by co-counsel, substitute counsel, or another attorney within the withdrawing attorney's firm, corporation, or clinic).

Subsection (c) specifies that withdrawal is permissible only with appellate court approval in instances not covered by subsection (b). To simplify the process and ensure that the appellate court, client, and other parties are presented with the withdrawal notifications and requirements, the Supreme Court adopted a form motion to withdraw (JDF Form 1905 SC). Alternatively, an attorney may file a motion to withdraw that complies with subsection 5(c)(1)–(9). Under either option, the client and opposing parties have 14 days to object to withdrawal. The appellate court will not grant the motion until at least (1) 14 days have passed since the motion was served or (2) the client and other parties have consented in writing to the attorney's withdrawal before the end of the 14-day period.

Appellate Bonds, Time, Motions, and Briefing

A number of changes were directed at bonds, filing deadlines, and motions and briefing generally. These changes include some substantive revisions.

Rule 7

After confirming there was no statutory basis to retain a rule on bond for costs on appeal in civil cases, the Committee deemed Rule 7 unnecessary, and it was repealed it in its entirety.

Rule 26

Most of the changes to Rule 26 are stylistic. The Supreme Court moved previous subsection

(b), "Enlargement of Time," to subsection (c) and renamed subsection (b) "'Legal Holiday,' Defined." Substantively, Juneteenth Day (June 19) and Frances Cabrini Day (the first Monday in October) were added as legal holidays, while Columbus Day is no longer a legal holiday.

Rule 28

As mentioned above, language from prior Rule 1(d), which referenced Rule 28(a) and the contents of briefs, was moved to new subsection 28(a)(7)(B). An explanatory comment clarified that the new language in Rule 28(a) is not an additional requirement.

Two substantive revisions to Rule 28 were also made. First, under subsection (i), parties should now advise the appellate court of any pertinent and significant legislation that comes to a party's attention after a brief has been filed that might impact the party's pending case. Second, the Supreme Court created subsection (j), which requires parties to notify the appellate court immediately after they have settled or otherwise resolved their case.

Rule 28.1

To parallel the substantive changes made to Rule 28(i), the Supreme Court added "legislation" to the types of supplemental authority that may be cited in a supplemental authority notice. Similarly, pursuant to new subsection (j), parties must immediately notify the appellate court after reaching a settlement or otherwise resolving their case.

Rule 32

At the suggestion of its Clerk's Office, the Supreme Court added a new subsection (d)(3)(A)(ii) to ensure that parties use correct captions for all original proceedings filed in the Supreme Court—both for proceedings originating in that Court and those related to an underlying action originating in a lower court. The changes also clarified the Supreme Court's terminology for parties in certiorari proceedings.

Rule 39.1

The Supreme Court revised Rule 39.1 to clarify that parties seeking attorney fees on appeal must explain why attorney fees are recoverable and that merely citing a statute or Rule 39.1 does not satisfy the legal requirement for awarding attorney fees.

> "A number of stylistic, clarifying, and substantive changes were made to Rule 21, which governs original proceedings in the Supreme Court."

The Record and Filing

Two Rules were amended to address requirements for the record and its sealing.

Rule 10

The Supreme Court revised Rule 10(f)(2) to address a concern in the appellate clerks' offices that Form 9 did not give parties adequate opportunity to explain the need to supplement the record after its transmission to the appellate court. Although the previous rule mentioned Form 9, it was not widely used, so references to the form were removed. Instead, a party seeking to supplement the record on appeal after it has been transmitted by the lower court must file a motion specifying which documents are missing and explaining the need to supplement the record to resolve the appeal.

Rule 30

Appellate courts treat "sealed" documents differently from "suppressed" documents. But parties often misunderstand these terms and use them interchangeably. Therefore, the Supreme Court revised Rule 30 to reference Chief Justice Directive 05-01, which defines these terms. The Committee hopes that the adoption of the directive's definitions will enable parties to better express their expectations with respect to confidentiality. Similar revisions were made to Rule 21(e)(3), discussed below.

The Mandate and Voluntary Dismissal

Rules 41 and 42 were amended to address requirements surrounding issuance of mandates and voluntary dismissals.

Rule 41

The Supreme Court added subsection (b)(3) to Rule 41 to remind parties that, consistent with Rule 39(c)(2), any itemized and verified bill of costs and proof of service must be filed within 14 days after the appellate court enters its mandate.

Rule 42

The Supreme Court divided Rule 42, which covers stipulated dismissals and dismissals by motion, into two subsections to clarify that the appellate court must grant stipulated dismissals meeting the requirements of Rule 42(a), while non-stipulated motions to dismiss will be dismissed at the court's discretion after all parties receive notice and time to respond. Because the substance of the last sentence of prior Rule 1(d), titled "Ground for Reversal, etc.," pertained to motions to dismiss, it was moved to Rule 41(b), which covers motions to dismiss.

Original Proceedings Filed in the Supreme Court

A number of stylistic, clarifying, and substantive changes were made to Rule 21, which governs original proceedings in the Supreme Court. First, the Supreme Court clarified in subsection (d)(1) that if an underlying proceeding forms the basis of the Rule 21 proceeding, the petition must include the exact unmodified caption of the proceeding in the lower court, with "In Re" before that caption. Second, consistent with its prior expectations, the Supreme Court added subsection (d)(5) to clarify that a Rule 21

petition must comply with the requirements in Rule 28(g) for opening briefs (including the 9,500-word limit) and follow the formatting requirements of Rule 32. A parallel change was made to subsection (i)(2); a response to a rule to show cause must comply with the requirements in Rule 28(g) for answer briefs (including the 9,500-word limit) and the formatting requirements of Rule 32.

At the request of the Supreme Court's Clerk's Office, which had regularly received motions to supplement the record in original proceedings pursuant to Rule 10(f), the Supreme Court clarified in subsection (e) that Rule 10 does not apply to original proceedings. Rather, in an original proceeding, any document that a petitioner would like the Supreme Court to review must be filed with the Rule 21 petition.

Subsection (e)(3) is new and was modeled, in part, after Federal Rule of Appellate Procedure 25.6. This subsection clarifies that parties (*not* the Supreme Court) are responsible for redacting sensitive information, identifying any documents that should be sealed or suppressed in a motion, and explaining why these documents warrant suppressed or sealed status. After reviewing the motion and the documents, the Supreme Court will decide whether to suppress or seal the documents in question.

Subsection (k) was added to clarify that amicus briefs may be filed in original proceedings and to specify the timelines for filing such briefs. When a party files a Rule 21 petition, the Supreme Court considers the petition promptly. Under subsection (k), amici curiae may elect to file a brief supporting a petitioner *before* the Supreme Court has issued a rule to show cause, but unless an amicus brief is filed simultaneously with the petition or immediately after the Court assigns a case number, there is no guarantee that the Supreme Court will consider the amicus brief before deciding whether to issue a rule to show cause. Thus, amici curiae may opt to file a brief *after* the Supreme Court has issued a rule to show cause. A brief that supports the petitioner or does not support either party must be filed within seven days after issuance of the rule to show cause order. Any amicus brief supporting a respondent is due when the response to show cause is due. Regardless of when an amicus brief is filed, it must comply with the applicable provisions of Rule 29. The Supreme Court also amended Rule 29(e) to clarify that Rule 21(k) governs the timing of amicus briefs filed in original proceedings.

Certiorari Review in the Supreme Court

Rules 51, 52, 53, and 55 were amended to clarify certiorari review in the Supreme Court.

Rule 51

In a minor revision to Rule 51(b), the Supreme Court changed the reference from Rule 26(b), which covers extensions of time in general, to Rule 56, which specifically covers extensions of time for petitions for writ of certiorari.

Rule 52

Rule 52 addresses the time for petitioning for review on certiorari. To prevent premature filing that could cause the intermediate appellate court to believe it was divested of jurisdiction in an underlying proceeding, the Supreme Court revised subsection (b) to specify that it will not accept a petition for writ of certiorari or a motion for an extension of time to file a petition until the time for rehearing has expired in the intermediate appellate court. This change is consistent with the prior expectations and practice of the Supreme Court's Clerk's Office.

Rule 53

The Supreme Court revised Rule 53(d) to mirror the change it made to Rule 3.4(l); the Supreme Court will adhere to the expedited timeline in dependency and neglect proceedings and, consistent with its past practice, will not accept reply briefs in support of petitions for writ of certiorari in those cases.

Rule 55

Consistent with the terminology used in other appellate rules, the Supreme Court revised Rule 55, which governs stays pending review on certiorari, to replace the phrase "court of appeals or . . . a district court on appeal from a county court" with "intermediate appellate court." No change in substance was intended.

> “As part of its task to facilitate the Supreme Court’s consideration and adoption of appellate rules that are clear, practical, and accessible to all audiences, the Committee welcomes comments regarding any of the Rules, which can be submitted at cocourtrules@judicial.state.co.us.”

Going Forward

Although the February 2022 Rules amendments affect over 20 Rules, most of the changes are not substantive and were made to improve readability, clarity, and understanding. With the adoption of these revisions, the Committee has fulfilled a large portion of the Supreme Court’s directive.

Currently, only a handful of Rules remain for the Committee to consider for the first time: Rule 3.1, concerning Industrial Claim Appeals Office appeals; Rule 4.2, discussing interlocutory appeals in civil cases; Rule 8.1, concerning stays in criminal cases; Rule 9, covering releases in criminal cases; and Rule 12, concerning appeals and proceedings in forma pauperis. The Committee anticipates recommending revisions to these Rules within the next year. As part of its task to facilitate the Supreme Court’s consideration and adoption of appellate rules that are clear, practical, and accessible to all audiences, the Committee welcomes comments regarding any of the Rules, which can be submitted at cocourtrules@judicial.state.co.us. GL



Steve Bernard was appointed to the Colorado Court of Appeals in 2006, and he served as the Court’s chief judge from December 2018 until he retired at the end of December 2021. He currently serves the court as a senior judge. **Gilbert M. Román** has served on the Colorado Court of Appeals since 2005 and as its chief judge since January 1, 2022. **Melissa C. Meirink** has served as a staff attorney for the Colorado Supreme Court since 2014.

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NOTES

1. The Rules are located in Chapter 32 of the *Colorado Revised Statutes Annotated*, Court Rules Book 2 (LexisNexis 2022).
2. Rule Change 2014(08), The Colorado Appellate Rules (June 23, 2014); Rule Change 2014(13), The Colorado Appellate Rules (Oct. 17, 2014); Rule Change 2015(01), The Colorado Appellate Rules (Jan. 7, 2015); Rule Change 2015(06), The Colorado Appellate Rules (June 25, 2015); Rule Change 2015(09), The Colorado Appellate Rules (Nov. 3, 2015); Rule Change 2016(05), The Colorado Appellate Rules (Apr. 7, 2016); Rule Change 2016(07), The Colorado Appellate Rules (May 23, 2016, eff. July 1, 2016 for cases filed on or after July 1, 2016); Rule Change 2016(08), The Colorado Appellate Rules (June 9, 2016); Rule Change 2017(10), The Colorado Appellate Rules (Correction to Rule Change 2017(10) issued Feb. 6, 2018); Rule Change 2018(14), The Colorado Appellate Rules (Sept. 11, 2018); Rule Change 2018(07), The Colorado Appellate Rules (Correction to Rule Change 2018(07) issued June 7, 2019).
3. Rule Change 2022(05), The Colorado Appellate Rules (Feb. 24, 2022).
4. *See* CRS § 18-1-409(1) (“[I]f the sentence is within a range agreed upon by the parties pursuant to a plea agreement, the defendant shall not have the right of appellate review of the propriety of the sentence.”).