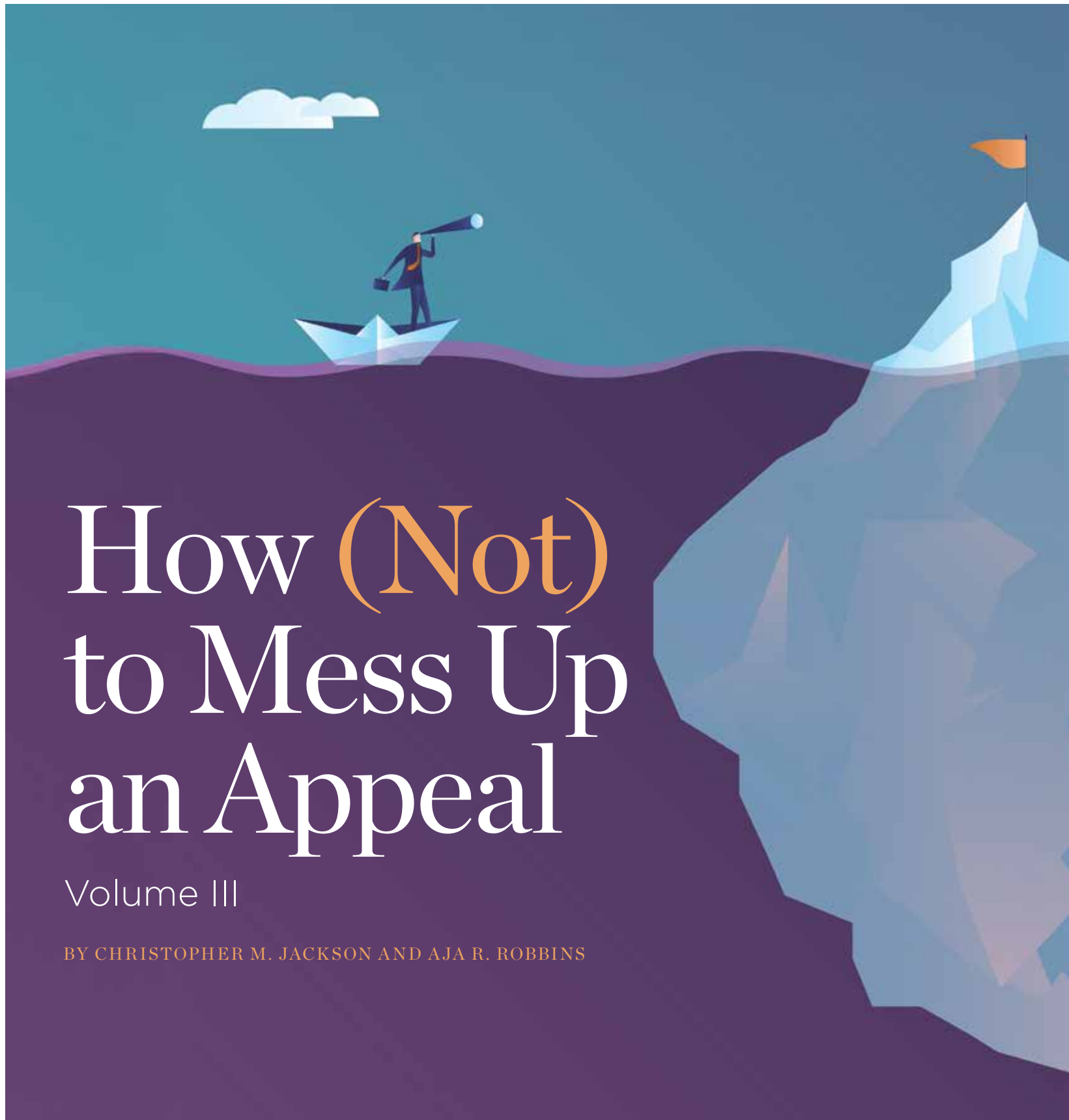




How (Not) to Mess Up an Appeal

Volume III

BY CHRISTOPHER M. JACKSON AND AJA R. ROBBINS

This article is the third in a three-part series discussing common pitfalls associated with appellate law and offering practical tips on how to avoid them.

You've navigated your way through trial court proceedings and managed not to flub the jurisdictional deadline associated with the notice of appeal.

Now it's time to present your case to the appellate court. What could go wrong? Unfortunately, it turns out the answer is "quite a lot."

Welcome to the final installment of this three-part series about how to avoid common mistakes in prosecuting or defending an appeal. The first article covered mistakes made at the trial court, the second covered the ins and outs of the notice of appeal, and this third article focuses on frequent errors that arise during the process of taking the appeal itself—as well as tips for how to avoid them.

Failing to Ask for a Stay of Execution in Judgment

Federal Rule of Civil Procedure 62(a) provides that execution on a judgment and proceedings to enforce it are automatically stayed for 30 days after the judgment is entered, unless the court orders otherwise.¹ Unlike the notice of appeal deadline, the date on which the stay expires is not tolled by the filing of post-judgment motions.² After that 30-day stay expires, nothing stops an appellee from executing on the judgment. This means that a judgment debtor/appellant who relies on Fed. R. Civ. P. 62(a)'s automatic stay alone is at the whim of the judgment creditor/appellee: if the appellee begins execution proceedings, the appellant may be forced to pay the judgment and simply hope the appellee will pay it back in the event of a reversal.

Thankfully, Fed. R. Civ. P. 62(b) provides that a party may automatically obtain a stay by providing a bond or other security. The stay will take effect when the court approves the bond or other security and will remain in effect for the time specified. If the party seeking to stay execution of the judgment posts a bond, the extension of the stay is a matter of right.³ In the

Tenth Circuit, the appellant may generally obtain a stay by posting a bond in the "full amount" of the judgment⁴—although this amount varies between federal jurisdictions.⁵ District courts also have discretion to modify⁶ or even waive⁷ the bond requirement for private parties,⁸ if "the equities so require."⁹

Colorado has a similar framework. Colorado Rule of Civil Procedure 62(a) provides for a 14-day automatic stay after the entry of judgment, with certain exceptions for injunctions and receiverships. CRCP 62(d) provides that a judgment debtor who appeals may obtain a stay in exchange for a supersedeas bond. The stay becomes effective when the bond is approved by the court. Colorado's procedure differs slightly from that of federal courts, though, because the Colorado rules provide that a court may grant a discretionary stay during the pendency of post-trial motions, during the time permitted for filing a notice of appeal, or during the pendency of a motion for approval of a supersedeas bond.¹⁰

In state court, the amount of the bond is generally 125% of the total judgment.¹¹ Additionally, Colorado statute provides that a court cannot require a bond that exceeds \$25 million in the aggregate, regardless of the size of the judgment.¹² If, however, the appellee proves that the appellant is intentionally dissipating or diverting assets, the court may enter orders that "require an appellant to post a supersedeas bond in an amount up to and including the total amount of the judgment that is appealed."¹³

When applying for a bond, at least in federal court, it's important to remember that the scope of the bond's protection will vary depending on its express terms. If a judgment creditor successfully fends off an appeal, and the supersedeas bond securing the stay states that it is only limited to judgment debtor's appeal in the circuit court, the judgment creditor may collect on that bond after the circuit court's mandate

is entered—even though the judgment debtor may still petition the US Supreme Court for certiorari and ultimately prevail.¹⁴ In the absence of express language identifying a specific federal appellate court, at least one court decided that the result is the same.¹⁵ On the flip side, if the express language of the supersedeas bond expressly states that the monetary judgment is secured through a ruling by the Supreme Court, regardless of the circuit court's decision, the bond should secure the judgment until the Supreme Court either issues a judgment or denies the petition for certiorari.

One last warning to heed: most jurisdictions have determined that the dismissal of a judgment debtor's appeal (for any reason) triggers a surety's liability under the supersedeas bond.¹⁶ In other words, if your appeal gets dismissed for lack of jurisdiction, the judgment creditor may then legally collect on that bond. This is yet another reason why it's crucial to evaluate and confirm the appellate court's jurisdiction at the outset of the appeal (preferably before filing the notice), a topic that we turn to next.

Failing to Confirm That Subject-Matter Jurisdiction Exists

Imagine the following scenario: you review the record, you painstakingly draft the opening and reply briefs, and just as you're gearing up for oral argument, you receive an order to show cause on the question whether the court has jurisdiction to consider your appeal in the first place. This happens more often than you would think.¹⁷ And remember, jurisdictional defects cannot be waived, by anyone.¹⁸ If the appellant fails to establish the existence of appellate jurisdiction, the appellate court simply cannot consider the appeal, and all of that time, energy, and money spent briefing the issues will have been for naught.

To avoid this less-than-desirable result, prudent appellate counsel will confirm the existence of the appellate court's subject matter jurisdiction before embarking on the record review and brief-writing process. Essentially, this means ensuring that "the order on appeal is final and the notice of appeal is timely filed."¹⁹ As detailed in the previous installment of this series, knowing exactly when an order

is final and ready for appeal is not always cut and dry. But in addition to the guidance we recently published regarding protective notices of appeal,²⁰ we can also advise that when filing appeals from interlocutory orders, including orders denying motions to compel arbitration²¹ or granting class certification,²² counsel should carefully research the case law surrounding the appealability of those orders, which is nuanced and often varies from circuit to circuit.

Remember, also, that Federal Rule of Appellate Procedure 28(a)(4) requires appellants to include a jurisdictional statement within the opening brief. This statement is essentially a jurisdictional checklist. Under Fed. R. App. P. 28(a)(4), it must include (1) a statement as to the district court's jurisdiction, with factual and legal citations to back it; (2) a similar statement as to the appellate court's jurisdiction; (3) the filing dates establishing the timeliness of the appeal; and (4) the assertion that the appeal is from a final order or judgment disposing of all parties' claims, or establishing jurisdiction on some other basis. Subsection (b) requires an appellee who is "dissatisfied" with the appellant's statement to file one itself. So whatever side you're on, it is wise for counsel to evaluate all four parts of Fed. R. App. P. 28(a)(4) early on in the appeal process to make sure they establish jurisdiction. Additionally, litigants should check the local rules of the circuit to which they're appealing, which may hold additional requirements relating to the jurisdictional statement.²³

Whatever you do, do not skimp out on a detailed and thorough jurisdictional statement. Circuit courts "pay[] careful attention to the parties' jurisdictional statements, because 'for centuries it has been recognized that federal courts have an obligation—to assure themselves of their own jurisdiction.'"²⁴ A few circuit courts have expressed quite a bit of frustration on faulty jurisdictional statements. In one case, the Seventh Circuit issued a particularly blunt order: "There is no reason why, month after month, year after year, the court should encounter jurisdictional statements with such obvious flaws. This imposes needless costs on everyone involved. The briefs filed by respondent [] and appellee [] are STRICKEN."²⁵

Not Knowing the Applicable Standard of Review

Fed. R. App. P. 28(a)(8)(B) and Colorado Appellate Rule 28(7)(A) require the appellant's opening brief to set forth the standard of review, complete with citations to authority.²⁶ In federal court, the appellee does not need to make a statement on the standard of review unless it is "dissatisfied" with the appellant's attempt.²⁷ In Colorado state court, the appellee must "under a separate heading placed before discussion of the issue," state whether it agrees or disagrees with the appellant's version.²⁸ Questions of law (like statutory or contractual interpretation) are reviewed de novo, factual determinations are reviewed for clear error, and "decisions on matters of discretion are reviewable for abuse of discretion."²⁹

But, like an impressionist painting, these delineations become fuzzier the closer you get to them. There is, for example, the thorny issue of what standard to apply to mixed questions of fact and law. A mixed question "asks whether the historical facts satisfy the statutory standard" or "whether the rule of law as applied to the established facts is or is not violated."³⁰ The official guidance from the US Supreme Court is that the appropriate standard for mixed questions "depends on whether answering it entails primarily factual or legal work."³¹ Some mixed questions require a court to "expound on the law" by "amplifying or elaborating on a broad legal standard," whereas some "require courts to resolve case-specific factual issues."³² When the lower court is "immersed in facts and compelled to marshal and weigh evidence and make credibility judgments," the appellate court should usually pay deference to that court³³—or so the story goes. Ultimately it often comes down to whether the court believes the issue to be resolved is "factual sounding."³⁴ This standard is just as malleable as it sounds.

Plus, litigants often try to game the facts or the law to obtain a less deferential review standard, which can result in confusing appellate opinions. In *Flying J, Inc. v. Comdata Network*, for example, the Tenth Circuit proclaimed that "whether the district court failed to consider or accord proper weight or significance to relevant evidence are questions of law re-

viewed de novo.”³⁵ The *Flying J* court relied on a line of Supreme Court cases standing for the proposition that a district court commits legal error when it makes fact findings under an incorrect legal standard, but stretched that facially reasonable proposition perhaps farther than it had in the past. This resulted in a rule statement that appears contrary to the spirit, if not the letter, of *Anderson v. Bessemer City*, which unequivocally held, “Where there are two permissible views of the evidence, the factfinders choice between them cannot be clearly erroneous.”³⁶

Setting these issues aside, there are other nuances in the standard of review that may prove to be traps for the unwary. Sufficiency of the evidence claims are reviewed de novo, using the same legal standard as the district court.³⁷ A jury’s factual determinations are reviewed for “substantial evidence”—that is, “whether the record contains substantial evidence to support the jury’s conclusion, viewing the evidence in the light most favorable to the prevailing party.”³⁸ Under the Administrative Procedure Act, the district court may only set aside agency action if the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.³⁹ Review under the arbitrary and capricious standard is “narrow in scope, but is still a ‘probing, in-depth review.’”⁴⁰ Yet on appeal, the district court’s determination as to whether that standard was satisfied is reviewed de novo.⁴¹

These examples are just the tip of the iceberg. The best advice we can give is to research the standard of review for each issue thoroughly before writing the argument on that point. There very well may be a jurisdiction-specific quirk that requires you to apply a different standard than you were initially envisioning.

Forfeiting or Waiving Issues (Including Waiver Itself)

The same rule that requires an appellant to state the standard of review in Colorado state court provides that an appellant must, in a separate heading before each issue in the opening brief, state whether the issue was preserved and point the court to the precise location in the record where it was raised and the court ruled.⁴² Again,

the appellee must include a statement in the response brief as to whether it agrees.⁴³

As with standards of review, the basic rules are familiar. A party *waives* an issue by intentionally relinquishing a known right.⁴⁴ A party *forfeits* an issue by failing to make a timely assertion of that right, typically due to neglect.⁴⁵ Failing to raise an issue is generally considered a forfeiture, not a waiver.⁴⁶ An example of waiver would be voluntarily dismissing a claim or a party from the case.⁴⁷ The distinction between waiver and forfeiture is significant because waiver distinguishes error, and thus appellate review, but forfeiture does not.⁴⁸ Accordingly, a forfeited issue may be reviewed for plain error, but a waived issue may not.⁴⁹

Notably, a party who wishes to raise a new issue (one that was previously forfeited) before the Tenth Circuit must explicitly request plain error review.⁵⁰ If it fails to do so, the court will chalk the omission up to a waiver and decline to consider the issue.⁵¹ The authors note that this idiosyncratic Tenth Circuit rule is an expansion of plain error review, which is generally applied only in criminal cases.

Navigating waiver and forfeiture can be a harrowing ordeal. Parties may waive issues by failing to cogently argue them,⁵² or by failing to raise them in the opening brief (raising a new issue in a reply is generally not permitted).⁵³ They may concede the merit of an alternative ruling by the district court by failing to challenge it on appeal.⁵⁴ They may waive “any objections not obvious to the court to specific points urged by” their opponent.⁵⁵ There are even appellate decisions suggesting that a party may forfeit or waive an issue if the discussion of that issue is relegated to a footnote or consists of a reference to a different argument raised at a different time.⁵⁶

There is one bright spot for appellants in all of this—they get the benefit of the fact that an appellate court can affirm on any alternative ground in the record.⁵⁷ In federal courts, this principal is constrained by a fairness requirement: addressing the ground must be “fair to the opposing party.”⁵⁸ Colorado state courts do not seem to limit the principle in this way.⁵⁹

In light of the complex rules surrounding waiver and forfeiture, lawyers must be vigi-

lant about preservation. The meaning of this sentence is twofold. First, it’s important to consider the broad scope of arguments and raise all potentially successful ones with the lower court. You never know which of the seeds you plant at trial may bloom into a winning argument on appeal. Second, it’s important to keep an eye on whether your opponent has raised an issue in their appellate brief for the first time. Appellate courts—particularly the Tenth Circuit—are much more willing (and likely) to decide an issue based on apparent waiver or forfeiture than trial courts are. Pointing out that your opponent forfeited and/or waived an issue below—even one with merit—may very well carry the day. On the flip side, it’s possible to “waive the waiver”: parties who fail to seize upon the other side’s waiver by pointing out the issue was waived can be deemed to waive that argument.⁶⁰ In short, there’s no downside to pointing out your opponent forfeited or waived an issue, so make sure to check whether it was truly preserved before responding on the merits.

Violating the (Intricate) Local Rules of the Appellate Courts

Before filing your brief, make sure to thoroughly read the local rules of the court to which you are submitting it. Federal courts of appeals are known to have very particular requirements, and failing to adhere to them may result in your brief being stricken.

Take, for instance, the Eighth Circuit’s unique rules surrounding sealed documents. In that circuit, a party who wishes to file a sealed document must submit only hard copies of the document.⁶¹ The party must also file a motion for permission to file the document under seal alongside it, also in hard copy format, that states whether the filing party believes the motion to seal may be made publicly available on PACER or should remain sealed.⁶²

The Eighth Circuit is not alone in maintaining idiosyncratic local rules. The Federal Circuit is notorious for declining to accept briefs and requiring parties to correct procedural or formatting mistakes and file a new, compliant brief. The Tenth Circuit also has quirks that practitioners should be aware of. The Tenth Circuit’s local rules state that they “supplement”

the Federal Rules of Appellate Procedure, and parties are required to comply with both.⁶³ Yet there are inconsistencies between the two that might cause issues. Consider the following examples.

With respect to appendices, Tenth Circuit Rule 30.1 expressly abrogates Fed. R. App. P. 30 by requiring parties to “attach to their briefs the documents required by Tenth Circuit Rule 28.2(A) and (B)” instead of those specified in Fed. R. App. P. 30. Additionally, the Tenth Circuit places a special burden on appellants to include within the appendix “all portions of the transcript necessary to give the court a complete and accurate record of the proceedings related to the issues on appeal.”⁶⁴ The court “need not remedy any failure of counsel to provide an adequate appendix,”⁶⁵ and “may decline to consider the issue” if the appendix is deficient.⁶⁶

With respect to hard copies, Fed. R. App. P. 31 requires parties to file 25 copies of each brief with the clerk of court (unless the local rules require a different number).⁶⁷ Taking advantage of that loophole, as of January 1, 2025, the Tenth Circuit no longer requires parties (including amici) to file hard copies of their briefs, appendices, or other appellate filings if they are filed through the court’s ECF system.⁶⁸ Now, with respect to briefs, hard copies are only required if “ordered by the court.”⁶⁹ If the court issues such an order, it “will order only the number of hard copies needed,” rather than the previously standard seven copies of the brief and one copy of the appendices.⁷⁰

And with respect to oral argument, Fed. R. Civ. P. 34 says that parties “may” include a statement as to whether oral argument is necessary. But the Tenth Circuit’s rules *require* both the appellant and the appellee to include, on the front cover of their respective principal briefs, a statement as to whether argument is requested.⁷¹ If argument *is* requested, the party must include a statement as to why argument is necessary *after* the brief’s conclusion.⁷² Pro tip: this statement is excluded from the brief’s word count.⁷³

Finally—though this is less of a matter of consistency with local rules—appellants and appellees alike should note that certain

practices are disfavored in the Tenth Circuit, including (1) filing motions to exceed word counts, (2) incorporating pleadings by reference, and (3) using “passim” within a brief’s table of authorities.⁷⁴ The court’s rules also state that motions for an extension of time are disfavored,⁷⁵ but in practice, the court usually grants a fulsome motion requesting a reasonable amount of time.

For Colorado practitioners, the good news is that the Colorado Court of Appeals and the Colorado Supreme Court don’t have additional local rules on top of the Colorado Appellate Rules. And unlike in federal circuit courts, where the appellant is responsible for collecting the record and filing it as appendices to the principal brief, C.A.R. 10(b)–(c) provides that as long as the record is maintained in an electronic format before the trial court, the clerk of the trial court may simply transmit the record to the clerk of the appellate court. C.A.R. 10(a) also standardizes the record’s contents, laying out exactly what the record will consist of in every case. Appellants must supplement this baseline with the transcripts of “all proceedings necessary for considering and deciding the issue on appeal,” and when they do so, they must file a designation of transcripts with the trial court and an advisory copy with the appellate court within seven days of filing the notice of appeal.⁷⁶ The appellee may also file additional transcripts it believes are necessary within 14 days of the notice of appeal being filed.⁷⁷

But there are still a few things to remember before filing your brief in Colorado’s appellate courts. First, you might be tempted to cite unpublished court of appeals opinions now that the Judicial Branch has made them available online. However, the court of appeals maintains an official policy concerning opinions not selected for official publication: these opinions should only be cited to explain the case history, identify the law of the case, or assert doctrines of issue or claim preclusion.⁷⁸ Citation of unpublished opinions for any other reason is not permitted in proceedings before the Colorado Court of Appeals.⁷⁹ Second, pursuant to C.A.R. 34, if you want oral argument, you have to file your request in a separate document entitled “request for oral argument,” no later than seven days after briefing closes. And third, the court of appeals promulgated a policy that spells out the precise

format for citations to the record (which are not consistent with *The Bluebook’s* rules).⁸⁰

Not Knowing the Rules of Horizontal Stare Decisis

Just a quick note on this point: in federal appellate courts, published panel decisions of one circuit are binding on future panels of the same circuit.⁸¹ So if you are facing tough precedent from the circuit court to which you are appealing, you may be out of luck unless you are able to distinguish, distinguish, distinguish. This is especially so given the very slim odds that the court would grant your petition for hearing or rehearing en banc, should you file one.⁸² That said, divisions of the Colorado Court of Appeals are not similarly bound,⁸³ likely (and slightly ironically) because there is no mechanism for en banc review under the Colorado Appellate Rules. As a result, different divisions of that court sometimes publish conflicting opinions,⁸⁴ which the Colorado Supreme Court may then step in to resolve.⁸⁵ Thus, if you are presenting an appeal to the Colorado Court of Appeals and facing unhelpful precedent from the same court, don’t be afraid to argue for a divergent result.⁸⁶

Not Knowing the Odds

Even if you do everything right (or—setting aside jurisdictional issues—wrong), it ultimately might not matter. Intermediate appellate courts rarely reverse lower court decisions.⁸⁷ “One could correctly guess the outcome of an appeal about 90% of the time, knowing nothing about the issues involved, by predicting that the appellate court will affirm the lower court decision.”⁸⁸

In federal circuit courts, the most recent statistics reflect that only 7.8% percent of cases adjudicated on the merits result in reversal.⁸⁹ Criminal appeals face worse odds overall: only 6.5% of those cases result in reversal.⁹⁰ For private civil cases, that number is higher, but only slightly: 12% of those cases are reversed.⁹¹ And the Tenth Circuit’s reversal rates are even lower than overarching ones (except in the case of criminal appeals, for which the reversal rate is exactly the same—6.5%).⁹² In 2024, only 5.3% of opinions issued by the Tenth Circuit reversed the lower court. For private civil appeals, the reversal rate was 6.7%.⁹³

Of course, it's always possible to try to appeal again, either by petitioning for panel or en banc rehearing⁹⁴ or seeking certiorari from the Supreme Court.⁹⁵ But it probably won't surprise you to learn that your chances of obtaining relief via rehearing or certiorari are even lower than the chances of overturning an unfavorable trial court decision.

Not all circuits issue data regarding how often petitions for rehearing are granted, but in 2018 the Federal Circuit published guidance stating that merits panels granted relief in only 3% of the more than 1,900 petitions filed since 1982.⁹⁶ En banc petitions were accepted even less frequently: of the 1,100 requests filed since 1982, only 16 were granted.⁹⁷ Although this data is admittedly outdated, the Tenth Circuit stated in a 1988 opinion that it granted only 1.3% of all rehearing petitions that year.⁹⁸ You might be wondering why successful petitions for rehearing are so few and far between. According to the Honorable Richard S. Arnold, formerly of the Eighth Circuit, the answer is simple: "[Judges] don't like to be told that they are wrong."⁹⁹

And the US Supreme Court is even less likely to grant your petition for certiorari. The Court receives roughly 7,000 petitions each term.¹⁰⁰ The Court's publications state that the Court grants certiorari in 100 to 150 cases a year, but in recent years that figure has declined precipitously, to perhaps less than half that.¹⁰¹ That said, if your case is one of the select few to be heard by the Court, you do have a much higher chance of obtaining reversal. This makes sense when considering the discretionary role of the Court: it tends to grant certiorari to correct errors and provide guidance to the lower courts with respect to a divisive or novel issue.

One critical caveat: These statistics run the gamut of every kind of federal appeal—including ones that realistically probably shouldn't have been filed in the first place. An appeal presenting a pure question of law on which there is no binding authority is in a much different position than an appeal challenging the district court's exercise of its discretion on whether to sustain an evidentiary objection during trial. Lawyers should carefully consider

each case rather than rely exclusively on these figures.

For state courts, there is less available data reflecting reversal rates, rehearing rates, and rates at which state supreme courts grant petitions for certiorari. Colorado, for example, does not appear to publish data regarding the number of appeals in which the Colorado Court of Appeals ultimately reverses. Based on institutional similarities between state and federal judges, it's reasonable to assume that the way in which appeals are considered and resolved is roughly analogous between the state and federal systems. For example, a 2015 study from the US Department of Justice analyzed roughly 70,000 criminal appeals decided in state courts and concluded that roughly 12% of those cases resulted in reversal.¹⁰² That said, it's important to remember that there are key differences between the two systems, including the general types of cases that they consider (state courts are courts of general jurisdiction, whereas federal courts' jurisdiction is limited to federal questions and diversity jurisdiction); variation in caseload; and the differing selection and retention processes for judges, among others.

Even in the wake of this data, though, effective appellate counsel can make a difference.

Empirical studies demonstrate that parties who hire an experienced appellate specialist have a better chance at obtaining a favorable outcome on appeal.¹⁰³ Appellate judges

from state and federal courts—as well as their clerks—have confirmed that a brief signed by “sophisticated appellate counsel” is more likely to move the needle.¹⁰⁴ One study concluded, after studying the outcomes in civil appeals in three federal circuit courts, that the number of previous appearances in appellate courts for the appellee's attorney correlated with a greater chance of affirmance.¹⁰⁵ The same study suggested that, at least in one circuit, an appellant's association with a large law firm increased its odds of reversal.¹⁰⁶

Whether your brief is well-written also tends to impact outcomes on appeal. “High-quality writing increases the likelihood of winning and increases the amount of language the Court shares with briefs,” whereas “low-quality writing can have the opposite effect.”¹⁰⁷ Some studies suggest that simpler briefs carry the day on this front,¹⁰⁸ while others come out the opposite way.¹⁰⁹ The hard-to-quantify aspects of what constitutes “good writing” on appeal is yet another reason that trial lawyers may want to consider hiring an appellate specialist to navigate the process.

Conclusion

As noted in the previous two installments, this article doesn't contain an exhaustive list of all potential issues that may arise in the appellate courts. But it should give the reader a good idea of what potential hurdles may lie ahead, should the client decide to take an appeal. Good luck! 



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NOTES

1. Note that Fed. R. Civ. P. 62(c) excepts certain orders from this rule, including interlocutory or final judgments in actions for injunctions or receiverships.
2. Fed. R. App. P. 4(a)(4).
3. See, e.g., *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1234 (10th Cir. 2000) (“[E]xecution of a judgment is stayed pending appeal once the appellant files a supersedeas bond.”).

4. *Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1559 (10th Cir. 1996).
5. Courts in the Ninth Circuit, for example, often require bonds 1.25 to 1.5 times the amount of the judgment. *E.g.*, *Cotton ex rel. McClure v. City of Eureka*, 860 F.Supp.2d 299, 1029 (N.D.Cal. 2012). And the local rules of some federal district courts may set forth the method for calculating the sum of the bond. *See, e.g.*, *Brookridge Funding Corp. v. Nw. Hum. Servs.*, 2008 U.S. Dist. LEXIS 41625, at *5 n.4 (D.Conn. May 29, 2008) (noting that the Northern District of New York has a rule that requires supersedeas bonds to include the judgment amount plus 11% and \$250 to account for interest and costs, whereas the District of Massachusetts requires a supersedeas bond to include the judgment amount plus 10% and \$500).
6. *Miami Int'l. Realty Co. v. Paynter*, 807 F.2d 871, 873–74 (10th Cir. 1986) (court did not err in granting stay without full supersedeas bond; escrow of lesser amount than full judgment plus injunction against transfer of assets was sufficient security).
7. *Fed. Prescription Serv. Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 757–60 (D.C.Cir. 1980) (district court's discretion includes ability to not require a bond).
8. Fed. R. Civ. P. 62(e) negates the bond requirement when the appellant is the United States, its officers, or its agencies or if the appeal is directed by a department of the federal government.
9. *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 796 (9th Cir. 1989) (construing Rule 62(d), which used to contain the bond requirement), *vacated on reh'g on other grounds*, 929 F.2d 1358 (9th Cir. 1990).
10. CRCP 62(b).
11. CRCP 121 § 1-23(3)(a).
12. CRS § 13-16-125(1).
13. CRS § 13-16-125(2).
14. *Hicks v. Cadle Co.*, No. 04-cv-02616, 2010 U.S. Dist. LEXIS 42579, at *1 (D.Colo. Mar. 31, 2010).
15. *Reylon, Inc. v. Carson Prods. Co.*, 647 F.Supp. 905, 906 (S.D.N.Y. 1986).
16. *See AmWest Sav. Ass'n v. Farmers Market of Odessa, Inc.*, 753 F.Supp. 1339, 1344 (1990); *Strode v. Abshire*, 283 P.2d 842, 843 (Okla. 1995) (surety liable where appeal dismissed on motion as “frivolous and without serious merit”); *Springer v. Metro. Cas. Ins. Co.*, 249 N.W. 226, 227 (Iowa 1933).
17. *E.g.*, *Cline v. Sunoco Partners Mktg. & Terminals L.P.*, Nos. 20-7064 and 20-7072, 2021 U.S. App. LEXIS 37003, at *6 (10th Cir. Nov. 1, 2021). For a more fulsome discussion of this case, please refer to the second installment of this series: Jackson and Robbins, “How (Not) to Mess Up an Appeal: Volume II,” 54 *Colo. Law.* 22 (Mar. 2025), <https://cl.cobar.org/features/how-not-to-mess-up-an-appeal-2>.
18. *E.g.*, *Vincent v. Consol. Operating Co.*, 17 F.3d 782, 785 (5th Cir. 1994).
19. *Chavez v. Chavez*, 2020 COA 70, ¶ 15.
20. Jackson and Robbins, *supra* note 17 at 23–24.
21. *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1379 (10th Cir. 2009) (holding that in order to properly invoke appellate jurisdiction under the Federal Arbitration Act, the litigant must either explicitly move to stay litigation and/or compel arbitration in the district court, or it must be unmistakably clear from the four corners of the motion that the movant seeks that relief).
22. *Microsoft Corp. v. Baker*, 582 U.S. 23, 26 (2017) (holding that federal courts of appeals lack jurisdiction under 28 USC § 1291 to review an order denying class certification after the named plaintiffs have voluntarily dismissed their claims with prejudice).
23. *E.g.*, 7th Cir. R. 28(a).
24. *Baez-Sanchez v. Sessions*, 862 F.3d 638, 641 (7th Cir. 2017).
25. *Id.*
26. In Colorado state court, the standard of review must appear under a separate heading; in federal court, the standard of review may appear either in a separate section or “in the discussion of the issue” itself.
27. Fed. R. App. P. 28(b).
28. C.A.R. 28(b).
29. *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563 (2014) (citation modified).
30. *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018) (citation omitted) Whether an action was “reasonable” is often a mixed question of fact and law. *E.g.*, *Brooks v. Colo. Dep't of Corr.*, 12 F.4th 1160, 1170 n.8 (10th Cir. 2021) (whether an accommodation was reasonable under the Americans with Disabilities Act is a mixed question of fact and law).
31. *Bufkin v. Collins*, 145 S.Ct. 728, 739 (2025) (citation modified).
32. *Id.* (citation modified).
33. *Id.* (citation modified).
34. *U.S. Bank*, 583 U.S. at 397.
35. *Flying J, Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 829 (10th Cir. 2005) (citation modified).
36. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).
37. *CGC Holding Co. v. Hutchens*, 974 F.3d 1201, 1210 (10th Cir. 2020).
38. *Behagen v. Amateur Basketball Ass'n*, 884 F.2d 524, 526 (10th Cir. 1989) (citation modified).
39. 5 USC § 706(2)(A).
40. *Forest Guardians v. US Fish & Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir. 2010).
41. *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008).
42. C.A.R. 28(7)(A).
43. C.A.R. 28(b).
44. *Forgette v. People*, 2023 CO 4, ¶ 28; *Sprint Nextel Corp. v. Middle Man, Inc.*, 822 F.3d 524, 531 (10th Cir. 2016).
45. *Forgette*, 2023 CO 4, ¶ 29; *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011).
46. *Platt v. Winnebago Indus.*, 960 F.3d 1264, 1273 (10th Cir. 2020).
47. *United States v. Martinez*, 92 F.4th 1213, 1260 (10th Cir. 2024) (explaining “waiver by abandonment” rule).
48. *Forgette*, 2023 CO 4, ¶ 30.
49. *Id.*
50. *E.g.*, *Platt*, 960 F.3d at 1273. To show plain error, the party must establish the presence of (1) error, (2) that is plain, that (3) affects substantial rights, and that (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Richison*, 634 F.3d at 1128.
51. *Platt*, 960 F.3d at 1273.
52. *Iweha v. Kansas*, 121 F.4th 1208, 1236 (10th Cir. 2024).
53. *Gutierrez v. Cobos*, 841 F.3d 895, 902 (10th Cir. 2016) (“[A] party waives issues and arguments raised for the first time in a reply brief.”).
54. *E.g.*, *Lawson v. Stow*, 2014 COA 26, ¶ 41.
55. *Hasan v. AIG Prop. Cas. Co.*, 935 F.3d 1092, 1100 (10th Cir. 2019).
56. *Schlosser v. Kwak*, 16 F.4th 1078, 1080 n.1 (2d Cir. 2021).
57. *See, e.g.*, *Johnson v. Heath*, 56 F.4th 851, 863 n.5 (10th Cir. 2022) (“We have discretion to affirm on any ground supported by the record, even if not the same reasoning relied on by the district court.”); *League of Women Voters of Greeley, Weld Cnty., Inc. v. Bd. of Cnty. Comm'rs*, 2025 CO 8, ¶ 67 (“[T]his court can affirm a judgment based on any ground supported by the record, whether or not it was considered by the trial court.”).
58. *Logsdon v. US Marshal Serv.*, 91 F.4th 1352, 1359 n.3 (10th Cir. 2024).
59. *Tisch v. Tisch*, 2019 COA 41, ¶ 40 (“An appellate court can affirm a trial court’s ruling for any reason supported by the record, even if that reason was not argued to, or addressed by, the trial court.” (citation omitted) (emphasis added)).
60. *E.g.*, *Hahn v. Walsh*, 762 F.3d 617, 629 n.28 (7th Cir. 2014).
61. 8th Cir. R. 25A(h).
62. *Id.* *See also* US Court of Appeals for the Eighth Circuit, Standing Order Regarding Sealed and Highly Sensitive Documents, Order No. 21-01.
63. 10th Cir. R. 1.1.
64. 10th Cir. R. 10.2(A)(1).
65. 10th Cir. R. 30(B)(3).
66. 10th Cir. R. 10.4(B).
67. Fed. R. App. P. 25(e).
68. Memorandum from US Tenth Circuit Clerk of Court Chris Wolpert, “2025 Revisions to the Tenth Circuit Rules” (Dec. 13, 2024), <https://www.ca10.uscourts.gov/sites/ca10/files/clerk/Summary%20of%202025%20Revisions%20to%20Tenth%20Circuit%20Rules.pdf>. *See also* 10th Cir. R. 31.5, 30.1, 29.3, 27.2.
69. 10th Cir. R. 31.5, 29.3.
70. Memorandum from Wolpert, *supra* note 68.
71. 10th Cir. R. 28.2(C)(2).

72. *Id.*

73. Fed. R. App. P. 32(f).

74. 10th Cir. R. 28.3.

75. 10th Cir. R. 27.6(A).

76. C.A.R. 10(d)(1), (3).

77. C.A.R. 10(d)(3).

78. Colorado Judicial Branch, "Court of Appeals Policies," <https://www.coloradojudicial.gov/court-appeals/court-appeals-policies>.

79. *Id.*

80. Court of Appeals, "August 4, 2017 Policy on Citation to the Record Adopted Pursuant to C.A.R. 28(e)," [https://www.courts.state.co.us/userfiles/file/Court_Probation/01st_Judicial_District/Record%20Citation%20Policy%208-4-17%20\(2\).pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/01st_Judicial_District/Record%20Citation%20Policy%208-4-17%20(2).pdf).

81. *E.g., Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019). Unpublished decisions, however, do not carry the same weight of horizontal stare decisis. *United States v. Heineman*, 767 F.3d 970, 974–75 (10th Cir. 2014).

82. See *infra* "Not Knowing the Odds."

83. See *Chavez v. Chavez*, 2020 COA 70, ¶ 13.

84. *E.g., People ex rel. A.V.*, 2012 COA 210, ¶¶ 10–11 (explaining conflicting rulings from different divisions and siding with one over the other).

85. One of the considerations governing review on certiorari is whether "a division of the court of appeals has rendered a decision in conflict with the decision of another division of said court." C.A.R. 49(b).

86. See generally Jackson, "Horizontal Stare Decisis," 49 *Colo. Law.* 32 (Apr. 2020).

87. Clermont and Eisenberg, "Litigation Realities," 88 *Cornell L. Rev.* 119, 150 (2002).

88. Edwards, "Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias," 68 *Emory L.J.* Online 1035, 1036 (2019).

89. US Courts, "Table B-5—U.S. Courts of Appeals Statistical Tables for the Federal Judiciary (December 31, 2024)," <https://www.uscourts.gov/data-news/data-tables/2024/12/31/statistical-tables-federal-judiciary/b-5>.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Petitions for rehearing and rehearing en banc are governed by Fed. R. App. P. 40.

95. See Sup. Ct. R. 12–16. Sup. Ct. R. 11 also provides that a party may petition the court to review a case pending in a circuit court before judgment is entered in that court, but that such petitions will only be granted "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination" by the Supreme Court.

96. "United States Court of Appeals for the Federal Circuit, Questions and Answers, Petitions for Rehearing (Fed. Cir. R. 40) and Petitions for Hearing or Rehearing En Banc (Fed. Cir. R. 35)," <https://bit.ly/46mp10W>.

97. *Id.*

98. *Westcot Corp. v. Edo Corp.*, 857 F.2d 1387, 1388 n.1 (10th Cir. 1988).

99. Arnold, "Why Judges Don't Like Petitions for Rehearing," 3 *J. App. Prac. & Process* 29, 37 (2001).

100. US Courts, "Supreme Court Procedures," <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures#:~:text=In%20fact%2C%20the%20Court%20accepts,court%20decided%20a%20Constitutional%20issue>.

101. *Id.*

102. Waters et al., Bureau of Justice Statistics, *Criminal Appeals in State Courts* (Sept. 2015), <https://bjs.ojp.gov/content/pub/pdf/casc.pdf>.

103. Gupta, "Leveling the Playing Field on Appeal: The Case for A Plaintiff-Side Appellate Bar," 54 *Duq. L. Rev.* 383, 384 (2016).

104. *Id.* See also Feldman, "Counting on Quality: the Effects of Merits Brief Quality on Supreme Court Decisions," 94 *Denv. L. Rev.* 43, 67 (2016) ("Attorney experience and credibility . . . play large roles in [judge's] decisions . . .").

105. Samaha et al., "Inputs and Outputs on Appeal: An Empirical Study of Briefs, Big Law,

and Case Complexity," Research Paper No. 20-14, at 7 (Law and Economics, New York University School of Law, 2020).

106. *Id.* at 21.

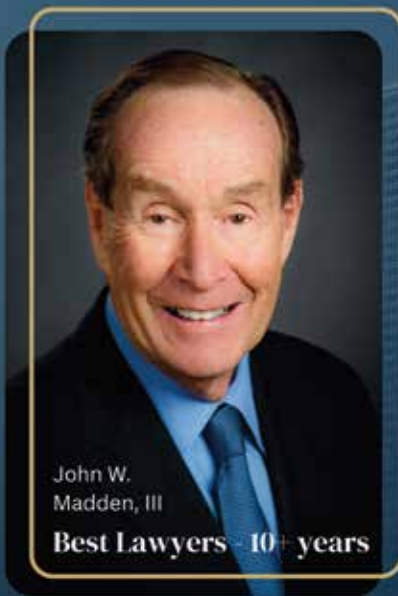
107. Feldman, *supra* note 104 at 67.

108. Campbell, "Writing That Wins: An Empirical Study of Appellate Briefs," 46 *Colo. Law.* 85, 87 (Mar. 2017).

109. Samaha, *supra* note 105 at 19 ("[N]ot one of our models indicates that shorter briefs tend to attract judge votes.").

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