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Lessons for Lawyers New to Civil Appellate Practice in Colorado Courts

by Alan Epstein and Matthew J. Hegarty

For attorneys just beginning their foray into appellate practice, the process in Colorado state appellate courts is likely to be daunting and perhaps overwhelming. To assist new attorneys or attorneys who may be transitioning into this practice area, this article provides both a retrospective on lessons on briefing and arguing appellate cases gleaned from decades of appellate experience, and a section highlighting important court rules to remember when presenting a case before those courts.

Briefing and Arguing

Practitioners new to appellate law should put into practice a number of principles regarding presenting a case to the appellate courts. However, experience teaches that two basic principles should receive particular attention: (1) mindfulness toward the standard of review for each issue a case presents, and (2) preparedness for oral argument, assuming orals are granted.

1. Be mindful of the standard of review. It is often the driving force behind how to present a case on appeal. Appellate standards of review typically fall into three categories:

- ***De novo.*** This implicates the lower court's legal conclusions, such as interpretation of a constitutional provision, statute, or court rule;[1] construction of a contract or other legally significant document;[2] or rulings on dispositive pretrial motions[3] or certain mid-trial or post-trial motions.[4] Appellate courts reviewing *de novo* give no deference to the lower tribunal.[5]
- **Clearly erroneous.** This implicates the lower court's factual findings in certain instances, such as during a bench trial.[6] Appellate courts reviewing for clear error exercise less skepticism than under *de novo* review and defer to the lower tribunal's fact-finding, unless "left with the definite and firm conviction that a mistake has been committed."[7]
- **Abuse of discretion.** This implicates the lower court's ruling on a discretionary matter, such as admissibility of evidence at trial[8] and, in most situations, the decision of whether to grant or deny attorney fees or costs.[9] Appellate courts reviewing for abuse of discretion defer to the lower court's decision unless "manifestly arbitrary, unreasonable, or unfair."[10]

Other standards of review include (1) deference to an administrative agency's interpretation of its own enabling statute and administrative regulations, except where contrary to statutory and constitutional law;[11] and (2) mixed questions of law and fact, such as jury instructions, for which the wording of a particular instruction is reviewed *de novo* for legal accuracy but the district court's decision to give the instruction in light of the record at trial is reviewed for abuse of discretion.[12]

Decisions reviewed for abuse of discretion or clear error are unlikely to be reversed by a higher court unless the decision was extremely egregious.[13] Hence, a more constructive approach is to focus on issues reviewed *de novo*. If most of the appealable issues involve discretionary decisions, emphasize the egregiousness of the lower tribunal's ruling through liberal citation to the trial or hearing transcript, explanation of how the abuse of discretion pervaded the trial or prejudiced the client, and discussion of cases where similar decisions constituted abuses of discretion.

2. Be well-prepared for oral argument. Treat oral argument like a conversation with a senior partner. The strong legal and factual points of the case should be emphasized and explained convincingly, and the weaknesses of the case should not be ignored but rather addressed in a matter-or-fact manner.[14] Also, expect the panel to be well-prepared. For example, during oral argument before the Colorado Court of Appeals, judges almost always possess a draft opinion resolving the appeal, and at least one judge and his or her clerks have read the entire record. Thus, the questions judges pose to advocates likely encompass what they perceive to be the salient legal principles or the important factual issues. Accordingly, it is vital to know the appellate record and the principal cases

About the Authors

Alan Epstein is a member of Hall & Evans, LLC with more than thirty years of appellate practice experience, including a clerkship with Judge Charles D. Pierce of the Colorado Court of Appeals—(303) 628-3300, epsteina@hallevans.com. Matthew J. Hegarty is a third-year associate at Hall & Evans and previously clerked for Judge David M. Furman of the Colorado Court of Appeals—(303) 628-3300, hegartym@hallevans.com.

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inside and out. One way to prepare is to outline the issues exhaustively.[15] However, be prepared to be flexible and responsive to the panel's questions rather than rigidly adhering to that outline. Finally, when the red light illuminates on the podium, respectfully thank the members of the panel for their time, reiterate a short request for relief, and sit down.

Respecting the Rules

There are a plethora of appellate rules by which practitioners need to abide. However, three particular sets of rules merit special attention for practitioners unfamiliar with appellate law in Colorado: (1) appellate rules regarding formatting of briefs and requests for appellate fees and costs; (2) the new public domain citation format for Colorado appellate cases issued on or after January 1, 2012; and (3) the types of interlocutory relief available in the Colorado Supreme Court and Colorado Court of Appeals.

1. Adhere to appellate rules when drafting briefs. The appellate rules "are not mere technicalities, but rather serve an important purpose in facilitating appellate review."[16] Judges routinely strike briefs and even dismiss appeals due to noncompliance with certain rules.[17] For example, two rules that are rigorously enforced by appellate courts are CAR 28, regarding contents of briefs (in particular subsection (k), which addresses recitation of the standard of review for a given issue and citation to the record where that issue was preserved for appeal); and CAR 32, regarding the formatting of briefs.[18] CAR 39, regarding costs and fees incurred on appeal, is another rule to consider when drafting briefs. The end of the principal brief should include a request for appellate costs under CAR 39, which (although typically minimal) are nevertheless recoverable by the prevailing party,[19] and a request for appellate attorney fees under CAR 39.5, as long as a legal basis for the request is stated (meaning a statute or contract authorizes recovery of attorney fees).[20]

2. Understand the impact of Chief Justice Directive (CJD) 12-01 on citation formats in briefs and judicial opinions. CJD 12-01 contains new rules, in effect since January 1, 2012, for public domain citation for published Colorado Supreme Court and Colorado Court of Appeals opinions issued since then, as well as for modified, revised, withdrawn, vacated, or substituted opinions issued since then.[21] It also contains detailed rules on how to cite cases issued since January 1, 2012. New appellate practitioners should consult CJD 12-01 for more information.

3. Know the differences in elements and application between CAR 4.2 and 21. CAR 4.2, the rule governing interlocutory appeal of a district court's order to the Colorado Court of Appeals, requires satisfaction of three elements before the appellate court will grant review under this rule: (1) immediate review of the district court's order will "promote a more orderly disposition or establish a final disposition of the litigation"; (2) the order involves a "controlling question of law," signaling the statewide importance of the issue; and (3) this controlling question of law is as yet "unresolved."[22] A typical scenario where CAR 4.2 comes into play is where a district court issues a ruling on a dispositive motion regarding a common law duty or a new or recent statute not yet interpreted by the appellate courts.[23] In one situation that may be *sui generis*, an appellate court accepted an interlocutory appeal of an issue collateral to the merits of the case, partly because the parties might save substantial amounts of time and money.[24]

CAR 21, by contrast, involves the direct review of a district court's ruling by the Colorado Supreme Court in the exercise of the Court's original jurisdiction, which relief is "extraordinary in nature," "wholly within the discretion of the Supreme Court," and "shall be granted only when no other adequate remedy, including relief available by appeal or under CRCP 106, is available."[25] In the context of civil litigation, this discretionary review typically involves a trial court's discovery rulings, which must "place[] a party at a significant disadvantage litigating the merits of the controversy and where a remedy on appeal would be inadequate,"[26] but also can address issues of "significant public importance" not yet resolved.[27]

The two rules interact as follows: where the district court denies a litigant's request for interlocutory appeal under CAR 4.2, that litigant's only recourse is to petition the Supreme Court for relief under CAR 21.[28] Hence, practitioners should file a CAR 4.2 interlocutory appeal before attempting a CAR 21 original jurisdiction appeal.[29]

Conclusion

The topics discussed here are by no means an exhaustive list of points to keep in mind when briefing and arguing appellate matters in Colorado state courts; however, the lessons from practice and the pointers regarding appellate rules should serve newly minted appellate practitioners well. To this end, here is a final tip: never pass up an opportunity to gain more skill, education, experience, knowledge, or training on appellate practice.

Notes

1. *See Gessler v. Colo. Common Cause*, 2014 CO 44, ¶ 7 (constitutional provision or statute); *Gleason v. Judicial Watch, Inc.*, 2012 COA 76, ¶ 14 (rule of court).

2. *See FDIC v. Fisher*, 2013 CO 5, ¶ 9 (contract); *Colo. Div. of Ins. v. Auto-Owners' Ins. Co.*, 219 P.3d 371, 376 (Colo.App. 2009) (legally significant document).

3. *See Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61, ¶ 16 (CRCP 12(b)(5)); *Colo. Ins. Guar. Ass'n v. Menor*, 166 P.3d 205, 209 (Colo.App. 2007) (CRCP 12(b)(1)). *See also Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 643 (Colo. 2005) (CRCP 56).

4. *See Vaccaro v. Am. Family Ins. Group*, 2012 COA 9, ¶ 40 (motions for directed verdict and judgment notwithstanding the verdict).

5. *See Vu, Inc. v. Ocean Marketplace, Inc.*, 36 P.3d 165, 167 (Colo.App. 2001).

6. *See Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶ 25. *Cf. id.* ("When the facts are undisputed, the reviewing court will not defer to the trial court's factual findings, but will instead conduct a de novo review and make an independent judgment on the merits.").

7. *Quintana v. City of Westminster*, 56 P.3d 1193, 1196 (Colo. 2002).

8. *See Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010).

9. *See Anderson v. Pursell*, 244 P.3d 1188, 1193 (Colo. 2011). The exception is where attorney fees are an element of statutory damages, in which case the reasonableness of a statutory attorney fee award is reviewed for abuse of discretion. *See Crandall v. City & County of Denver*, 238 P.3d 659, 661 (Colo. 2010).

10. *Planning Partners Int'l, LLC v. QED, Inc.*, 2013 CO 43, ¶ 12.

11. *Gessler*, 2014 CO 44, ¶ 7.

12. *See Bedor v. Johnson*, 2013 CO 4, ¶ 8.

13. *See Colo. Nat'l Bank v. Friedman*, 846 P.2d 159, 166-67 (Colo. 1993).

14. Scalia and Garner, *Making Your Case: The Art of Persuading Judges* 179 (Thomson West, 2008).

15. *Id.* at 151-53.

16. *Draper v. DeFrenchi-Gordineer*, 282 P.3d 489, 499 (Colo.App. 2011).

17. *See Bruce v. City of Colo. Springs*, 252 P.3d 30, 32 (Colo.App. 2010).

18. *See, e.g., Town of Erie v. Town of Frederick*, 251 P.3d 500, 506 (Colo. App. 2010); *O'Quinn v. Baca*, 250 P.3d 629, 631-32 (Colo.App. 2010).

19. *See Giampapa v. Am. Family Mut. Ins. Co.*, 12 P.3d 839, 842 (Colo. App. 2000) (awardable appellate costs "are limited to docket fees and the expense of producing necessary copies of the briefs filed with the appellate court"), *rev'd on other grounds*, 64 P.3d 230 (Colo. 2003).

20. *See Gattis v. McNutt*, 2013 COA 145, ¶ 45; *Akin v. Four Corners Encampment*, 179 P.3d 139, 147-48 (Colo.App. 2007).

21. *See generally* CJD 12-01.

22. *Adams v. Corr. Corp. of Am.*, 264 P.3d 640, 647 (Colo.App. 2011) (Terry, J., specially concurring). *See* CRS § 13-4-102.1.

23. *See, e.g., Hickman v. Catholic Health Initiatives*, 2013 COA 129, ¶ 1 (CRS § 12-36.5-203); *Mid Valley Real Estate Solutions V, LLC v. Hepworth-Pawlak Geotechnical, Inc.*, 2013 COA 119, ¶ 1 and n.1 (new common law duty of care of construction professional working on residential building to commercial entity holding title to property); *In re Parental Resp. of M.D.E.*, 2013 COA 13, ¶¶ 8-9 (CRS § 19-1-117); *Kowalchik v. Brohl*, 2012 COA 24, ¶ 1 (CRS § 39-22-522); *Shaw Constr., LLC v. United Builder Servs.*, 2012 COA 24, ¶¶ 14-15 (CRS § 13-80-104). Notably, *Mid Valley* involved interlocutory appeal of a denial of summary judgment, but the court of appeals considered appeals under CAR 4.2 exceptions to the rule that a denial of summary judgment was not susceptible to interlocutory appeal. *See Mid Valley* at ¶¶ 2 and 15 n.2. *See also Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1247 (Colo. 1996) (general rule).

24. *See Triple Crown at Observatory Vill. Ass'n v. Vill. Homes of Colo.*, 2013 COA 144, ¶¶ 15-20.

25. CAR 21(a)(1).

26. *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2014 CO 36, ¶ 22.

27. *Id.* at ¶ 22 (quoting *Leaffer v. Zarlengo*, 44 P.3d 1072, 1077 (Colo. 2002)).

28. *See Young v. Jefferson County Sheriff*, 2014 CO 1, ¶ 8.

29. Practitioners should note that employing CAR 4.2 and 21 for appealing from the pretrial orders of a trial court differs from seeking certification under CRCP 54(b), which applies where, in a situation involving multiple claims or multiple parties, the trial court

> direct[s] entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Absent certification under CRCP 54(b), litigation involving multiple claims or multiple parties "is treated as a single action which is not final and appealable until all of the issues in the litigation are adjudicated." *Kempter v. Hurd*, 713 P.2d 1274, 1278 (Colo. 1986). ■