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April/May 2013 Volume 62 Issue 3

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Features

Appellate Practice & Procedure

9 A Primer on Oral Argument
By Marc Kaplan, Esq. & Margaret McDonald, Esq.

15 Standards of Review 101
By Diane Vaksdal Smith, Esq.

21 Making Better Electronic Records for the Colorado Appellate Courts
By Blain Myhre, Esq.

Distracted Driving

26 Sad but Preventable - A Trial Lawyer's Quest to End Distracted Driving and Save Lives
By Kurt Zaner, Esq.

Appellate Practice & Procedure

27 Whether, What and When to Appeal
By Christina Gomez, Esq.

Alternative Dispute Resolution

31 Data Dumping and Other Problems in Mediation
By Joe Epstein, Esq.

Law Office Management

33 Avoid Making Your Landlord Happy with Your Lease
By Cheryl Stafford

Distracted Driving

41 Driving While on the Cell Phone
By Ira Leesfield, Esq., Richard I. Segal, Esq. & Kurt Zaner, Esq.

Departments

5 Officers & Editors
7 Letter from the President
35 Legal Staff
37 EAGLE Profile
38 EAGLE Donors
40 EAGLE Recruiting Stars
45 Trine's Tales
51 Who Are We?
52 Lobbyists Report
53 After Hours

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THANK YOU

A special thank you to CTLA members
who have provided End Distracted Driving presentations
or attended the training session on March 7.

We cannot succeed without your involvement.

MEMBERS WHO PROVIDED PRESENTATIONS

J. Robert Davis
Russell Hatten
Stuart Ollanik
Geoffrey Petis

MEMBERS WHO ATTENDED THE TRAINING SESSION

Roger Adams
Erika Alverson
Carrie Armknecht
Jerry Bowman
Nelson Boyle
Marc Harden
David Klibaner
Lain Lawrence
Porya Mansorian
Ben Norton
Tayo Okunade
Dale Pugh
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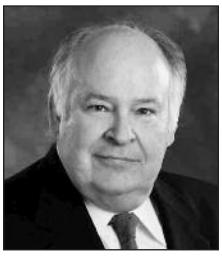
Saul Sarney
Daniel Sloane
Kurt Zaner

CTLA needs members to help make our communities
safer. These educational and inspiring talks
present the sobering statistics of our current safety crisis.
They share true stories of the costs of distracted driving
and offer simple steps that drivers can use immediately
to help themselves and others around
them End Distracted Driving.

**If you are interested in participating in the
End Distracted Driving Campaign, please contact
Nick or Parisa at CTLA at (303) 831-1192.**



Let's Try Some Cases

By James M. Croshal, Esq.

I love Stephen Colbert. And in honor of the comic icon, I want to give a tip of my hat and a wag of my finger.

I tip my hat to Larry Lee, Carrie Frank, Sonny Flowers and all of our members who work on our continuing legal education programs. There is no doubt that the continuing education programs that we have are of the highest quality. They tell us how to talk to clients, what information we need to start a case, how to deal with insurance companies, how to investigate claims, how to plead a case, how to conduct discovery, how conduct voir dire of a jury, give an opening statement, conduct direct and cross-examination, how to make an appellate record and how to write a brief. The quality of these programs is far better than it was twenty years ago and is comparable to what you would find at an AAJ convention. They are far superior to what the Colorado Bar Association or the "commercial" legal education companies offer.

I also want to tip my hat to Mari Bush, Alan Higbie and the case assistance committee. Their monthly roundtable provides litigation support to any member who wants it.

I also want to give a tip of my hat to the many members who put this education to use. Every day, I review Listserv and see stories of members who have gone to trial and won and lost cases. Unfortunately, it's the same lawyers whose names are listed again and again.

So I must give a wag of my finger to those members who have the opportunity to take the information and training that is readily available - both formally and informally - and refuse to go to trial.

I have heard Chief Justice Bender speak on several occasions where his theme has been "There Are Far too Few Civil Cases that Go to Trial." The statistic he gives is that only one per cent of all civil cases go to trial.

I know that there are many of our members who don't - and won't - try a case. They do themselves, their clients and our association a disservice. By not pushing the envelope, they allow insurance companies to set their own settlement values. By not being willing to step into the courtroom, they do a disservice to their client. As many of you know, my wife, before she was a judge, did insurance defense work. She will tell you that she, and the companies she represented, knew which lawyers would try cases and which lawyers would not, and those lawyers who did not try cases inevitably ended up getting less for their clients than those lawyers who were willing to go to court. The threat of trying a case and the reputation of having the willingness to go to trial does increase what your clients receive.

Not only is it to the benefit of our clients and our members for more of us to go to trial, but it is the ultimate continuing legal education class. At some point in their careers, Tom Brady and Peyton Manning had to stop playing quarterback in a video game and step onto a real playing field. And if they're like us, they probably learned more in the games they lost than those they won, but they were also able to take the knowledge they gained from those losses and convert it into victories.

I am not advocating that you should try every case. What I am advocating is that when the other side has not made an offer that would make a significant difference in your client's life, and you have a shot at making that difference in your client's life, go to trial. However, I shouldn't stand as an obstacle to my client's decision to go to court.

If you haven't tried a case before and you're worried, contact someone who has tried cases and ask him or her to either mentor you or co-try the case with you. If you're worried about the cost, perhaps you shouldn't be doing the case in the first place. You can also, after discussions with your client, try the case in a manner that makes sense, based on the probability of success, the amount of damages, and the coverage. I have tried cases where I have not taken the defendant's deposition, and gotten 3 to 4 times the last settlement offer. I've had cases where there are numerous treating physicians, and rather than call them all, I've had one doctor do a "plaintiff's IME" and then only had to incur the cost of one expert. I have, on an occasion or two, represented a plaintiff in small claims court to recover the damages on a personal injury case. Now that was a learning experience!

My suggestion to Larry Lee for next year's Blockbuster would be not only for our members to sign an affidavit pertaining to their practice, but require a commitment to try a case within the next 18 months.

Let's see if we can change the statistics with the Colorado State Judicial Department. Let's see if we can increase the heat on the insurance industry. Let's see if we can be trial lawyers. ▲▲▲

Look Who's Opening the Door at Convention

to New Ideas, Winning Strategies and Better Results.

Mike Papantonio, a senior partner of Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A., has received numerous multi-million dollar verdicts on behalf of victims of corporate malfeasance.

Papantonio serves as president of The National Trial Lawyers and frequently appears on MSNBC as a political commentator. He and Robert F. Kennedy, Jr., also host *Ring of Fire*, a nationally syndicated radio show.

Joshua Karton teaches litigators how to apply the personal communication skills and theater/film/television to the art of advocacy. He has designed and conducted trial advocacy programs for AAJ, the Gerry Spence Trial Lawyer's College, the JAG Corps, ABA, as well as maintaining a private practice of case consultation and witness preparation. Karton is the president of Communication Arts for the Professional.

Lisa Blue Baron has earned more than $350 million in winning verdicts and millions more in settlements for her clients. Over the past three decades, she has represented victims diagnosed with mesotheloma and other asbestos-related illnesses. Blue Baron also maintains a private consultancy as a forensic psychologist and is a nationally renowned expert in jury selection.

Make plans to hear these national speakers and look for more details about the exciting lineup of topics and presenters at the 2013 CTLA Convention.
August 1–3 in Snowmass Village at the NEW Westin Snowmass Resort
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A Primer on Oral Argument

By Marc Kaplan, Esq. and Margaret McDonald, Esq

When appealing a judgment or order, or defending an appeal, research and brief writing are paramount. Yet, there are cases where oral argument has turned a loss into a win. This article focuses on the procedure surrounding oral argument in Colorado courts, though much of its advice regarding preparation and delivery of argument applies to appellate advocacy generally. The article will discuss not only appeals in the Colorado Court of Appeals and Colorado Supreme Court, but also appeals from county court to district court, and petitions for magistrate review in the district court. This article is intended to be a reference for seasoned attorneys whose practice involves relatively little appellate work, and for new attorneys who may be handling an appeal for the first time.

United States Supreme Court Justice Ruth Bader Ginsburg notes, "As between briefing and argument, there is near-universal agreement among federal appellate judges that the brief is more important."[1] The fact that the Colorado Appellate Rules do not require oral argument suggests that Justice Ginsburg's statement may be true in Colorado courts, as well. Nevertheless, the primary importance of briefs to the appellate process does not negate the importance of oral argument. Judge John Webb of the Colorado Court of Appeals has stated, "Oral argument is an invaluable opportunity to engage the court in a dialogue about the case, drive home a few key points and address any concerns or confusion the court may have."[2] Judge Patricia Wald of the United States Court of Appeals for the District of Columbia has expressed her belief that oral argument can persuade a judge one way or another in close cases.[3] And empirical evidence suggests that judges, in fact, do change their minds after oral argument. Two judges of the United States Court of Appeals for the Eight Circuit tracked the effect of oral argument on their cases over a ten-month period, and found that oral argument changed their decisions as to which party would win in thirty-one and seventeen percent of the cases, respectively.[4] Because oral argument is not mandatory in Colorado courts, the question may arise whether to request oral argument. The authors believe the answer is "yes," unless cost is a concern or the opposition failed to brief their issues adequately. If the results in Colorado cases track even the lower percentage in the Eighth Circuit, a one-in-six chance of changing a judge's mind should persuade most attorneys that oral argument is worth the effort.

The Purpose of Oral Argument

The purpose of oral argument is to "help the judges decide the case."[5] After reading the briefs, judges may have identified issues they consider dispositive and others they consider either troubling or unclear. Oral argument gives counsel an opportunity to address the judges' concerns about all issues the judges wish to discuss. Judge Jacques Wiener, senior judge, United States Court of Appeals for the Fifth Circuit Court, described oral argument as an invitation from the judges. He advised attorneys, "You would not have been invited had we not anticipated that your participation in oral argument . . . would further crystallize the issues, enhance our understanding of the factual and legal details, subtleties and nuances of the case, and would answer any questions that remained unanswered after we read your briefs."[6]

Oral argument also gives counsel an opportunity to ensure that the judges have not missed key facts or the application of particular legal authority. Many times the nuances and import of a fact or argument get lost in the briefs. Counsel should view oral argument as an opportunity to gauge the court's understanding of the facts, law and arguments, to educate the court if necessary, and to persuade the court that justice demands a particular holding or outcome.

Requesting Oral Argument

Under the Colorado Rules for Magistrates, a party may petition the district court to review a magistrate's final order or judgment in proceedings where the parties' consent is not required.[7] The reviewing judge may conduct "further

proceedings" with respect to the petition.[8] The rules do not specify how the parties should request "other proceedings" or what form those proceedings will take.[9] However, counsel should consider requesting oral argument either in the petition or in a separate motion. In most cases, oral argument could both further the petition and augment the record for further proceedings in the district court, if any. Once the district court issues a decision regarding the petition for review, either party has the option to pursue an appeal to the Court of Appeals, where the transcript of the oral argument before the district court would become part of the record on appeal, if designated.[10] Thus, oral argument may provide a useful opportunity to supplement the record in support of the case.

Rule 411 of the Colorado Rules of County Court Civil Procedure permits parties to a civil action in county court to appeal judgments of the county court to the district court.[11] Rule 411 does not specify how parties should request oral argument, nor does it indicate the form that such argument should take. It only states, "when the briefs have been filed the matter shall stand at issue and shall be determined on the record and the briefs, with such oral argument as the court in its discretion may allow."[12] Counsel should consider requesting oral argument in a separate motion.

In the Court of Appeals and the Supreme Court, any party to the appeal may request oral argument and must do so in a document separate from the briefs.[13] The party must file the document requesting oral argument "no later than 7 days after the briefs are closed."[14] Both the Court of Appeals and the Supreme Court have discretion to order oral argument where neither party requested it and to deny oral argument even if a party properly requested them.[15]

Once the Court of Appeals or Supreme Court clerks have scheduled oral argument, the parties may motion to postpone argument to a later date but must do so "reasonably in advance of the date fixed for hearing."[16] The Supreme Court does not typically grant requests to postpone arguments because that court holds oral argument on a limited number of occasions, approximately seven times a year, 21 days total.[17]

Format of Oral Argument

In the Court of Appeals and Supreme Court, the appellant "is entitled to open and conclude the argument."[18] Colorado appellate courts do not permit appellants to reserve time for rebuttal in advance of the opening argument; therefore, if the appellant attorney wishes to set aside time for rebuttal, the attorney must conclude his or her opening argument before exhausting his or her allotted time.[19] If multiple parties have filed on one or both sides of an appeal, all appellants argue before the appellees.[20] The parties on each side decide among themselves in which order they will argue.[21]

The amount of time allotted for oral argument differs among the levels of appellate courts. With respect to district courts, Colorado Rule of County Court Civil Procedure 411 does not specify the format that oral argument should follow in a county court civil appeal.[22] Similarly, Rule 7 of the Colorado Rules for Magistrates does not explain the format that "other proceedings" should take.[23] Therefore, the length and format of argument presumably remain within the district court's discretion.

In the Court of Appeals, the presumed time for argument is fifteen minutes for each side, whereas in the Supreme Court, the presumed time for argument is thirty minutes for each side.[24] Either court may lengthen or shorten the argument time, and the courts may terminate argument "whenever in [the court's] judgment further argument is unnecessary."[25] Parties to appeals in either court may request additional time for argument in a motion filed within seven days after briefs are closed.[26] If there are multiple parties on each side of an appeal, those parties must decide among themselves how to divide the time allotted to their side.[27]

At both the Court of Appeals and Supreme Court, a system of lights on the podium assists attorneys with timekeeping.[28] A green light indicates that time has begun.[29] A yellow light indicates that two-thirds of the time remains.[30] Thus, in the Court of Appeals, a yellow light appears when there are five minutes remaining, and in the Supreme Court, a yellow light appears where there are ten minutes remaining.[31] A red light indicates, of course, that time has elapsed and counsel should promptly conclude the argument. Neither the Court of Appeals nor the Supreme Court allows the appellant to reserve time for rebuttal. Rather, counsel for the appellant must conclude argument early enough to allow time for rebuttal. As a general rule of thumb, the authors suggest that counsel plan to reserve the entire time after the yellow light for rebuttal. In many cases rebuttal will be so important that counsel should reserve half the entire time allotted.

Preparation for Oral Argument

Oral argument should not summarize the briefs, so counsel must decide which points from the briefs to argue.[32] Briefs typically raise more issues than the attorney can adequately discuss in the time allotted for oral argument. Furthermore, not all points weigh equally in the outcome of an appeal. Thus, counsel should identify the key argument that will dictate a win or loss on appeal and structure the oral argument around them. Until one knows how to win, and how

the other side can win, one cannot effectively argue the case. Counsel must put themselves in the shoes of the court, and identify the ultimate facts and law the judges need to rely upon in order to render their opinion. Often these will be the points that, when viewed objectively, the court could resolve in favor of either party.[33]

Before oral argument, judges and practitioners recommend carefully reviewing the record, the procedural details, all briefs filed in the matter, including amici briefs, and all legal authorities cited in the briefs.[34] Detailed knowledge of the record is particularly important during oral argument because the judges will likely be less familiar with the record than the attorneys.[35] The judges may become frustrated if counsel cannot guide them to appropriate portions of the record and counsel's credibility may suffer.[36] Counsel should demonstrate command of the legal authority by being prepared to repeat important statutory language verbatim and to give a summary of the facts, holding, and reasoning for important cases.[37] Finally, counsel should be ready with a short, precise statement of the remedy the party seeks to have at his or her "verbal fingertips."[38]

Because the judges will likely interrupt the parties' prepared arguments with at least some questions, counsel should anticipate what those questions would be and prepare terse, exact answers. Review of the briefs and record should generate a list of more likely questions. However, counsel should also spend some time considering several less-obvious types of questions, including questions aimed at ferreting out precedential and policy implications as well as questions designed to elicit concessions from counsel.

Judges should be concerned with resolving the individual dispute before them fairly, but the case may be one that creates new law or policy. Counsel should be prepared to explain the exact parameters of a desired rule of law in response to questions as to future applications of that rule.[39] Counsel also should plan to incorporate broader policy arguments supporting the requested relief and be prepared to address countervailing policy arguments.[40] Chief Justice Michael Bender of the Colorado Supreme Court notes, "[e]ffective advocates are often those who say, convincingly, 'This is good policy.'"[41] With respect to concessions, the former chief judge of the United States Court of Appeals for the Fourth Circuit, Karen J. Williams, warns that while failure to concede non-critical points can damage counsel's credibility, the court "may be leading you down the slippery slope to an absurd point."[42] Thus, before oral argument, counsel should nail down those concessions that he or she cannot make because they would result in a loss on appeal, those concessions that he or she can make if necessary because they do not determine a win or loss on appeal, and those concessions that counsel can make readily.[43]

Many of the articles and books on oral argument preparation exhort advocates to practice their arguments during one or more moot courts sessions.[44] The authors recognize that these types of sessions are not indicative of how the judges will rule, but recommend that counsel present their arguments to respective colleagues, or even hire a former judge to help counsel critique and hone the arguments. What appears to be a slam dunk to counsel may very well be a stumbling block for others. At the very least, the more counsel tests the arguments, the better-prepared counsel will be to address the court's concerns about those arguments.

Justice Ginsburg recommends that counsel visit the court where oral argument will occur to dispel any anxiety born from lack of familiarity.[45] Especially if counsel has not argued in a particular court, counsel should observe proceedings to learn how that particular court administers argument.

A Judge's Preparation for Oral Argument

For the most part, Colorado district court judges oversee busy dockets and can be responsible for well over a hundred active cases, especially in populous regions like Denver. At any moment, a district court judge also may be responsible for several appeals from county court in addition to his or her regular caseload. The degree to which a district court judge prepares for oral argument varies greatly from chamber to chamber because judges at the district court level do not adhere to uniform protocols concerning the administration of their chambers and because each chamber employs a unique division of labor between the judge and his staff. Some district court judges delegate initial review of pleadings and drafting of orders to their law clerks. Others perform much of the legal research and writing themselves and leave administrative tasks to their law clerks. Some chambers fall somewhere in between or somewhere else entirely. Depending on the chamber, the judge may have read the briefs and record herself, may have read a bench memorandum that the law clerk produced, or the judge may have discussed the issues in the briefs with the law clerk.

The judges of the Court of Appeals adhere to relatively uniform procedures for oral argument preparation.[46] Once an appeal becomes ripe for review, the clerk's office randomly assigns the case to a division consisting of a three-judge panel that serves for four months at a time.[47] Each panel "sits" every two weeks, usually on a Monday or Tuesday, during which time the panel

considers up to seven cases, and schedules approximately four of them for oral argument.[48] Before the sitting, the most senior judge on a panel assigns two or three cases to each member of the panel, who then prepare predisposition memoranda about their cases for consideration by the other panel members.[49] The judges prepare these predisposition memoranda in conjunction with their law clerks after reviewing the briefs, the decision below, and the record on appeal.[50] Sometimes a memorandum takes the form of a draft opinion.[51] Thus, every two weeks, each judge on the court of appeals typically must produce two to three predisposition memoranda and assimilate the information contained in four to five other predisposition memoranda prepared by the other judges, plus review the briefs, the decisions below, the records of those cases, and perform independent legal research if necessary.[52]

The State Judicial Branch website does not contain any information about how the justices of the Colorado Supreme Court prepare for oral argument. However, the authors gleaned the following information from some current and former staff members to justices of the Supreme Court. The clerk's office of the Colorado Supreme Court randomly assigns cases to the justices' chambers. Upon receipt of a petition for certiorari, the assigned Justice and his or her law clerks review the petition and relevant portions of the record, and then draft a memorandum advising whether to grant or deny the petition. The justice circulates the memo to all of the justices, who likewise vote on whether to grant or deny the petition. If the court grants a petition, the clerk's office sets a briefing schedule and schedules oral argument. Before oral argument, the law clerks prepare a compilation of important statutes, cases, and other authorities cited in the briefs for each case. The justices typically read this memo and the briefs in preparation for oral argument.

In light of this information, counsel cannot know the degree to which an appellate judge is familiar with his case and prepared to hear argument on it, from the district court to the supreme court level. If counsel is unprepared for an unprepared judge, oral argument will be of very little use. If counsel is unprepared for a prepared judge, counsel will at best irritate the court for having wasted it is time and at worst appear foolish and incompetent. In either case, counsel will have wasted the client's money and an opportunity to persuade the court. The bottom line is that counsel should prepare as if the judge or judges will be very well prepared and extremely familiar with the case.

Making the Argument

Pursuant to Rule 34 of the Colorado Appellate Rules, counsel "will not be permitted to read at length from briefs, records or authorities" and the judges expect counsel to engage in a dialogue, not give a speech.[53] Counsel will need the briefs and record if the court directs the attorneys to information on a particular page of an appeal document, but because the court rarely directly references the appellate materials, counsel can leave the briefs and record at counsel's table.[54]

Typically, oral argument consists of a short, descriptive introduction that maps the issues and presents the theme, the arguments themselves and a conclusion. Colorado Appellate Rule 34 requires that the opening argument include a "concise statement of the case."[55] A common introduction briefly conveys the identities of the lawyer and client, the procedural posture of the case, the remedy the client seeks and why she is seeking it, sufficient factual context, a "road map" of the arguments, and the theme of the case.[56] Upon arriving at the podium, counsel should refrain from speaking until she has the court's attention.[57] As part of the introduction, counsel typically greets the court and makes an entry of appearance. In the district court, a simple "Good morning/afternoon your honor" and a statement of counsel's name and client is appropriate, whereas the more formal greeting "May it please the Court" followed by counsel's name and client is appropriate in the Court of Appeals and Supreme Court.[58]

The beginning of an oral argument may be the only time where counsel can speak uninterrupted. Counsel should advocate and make an impression on the court rather than speak in neutral statements.[59] Judge Williams suggests that counsel use the first few minutes of argument to "succinctly present [the] issue and explain to the court the most important reason why [counsel] should prevail."[60] Judge Webb has explained that in some instances the judges may refrain from interrupting counsel if they know that counsel will address their concerns during the argument.[61] Appellee counsel's argument also begins with an introduction and road map. However, because the appellant counsel has likely provided sufficient context, appellee counsel should "strive to grab the courts' attention by showing that he or she is 'responsive' to the court's concerns."[62] For example, appellee's counsel might reference a judge's question or statement directed to appellant's counsel.

Rebuttal points should be few in number and should respond to specific issues raised by appellee's counsel or questions of the judges.[63] Counsel should not reserve important arguments for rebuttal or attempt to finish her main argument during rebuttal.[64] Counsel also should not argue trivial

points during rebuttal.[65] Counsel ultimately must decide what to argue on rebuttal as oral argument progresses.[66]

It is important to maintain eye contact with the judges and stop speaking immediately when any judge makes a noise or gesture indicating that she has a question.[67] Carefully listen to the question posed, and before responding, consider the purpose of the question.[68] A judge might ask a question to elicit a concession or, conversely, to strengthen counsel's arguments and thereby convince skeptical members of the court.[69] Some questions may be hostile, but some questions may be friendly and aimed at bolstering counsel's position.[70] If counsel does not understand the question, politely seek a clarification from the court.[71]

Counsel should respond to the court's question immediately, and should never delay answering to continue with the presentation.[72] The response should begin with a short answer, "no," "yes," "it depends," or I don't know," which will satisfy the court that counsel has indeed answered the question, followed by a longer explanation.[73] The response should also directly address the court's question. Evasive answers anger the court and cause counsel to lose credibility.[74] Counsel should address negative facts and law directly rather than try to avoid them.[75] When possible, counsel should take advantage of the questions by tying the response to counsel's key points.[76]

When given a hypothetical question, counsel should **never** answer with, "Your Honor, that is not this case."[77] Judges pose hypothetical questions to test the limits of proposed rule.[78] Justice Ginsburg explains, "[the judge] knows, of course, that her hypothetical is not this case, but she also knows the opinion she writes generally will affect more than this case. The precedent set may reach her hypothetical."[79] If, as previously suggested, counsel has thought through and articulated the parameters of the rule or outcome the party requests, counsel will be prepared to answer hypothetical questions meant to flesh out those parameters.[80]

If possible, counsel should bring the argument to an end with enough time to deliver a conclusion. Like the introduction, concluding remarks should be brief, but at least should state what counsel wants the court to do, such as overrule the decision below or deny a petition for magistrate review.[81] If the argument ends with several minutes remaining, counsel might consider offering a summary of her points as well, which should be no longer than a few sentences. Counsel should be prepared to offer both a longer and shorter version of the conclusion. Moreover, counsel should not be afraid to complete her argument and take a seat, even when there is time remaining.[82] If time runs out while counsel is in the middle of arguing a point or answering a question, counsel should first acknowledge that time has finished and then ask the court whether counsel may briefly finish the thought or answer.[83] If the court denies this request, counsel should finish stop speaking other than to thank the court for its time and attention.

Conclusion

Oral Argument is a privilege - an opportunity to discuss a case with the judge(s) who will decide the client's fate. If counsel believes in the merit of a case, counsel should be excited to engage in this discourse. The briefs may be impressive, but it is rare that the other sides' briefs are so bad that the decision is an easy one. Oral argument may be the difference between winning and losing. Who among us can take that risk?

Counsel should recognize that it is more difficult to fashion a persuasive argument if provided limited time. Counsel must thoroughly think through the case over and again, identifying the key points that lead to the result desired. Understanding where the court must go is essential if counsel is to articulate a persuasive argument, especially when questions can derail the planned presentation. Counsel must articulate those key points, and not go down roads which may be important to the client, but that do not lead to the remedy sought.

The best appellate lawyers are the ones who are prepared and know what they want, how to get it and how to help the judges get there with them. These lawyers know what remedies are permissible, and know what remedies are favored by the court. The best appellate lawyers care about their clients, their cases and the legal system. They argue with passion, intellect and integrity, as all great trial lawyers do. ▲▲▲

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Endnotes:

[1] Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 567-68 (1999).

[2] John R. Webb, *Appellate Practice: Better Writing, Briefing, and Argument*, *in* Colorado Appellate Handbook (Hon. Janice B. Davidson ed., 2013 ed. CLE in Colo.) app. B, at 537, 558.

[3] Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. App. Prac. & Process 7, 17 (1999).

[4] Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 Am. J. Trial Advoc. 571, 573-74 (summarizing Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A. J., Sept. 1984, at 68, 68-70.)

[5] Karen J. Williams, *Help Us Help You: A Fourth Circuit Primer On Effective Appellate Oral Arguments*, 50 S.C. L. Rev. 591, 591-92 (1999); Diana L. Terry, *Putting Your Best Foot Forward – Improving the Effectiveness of Appellate Advocacy*, Colo. Law., July 2001, at 111, 111.

[6] Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 Tul. L. Rev. 187, 199-200 (1995).

[7] Colo. R. Mag. 7(a)(2), (a)(5).

[8] *Id.* at 7(a)(8).

[9] *Id.*.

[10] *Id.* at 7(a)(11).

[11] Colo. R. Cnty. Ct. Civ. P. 411(a).

[12] *Id.* at 411(d).

[13] Colo. App. R. 34(b)(1)-(2).

[14] *Id.*

[15] *Id*.

[16] *Id.* at 34(a).

[17] G.J. Hobbs, Jr., "Protocols of the Colorado Supreme Court," *available at* www.courts.state.co.us/Courts/Supreme-Court/Protocols.cfm.

[18] Colo. App. R. 411(c).

[19] Colorado Appellate Handbook, *supra* note 2, app. B, at 471.

[20] *Id.* at 181.

[21] *Id.*

[22] Colo. App. R. 411.

[23] Colo. R. Mag. 9.

[24] Colo. App. R. 34(b)(1)-(2).

[25] *Id.*

[26] *Id.*

[27] Colo. Appellate Handbook,, *supra* n. 2, at 181.

[28] *Id.*

[29] *Id.* at 182.

[30] *Id.*

[31] *Id.*

[32] Mary Beth Beazley, A Practical Guide to Appellate Advocacy, 216 (2006).

[33] Williams, *supra* note 5, at 595.

[34] Beazley, *supra* note 32, at 217-18; Williams, *supra* note 5, at 596-97.

[35] Gabriel, *supra* note 4, at 575.

[36] Wald, *supra* note 3, at 20.

[37] Beazly, *supra* note 32, at 218.

[38] Gabriel, *supra* note 4, at 579.

[39] Gabriel, *supra* note 4, at 578; Williams, *supra* note 5, at 596.

[40] Williams, *supra* note 5, at 596.

[41] *A Visit From Colorado Supreme Court Justice Michael Bender*, CBA Litig. Council Newsl. (Colo. Bar Ass'n, Denver, Colo.) June 2011, at 3.

[42] Williams, *supra* note 5, at 599. *See also* Wald, *supra* note 3, at 19 ("Think hard about the predicates of judges' questions – your implicit acceptance of them is often more dangerous than any answers you will give to the main question.").

[43] Beazly, *supra* note 32, at 218.

[44] Gabriel, *supra* note 4, at 580; Andrew M. Low, *How to Lose an Appeal by Giving a Jury Argument to the Appellate Court*, Colo. Law., May 1992, at 913, 914; Terry, *supra* note 5, at 111; Williams, *supra* note 5, at 597.

[45] Ginsburg, *supra* note 1, at 568-69.

[46] James S. Casebolt, "Protocols", *available at* www.courts.state.co.us/Courts/Court_Of_Appeals/Protocols.cfm.

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] Colo. App. R. 34(c).

[54] Beazley, *supra* note 32, at 219.

[55] Colo. App. R. 34(c).

[56] Beazly, *supra* note 21, at 220-21.

[57] *Id.* at 221.

[58] *A Visit From Colorado Supreme* Court *Justice Michael Bender*, *supra* note 41, at 3 (Justice Bender indicating that "May It Please the Court" is the appropriate greeting in the Colorado Supreme Court.).

[59] Beazly, *supra* note 32, at 222.

[60] Williams, *supra* note 5, at 598.

[61] Webb, *supra* note 2, at 561.

[62] Beazly, *supra* note 32, at 224.

[63] Webb, *supra* note 1, at 564.

[64] Beazly, *supra* note 32, at 230.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 227.

[68] *Id.*

[69] *Id.*

[70] Fotios M. Burtzos, *Common Sense Rules for Oral Argument*, Colo. Law., Sept. 1997, at 71, 71.

[71] Beazly, *supra* note 32, at 228.

[72] Burtzos, *supra* note 70, at 71.

[73] Beazly, *supra* note 32, at 228; Williams, *supra* note 5, at 599.

[74] *Id.*

[75] Gabriel, *supra* note 4, at 587.

[76] Beazly, *supra* note 32, at 228.

[77] Ginsburg, *supra* note 1, at 569.

[78] Beazly, *supra* note 32, at 229.

[79] Ginsburg, *supra* note 1, at 569-70.

[80] Beazly, *supra* note 32, at 229.

[81] Beazly, *supra* note 32, at 226.

[82] Webb, *supra* note 2, at 564.

[83] *Id*.

Standards of Review 101

By Diane Vaksdal Smith, Esq.

In order to succeed on appeal, the appellate advocate must carry the burden of showing either the existence of or the lack of prejudicial error. In the federal courts, Rule 61 provides, in part "[u]nless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for … disturbing a judgment or order."[1] Likewise, Colorado's version of Rule 61 provides that no error is grounds for disturbing a judgment or order, "unless refusal to take such action appears to the court inconsistent with substantial justice."[2] According to the rules, prejudicial error requires a showing that the error or defect affected a party's substantial rights.[3] If the error did not affect a party's "substantial rights" then the rule deems the error harmless and not grounds for reversal.

Thus, appellant's counsel has the burden of demonstrating that any claimed error affected the party's substantial rights. While the burden of proof is not entirely clear, the Tenth Circuit has stated that absent some unusual countervailing circumstances, the appropriate burden in a civil case for determining reversible error is whether the substantial rights of the parties were "more probably than not" affected.[4] At least as to jury instructions, Colorado state courts have commented, "we will reverse only if convinced that the instruction constituted a manifest injustice that almost surely affected the outcome."[5]

In order to make the best case for showing the error prejudiced the appealing party's substantial rights, the first step is to properly frame the issue and identify what standard of review will apply. The identification of the proper standard of review is so important that under both federal and state appellate rules, the appellant must identify, among other things, the applicable standard of review and provide the reviewing court with authority supporting the application of the standard.[6] The appellee has the opportunity to provide a contrary statement if that party disagrees. Thus, identification of the standard of review is the first opportunity for the parties to frame the issues and maximize their respective chances of success on appeal.

The Standards of Review

There are three levels of appellate review, distinguished by the level of deference shown to the trial court's determination. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error) and matters of discretion (reviewable for 'abuse of discretion')."[7]

The latter two are sometimes conflated, but they have distinct meaning in the appellate process as well as a different effect in the appellate review process.

The standards of review appear to reflect recognition of the powers and responsibilities exercised by each level of court and the need to preserve the structural integrity of the court system. A trial court is uniquely qualified to make decisions when facts are in dispute, and it is appropriate to afford the trial court a high level of deference when engaged in the fact-finding process. Accordingly, the clearly erroneous standard applies to review of factual findings and provides the highest level of deference in the review process. Additionally, trial judges are responsible for managing the docket and conducting the day-to-day business of the court. The abuse of discretion standard derives from the trial court's exercise of discretion to make procedural determinations and affords an intermediate, though still high, level of deference. The de novo standard applies to the trial court's legal determinations. The latter requires no deference to the trial court's determinations because both the trial court and the appellate court are equally capable of interpreting the law.

The Clearly Erroneous Standard

It is often said that the appellate courts do not review the trial court's factual determinations, but that is not entirely accurate.[8] An appellate court will not engage in fact-finding, but it can, in the proper case, review the record to determine if there is sufficient evidence to support the particular finding using the clearly erroneous standard.[9] As the Supreme Court explained in *Page v. Clark*,[10]

> The sanctity of trial court findings is derived from the recognition that the trial judge's presence during the presentation of testimonial evidence provides an unparalleled opportunity to determine the credibility of witnesses and the weight to be afforded the evidence, which is before the court. . . .

"Clear error" occurs if the record contains insufficient evidence to support the factual finding. This standard does not permit an appellate court to reverse because it would have done something differently.[11] Rather, reversal occurs only, if after reviewing the evidence in the record, the appellate court is left with "the definite and firm conviction that a mistake has been made."[12]

However, in certain circumstances the reviewing court must independently review the trial court's findings of fact. For example, in defamation cases the reviewing court must conduct an independent review of the record to determine whether the evidence is sufficient to defeat First Amendment protections.[13] Also, an appellate court can independently review the record to determine if the trial court made enough findings of fact to permit meaningful appellate review.[14]

The Abuse of Discretion Standard

An appellate court reviews using the "abuse of discretion" standard when the decision falls within the discretionary power afforded the trial judge to decide what are often procedural matters. Under the Rules of Civil Procedure, whether federal or state, trial judges have discretion to make any number of day-to-day decisions. This can include whether to continue a hearing, whether to afford additional time to submit expert reports or whether to give a particular jury instruction. Thus, when the trial judge has the ability to select one option out of a range of alternatives, the appellate court will almost always review the resulting decision using the abuse of discretion standard.[15]

An abuse of discretion occurs if the trial court's ruling is manifestly arbitrary, unreasonable or unfair. The Tenth Circuit has stated "we will reverse a district court's determination only if the court exceeded the bounds of the rationally available choices given the facts and the applicable law in the case at hand."[16] In practice it may be difficult to determine whether (and prove that) this standard has been met. However, in general an abuse of discretion occurs if the trial court acts without competent evidence to support the decision.[17] For example, the trial court commits an abuse of discretion by striking late-disclosed experts without any evidence of prejudice by the party seeking the exclusion of the expert testimony.[18] A trial court also commits an abuse of discretion if it bases its factual finding on an incorrect legal standard.[19]

The De Novo Standard

The final level of review, de novo, applies when the question is one of law. Courts will perform a de novo review when the facts are not in dispute and the only issue before the court, whether trial or appellate, involves a legal determination. Perhaps the most common examples of de novo review are statutory interpretation and summary judgment. However, this standard also applies to the interpretation of procedural rules[20] or written documents.[21]

This standard is the most powerful for the appellant's advocate, because the appellate court does not defer in any way to the legal determinations of the trial court. If possible, the appellant should find a way to frame the issues on appeal to permit de novo review.

Mixed Questions of Fact and Law

Sometimes the resolution of an issue on appeal requires application of more than one of the three standards of review identified above. This occurs when an appellate court reviews a mixed question of fact and law. A mixed question exists when a combination of judicial functions occurs: that is, the issue under review involves a determination of the facts and application of legal principles to reach the ultimate outcome. When faced with a mixed question, the appellate practitioner should first determine whether the issues can be separated. If so, more than one standard may apply once the issues are broken down into their separate parts. For example, in *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*,[22] the court applied all three standards while reviewing the water court's determination regarding certain previously decreed water rights. The court reviewed the water court's factual findings using the clearly erroneous standard, reviewed the trial court's decisions about the admissibility of evidence of the use of water by applying the abuse of discretion standard and reviewed the trial court's decision regarding the interpretation of prior water decrees using the de novo standard.[23]

If the mixed question of fact and law cannot be readily broken down into

distinct issues, then the appellate practitioner needs to determine which issue predominates – the facts or the law.[24] Then apply either the clearly erroneous or the de novo standard. Some of the factors to consider whether to apply a deferential (clearly erroneous) or no deference (de novo) standard are as follows:

- Is the issue one of fact or law in the first instance?
- Who is in the best position to answer the question presented?
- Is the issue one of general application or unique factual determination?
- Is the issue important to the judicial system from a structural standpoint?
- What impact will a decision have from a societal standpoint?

The greater the impact the issue has at the societal or structural level, the more likely a de novo standard will apply. The more individualized impact, the more likely the clearly erroneous standard will apply.

Specific Examples Applying the Standards of Review

The following examples focus primarily on the application of standards of review in civil cases, where counsel has properly preserved the issue of error. The simplest rule of thumb to determine what standard applies is as follows: if the question depends on the resolution of facts, a deferential standard of review will apply unless appellate counsel can reframe the issue as one of law.

Review of Orders Regarding Rule 12 Motions to Dismiss

When a trial court grants a motion to dismiss for failure to state a claim under Rule 12(b), the court is deciding a question of law. That is, the court treats the well-pleaded facts of the complaint as true and determines whether the allegations state a legal claim for relief, so the appellate court reviews the ultimate decision de novo. Under these circumstances, the appellate court is as capable of determining whether the complaint states a claim as is the trial court, and so need not defer.

However, if a litigant challenges jurisdiction pursuant to Rule 12(b)(1) or (2), and the court holds an evidentiary hearing for purposes of determining the factual foundation for the assertion of jurisdiction, this usually presents a mixed question of fact and law. Accordingly, an appellate court will review any factual findings using the clearly erroneous standard.[25] However, all legal conclusions are subject to de novo review.[26]

"Judgment on the pleadings is appropriate when a case's material facts are not in dispute, and 'judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice.'"[27] Like decisions under Rule 12(b)(5) and Rule 56, a judgment on

the pleadings is subject to de novo review because the determination of the ruling involves only a question of law.[28]

Review of Orders Resolving Rule 15 Motions to Amend

A trial court's decision to grant or deny a motion to amend pursuant to Rule 15 is subject to an abuse of discretion standard.[29] In deciding whether to grant a Rule 15 motion, the trial court engages in fact finding as part of the determination of whether the movant has shown good cause to permit the amendment, subject to considerations of justice.[30] For example, "[a] trial court may properly deny a motion to amend because of delay, bad faith, undue expense or other demonstrable prejudice."[31]

Review of Orders Resolving Motions for Summary Judgment

Just as with Rule 12 motions for failure to state a claim, a ruling granting summary judgment pursuant to Rule 56 is reviewed de novo. Because the trial court cannot grant the motion if the material facts are in dispute, the ruling is necessarily only one of law. Although an appellant cannot appeal an order denying a motion for summary judgment,[32] appeal of an order denying summary judgment on qualified immunity for a public employee may be appealed on an interlocutory basis if the trial court resolves the motion solely on legal issues.[33]

Review of Orders Regarding Discovery Matters

Decisions on discovery matters are within the trial court's discretion and subject to review using the abuse of discretion standard.[34] The use of this standard hearkens back to the role played by the trial court in resolving discovery matters: the trial court is charged with managing the business of the trial court, including the preparation of cases for trial, and decisions involving those matters receive a high degree of deference.

Review of Orders Including Statutory Construction

The construction of a statute involves a question of law that an appellate court reviews de novo.[35] When the appellate court reviews a determination of law, it affords no deference to the trial court.

Review of Orders Resolving Motions for Continuances or Regarding Scheduling

As with matters involving discovery, the trial court has the discretion, subject to considerations of justice, to control its own docket. Thus, the court reviews decisions regarding scheduling and timing using the abuse of discretion standard.

Review of Evidentiary Rulings

The court reviews rulings regarding the admissibility or exclusion of evidence under the "abuse of discretion standard.[36] Thus, when a trial court permits an expert to testify regarding a specific matter, then the decision is subject to review using the abuse of discretion standard.[37]

Review of Orders Resolving Motions for Directed Verdict

When a party makes a motion for directed verdict, that party essentially admits the truth of the facts presented during the trial. All facts are taken in the light most favorable to the non-moving party and the court applies the law to determine whether to grant the motion. Thus, a ruling on a motion for directed verdict is reviewed de novo.[38]

Review of Orders Regarding Jury Instructions

An appellate court will review a trial court's decision to give or not give a particular jury instruction for an abuse of discretion and may order a new trial "when the record shows that the jury might have answered differently if a proper instruction had been given." [39]

Review of Orders Challenging Trial Court's Findings of Fact

When a trial judge sits as the finder of fact, in place of a jury, then the trial court's factual determinations based on disputed evidence are reviewed using the clearly erroneous standard.[40] However, as with any other situation where the facts are undisputed, a reviewing court will not defer to the trial court's legal determination, but will instead conduct a de novo review and make an independent judgment on the merits.[41]

Review of Jury Verdicts

Depending on the nature of the challenge to a jury verdict, any one of the three standards of review may apply. If a party challenges the verdict directly, the clearly erroneous standard applies. The court will uphold the verdict if competent evidence supports it.[42] However, if the appellant challenges the verdict claiming that it is the result of the jury's consideration of extraneous prejudicial information, the trial court's determination presents a mixed question of law and fact. "We apply an abuse of discretion standard to the court's findings of fact, but we review the court's conclusions of law de novo."[43]

Review of Orders Regarding Punitive Damages Award

The Court of Appeals applies the de novo standard to determine whether the evidence was sufficient to justify an award of exemplary damages.[44] It reviews a trial court's decision to increase an award of exemplary damages under the statute using the abuse of discretion standard, because it depends upon factual determinations based on evidence in the record.[45]

Review of Decisions Regarding Post-Trial Motions under Rule 59

A court's decision on a motion for new trial is reviewed for abuse of discretion, because the trial court is uniquely qualified to determine whether a new trial or amended judgment is warranted, having seen all the testimony and having the opportunity to observe the credibility of the witnesses and the interactions of counsel.[46] However, the trial court reviews a decision de novo to grant a judgment notwithstanding the verdict, because it can grant a JNOV only if the evidence is such that reasonable persons could not reach the same conclusion as the jury.[47]

Review of Decisions Regarding Post-Trial Motions under Rule 60

A decision under Rule 60(b)(3), which allows a court to grant a party relief from a void judgment, is reviewed de novo.[48] Generally speaking, a judgment is void if the court lacked personal jurisdiction over the parties or subject matter jurisdiction over the cause of action, or if it was entered in violation of a party's procedural due process rights to notice or to be heard. In contrast, the grant or denial of a C.R.C.P. 60(b)(5) motion, which allows a trial court to set aside a judgment for any otherwise unspecified reason justifying relief, lies within the sound discretion of the trial court and will be reviewed for abuse of that discretion.[49]

Review of Awards of Attorney's Fees and Costs

A trial court has discretion to determine reasonable attorney fees and costs, and review of such awards uses an abuse of discretion standard.[50] However, review of the entitlement to receive an award of attorneys' fees is question of law that is reviewed de novo. Likewise, the court also uses an abuse of discretion standard to review a determination of who is the "prevailing party" for purposes of a post-trial cost award.[51]

Review of Decisions in Disciplinary Proceedings

In disciplinary proceedings, the Hearing Board is the finder of fact and has the authority to make determinations regarding the credibility of witnesses and resolve conflicts in evidence. The Supreme Court will only reverse those findings if they are clearly erroneous.[52] "While this court has plenary authority over matters of attorney discipline, we have established standards of review and will disturb the Hearing Board's factual findings only if they are clearly erroneous or not supported by substantial evidence in the record." However, the Court reviews the hearing board's conclusions of law de novo.[53]

Plain Error

In civil cases, review using the plain error rule is exceedingly rare.[54] Unlike criminal law, where the Rule of Criminal Procedure 52(a) allows review for plain error, civil law requires trial counsel to preserve an issue for appeal by making an objection on the record. However, with respect to jury instructions, plain error review in a civil case is possible. An appellate court may review a claimed jury instruction error for plain error where the appellant's counsel failed to make a proper objection, but such review is limited to unusual or special cases where "correcting the error is necessary to avert unequivocal and manifest injustice."[55] "To meet this stringent standard, a party must at least demonstrate that the error 'almost surely affected the outcome of the case.'"[56]

Conclusion

When preparing an appeal, the appellate practitioner cannot simply recite a standard of appeal and argue from there. Instead, counsel must frame the issue on appeal in light of the most favorable standard of review for that particular party's purpose. Appellant's counsel must show prejudicial error that affected the appellant's substantial rights. Where possible, the appellant's counsel should try to frame the issues as questions of law to permit de novo review. The appellee's task is to demonstrate that no prejudicial error has occurred and in doing so, the appellee's best friend is the "harmless error" standard. Regardless of which side counsel appears for, a thorough understanding of the standards of review is necessary in order for appellate counsel to represent their client effectively.

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Endnotes:

[1] Fed. R. Civ. P. 61.

[2] C.R.C.P. 61.

[3] *Cf*. Fed. R. Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected").

[4] *United States Indus. v. Touche Ross & Co.*, 854 F.2d 1223, 1253 (10th Cir. 1988), *impliedly overruled on other grounds by Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996).

[5] *Holley v. Huang*, 284 P.3d 81, 86 (Colo. App. 2011).

[6] F.R.A.P. 28(a)(8)(B); C.A.R. 28(k).

[7] *Pierce v. Underwood*, 487 U.S. 552, 558 (U.S. 1988).

[8] *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380 (Colo. 1996).

[9] Fed. R. Civ. P. 52(a)(6); C.R.C.P. 52.

[10] *Page v. Clark*, 592 P.2d 792, 796 (1979).

[11] *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

[12] *Quintana v. City of Westminster*, 56 P.3d 1193, 1196 (Colo. App. 2002), *citing United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

[13] *Air Wis. Airlines Corp. v. Hoeper*, 2012 CO 19, ¶ 43 (Colo. 2012).

[14] *Chase v. Colo. Oil & Gas Conserv. Comm'n., 2012 COA 94, ¶39 (Colo. App. 2012).*

[15] *Buckmiller v. Safeway Stores, Inc.,* 727 P.2d 1112, 1115 (Colo. 1986).

[16] *Big Sky Network Can., Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183, 1186 (10th Cir. 2008).

[17] *Bedor v. Johnson*, 2013 CO 4, ¶ 35 (Colo. 2013) (trial court abused its discretion because competent evidence did not support giving the sudden emergency instruction).

[18] *Warden v. Exempla, Inc*., 2012 CO 74, ¶ 35 (Colo. 2012).

[19] *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, ¶ 7 (Colo. 2012).

[20] *Northstar Project Mgmt. v. DLR Group, Inc*., 2013 CO 12, ¶ 12 (Colo. 2013).

[21] *Mt. States Mut. Cas. Co. v. Roinestad*, 2013 CO 14, ¶ 13 (Colo. 2013).

[22] *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclam. Dist*., 256 P.3d 645, 660 (Colo. 2011).

[23] *Id*. at 660.

[24] *Armstrong v. Comm'r,* 15 F.3d 970, 973 (10th Cir. 1986).

[25] *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993).

[26] *Union Pac. R.R. v. Equitas Ltd.*, 987 P.2d 954, 957 (Colo. App. 1999).

[27] *Sterenbuch v. Goss*, 266 P.3d 428, 432 (Colo. App. 2011).

[28] *In re Est. of Johnson*, 2012 COA 209, ¶ 18 (Colo. App. 2012).

[29] *Stamp v. Vail Corp*., 172 P.3d 437, 447 (Colo. 2007).

[30] C.R.C.P. 1(a) (the rules of procedure "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action"); Fed. R. Civ. P. 1.

[31] *Benton v. Adams*, 56 P.3d 81, 84 (Colo. 2002).

[32] *Copar Pumice Co., Inc. v. Morris*, 639 F.3d 1025, 1031 (10th Cir. 2011), *quoting Haberman v. Hartford Ins. Group*, 443 F.3d 1257, 1264 (10th Cir. 2006).

[33] *Furlong v. Gardner*, 956 P.2d 545, 549 (Colo. 1998); *Monarque v. Garcia*, 2012 U.S. App. LEXIS 25428 (10th Cir. Dec. 12, 2012) (court lacks jurisdiction to review trial court's denial of summary judgment based on disputed facts).

[34] *J.P. v. Dist. Court*, 873 P.2d 745, 751-52 (Colo. 1994).

[35] *State ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161, 164 (Colo. 2001).

[36] *People v. Shrek*, 22 P.3d 68, 73 (Colo. 2001).

[37] *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 590 (Colo. 2004).

[38] *Thyssenkrupp Safway, Inc. v. Hyland Hills Parks & Rec. Dist*., 271 P.3d 587, 590 (Colo. App. 2011).

[39] *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375, 1378 (Colo. App. 1996).

[40] *Amos v. Aspen Alps 123, LLC*, 2012 CO 46, ¶ 25 (Colo. 2012).

[41] *Hinojos v. Lohmann*, 182 P.3d 692, 694-95 (Colo. App. 2008).

[42] *P.F.P. Family Holdings, L.P. v. Stan Lee Media, Inc.*, 252 P.3d 1, 3 (Colo. App. 2010).

[43] *Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011).

[44] *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1092 (Colo. 2011).

[45] *Gen. Steel Domestic Sales, LLC v. Bacheller*, 2012 CO 68 M, ¶ 41 (Colo. 2012); *Harvey v. Farmers Ins. Exch*., 983 P.2d 34, 40 (Colo. App. 1998).

[46] *Schuessler v. Wolter*, 2012 COA 86, P47 (Colo. App. 2012).

[47] *W. Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570, 578 (Colo. App. 2006).

[48] *L & R Exploration Venture v. Grynberg*, 271 P.3d 530, 533 (Colo. App. 2011).

[49] *State Farm Mut. Auto. Ins. Co. v. McMillan*, 925 P.2d 785, 790 (Colo. 1996).

[50] *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230 (Colo. App. 2006).

[51] *Remote Switch Sys., Inc. v. Delangis*, 126 P.3d 269, 274 (Colo. App. 2005).

[52] *In re Haines*, 177 P.3d 1239, 1244 (Colo. 2008).

[53] *Id.*, at 1245.

[54] *Wycoff v. Grace Cmty. Church of the Assemblies of God*, 251 P.3d 1260, 1269 (Colo. App. 2010).

[55] *Vanderpool v. Loftness*, 2012 COA 115M, ¶ 34 (Colo. App. 2012).

[56] *Robinson v. City & County of Denver*, 30 P.3d 677, 685 (Colo. App. 2000).

Making Better Electronic Records for the Colorado Appellate Courts

By Blain Myhre, Esq.

Having a good, complete record is vital to succeeding on appeal. Without a proper record, counsel loses otherwise good appellate issues, the court lacks the tools necessary to do its job, and the rights of the parties suffer. Responsibility for ensuring creation of the record on appeal in the Colorado state appellate courts rests with counsel for the appellant. Thus, appellant's counsel must make sure the record gets put together correctly. With the widespread use of e-filing and electronic records, it is more important than ever to ensure that a complete and useful record goes up to the court of appeals. Electronic records are a powerful and positive development that can improve the quality of appellate records. Yet, electronic records are not without their problems. This article points out some problems with electronic records and suggests ways for counsel and the courts to improve their quality.

The need for a complete record

Why is a complete record on appeal so important? The Colorado Supreme Court has emphasized, "It is axiomatic that a judgment entered by a court of general jurisdiction is presumed to be correct. A litigant suffering an adverse judgment has the burden of overcoming this presumption."[1] Addressing a deficient record, the court said, "The record presented to use for review contains nothing from which it is made to appear that the trial court erred. We must look to the record alone to determine whether the trial court acted properly in the premises."[2] Since the scope of the appellate court's review rests on the contents of the appellate record,[3] a complete record is essential. As electronic records replace paper records, counsel and the courts must ensure that electronic records are as good and complete as they can be.

The record on appeal consist of three categories of materials—pleadings (which include filings by counsel, the court's orders, verdict forms, jury instructions, and the like), transcripts, and exhibits (whether admitted or not). In creating the traditional record on appeal, pleadings ordinarily present fewer problems than transcripts or exhibits.

Transcripts, however, can present problems. There is the basic question of which transcripts counsel must acquire. Counsel must be sure to designate and pay for all transcripts and ensure that those transcripts make it into the record. But there are other considerations that counsel needs to address in the trial court. Despite technological advances, digital recorders are no substitute for live court reporters. Counsel usually will not discover problems created by a digital recorder until they are too late to fix. Relying on a digital recorder, rather than a court reporter, risks important in-court statements going unrecorded and, in the worst case, risks having no contemporaneous recording made at all. I have seen transcripts prepared from digital recordings where large sections of transcript are marked "inaudible" and where bench conferences—where legal error can easily occur—go completely unrecorded. I have also seen entire hearings go unrecorded due to court errors in using the equipment or due to equipment failures. Court reporters eliminate those risks by placing a skilled person in court to create the contemporaneous record and to address any problems as they arise, not after the fact. Thus, trial counsel should get a court reporter if at all feasible. Court reporters help ensure that the record contains the best and most complete transcripts possible.

Exhibits often present the most problems in compiling the record on appeal. Exhibits go missing. The court returns then to counsel or shuffles them elsewhere. (I have had to retrieve exhibits from a police evidence room.) Sometimes exhibits that a party offered but the court refused do not make it into the record. With the increased use of e-filing, many courts now require exhibits to be uploaded, which is a positive development, but one that is not without its own problems, as discussed below. Putting together electronic

records presents most of the same problems as traditional records, but with the power of the electronic record comes new problems that counsel and the courts must address.

The Electronic Record: Problems and Potential Remedies

Attorneys who regularly practice in the Colorado Court of Appeals are used to receiving a CD from the court that contains the record on appeal. That record usually consists of a single PDF file, of thousands of pages, with bookmarks to assist in navigating the file. While electronic records are a welcomed change from the boxes of pleading files and transcript volumes of paper records, there is still room for improvement.

Documents should be text searchable

Too many documents in electronic records are scanned documents, which are not text-searchable. Text documents in the electronic record should be in text-searchable (native) PDF format. Colorado district courts should require counsel to file all pleadings in that format, rather than submitting scanned documents. Printing documents to PDF rather than printing out hardcopies and scanning them in should be mandatory.

The Tenth Circuit requires submission of briefs and other documents in native PDF format precisely because such documents are text searchable.[4] Similarly, the court of appeals requires electronic briefs to be text searchable.[5] So there is no reason that documents in the electronic record should be scanned when the text-searchable form is readily available. When dealing with a 5000-page record on appeal, the ability to search text is critical.

Currently, however, district courts permit scanned documents to be e-filed. Taking a pleading that is in pure digital format, printing it out on paper, then scanning the document to create a PDF makes no sense, wastes paper and creates an inferior appellate record. The courts should uniformly ban attorneys from e-filing scanned documents (except for exhibits for which no native PDF exists, and counsel cannot generate one). District court appeals clerks should produce records that, to the greatest extent possible, are text-searchable. Since creating the record begins from the inception of the case in district court, courts should require text-searchable documents from the outset of a case. Cleaning up the problem of scanned documents after the fact (through OCR or by requiring counsel to re-upload filings in native form, for example), is impractical, inefficient and unfairly burdensome to counsel and the appeals clerk charged with putting the record together. Thus, to take full advantage of the power and convenience of e-filing and electronic records, all electronic filings should be in native PDF absent extraordinary circumstances. To be sure, attorneys must file scanned documents when no native form exists or because the document is not a text document, but all pleadings can and should be in text-searchable format. The Tenth Circuit requires all pleadings to be in native PDF format because that allows the judges and clerks to perform text searches, and thereby do their jobs more efficiently.[6] With the ready availability of "print to PDF" features on word-processing software, or PDF-writing software (such as CutePDF™), attorneys have no excuse for filing scanned PDF pleadings.

Besides pleadings, transcripts should also be in text-searchable format. Except in the rare case of old transcripts where no electronic version exists, there is no reason that a scanned transcript should be part of a record. Yet, I have seen records on appeal in the last few years where clerks have scanned in transcripts (evident not only because the transcript was not text-searchable but also because, in some cases, the holes for binding the paper transcripts were visible in the scanned document appearing in the electronic record). Not only does scanning transcripts take more time than simply uploading or copying a digital transcript file, it also creates an inferior record. Thus, when having transcripts produced for a record, appellant's counsel should ensure that the clerk includes the text-searchable version of the transcripts. Searchable transcripts make it much easier and more efficient for counsel and the courts to use the transcripts effectively.

Electronic Exhibits must be of good quality and clarity

An electronic record is only as good as the quality of the documents it contains. Exhibits present particular difficulties, especially if they are visual exhibits (photographs, diagrams, maps). As a result of the 1.5 megabyte file size limit imposed by File and Serve (and even ICCES's 3.0 MB limit), high-resolution color images may be too large to upload. Instead, I have seen such images altered, by changing them from color to black and white and by reducing their resolution, in order to fit within the file-size limits. Many of these altered electronic images are worthless for appellate purposes, and they do not accurately reflect the exhibit that counsel actually used at trial. Thus, the courts must make allowances for the inclusion of the original documents in the electronic record. A key color photograph admitted at trial as an exhibit should go to the court of appeals in the same form as the trial court admitted it. Currently, in cases where electronically uploaded exhibits are not of the same quality as the trial exhibits, appellant's counsel

may have to supplement the record with the actual hard-copy photographs, or CDs or other digital media containing the original high-resolution files.

For the courts, this issue is one to address in order to permit electronic filing of exhibits (and any other documents) of sufficient quality to ensure their usefulness on appeal. Without appropriate attention and care, the clear color hard-copy photograph admitted at trial can become a grainy black-and-white mess in the electronic record. Therefore, electronic filing should allow for high-resolution images and other oversized files to be part of the record on appeal without the need for counsel to supplement the record.

Trial courts should insist that digital uploads be of sufficient quality to represent the paper exhibit accurately. If e-filing file-size limitations will not allow the file to be uploaded "as is," then the court should permit counsel to submit such "oversize" files on CD, DVD, flash drive, or other appropriate digital medium. Those storage devices can then go directly to the court of appeals as part of the record when the district court transmits it. (Kudos to judges who currently require filing exhibits on CD or DVD, which permits submission of the original high-resolution images without limiting the file size.)

Because both File and Serve and ICCES limit the size of files that attorneys can e-file, counsel must ensure that any electronically-uploaded exhibits do not suffer loss of resolution and clarity. If file-size restrictions make it impossible to upload an exhibit of sufficient quality, courts and counsel must adopt procedures allowing alternative arrangements to put good quality electronic exhibits in the record. It is laudable that many district judges now require counsel to upload exhibits electronically. But unless counsel takes steps to ensure that those exhibits are accurate, good quality representations of the item that constituted the original exhibit, then the benefit of e-filing is lost. In particular, graphics (photos, maps, diagrams) can cause problems. Color photos or diagrams can wind up in black and white in the record. Their quality can suffer by diminished resolution as counsel reduces the file size in order to comply with the e-filing file-size restrictions. Sometimes counsel uploads oversized documents, such as maps, in pieces, and sometimes they do not upload all the pieces. As long as low file-size limits exist for e-filing, alternative procedures must be available to ensure that the exhibits transmitted to the appellate court are equivalent in both clarity and quality as the exhibits used in the trial court. Requiring counsel to provide exhibits on CD, DVD or flash drive is great so long as counsel gives the court the clear and accurate exhibit. This approach preserves the exhibits in a readily accessible digital format, making it easier to produce a record that contains all the exhibits in an appropriate form. Regardless of how they do it, though, it is crucial that the trial courts preserve the exhibits in their best electronic form.

Another advantage of providing exhibits on CD, DVD or flash drive, is that it helps avoid the problem of exhibits being lost, misplaced, or scattered to the wind. Due to perceived or actual space limitations, district courts will often return exhibits to counsel for counsel to hold. This practice, while understandable, should stop. The court, not counsel, should be the custodian of the exhibits until the ultimate conclusion of the case—i.e., after all appellate and trial proceedings are at an end and there is nothing left for the parties or the court to do. All exhibits used at trial (whether admitted or not) should remain housed in the court. Ideally, a court should maintain a central records room where all records are stored and maintained. That way, the exhibits are where they should be in the event a case goes up on appeal. I have had the frustration of having to track down exhibits that the court returned to counsel (a particular difficulty when I was not trial counsel), sent back to police evidence rooms or simply lost through carelessness. While mistakes will occur, maintaining a central records room with a uniform procedure to maintain and hold exhibits, will minimize them. And requiring submission of exhibits on CD, DVD or

flash drive will reduce the incidence of lost exhibits, as easily reproducible digital copies will be available.

Bookmarks and indexing of the electronic record

Assuming counsel and the district court have created the basic elements of a good electronic record in the district court proceedings, the task then falls on the court clerk to create a well-organized electronic record. Currently, the court of appeals gives appellate counsel a CD containing the record on appeal, which usually consists of a single PDF file. Since the single PDF file may run in excess of 5000 pages, proper indexing and bookmarking of the PDF file is vital.

The clerks should organize bookmarks within the PDF so that counsel and the court can easily locate any document. While most clerks do a good job of creating bookmarks in a way that is useful for counsel and the appellate court, some bookmarks are better than others. For some bookmarks, it is not always readily apparent to what the bookmarks refer. One useful improvement would be to create a standard, uniform procedure for bookmarking that requires identifying a document by its title and filing date and places documents in logical sequence. Ideally, clerks should separate pleadings, transcripts and exhibits, preferably in separate PDF files. Pleadings should appear in chronological order based on filing date. Transcripts should appear in chronological order based on hearing date. Exhibits should be separated by proceeding (e.g., pretrial exhibits should be separate from trial exhibits) and then arranged in numerical and alphabetical order. Uniform organization and bookmarking will enhance navigation and thereby improve both the utility of the electronic record and efficiency for the court and counsel.

Recognizing that there will still have to be some scanned documents in the record, courts should require counsel to "tag" those scanned documents to make them easier to locate. For example, if an exhibit is a scanned photograph, it is not searchable. But adding a text-searchable cover page to the exhibit would assist in making the photograph easier to find. That is, a text-searchable native PDF page that says "Defendant's Exhibit F," would permit counsel and the court to locate the exhibit by searching for "Exhibit F." Such "tags" would enhance the utility of the electronic record. Courts should require counsel to use such searchable tags and a uniform tagging system, so that everyone knows how to tag and, therefore, how to search for scanned documents.

To the extent that file-size limits for e-filing remain, the courts should adopt file-size limits that are more reasonable. With the arrival of ICCES, the limit has increased from 1.5 MB (for File and Serve) to 3.0 MB. This is certainly an improvement over the File and Serve limit, but it is still a far cry from the 10 MB limit in the Tenth Circuit. To the extent a limit is necessary at all, courts should adopt standard procedures to permit filing "oversized" electronic files with the court rather than having documents reduced to an inferior quality simply to comply with the file-size limit. Besides the easy alternative of allow filing by CD, DVD, or flash-drive, the court could permit transmission of larger files through alternate transfer means such as Dropbox™, Yousendit®, cloud-based file sharing, or via secure FTP (File Transfer Protocol). In any event, a file-size restriction, whether arbitrary or necessary, should not hinder the creation of an appropriate electronic record on appeal.

And when electronic means fail to or cannot create the record necessary, the hard-copy of paper documents should be included in the record on appeal as a matter of course, rather than only if counsel moves to supplement the record. Common examples of documents that may not be capable of being included in the electronic record include oversized maps and diagrams that cannot be appropriately scaled down without losing their clarity and quality.

Conclusion

The problems with electronic records are not particularly difficult to solve. Implementing uniform procedures focused on creating the most useful and versatile digital record throughout the district court proceedings will go a long way to creating a good and complete record on appeal. But counsel and the courts need to commit to making such changes—changes that will greatly benefit the bench and the bar.

While it is not possible to predict the future, it is evident that the courts and the profession will continue to become more electronic. The Colorado Court of Appeals currently strongly encourages counsel to submit hyperlinked briefs (electronic briefs in which all legal and record citations are hyperlinked to the source material).[7] With improved electronic records, hyperlinked briefs are easier than ever to create, and will eventually become standard. As the legal profession moves to more frequent use of hyperlinked briefs and other documents and to expanded e-filing, and as electronic records become standard, it is more vital than ever that electronic records be as versatile and useful as possible. Counsel and the courts have the ability to improve electronic records and have great incentive to do so. The future will certainly bring further technological innovation (including, at

some point, hyperlinked records). But regardless of the nature of the change or innovation, it is essential that the bench and bar work together to improve the system as a whole. The burden to do so does not rest solely on counsel or solely with the courts. Instead, it is a shared obligation to enhance the quality of the judicial system—a duty we all owe to the public. ▲▲▲

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Endnotes:

[1] *Laessig v. May D & F*, 402 P.2d 183, 185 (Colo. 1965).

[2] *Id.*

[3] *See McCall v. Meyers*, 94 P.3d 1271, 1272 (Colo. App. 2004)

[4] *See* 10th Circuit Court of Appeals CM/ECF User's Manual, at 2 (PDF page 7) ("**the Court requires that all pleadings be submitted in native PDF.** Attachments to pleadings may be submitted in scanned PDF if native format is not available"), available at www.ca10.uscourts.gov/downloads/ecf-user-manual.pdf.

[5] Colorado Court of Appeals Interim Policy Regarding Electronic Records and Briefs Version 1.0, at section B.4, available at www.courts.state.co.us/ userfiles/File/Court_Probation/Court_Of_Appeals/elec_policy_final.docx.pdf.

[6] *See* 10th Circuit Court of Appeals CM/ECF User's Manual, at 2 (PDF page 7).

[7] Colorado Court of Appeals Interim Policy Regarding Electronic Records and Briefs Version 1.0, at section B.5.

Sad but Preventable - A Trial Lawyer's Quest to End Distracted Driving and Save Lives

by Kurt Zaner, Esq.

On the afternoon of July 17, 2009, twenty-one-year-old Casey Feldman was crossing the street at a crosswalk when a distracted driver hit and killed her. Devastated from the loss of their daughter, Pennsylvania trial lawyers, Joel Feldman and his wife, Dianne, decided to find a silver lining and fight back against what is quickly becoming one of the most dangerous and ubiquitous behaviors in America - distracted driving. Understanding both the tragic consequences and the root causes of distracted driving, the Feldmans launched the End Distracted Driving campaign (EndDD) - a nationwide effort, headed by trial lawyers in all fifty states. The goal is to educate our youth on the dangers of distracted driving, and more importantly, how to prevent it.

Distracted driving is any activity that could divert a person's attention away from the primary task of driving. There are the obvious culprits that everyone understands but still seems to have a hard time avoiding - texting, checking email, surfing the web and talking on the phone while driving. The average text message takes four seconds to type; if a car is traveling fifty miles per hour that equates to 300 feet of travel in complete ignorance of one's surroundings.[1] Even the least ostensibly culpable behavior on this list, talking on the phone, can prove equally risky. The science has been around for nearly a decade, with NHTSA studies concluding that the cognitive distraction of talking on the phone can render a driver as impaired as an intoxicated driver (in some cases even more).[2] In addition to these "obvious" distracted behaviors, the distracted driving list also includes a myriad of seemingly innocuous behaviors, which are often just as dangerous - eating, programming the GPS, applying makeup, adjusting one's tie, even changing CDs or radio stations.

In creating the program, Joel and Dianne have invested time and money - not only learning the science behind distracted driving, but also figuring out the best way to attack it. After cultivating the research and talking to the experts, Joel created a one-hour presentation that informs, compels, educates and creates hope. Given Casey Feldman's young age and the ambitious long term-goal of curbing distracted driving for years to come, Joel decided to target the next generation of drivers: high school students.

EndDD is currently presenting its program to high school students across the country in hopes of creating a sea change in driving behaviors. The program begins with the premise that we all drive with distractions – this is not a problem just for teenagers, rather it is endemic to all of society. By admitting that we are all culpable, and therefore on the same team, Joel eliminates the "us versus them" barriers that typical lecture formats often create with a youth audience. Once this is accomplished, the presentation doses out a mix of educational facts and information in an interactive way, drawing on relevant as well as hip sources such as the popular television show Myth Busters. Teens in the audience are encouraged to participate, offering their own anecdotes of distracted driving, either committed by themselves as drivers or observed as passengers in the car.

Some of the most powerful elements of the presentation are short videos that poignantly tell the stories of teenagers and young adults killed by distracted drivers. One of the vignettes tells the tragic story of two young women – one who lost her father to a distracted driver and the other who killed him. Both women share their grief in candid interviews; the daughter who lost her father was six months

Continued on page 30

Whether, What and When to Appeal

By Christina Gomez, Esq.

It is a story most litigators know all too well. They lose on an important issue in a case, and the first thing their client asks is, "Can we appeal?" In most instances, the short answer is "Yes." However, there are many reasons why you may counsel against taking an appeal, and even more reasons why you should be cautious in deciding when to file an appeal and what issues to raise in it. This article is designed to aid litigators in navigating these choices.

Whether to appeal

Deciding whether to pursue an appeal necessarily involves consideration of both the merits of a potential appeal and the costs and time involved in taking the appeal. Yet a fully informed decision involves several other factors as well. Some of the primary issues litigants should consider include:

- **What issues would we raise on appeal, and what are our chances of success on those issues?** This means assessing the legal merit, standard of review and other matters relating to the viability of each potential issue, as discussed in further detail below.
- **If we won on these issues, how would it change the outcome?** Would it eliminate all or just a portion of the judgment? Would it result in a new trial on all or just some issues? If it would lead to further proceedings in the trial court, is there a possibility that the outcome could in fact be worse for you? For instance, if a jury assessed $250,000 in damages against your client, and the most you could hope to obtain through an appeal is a new trial on damages, consider whether on retrial a jury might assess an even higher amount in damages.
- **Is it worth the cost of taking the appeal?** Estimate how much you are likely to incur in costs and attorney's fees for the appeal, and consider whether the amount at stake in the appeal justifies incurring these amounts.
- **Is it worth the time and effort to pursue the appeal?** An appeal is likely to take a year or more. Is it worth expending your efforts over that time period, or would it be better to simply cut your losses and let the matter come to an end?
- **If you appeal, is your opponent likely to cross-appeal?** Sometimes filing an appeal will trigger your opponent to file a cross-appeal on issues it otherwise would not have challenged in an appeal. Consider what issues your opponent might raise in a cross-appeal, what your opponent's chances of success would be on those issues, and how those issues could change the outcome of the case.
- **Is there a chance you could be charged with paying your opponent's appellate attorney fees?** If the trial court awarded fees, for instance based on a statute or contract, similar fees may well be awardable for an appeal. That greatly increases your potential costs in the event that you lose your appeal.
- **Is there a chance you might create bad precedent?** If the facts are not very good in this particular case, but your client may find itself facing the same or a similar legal issue in the future, consider whether you should wait and pursue an appeal when you are presented with a better set of facts. Otherwise, you may be more likely to create bad precedent that your client will be stuck with in future cases.
- **Are there some findings or rulings you just cannot live with?** If you are concerned about the future impact of certain findings or rulings in your case - such as by application of issue preclusion in a later proceeding - you should consider raising those issues through an appeal.

What to appeal

As noted above, some of the most important aspects of deciding whether to pursue an appeal are identifying the issues you would raise on appeal and assessing your chances of prevailing on those issues. Even if you already know you intend to file an appeal, it is critical to winnow your appeal down to the few issues you think are most critical or give you the greatest chance of success. Among the most important considerations in selecting your issues are:

- **Does existing law support your argument?** Obviously, a key part of assessing the strengths and weaknesses of the issues you might raise on appeal is reviewing the existing law on those issues. Do the applicable statutes and cases support your argument? Do any of the prior cases address facts similar to those in your case? Is there potentially bad authority you would have to distinguish?
- **What standard of review will apply?** Your chances of success on appeal go down substantially if the appellate court will review the trial court's decision under a very lenient standard, such as the clearly erroneous standard applicable to findings of fact (whereby the appellate court will affirm unless the findings are so clearly erroneous as to not find support in the record)[1] or the abuse of discretion standard applicable to discretionary matters like preliminary injunctive relief, discovery rulings and the admission or exclusion of evidence (whereby the appellate court will affirm unless the ruling is manifestly arbitrary, unreasonable or unfair).[2] As an appellant, you generally are better off if you can identify a legal issue subject to a de novo review standard; then the appellate court will decide the issue anew, with no deference to the trial court's decision.[3]
- **Was the issue preserved?** Often an appellate court will not even consider an issue presented on appeal if the appellant did not raise the issue before the trial court. This means not only making an objection at the appropriate time, but also stating the basis for the objection with as much particularity as possible. Although there are some exceptions to this rule, the more specifically a party raised an issue in the trial court, the better the chances are that the appeals court will consider it.[4]
- **Is there an adequate record?** If you want to show error in a decision made by the trial court, you need to ensure that there is an adequate record to establish the court's error and the harmfulness of that error. Thus, for instance, a party seeking to challenge the exclusion of testimony at trial must submit an offer of proof demonstrating what the witness would have testified.[5] Likewise, a party seeking to challenge the sufficiency of evidence to support a particular finding must present a complete record to the appellate court, including a full transcript.[6] If a party does not do this, the appeals court may well find that the party waived the issue or the court may subject that issue to a stricter review standard.[7]
- **What impact will the issue have if you are successful?** Sometimes winning on a particular issue will have no impact on a case, because there is another basis for affirming the judgment. For instance, if the trial court dismissed your claim for failure to satisfy two required elements, showing the appeals court that you satisfied the first element will have no impact unless you also show that you satisfied the second element. Also, winning on some issues might lead to an entire reversal whereas winning on others might lead to lesser relief - such as a lower damage award or a new trial.

When to appeal

Ultimately, you have to make the decision fairly quickly on whether to appeal, because the deadlines to file a notice of appeal are short - and they are jurisdictional. This means that if you do not file in a timely manner, you will lose your right to an appeal. Some of the various issues you should consider in deciding when to file a notice of appeal are:

- **Is the judgment "final"?** The general rule is that a judgment or order is final and appealable when it disposes of all issues raised in the case and leaves nothing more for the trial court to do but execute the judgment.[8] However, there are many nuances to this rule, and you should ascertain whether the judgment or order you want to appeal is final in your case.
- **Have the procedural requirements for finality been satisfied?** These rules differ in the state and federal court systems. In state court, a trial court's oral rulings are not final and cannot be appealed until the court reduces them to writing and signs and dates them.[9] In federal court, a final judgment must be set forth in a separate document, and not just incorporated into the trial court's orders on other matters.[10] However, this "requirement does not affect the finality of a court order; failure to comply with the requirement merely extends the time for a losing party to file a notice of appeal."[11]
- **If the judgment is not final, can you take an interlocutory appeal?** Even if the judgment or order is

not yet final, you may be able to appeal a ruling on an interlocutory basis. In most instances, choosing not to take an interlocutory appeal will not preclude you from raising the issue once the judgment becomes final - but you should verify that this is true in your particular case.[12] Various statutes and rules provide for interlocutory appeals of certain types of orders, such as orders granting or denying temporary injunctions, appointing receivers, denying motions to compel arbitration, or granting or denying class certification.[13] For other orders, you might seek an interlocutory appeal through other means - most notably C.A.R. 4.2 and C.R.S. § 13-4-102.1 in the Colorado Court of Appeals, C.A.R. 21 in the Colorado Supreme Court, and 28 U.S.C. § 1292(b) and the collateral order doctrine in the federal courts.[14] Or, if an order creates finality on some but not all claims or parties, you might seek entry of judgment under C.R.C.P. 54(b) or Fed. R. Civ. P. 54(b).

- **If the judgment is final, do any pending motions toll the appeal deadline?** In a Colorado court, any party's filing of a C.R.C.P. 59 motion for judgment notwithstanding the verdict, to amend findings of fact, to alter or amend the judgment or for a new trial tolls the appeal deadline.[15] The appeal clock restarts after 63 days, at which point the rule deems the motion denied, or when the court rules on the motion - whichever comes sooner.[16] By contrast, C.R.C.P. 60 motions have no tolling effect on the appeal deadline. In federal court, a party's timely filing of a renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) tolls the appeal deadline, as do a motion to amend or make additional findings under Fed. R. Civ. P. 52(b), a motion for attorney's fees under Fed. R. Civ. P. 54(d)(2) (if the trial court orders pursuant to Fed. R. Civ. P. 58(e) that it be treated as a Fed. R. Civ. P. 59 motion), a motion to alter or amend the judgment or for a new trial under Fed. R. Civ. P. 59 or a motion to correct a clerical error or for relief from judgment under Fed. R. Civ. P. 60.[17] The appeal deadline is stayed until the court disposes of the last such motion, and, unlike in state court, there is no point at which the rule deems the motion denied.[18]
- **If the judgment is final and nothing tolls the appeal deadline, when is the notice of appeal due?** For most civil cases proceeding in Colorado state court, the appellant must file a notice of appeal from a district court judgment within 49 days.[19] However, different and often shorter deadlines apply to certain kinds of cases or orders, such as orders by the Industrial Claim Appeals Office or other state agencies, orders granting or denying class certification, orders in dependency and neglect proceedings and orders of the small claims courts, county courts or magistrate judges.[20] For most civil cases proceeding in federal court, the appellant must file a notice of appeal within 30 days, or within 60 days in cases in which the United States is a party.[21] In both court systems, the court may extend the deadline for excusable neglect, but only in very rare circumstances.[22] ▲▲▲

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Endnotes:

[1] *See, e.g.*, *S. Fork Water & Sanitation Dist. v. Town of S. Fork*, 252 P.3d 465, 468 (Colo. 2011); *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1238 (10th Cir. 2012).

[2] *See, e.g.*, *Warden v. Exempla, Inc.*, 2012 CO 74, ¶ 17, 291 P.3d 30, 34; *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012).

[3] *See, e.g.*, *S. Fork Water & Sanitation Dist.*, 252 P.3d at 468; *LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment & Dependent Life Ins. Plan*, 605 F.3d 789, 795-96 (10th Cir. 2010).

[4] *See, e.g.*, *Vaccaro v. Am. Family Ins. Group*, 2012 COA 9, ¶¶ 52, 54, 275 P.3d 750, 761; *Wall v. Astrue*, 561 F.3d 1048, 1066 (10th Cir. 2009).

[5] *See, e.g.*, *Rossi v. Osage Highland Dev., LLC*, 219 P.3d 319, 321 (Colo. App. 2009); *Perkins v. Silver Mountain Sports Club & Spa, LLC*, 557 F.3d 1141, 1147 (10th Cir. 2009).

[6] *See, e.g.*, *Northstar Project Mgmt., Inc. v. DLR Group, Inc.*, —- P.3d —-, 2013 WL 501375, at *2-3 (Colo. 2013); *Whittington v. Nordam Group Inc.*, 429 F.3d 986, 991-92 (10th Cir. 2005).

[7] *See, e.g.*, *Rossi v. Osage Highland Dev.*, 219 P.3d at 321 (appellate court refused to consider argument where party failed to make an objection or submit an offer of proof in the trial court); *Perkins*, 557 F.3d at 1147 (appellate court reviewed argument under plain error standard where party failed to provide an adequate offer of proof in the trial court); *Whittington*, 429 F.3d at 992 (appellant's failure to submit the entire transcript could alone warrant rejection of its sufficiency of the evidence argument).

[8] *See, e.g.*, *Luster v. Brinkman*, 250 P.3d 664, 666 (Colo. App. 2010) ("For an order to be final, it must end the particular action in which it is entered and leave nothing further for the court pronouncing

it to do in order to completely determine the rights of the parties involved in the proceeding. . . ."); *S.E.C. v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1270 (10th Cir. 2010) ("A decision is 'final' when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'") (citation omitted).

[9] C.R.C.P. 58(a) ("[T]he court shall promptly prepare, date, and sign a written judgment . . . ."); *see also, e.g.*, *In re Marriage of West*, 94 P.3d 1248, 1250 (Colo. App. 2004); *In re Marriage of Spector*, 867 P.2d 181, 183 (Colo. App. 1993).

[10] Fed. R. Civ. P. 58(a) ("Every judgment and amended judgment must be set out in a separate document . . . .").

[11] *Constien v. United States*, 628 F.3d 1207, 1210 (10th Cir. 2010).

[12] *See, e.g.*, *Prefer v. PharmNetRx, LLC*, 18 P.3d 844, 848 (Colo. App. 2000); *In re Application of N.W. Mut. Life Ins. Co.*, 703 P.2d 1314, 1317 (Colo. App. 1985); *In re Unioil, Inc.*, 962 F.2d 988, 993 (10th Cir. 1992). *But see Hutchinson v. Pfeil*, 211 F.3d 515, 518 (10th Cir. 2000) (appeal from denial of intervention must be taken immediately).

[13] C.A.R. 1(a)(3)-(4); 28 U.S.C. § 1292(a)(1)-(2); C.R.S. § 13-22-228; 9 U.S.C. § 16(a)(1); C.R.S. § 13-20-901(1); C.R.C.P. 23(f); Fed. R. Civ. P. 23(f).

[14] *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 605 (2009); *S.E.C. v. Merrill Scott & Assocs.*, 600 F.3d at 1270.

[15] C.A.R. 4(a); *see also* C.R.C.P. 6(b), 59(a).

[16] C.A.R. 4(a); C.R.C.P. 59(j).

[17] Fed. R. App. P. 4(a)(4)(A); *see also* Fed. R. Civ. P. 50(b), 52(b), 54(d)(2), 58(e), 59, 60.

[18] Fed. R. App. P. 4(a)(4)(A).

[19] C.A.R. 4(a).

[20] C.A.R. 3.1 – 3.4, 4(a). For appeals from state agencies (other than the Industrial Claim Appeals Office), the pertinent procedures, including appeal deadlines, are set forth by statute. *See generally* C.R.S. § 24-4-106. Appeals of decisions by small claims or county courts lie with the district courts and follow the procedures set forth in C.R.S. §§ 13-6-310 – 13-6-311. Appeals of decisions by magistrate judges also generally lie with the district courts and follow the procedures set forth in C.R.M. 7.

[21] Fed. R. App. P. 4(a)(1).

[22] C.A.R. 4(a); Fed. R. App. P. 4(a)(5); *see also, e.g.*, *People ex rel. M.A.M.*, 167 P.3d 169, 172 (Colo. App. 2007); *United States v. Torres*, 372 F.3d 1159, 1162-64 (10th Cir. 2004).

Distracted Driving *Continued from page 26*

pregnant at the time of the crash. She talks about her future without a father, and without a grandfather for her child. Meanwhile, the other young woman spills out her deep remorse and sorrow for taking her eyes off the road when she checked her G.P.S., ruining another family's life forever: "I wasn't texting, I wasn't using my cell phone, but I still killed someone."

By showing both "sides" to distracted driving, the program ends with its most resonate and lasting theme - distracted driving is sad but preventable. The final video recounts Casey Feldman's story and death, as told by her friends and family. At twenty-one years old, beautiful and with her whole life ahead of her, Casey was killed by a distracted driver reaching for a drink on his passenger side as Casey entered a crosswalk in broad daylight at an intersection. Despite this tragedy, there is an undercurrent of hope in her friends' interviews. All of them pledge that they will no longer drive while distracted - they now fully understand that the dire consequences of distracted driving do not affect only "other people," but can hurt anyone, at any time.

And thus ends the program with a list of promises that affirms what we all can do – we **can** drive without texting, we **can** drive without making calls, we **can** wait to eat until after we finish driving and perhaps most importantly, as passengers in cars we **can** ask drivers not to drive distracted. If we truly hope to create a paradigm shift, we all must play our own part.

It is in this spirit that CTLA New Lawyers and Membership Committees have decided to carry the EndDD flag into Colorado and continue this good fight within our own community. ▲▲▲

To become an EndDD presenter or request a presenter for your local school or community group, please contact CTLA at 303-831-1192 or email info@ctlanet.org.

Endnotes:

[1] At 55 mph, a car will travel at 75 feet per second.

[2] David L Strayer & Frank A. Drews, *Multi-Tasking in the Automobile*, www.psych.utah.edu/lab/appliedcognition/publications/distractionmultitasking.pdf; for more on this topic, see the article re-published contemporaneously in this TRIAL TALK-Driving While on the Cell Phone – *Punitive Damages Should Come Through Loud and Clear.*

Data Dumping and Other Problems in Mediation

By Joe Epstein, Esq.

Introduction

Mediation should generally settle personal injury cases satisfactorily in just one session. Usually, when that does not occur it is because one party or another is not prepared to resolve the case. Last minute data dumping by one party or another, last minute motions, lack of client preparation, the failure to educate the opposing party and the mediator, and the failure to engage in pre-mediation lien reduction are the main preventable problems. To help address these problems, one can effectively use a personal injury mediation checklist, such as the one in the sidebar, to facilitate "one-step" mediations.

Data Dumping

When plaintiffs' attorneys provide medical records, employment files, medical bills, expert reports and a demand letter or mediation statement to opposing counsel and the mediator 3 days before mediation - it is too late! It is simply too late for defense counsel and the carrier to process this information in time for the mediation. It is also too late for proactive mediators to call with questions they have about this last minute data production. Similarly, last minute production of independent medical evaluations, which leave no time for a response motion, negatively impact mediations. The same is true for summary judgment motions and motions in limine filed by counsel at the last minute. The task for all counsel is to avoid the last minute data dump. The parties should provide important data 30 days before most mediations.

Lien Resolution

As a practical matter, medical lien resolution is a critical part of the mediation and case settlement process. Satisfactory lien resolution enables settlements that would not be practical otherwise.

Attorneys should contact health care providers who provide medical care on liens in advance of mediation and work out a deal based upon anticipated outcomes. When that is not possible, make arrangements to have the provider available during mediation. Address Medicare benefits providers in a similar fashion. Settling first and dealing with liens afterwards is not as effective and can put clients into a breach of the terms of Medicare requirements, their private health plan or ERISA.

Consider outsourcing your lien resolution headaches to a company with expertise in the field of lien resolution prior to the mediation in cases involving Medicare, Medicaid, health care insurers and hospitals. These companies marshal the lien information, save staff time and provide preliminary lien reduction figures in advance of mediation. During mediation, they can provide a one-point of contact service. Plaintiffs' counsel has the option of passing along this information to defense counsel.

Plaintiffs' counsel and their lien resolution service providers should not overlook the fact that the defendants' independent medical report can be a valuable tool in the lien resolution negotiation process. These reports often raise issues with the reasonableness and necessity of the care provided, as well as causation and permanency issues, in a way that the lien resolution service provider can use effectively. Counsel and the provider can also use such data to educate lien holders about the compromise nature of the settlement process.

Failure to Educate

In "Cool Hand Luke," the warden famously said "*What we got here is failure to communicate."* In the context of mediation, the plaintiff's attorney may categorize this failure to communicate as a failure to educate clients about expectations, opponents about risks and mediators about each party's leverage in advance of mediation.

Experience shows us that the exchange of non-confidential mediation statements between counsel enable both sides to come to the mediation with fewer surprises and with a more balanced perspective of the case. This exchange also enhances the likelihood of realistic client expectations.

Mediators work best with parties when all counsel educate them by providing their leverage points in advance and reiterate them (while acknowledging weaknesses) again at mediation. Keep in mind, mediation is all about the persuasive and effective utilization of leverage.

Mediation Checklist

Most people, attorneys being no different, do best when working from checklists and with deadlines. Accordingly, it is best when attorneys set their case for mediation 60-90 days in advance, so they create anticipated deadlines for the exchange of information with plenty of room to spare. The best-case scenario is to complete the exchange of required information 30 days in advance of mediation. This allows both sides to analyze the "same" case and determine their best case, worst case and likely result at trial. The information exchange enables parties to determine their realistic settlement evaluation. It is when parties come to mediation with "different" cases (due to their failure to adequately and timely share data) that they do not settle.

As a device to assist parties, we have developed the checklist in the side bar.

Conclusion

Two-step mediations-one for discovery and one for negotiations- is too costly, financially and emotionally, for most personal injury cases. Parties and mediators should be proactive. All should work together in advance of mediation to make the mediation "dance" a one-step process. Utilizing our checklist and working together, we can make ours an effective and efficient dispute resolution process. ▲▲▲

 An earlier version of this article appeared in the March/April 2013 issue of THE ADVOCATE, published by the Arizona Trial Lawyers Association.

Joe Epstein, Esq. is an internationally recognized mediator who concentrates his practice in the Rocky Mountain/ Southwest region of the United States. He focuses his mediation practice on emotionally intense cases, which include business dissolutions, catastrophic injury, employment, medical malpractice, probate, product liability and wrongful death. He has published numerous articles. Best Lawyers, Colorado Law Week (Mediator of the Year 2011), National Academy of Distinguished Neutrals and International Academy of Mediators (Past Vice-President) have recognized him. Based in Denver, CO and Scottsdale, AZ, he may be contacted at 4601 DTC Blvd, Ste. 1000, Denver, CO 80237; 303-355-2314; 480-314-1820; 888- 355-2314; joe@crs-adr.com, or www.crs-adr.com

Mediation Checklist for Personal Injury Case

1. Have you taken the necessary depositions? ❑
2. Have you exchanged the necessary expert & medical reports been exchanged? ❑
3. Have you provided the necessary medical and other economic special? ❑
4. Have you made arrangements to have all necessary parties at or available for mediation? ❑
5. Have you exchanged pre-mediation demands and offers? ❑
6. Have you put Medicare and Medicaid on notice? Have other liens reduced or released their claims or will lien holders be available at mediation? ❑
7. Have you exchanged and emailed "non-confidential" mediation statements to the mediator? ❑
8. Have counsel prepared their respective clients for mediation? ❑
   a. Has plaintiff counsel obtained informed input from the plaintiff? ❑
   b. Has the adjuster evaluated the case and obtained authority? ❑
9. Have counsel alerted the mediator to any special circumstances? ❑
10. Have you filed required motions well in advance of mediation? ❑

Avoid Making Your Landlord Happy with Your Lease

By Cheryl Stafford

The last time I wrote in this space, it was about how the Denver Metro Area market for office space favored tenants, mostly due to relatively weak demand and high vacancy rates. A lot has changed since then and none of the changes benefits Denver's commercial tenants.

In this market, it is important to understand what might be driving landlords - it depends on each one's specific situation and experience. Many owners purchased their properties in the 2004-2007 time frame when prices were relatively high. Then, due to the subsequent economic recession, few were able to make a profit on their investment. Those that were able to weather the storm are currently enjoying much higher occupancy rates - in the 90 percent range compared to around 60 percent just two to three years ago. In short, they are seizing the opportunity to make up for lost time by setting higher lease rates today and getting them.

There are still some pockets of opportunity for tenants. Many buildings that were purchased out of foreclosure or from cash-strapped owners threatened with foreclosure have new and aggressive landlords. Since their new basis is relatively low, even after making necessary upgrades and catching up on maintenance issues, the new owners can afford to be extremely aggressive with lease rates. Therefore, these properties provide an excellent option for relocation or for use as leverage with an existing landlord.

The recent tenant's market occurred during a period when commercial office space was overbuilt and when the poor economy drove a downturn in demand. Now, in most submarkets, new construction has been at a virtual standstill for the past five to six years. Vacancy rates on properties have dropped from more than forty percent to ten percent and lower.

Adding to the challenge, landlords are hitting renewing tenants especially hard counting on the reluctance of many tenants to consider moving. It is very common for an existing tenant to receive a lease renewal proposal that is significantly more than a new tenant would pay in the same property. Therefore, it makes more sense than ever for you to have one or more viable relocation options **before** you attempt to negotiate with your current landlord.

Along those lines, regardless of trends, whether your goal is to renew or relocate, your strategy must be the same: create competition. If you prefer to renew your existing space, it is important to have real alternatives. Actually, the more you want to stay put, the more important it is to have backups. This is no time to bluff a landlord who knows the market inside and out. Not only is it imperative that your existing landlord know you can **leave**, it is equally important to have potential landlords think you can **stay**.

Similarly, if you need to relocate for whatever reason, there is every reason not to share this information with any potential landlord, only your own team should have this critical insight into your situation. Readers of this publication do not need to be reminded of the role of confidentiality and leverage in negotiation!

If your office lease is coming up for renewal during the next two years, it is very important to educate yourself and

be proactive. You cannot develop an effective strategy to create maximum leverage in your negotiations in a vacuum or at the last minute.

There is a tried and true playbook to ensure that you get the space you want and pay only for what you need. The steps are as follows:

- **Needs Assessment** - Working as a team, your management, space planner, tenant's representative, and real estate attorney should define the company's ideal space, including square feet, configuration, special requirements, and legal terms. The architect should develop a preliminary plan to use as a guideline in the subsequent search for space options.
- **Market Analysis** - Next, get educated on market conditions. Is this the time to purchase rather than lease? Should you relocate or renew your lease? There are continually shifting market factors at play in each scenario, and you need to identify and consider the pros and cons of each option.
- **Develop Options** - Once you have determined the ideal (i.e. most efficient) layout to meet your needs, along with the minimum requirements you will consider regarding any one option, it is time to move to the market and solicit options via a Request for Proposal.
- **Selection** - You should compare locations that fit your criteria from every angle in order to identify your very best options. Ideally, you should quantify variables so you can establish the all-inclusive annual cost of each alternative and make a true "apples to apples" comparison. Conduct a test fit space plan in each of your semi-final choices. Quoted lease rates mean nothing until you know the exact square footage you will be paying for in the space that meets your needs.
- **Negotiations** - You can put the leverage that you created in the Develop Options phase into play to your great advantage. You should have multiple options at this point, ideally to two to three. Maintain your neutrality, at least as far as the potential landlords are concerned, in order to create the competitive environment in which to negotiate the best rate and terms with each. When you have well-researched options, you have the upper hand. Also, consider this: tenants negotiate a lease every three to ten years; your adversary in this process, the landlord, does it every day. There is true value in having someone on your team with expertise equal to that of the landlord - someone who will watch out for **your** interests and expertly guide you at to this point.
- **Lease Signing** - You should have pre-negotiated critical legal conditions at the initial proposal stage so that there are no surprises at this point. In order to maintain your leverage you should evaluate your final two options with completed leases in hand. Once you "decide" on one option, your leverage is gone - only take that leap after all lease points are fully negotiated and your final lease mutually executed.
- **Construction oversight** - If the space solution involves a new build out or a remodel, your architect should have prepared the drawings already and should now monitor the work to ensure that the management cuts no corners in the transition from contract to construction. You need to be certain you are getting what you are paying for.
- **Operating Expense Review** - As part of the Selection step, it is important that you verify that the owner's most recent operating expenses, as reported, are in line with expenses for similar properties. But remember that the landlord recalculates these annually. Be vigilant throughout the lease term and carefully review your annual operating expense increases for accuracy and competitiveness each spring. ▲▲▲

Cheryl Stafford is a principal at Corporate Real Estate Advisors, a Denver commercial real estate consulting firm that exclusively represents tenant clients in office space purchases or leases. She is past President of the Denver Commercial Board of Realtors.

Three Reasons You Should Enroll Your Legal Staff as Members of CTLA

By Nicole Peterson, Carrie Armknecht, Marsha Mager and Mianne L. Besser
(Co-Chairs of the Legal Staff Committee)

It would be hard to imagine the legal field without legal staff. Attorneys rely on their support teams in different ways, and it is rare to find an attorney who does it all alone. Whether he or she is a paralegal or an entry-level receptionist, most attorneys rely on someone without a law school education to ensure that their firms run smoothly.

That said, it is also difficult to ensure the proper training, education and understanding within the various fields of practice. How much time do you have to devote to educating your staff?

Within the CTLA community of more than 1,000 attorneys, we have a budding membership of just over 100 legal staff members. CTLA can help educate and connect your personnel to their peers, ready to share their collective knowledge and experience. With a membership cost of only $75.00 annually, how can you not enroll your staff?

Top three reasons your staff should become CTLA members:

1. Avoiding Malpractice & Boosting Performance

The most dreaded word in the legal field: malpractice. We are sure many of you heard Larry Lee in your head, telling you to "notify your carrier" at the mere mention of the word. It is frightening, intimidating and, in most cases, completely avoidable with proper knowledge and understanding. There are currently no malpractice regulations for paralegals or legal staff in the state of Colorado. You, the attorney, are responsible for all action (or inaction). You place a lot of trust in your staff everyday.

The July/August 2010 edition of *Law Practice Magazine* outlined the most common forms of legal malpractice. Among the most common causes, nine were tasks attorneys typically delegate to legal staff (accounting for just over 50% of the claims)[1]. Whether it is a failure to properly calendar or a failure to make a deadline, the staff members' knowledge of the law and its constant changes is crucial in preventing malpractice claims.

Attorneys often comment that it is not possible to train their staff, run their businesses and practice law at the same time. Not only is it difficult to find the time, it is also difficult to identify and understand the depth of your staff's needs and the best practices involved in implementing and sharing information within your firm.

What if your staff had access to the most experienced paralegals in the personal injury field? How much would you pay these experienced paralegals to help your staff, guide them and answer their questions? The CTLA Legal Staff Committee and membership body is comprised of several experienced and outstanding paralegal professionals in the industry. Listserv members have mentioned Nicole Peterson several times for her trial skills and expertise, and she assists the attorneys many of you use as your experts. Mianne L. Besser is President of the Rocky Mountain Paralegals Association and an Adjunct Instructor for the Community College of Aurora's Paralegal Program. Marsha Mager has more than 30 years experience, and she enjoys what she does enough to take her staff to hear the *Levy v. American Family* oral arguments out of pure love of the law. Carrie Armknecht has been a paralegal for more than 12 years and will finish her Associates in Paralegal Studies in 2013. The committee has a combined 78 years of legal experience, and they all love what they do.

The Legal Staff Committee plans and hosts educational programs at CTLA to address various issues that affect your everyday operations. We discuss new decisions or changes to the law that affect what staff should be doing as a result. The committee will be hosting roundtables to allow members to discuss issues they have, questions about trial, discovery, etc. and come up with practical solutions they can use in your office. We hold meetings and seminars around the state in Denver, Northern Colorado, Colorado Springs and Grand Junction. The committee can help your staff with practical standardized procedures that you can personalize for your own practice. After all, who better to create procedures than some of the best in the industry at performing the procedures themselves?

2. Creating a Cohesive Practice through Shared Knowledge

Think of how inspired you are following Blockbuster or after the Annual Convention. It inspires you, as you envision your legal greatness to come. You return to the office fired up, ready to go and begin trying to implement lessons learned. However, not everyone in your office shares your incredible visions. No one understands your new vision, your cutting edge tactics or the new steps you need to take to incorporate them into your practice.

Your time is valuable. If your staff was able to attend the Blockbuster program in person, you could have shared your vision first hand. After all, who better to teach your staff than Michael Freeman himself? With a CTLA legal staff membership, you enjoy reduced rates on seminars and CLE programs, learning the latest case law and legal strategies first hand.

You could certainly benefit from having your staff share the same excitement you feel. They would know what you mean when you say "Reptile" and "Rules of the Road." In short, they would understand your goals and the importance of achieving them. All would know your greatness and legal prowess (insert studio audience applause here).

3. Being Prepared for Battle; Power in Numbers

Insurance companies have outnumbered us significantly. State Farm alone employs over 60,000 individuals in the United States, not including agents.[2] We have all read the biography of an insurance adjuster and seen the numerous seminars they attend annually. For every piece of legislation CTLA fights to pass or defeat, insurance companies hold seminars to teach their staff how to avoid these changes in the law.

As a group, we can inform each other of our experiences and our ideas to overcome the giants we face every day. Information and strategies are key to leveling the playing field; without knowing their latest tricks, you cannot prepare for them. You have to rely on your staff to know how to plan and how to react when they occur. One of the most popular and valuable benefits of legal staff membership is access to the legal staff-only listserv, which allows you to have a few more "employees" on your side, turning your legal team into a legal army. It provides the extra information you did not know you needed, and it is available to your staff at anytime.

The Legal Staff Committee believes in the mission of CTLA and feels honored to be able to grow the community of legal staff who enjoy many of the benefits that you, as an attorney, enjoy everyday. At $75.00, it is relatively inexpensive and quite possibly one of the safest investments you will make each year. We hope to create a legal community that continues to evolve through member input and attorney member support.

While it may be impossible to address every issue your practice faces, we can help ensure that you have the most knowledgeable, prepared and united legal staff in Colorado. We can offer resources for vital questions when you are in deposition or when it is an issue that has less to do with the practice of law and more to do with paperwork. Please help us help you make your practice and your organization, CTLA, stronger than ever. ▲▲▲

Contact CTLA today to register your staff as a CTLA member at 303-831-1192 or log on to www.ctlanet.org.

Endnotes

[1] Dan Pinnington, *The Most Common Legal Malpractice Claims by Type of Alleged Error,* LAW PRACTICE, July/August 2010, Vol. 36, No. 4 www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_webonly_webonly07101.html.

[2] State Farm Insurance: Our Story www.statefarm.com/aboutus/company/company.asp.

EAGLE Member: Marc P. Harden

I often think of how grateful I am to have been called to this dignified and important work. I am proud to be a trial lawyer and a member of this tremendous organization.

I am frankly lucky to be a trial lawyer. In college, I studied business and went to law school with intentions of continuing to work in the business world. During school, I fortuitously happened upon an opportunity to work for the Public Defender. I thought it sounded interesting and liked the idea of going to court every day. As a student, I was allowed to defend people that had been charged with sometimes relatively serious misdemeanor offenses. My clients had no money and most of them were being **processed** through a system they had no influence in. I was able to help protect the rights of many regular folks that could not otherwise hire a lawyer. I quickly realized how personally gratifying trial work was. I became captivated by the splendor and power of the jury system. I was hooked on standing shoulder-to-shoulder with real, regular people. My business career was toast.

After my time in the criminal defense arena, I became interested in the opportunities that exist to help level the playing field for regular folks through our civil justice system. I ultimately took a job at a local personal injury firm and for several years worked with some remarkable and talented lawyers and mentors, particularly Angela McGraw, James Olsen, Adrian Sak and many others. I enjoyed squaring off against the defense battle-bots and am grateful I was given the freedom and opportunity to take many cases to trial.

I now own a firm with my law partner, Kurt Zaner. We both enjoy taking on the behemoth corporate machine and crusading for those who so need to be heard. We keep the practice fun and fresh, despite the serious causes we take on, and every day I am reminded of how lucky I am to do the good work for which CTLA stands. It is a true honor to serve humbly as a trial lawyer, protecting our incredible community - a place I am so proud to be from and in which I choose to raise my three children. I am so thankful that our courts grant access to our worthy clients. I do not take lightly the trust that our clients put in us.

I became involved with EAGLE several years ago. I believe it is our collective responsibility to ensure that laws are passed and maintained for the benefit and assistance of the people we so care about. I see EAGLE as part of my duty to do what I can to help those that have little voice or opportunity to protect themselves. EAGLE is one of our greatest opportunities to serve and protect our community. ▲▲▲

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Driving While on the Cell Phone:

Punitive Damage Awards Should Come Through Loud and Clear

By Ira H. Leesfield, Esq., Richard I. Segal, Esq. and Kurt Zaner, Esq.

Socrates, as reported by Plato, noted that "[t]he unexamined life is not worth living."[1] He said this to a jury of Athenians in the year 399 B.C., after having been found guilty of heresy and sedition. Socrates was pleading with his fellow Athenians to further examine and understand the complex meaning and worth of a single life.

Today, perhaps, we are a bit less sophisticated. The "good life" that we usually seek to attain would be somewhat removed from the values Socrates espoused and sought. Nonetheless, we all could agree that to attain "good" can only be achieved if one is alive. If life is what we live for, and good is what we seek to attain, then why do many of us drive while we hold conversations on our cell phones, diverting our attention from the road - tempting fate?

As lawyers and as a legal community, we need to reconceptualize the meaning and worth of the gift of life. We have all faltered. Most of us take life for granted by following our daily routines and trying to pack as much work as possible into the hours of the day. We check our e-mail on our BlackBerrys, we discuss client matters on the phone, and we even send and receive faxes - all while driving through dangerous traffic or in residential neighborhoods where children play in the streets. Today we need to reexamine the life in which we consciously or unconsciously participate. As lawyers, we should plead to the courts to bang the proverbial gavel of consciousness, waking up a society dormant to the risk of driving while on the cell phone. And perhaps the only means by which courts will be able to accomplish this is the imposition of punitive damages.

Examining the Evidence of Danger

To begin, we need to remember that an automobile is an extremely dangerous object that can easily cause grievous injury. Even when driven carefully and defensively, cars kill. When our driving skills and focus are compromised, the stakes are raised and other people's lives, along with our own, can be placed in danger. Thus, lawmakers are scrambling to find a solution to a problem that has become endemic to our society: driving while distracted. According to the National Highway and Traffic Safety Administration, distracted driving contributes to one in four traffic accidents.[2] Astonishingly, between 4,000 and 8,000 crashes per day are associated with distracted driving.[3]

Driving while talking on a cell phone is just one manifestation of distracted driving. People sometimes watch movies while driving, listen to loud music under headphones, eat, play video games, groom themselves and perform a host of other dubious actions. However, the ubiquity of cell phone use is now an unfortunate but established part of our driving environment. In fact, at the end of 2004, estimates suggest there were 182 million cellular subscribers in the United States.[4] At any given moment throughout the day, 8 percent of drivers on the road are using their cellular phones.[5] Moreover, two separate field studies have corroborated the fact that over 40 percent of Americans admit to conversing on the cell phone while driving.[6]

Further, technological innovations regularly lead to new products, and cell phone companies have proven adept at providing new gadgets to further distract drivers. They are inundating the market and creating a cornucopia of distracting behaviors that appears to have no end in sight.[7]

Concerns about such proliferation are merely anecdotal and ungrounded - or so the cell phone companies argue. New research, however, is providing scientific support for such commonly held fears. One study concludes that cell phone drivers' reaction times are reduced by approximately 20 percent and that such drivers are significantly more

likely to be involved in rear end collisions than drivers not using cell phones, even though the drivers' eyes are fixed on the road ahead.[8] The study's authors conclude that this can be attributed to an "inattention blindness," which suggests that the cognitive distraction caused by cell phone usage decreases a driver's awareness of important information in a driving scenario.[9] Even more startling is the finding that hand-held and hands-free phones are equally faulty in creating distracted drivers.[10] Thus, the impetus behind the distraction is directly attributable to cognitive preoccupation, as opposed to the difficulties of manually holding or manipulating a cellular phone.

Most shocking of all is the conclusion that the performance of drivers who are conversing on cell phones is *more impaired* than drivers who are intoxicated.[11] According to one study, drivers on cell phones have more accidents and slower reaction times than drivers who are legally drunk. The new scientific evidence makes one message abundantly clear: drivers should not use *any* type of cell phone behind the wheel.[12]

Employer Liability

With new science pointing out the dangers of driving while on the cell phone, law firms and many other types of employers are left with the dilemma of balancing productivity and safety. Ideally, employers want to be in constant contact with their employees. For example, many law firms provide their attorneys with BlackBerrys, and some firms even go so far as to pay their attorneys' cell phone bills. However, astute managing partners must question whether this practice of providing attorneys with cell phones might end up in the long run exposing the firm to costly liability.

A law firm could be held liable for its employees under respondeat superior or negligence. The doctrine of respondeat superior is based on the assumption that the master controls the acts of the servant and is therefore liable for the consequences of those acts.[13] Thus, it is foreseeable that a law firm could be held liable for an employee who causes an accident while being on the cell phone with his employer or a client.[14]

Interestingly, a recent study by the National Highway and Traffic Safety Administration estimated that each on-the-job employee automobile accident costs an employer an average of nearly $16,500, and with each injury that number increases by $76,000 or more.[15]

Managing partners should also recognize that in 1999 Smith Barney was sued when one of its employees caused an accident, killing a man while conducting Smith Barney business on his cell phone. Faced with a jury trial, Smith Barney settled the lawsuit for $500,000.[16] In 2001, a law firm in California was sued when one of its attorneys hit and killed a child while using her cell phone and driving.[17] Allegedly, the attorney was talking on her cell phone and doing work for the firm at the time her vehicle swerved and hit the child.[18] Before the trial, in 2004, the employer law firm settled with the child's family for an undisclosed amount.[19]

Thus, it is vital that employers consider the ramifications of allowing or passively agreeing to allow employees to do business on their cell phones while driving. In essence, to mitigate the possibility of future liability, law firms should have a clear policy stating specifically where they stand on the cell phone issue and what they expect from their employees.

Legislative Failures

With a myriad of behaviors contributing to driving while distracted and the ostensible difficulties of enforcing the pertinent statutes, many states and local governments have sought to confront the most visible and obvious culprit: driving while talking on the cell phone. Interestingly, by 2005 lawmakers in 26 states had proposed 62 bills limiting cell phone use while driving.[20] Despite these efforts, with cellular phone lobbies playing the role of formidable adversary with seemingly unlimited resources, legislative attempts have been met with fierce resistance. As a result, attempts to restrict cell phone use have enjoyed only limited success. In fact, only two states, New York and Connecticut, and the District of Columbia currently have cell phone bans enforced on a primary level.[21]

Despite the documented dangers stemming from driving while on a cell phone, some states have completely and effectively precluded any local legislation from confronting the issue. Ten states - including such populous states as Florida, New York and Pennsylvania - have passed legislation preempting all local governments from passing any legislation addressing cell phone use while driving.[22] Clearly, a legislative impasse exists, providing little hope that states will be able to cure this ill in the near future.

Another Option: Punitive Damages

With legislative attempts falling far short of any solvency, and accident costs and injuries escalating at troubling rates, is there any hope of effectively addressing the problem? Can the dangers of driving while on the cell phone be mitigated or removed altogether? Without a viable solution in sight, perhaps the logical place to turn is the courts.

Few doubt that cell phone use while driving will increase if left unchecked. It may never go away. Hence, if it is indeed impossible to eliminate this habitual and pervasive practice, at the

very least the law should possess the proper means to compensate its victims adequately and to punish culpable tort-feasors. Our belief is that this can best be effected through the application of punitive damages. Just as punitive damages are available in driving while in intoxicated (DWI) collisions, they should also be applied to collisions that occur because drivers were using their cell phones.

The U.S. Supreme Court has held that punitive damages are aimed at deterrence and retribution, and may be imposed to further a state's legitimate interests.[23] Though the dearth of legislation would suggest otherwise, the protection of our own and other's lives should indeed be such a legitimate interest.

States control the discretion over the imposition of punitive damages.[24] A majority of states permit juries to assess punitive damage awards against defendants who cause auto accidents while intoxicated. The authority is derived from statutes and common law. Some states adopt a per se approach, where evidence of a drunk driver is sufficient on its own to support a finding of punitive damages.[25] Other states determine whether punitive damages are warranted in DWI cases by conducting an individualized inquiry into the driver's conduct and any other aggravating circumstances.[26] In general, punitive damages may be assessed when the act in question was committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or in reckless indifference to another person's legal rights.[27]

All of the justifications for punitive damages in DWI cases can be effectively transplanted to cases of driving while on the cell phone. The similarities between the two are undeniable. Like DWI, driving while on the cell phone is an intentional, voluntary behavior that unnecessarily endangers drivers, passengers and pedestrians. The volitional decision to drive while distracted places other people's lives in danger. In fact, proving that the driver was on a cell phone would be fairly simple, as cell phone records can almost conclusively prove whether a driver was using his or her cell phone at a certain time.

To reiterate the findings noted in the study previously mentioned, a driver talking on his or her cell phone suffers a greater impairment to driving ability than a drunk driver.[28] With this conclusion, the logical bridge for punitive damages is clear.

Perhaps the most compelling argument for punitive damages is that all of the dangers and risks created by driving while on the cell phone are avoidable. It is a choice. The driver chooses whether to risk his or her life - and the lives of others - in driving while on the cell phone. Requiring a driver to devote his or her full attention to the operation of a 2,000-pound vehicle is not unreasonable.

Since no legislative remedy seems possible in the near future, the last bastion of hope for victims and society is the court system. Punitive damages assessed against drunk drivers will serve as the model by which courts can assess punitive damages against those recklessly driving while conversing on their cell phones. The only difference between the two - and it may be ephemeral - is the **illegality** of driving while intoxicated. Even without the legislation, driving while on the cell phone rises to the punitive damage level of aggravated misconduct, qualifying as wanton and willful behavior that consciously endangers our safety and that of others. Punitive damages for driving while on the cell phone provide the most immediate and efficient means to address the epidemic. They will punish the culpable persons and serve as much needed to deterrent to others. If we, as a society, do not have the willpower and strength to control our own actions, then we must resort to the court system to enforce our own safety.

Conclusion

Let us not forget: life is here today, and it is our responsibility to maintain it. Various tasks and decisions lie within our control to make sure life will be here tomorrow. So, the next time you are in the car, before picking up your cell phone, examine if your life is worth living. As lawyers, we can lead by example; and with punitive damages as a deterrent, others are sure to follow. ▲▲▲

[Note from Kurt Zaner: Since the time the ABA published this article originally, forty-five states (including Colorado) have passed laws in some form prohibiting texting while driving. While most of the laws fall far short of what is necessary - some only impose fines of less than $100 - it is a good start nonetheless. However, there are no laws against distracted driving. Recent statistics suggests distracted driving is more of a problem than ever - Denver's auto-pedestrian accidents were up 46 percent for the first eight weeks of 2013 over the previous two years. Last year, the city had 13 hit-and-run fatalities, more than the previous three years combined.[29]].

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Endnotes:

[1] *See* Plato, *Apology*, in GREAT DIALOGUES OF PLATO 423, 443 (Eric H. Warmington & Philip G. Rouse eds., W.H.D. Rouse trans., Mentor Books 1956).

[2] Business Wire, *Insurance Institute for Highway Safety Finds Cell Phone Users Four Times More Likely to Crash- 21st Century Insurance Urges Motorists to* "*Just Drive*," http://findarticles.com/p/articles/mi_m0EIN/is_2005_July_12/ai_n14737740 (last visited June 18, 2007).

[3] Karen Lurie, Driving While Distracted, www.sciencentral.com/articles/view.php3?language'english&type'&article_id'218392289 (last visited June 18, 2007).

[4] Cellular Telecommunications and Internet Association, CTIA's Semi-Annual Wireless Industry Survey Results, http://files.ctia.org/pdf/CTIAYearend2004Survey.pdf (last visited June 18, 2007).

[5] Donna Glassbrenner, *Driver Cell Phone Use in 2004 - Overall Results,* www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809847.pdf (last visited June 18, 2007).

[6] Mason-Dixon Polling & Research, Inc., *Drive for Life Annual National Driver Survey*, www.safedrivingtest.com/driversadmit.html (last visited Nov. 1, 2006); *see also* JANE STUTTS, ET AL., *Distractions in Everyday Driving* (AAA Foundation for Traffic Safety, June 2003), www.aaafoundation.org/pdf/DistractionsInEverydayDriving.pdf (last visited June 18, 2007).

[7] Melania Zaharopoulos, *Driving under the Influence of PSP,* www.gilroydispatch.com/lifestyles/contentview.asp?c'165830 (last visited June 18, 2007).

[8] David L. Strayer & Frank A. Drews, *Multi-Tasking in the Automobile,* www.psych.utah.edu/AppliedCognitionLab/WickensChapterFinal.pdf (last visited June 18, 2007). Strayer & Drews have posited that a driver talking on a cell phone enters a sort of virtual reality with the person on the other end of the conversation, instead of dealing with the physical environment that they are actually in. "What happens is, even though the driver is looking out the windshield, [and] they're looking at signs and other information in the driving scene, they're not actually processing it," suggest Strayer and Drews. "They're not seeing that information because their mind is concentrating on the cell phone conversation, and not on driving." *See* Lurie, *supra* note 3.

[9] Strayer & Drew, *supra* note 8, at 126.

[10] Suzanne McEvoy et al., *Role of Mobile Phones in Motor Vehicle Crashes Resulting in Hospital Attendance: A Case - Crossover Study,* 331 BRIT. MED. J. 428 (Aug. 2005), www.bmj.com (last visited June 18, 2007).

[11] Strayer & Drews, *supra* note 8.

[12] Press Release, Governor's Highway Safety Association, New Research Reinforces Safety Hazards of Cell Phone Use While Driving (July 12, 2005), www.ghsa.org/html/media/pressreleases/2005/071205.html (last visited June 18, 2007)

[13] *See Vigilant Ins. Co. v. Keiser*, 391 So. 2d 706, 714 (Fla. Dist. Ct. App. 1980)

[14] *See King v. Pagliaro Bros. Stone Co*., 703 A.2d 1232, 1233 (D.C. 1997) (employer sued for negligence when employee truck driver caused accident while talking on his cell phone.)

[15] *See* NAT'L HIGHWAY & TRAFFIC SAFETY ADMIN., THE ECONOMIC BURDEN OF TRAFFIC CRASHES ON EMPLOYERS 6-7 (2003), www.nhtsa.dot.gov/people/injury/alcohol/EconomicBurden/pages/WhatDOTCCost.html.

[16] *See* Terry Carter, *Crash Course for Business: Companies Can Be Liable for Accidents Resulting from Job-Related Cell Phone Use*, 85 A.B.A. J. 40 (Aug. 1999).

[17] *See* Teri Zucker, *Around the Firms,* 7 L. FIRM PARTNERSHIP & BENEFITS REP. 1 (July 2001).

[18] *Id*.

[19] *Id*.

[20] Matt Sundeen, *Highway Safety Cell Phones and Highway Safety: 2005 Legislative Update* (National Conference of State Legislatures July 2005), www.ncsl.org/programs/transportation/cellphoneupdate05.htm (last visited June 18, 2007).

[21] Governor's Highway Safety Association, State Info & Laws, Cell Phone Laws, www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (last visited July 27, 2007). Although observed hand-held phone use in New York dropped 50 percent in the months immediately following the enactment of the law, a year after the ban usage rates had climbed nearly to the same rates that existed before the ban. *See Hand-Held Cell Phone Use Goes Back Up in New York, Despite Year-Long Ban,* 38 STATUS REP. at 6 (Ins. Inst. for Highway Safety, Aug. 26, 2003), www.iihs.org/sr/pdfs/sr3808.pdf.

[22] Governor's Highway Safety Association, *supra* note 21. The 10 states are Florida, Kentucky, Louisiana, Mississippi, Nevada, New Jersey, New York, Oklahoma, Oregon and Pennsylvania.

[23] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1995).

[24] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003).

[25] *See, e.g.,* Honeycutt v. Walden, 294 Ark. 440, 743 S.W.2d 809, 810 (1988); *Taylor v. Superior Court of L.A. Cnty.*, 24 Cal. 3d 890, 157 Cal. Rptr. 693, 598 P.2d 854, 857 (1979); *Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla. 1976); *Calloway v. Rossman*, 150 Ga. App. 381, 257 S.E. 2d 913, 917 (1979).

[26] *See, e.g. Smith v. Chapman*, 115 Ariz. 211, 564 P.2d 900, 903-04 (1977); *Infeld v. Sullivan*, 151 Conn. 506, 199 A.2d 693, 694-95 (1964); *McMahon v. Chryssikos*, 218 N.J. Super. 571, 528 A.2d 104, 109 (Law Div. 1986); *Cabe v. Lunich*, 70 Ohio St. 3d 598, 640 N.E.2d 159, 162-63 (1994).

[27] *Fla. E. Coast Ry. Co. v. McRoberts*, 111 Fla. 278, 149 So. 631 (1933).

[28] Strayer & Drews, *supra* note 8, at 131.

[29] www.denverpost.com/news/ci_22827857/spike-denvers-auto-pedestrian-cases-has-officials-seeking.

The Crowley Prison Riot and the Evils of the Private Prison System

By Bill Trine, Esq.

Following the prison riot at the Crowley County Correctional Facility (CCCF) in July, 2004, I filed consolidated lawsuits[1] for more than 200 inmates who did not participate in the riot, but were innocent victims of the gross negligence of Corrections Corporation of America (CCA), the largest private "for profit" operator of prisons in the United States. After eight years of litigation and facing a 25-week jury trial, CCA finally began offering individual settlements to our remaining 198 clients.[2] When the offers, after lengthy negotiations, were in an amount that I could recommend, we began settling each individual case and the court vacated the trial set for March 11, 2013. The court dismissed each client's case as it settled.[3]

Many of you followed this litigation with some interest - perhaps because of its length and complexity - and I am now free to divulge some of the evils inherent in the private prison industry as revealed in the formal pre-trial discovery. I can do so because I refused to enter into a confidentiality agreement as a condition of settlement. But before publicizing those evils, let me first give you a capsule summary of the eight years of this epic litigation.

We were in the appellate courts five times resulting in two published opinions[4]; defended the depositions of 126 inmate/clients[5]; took the depositions of 30 CCA employees; and reviewed over 150,000 pages of documents produced by CCA, the Colorado Department of Corrections and the Inspector General. Multiple motions were filed, including 13 motions in limini. Just weeks before the scheduled trial, the court dismissed CCA's frivolous affirmative defenses[6] and struck the 483 designated nonparties[7]. The court had earlier dismissed CCA's counterclaims and ruled that the evidence supported plaintiffs' claims for punitive damages.

So what did this entire discovery reveal of the evils inherent in permitting private "for profit" corporations to operate our prisons? It clearly demonstrated that CCA's quest for greater profits caused the Crowley prison riot because they used the cost saving practice of understaffing prisons with untrained and poorly paid personnel and treating prisoners as merchandise to be transferred in large groups from one prison to another for greater profits. They often made transfers to isolated rural areas of the nation on short notice, separating inmates from friends, family and any support system. The evidence produced in these lawsuits demonstrated that it was this willful and wanton conduct by CCA that caused the initial disturbance, which CCA then permitted to escalate into a four-hour prison-wide riot when the CCA staff quickly abandoned the recreation yards and housing units at the first sign of trouble. So here is the Crowley story that demonstrates why government should not permit private companies to use our prison system for profit, rather than protecting the safety, welfare and rehabilitation of its inhabitants.

The Crowley Prison Riot

The Location

To increase profits, private prison companies try to locate their prisons in rural areas where there is a cheap labor market, a lower tax base, and a local government that will become dependent on this new industry and support its growth. CCCF was therefore ideal. It is isolated about 50 miles east of Pueblo in a rural county, surrounded by sparse prairie grassland conditions, some ranch land and a few farms. The county is also home to a state operated prison. These two prisons constitute the only "industry" in Crowley County. **The 2010 census showed 5,518 county residents of which 2,682 were prisoners, giving Crowley County the highest percentage of prisoners of any county in the U.S.** There are only four small towns in the county, which includes the county seat, Ordway, with a population of 1,080, a gas station, one small restaurant, and no overnight lodging. These demographics are relevant when considering the importance of family contact and visitation to successful rehabilitation.

The First Riot

The first riot occurred at CCCF in 1999 when another private prison company operated it.[8] That company

arranged to have a large group of medium security prisoners transported from the state of Washington to CCCF in order to fill vacant beds and increase profits. The transfer interrupted the Washington inmates' rehabilitation and educational programs and jobs, interfered with family visitation and contact with lawyers, and placed them in an isolated environment. Soon after the transfer, a small group of Washington inmates started a disturbance, which became a riot with destruction of property. Following the riot, the Washington inmates were transferred back to their home state.

The Second Riot and CCA's Willful and Wanton Conduct

CCA then took over the management and operation of CCCF on January 19, 2003, and sent a CCA employee, Richard Selman, to function as the Chief of Security. He arrived in April 2003 and immediately recognized the need for changes that were necessary to improve security. At that time, CCCF had four housing units and two recreation yards, east and west, and it released all inmates at the same time for recreation. They could congregate and wander freely between yards. So in the summer and fall of 2003, Selman recommended significant and costly changes to improve security including fencing around both yards to control inmate movement "versus the whole yard being an open style compound where inmates could be everywhere." He recommended that they enclose an observation tower and staff it 24 hours a day; and schedule shifts for use of the recreation yards by inmates.[9]

However, CCA's home office ignored these recommendations as it was planning a substantial expansion of the prison to increase its profitability. It planned to add two new units to house several hundred new inmates. Construction started in the fall of 2003, and when it was nearly complete in the spring of 2004, CCA arranged to have 300 prisoners from Washington again transferred to CCCF to fill it. The plans for this transfer of prisoners caused Warden Leland Crouse concern because the entire prison population could move freely from one recreation yard to the other. So he developed a plan that he discussed with his regional supervisor to control movement by establishing a recreation schedule so that "only one pod or one unit would have access to one part of the yard at a time."[10] These plans were in place, but they had not implemented them before the transfer of Washington inmates.

Upon learning of the planned transfer, CCCF inmates and correctional officers (CO) who had been present during the 1999 riot voiced their concern and fear of another riot should the transfer of Washington inmates again take place. CCA's management in its home office in Nashville, Tennessee ignored the objections and concerns, and the first 100 inmates arrived in late June 2004, followed by a second group two weeks later.

Upon arrival, the Washington inmates learned that there would be no conjugal visits with their wives, no smoking and no Washington law library, all of which were available to them in Washington prisons. Instead, CCCF offered isolation with limited programs and jobs. Nearly all inmates were from poor Washington families who would be unable to travel to Colorado for visitation. They could not afford frequent long distance telephone charges at the elevated rates prisoners pay.[11] They complained, and some threatened to riot. Although the threats of a riot worried other inmates and some COs, CCA management ignored them as tension mounted.

Then, on the morning of July 20, 2004, there was a visible show of force when COs restrained an 18-year-old Washington inmate in the yard and carried him to segregation as hundreds of inmates watched. Some angry Washington inmates, who thought they used excessive force, planned a confrontation that evening when both yards would be open for recreation to all 1100 inmates.

As word of this plan spread, many inmates, concerned for their own safety, voiced their fears to COs and warned them of the plans. The COs notified their superiors and voiced their own concerns. The captain in command called a meeting of the COs that evening, before releasing the inmates, to discuss the threats. During that meeting, several COs opined that they should not release inmates for fear of a riot. They felt the prison should remain in lockdown until tempers cooled and they dealt with inmates grievances. The captain overruled them and simply cautioned the COs to be careful when they patrolled the yards.

They released all inmates for yard recreation in both yards, despite the advance warnings. A group of Washington inmates in the west yard immediately confronted the two yard COs, demanding to see the warden to voice their grievance over the morning incident. When the COs refused, groups of inmates began forming in that yard. The COs panicked and ran from the yard, as did the two COs in the east yard. Then the two COs in each of the five housing units abandoned those units, as the disturbance became a full-blown riot.

Realizing that the skeleton crew of COs on duty had essentially abandoned the prison, rioters went on a rampage - setting fires, breaking into housing units, destroying property, looking for sex offenders and creating chaos. The CCCF Operations Manager, did not have adequate staff and munitions to control the initial disturbance and developing riot, and had to wait for three hours for special operations response

teams (S.O.R.T.) to arrive from distant facilities in order to retake control of the prison. In taking control, CCA indiscriminately treated all inmates as participants in the riot, even those who had been in their cells, the medical ward or the library throughout the riot.

As a result, the plaintiffs (none of whom participated in the riot) sustained physical and psychological injuries in varying degrees. Nearly every plaintiff suffered from smoke and gas inhalation, from fear of injury or death, from excruciating pain resulting from the punishment inflicted on all inmates once the riot was under control and from months of lockdown. Most plaintiffs, after guards cuffed them and placed them in the yard, had to urinate in their clothing and wear that clothing for many hours or even days. Many had to shower at gunpoint, without curtains, in front of female guards who made fun of them and videotaped them in the nude. Many spent time in overcrowded cells with no bedding, mattresses or hygiene products (even toilet paper) for days. Many slept on concrete floors or hard steel bunk beds for days. COs fed them baloney sandwiches, by dropping the food on the cell floors. COs mistreated or punished all of them - the guilty and innocent alike - as rioters and locked them down for up to three months with little or no contact with families.

There were also injuries to some individual plaintiffs that were not common to all, but were unique because of preexisting conditions that were aggravated by the riot, or because of more brutal treatment inflicted on some. For example, those plaintiffs who were told to lie face down in their cells in sewage water that flooded their cells, then drug through the water by their ankles to be cuffed so tightly that the ratcheted plastic cuffs cut into their skin and numbed their hands and shoulders as they were left in that condition for hours. Or those inmates who were tear gassed at close range while lying in the yard, cuffed, and being told, "That's what you get for rioting." Some inmates were under treatment following major surgery and begged not to be re-injured and their complaints ignored. Some had a serious asthma condition and were denied use of their inhalers. Some were under treatment for mental illness and their medications discontinued. Some were severely traumatized and have had recurring nightmares of being trapped and burned alive, or beaten to death by crazy inmates.

All of this because CCA transferred a large group of unhappy Washington inmates to Colorado to fill newly built units and increase profits, then ignored their complaints and the advance notice of a planned disturbance — a disturbance that was not controlled because of CCA's cost saving practice of understaffing its prisons with untrained personnel.[12] Lengthy investigations conducted by the Colorado Department of Corrections (DOC), and the department's Office of the Inspector General,[13] revealed the cause of the riot to be directly related to the cost saving conditions existing at the prison and the bulk transfer of Washington inmates who were transferred on short notice, and separated from friends, family and any support system.[14]

CCA's Spoilation or Destruction of Evidence

In the course of this litigation, we also discovered that CCA has a policy of conducting its own internal investigation of the cause of riots in its facilities, and did so in this case by immediately sending a team of five Wardens selected from other CCA facilities as an "After Action" team to conduct the investigation. The team leader authored an "After Action Report" for the home office, which was kept secret and never disclosed to the DOC or Office of the Inspector General. However, several COs testified that they were interviewed by the after action team, and one, the Captain who authorized the release of inmates to the yards on the evening of the riot, testified he was immediately put on administrative leave following the interview, and later discharged by CCA.

CCA failed and refused to provide the "After Action Report," which plaintiffs requested in formal discovery, claiming that they could not find the report. The trial court then granted plaintiffs' Motion for Sanctions, ruling that plaintiffs were entitled to a jury instruction that would permit the jury to conclude that the report was favorable to the plaintiffs and adverse to CCA.[15]

Unresolved Trial Problems and Legal Issues

The complexity of this litigation created unusual problems and legal issues. First, how would a jury hear the testimony of 198 plaintiffs over the course of 25 weeks and be able remember that testimony, particularly when each plaintiff was asserting injuries and damages unique to that plaintiff. Those still incarcerated would be testifying by telephone, compounding the problem.

It was a foregone conclusion that there would be a mistrial, inconsistent verdicts or inability to render verdicts. The obvious solution would be an initial trial of just a few plaintiffs on all issues. If the plaintiffs prevailed on liability, issue preclusion (collateral estoppel) would permit trying the remaining cases in groups of ten to the same jury, which would decide only damages. If the first trial resulted in defense verdicts, the court would have to dismiss the remaining cases based on the doctrine of issue preclusion.

However, collateral estoppel only applies when the court enters the final judgment. Entry of final judgments would allow the parties to file appeals following the first trial, thus delaying trial of the remaining cases. If courts affirmed liability on appeal, the plaintiffs would have to try the remaining cases before a new jury, necessitating a duplication of the liability evidence that supported punitive damages. Therefore, it would take a stipulation of the parties agreeing to apply collateral estoppel to the results of the first trial - without entry of final judgments - in order to proceed with a series of trials, using the same jury to decide only the issue of damages. The parties would also have to agree to delay entry of final judgments until the conclusion of those trials.

CCA was unwilling to enter into such an agreement. Instead, it proposed a bellwether approach[16] that would divide plaintiffs who might have similar injuries into groups, then proceed to trial with only a representative of each group as a plaintiff. Everyone in a designated group of plaintiffs would then be bound to accept the same amount of damages that the jury awards to the group representative. We could not ethically or legally utilize the bellwether approach (sometimes used in class actions when it is easy to calculate the damages to each member of the class) where each plaintiff's non-economic damages were unique. Further, this was not a class action, and the court had no jurisdiction to order a bellwether approach absent the consent of all parties. Because it was unethical to group plaintiffs in the manner requested,[17] and we could not group the plaintiffs' by their damages, we would not stipulate to a bellwether agreement.

Instead, we filed a motion for separate trials, asking the court first to proceed with a trial of only a few plaintiffs on all issues. If plaintiffs prevailed on liability, then we wanted to use the same jury to decide the damage issues in trials of the remaining plaintiffs in groups of ten. The court denied the motion, and the Colorado Supreme Court refused to intervene.[18]

Hence, in the absence of an agreement or court-ordered separate trials, we prepared for a 25-week trial for 198 plaintiffs, certain that the trial would end in a mistrial or reversible error resulting in an appeal.

The second problem was a practical, not legal problem. The court denied our motion to change venue out of Crowley County when CCA was the only remaining defendant. The trial court and the parties knew that jury selection would be very difficult. There were only 2,826 residents in Crowley County exclusive of prisoners, including children and others who were not qualified for jury service. The prison system employed many of those residents or they knew people who worked there. In addition, the small courtroom would accommodate only a handful of jurors. In an effort to remedy these problems, the trial court set aside the first week of trial for jury selection in a church in Ordway, which the state rented for that purpose. Then the state summoned 360 residents to appear there as jurors on two consecutive days in groups of 180. Finding jurors willing to sit for 25 weeks would alone pose a potential insurmountable barrier for jury selection. The other legal issues and problems are best left for a future "Trine's Tales.

Conclusion

The only villain in this case is CCA who transferred a large group of unhappy Washington inmates to Colorado for a profit, knowing that the transfer placed the prison at high risk for a riot that CCA would be unable to control. It understaffed the facility with inadequately trained COs. CCA knew that a riot would harm many innocent inmates and place its own employees at risk. In fact, when the rioting began, frightened employees abandoned the yards and housing units. Many later resigned. Why work at low wages when your employer fails to protect you from harm.

CCA was the legal custodian of the innocent inmates - responsible for their health and safety. It was also responsible for the safety of the surrounding community and for those who responded to the riot. It was responsible for the safety of its employees. This villain violated all of those duties and responsibilities - blinded by the desire for greater profits.

The plaintiffs were victims. The employees were victims. The responders were victims. I can also argue that the Washington inmates who started the disturbance and riot were victims of CCA's total indifference to their need for family contact and rehabilitation, when transferring them to an isolated prison in Colorado. The plaintiffs, who had no control, could only trust that CCA would protect them. CCA betrayed them instead.

So, did CCA learn anything from the Crowley experience? Apparently, it did not. It contracted with the California DOC to send its inmates to the 2400-bed medium-security prison operated by CCA in Sayre, Oklahoma, resulting in a riot started by the California inmates on October 11, 2011, seven years after the Crowley riot. The Oklahoma riot resulted in injuries to many inmates.

One thing is clear: when a private prison company's duty as a custodian, to protect the safety and welfare of its inhabitants, conflicts with its desire to create profits for its shareholders, the profit motive always prevails. ▲▲▲

Bill Trine has been a successful trial lawyer for 54 years. He has logged more than 150 jury trials throughout his storied career. A past president of CTLA and the first recipient of the Norm Kripke Lifetime Achievement Award, he also founded and served as president of Trial Lawyers for Public Justice, a Washington D.C. based public interest law firm. He is on the Board of Directors of the Trial Lawyers College in Wyoming and the Human Rights Defense Center in Vermont, which publishes Prison Legal News.

Endnotes:

[1] *Adams v. Corrections Corporation of America* filed in the District Court of Crowley County, State of Colorado, Case Number 2005CV60 Div. B, consolidated with *Abrahamson v. CCA,* Case Number 2006CV08.

[2] We filed lawsuits for more than 230 inmates. Several died during the lengthy litigation. Some returned to Washington prisons after the riot and did not respond to discovery requests or other court orders. Some became homeless, and we lost contact. The court dismissed their cases. Of the 198 remaining who received offers of settlement, we could no longer locate five. One had permission to visit his dying mother, but failed to return to the halfway house and remained a fugitive. Another had been deported, and we could no longer locate him. The others essentially "disappeared" with no family contacts.

[3] My co-counsel and daughter, Cheryl Trine, was an enormous asset from the beginning. She assisted in writing briefs, taking and defending depositions, arguing motions and preparing for trial. I would also be remiss in not publically giving credit to my dear friend and great trial lawyer from Washington D.C., George Shadoan, who helped defend the depositions of our clients and assisted me as a consultant. I also credit my able assistant, Jenny Lindberg, who has had constant contact with the plaintiffs since 2004.

[4] *See*, *Adams v. Corrections Corporation of America,* 187 P.3d 1190 (Colo. App. 2008) and *Adams v. Corrections Corporation of America,* 264 P.3d 640 (Colo. App. 2011). Adele Kimmel, a lawyer with Trial Lawyers for Public Justice, authored the winning brief in the first appellate decision, 187 P.3d 1190, making new law to permit inmates to sue in Colorado courts without first exhausting administrative remedies.

[5] Nearly all were by telephone, each lasting 2-3 hours. Many of the inmate/clients were in prison facilities in WA, CO and WY. We had to prepare for depositions with each client by telephone. Colorado trial lawyers who assisted as volunteers in defending depositions of plaintiffs are Deborah Taussig and John Taussig of Boulder and Steve Shanahan of Fort Collins.

[6] CCA argued that even if the plaintiffs did not actively participate in the riot, 47 were guilty of comparative fault by leaving their cells during the riot to phone family or by remaining in the yards when they could not return to their units - they were locked out. CCA argued that this conduct constituted an "assumption of risk."

[7] CCA named over 483 inmates as designated nonparties, claiming some participated in the riot, 189 made telephone calls during the riot, 106 were on the facility grounds "and/or outside their assigned cell/unit, failing to lockdown" and that 21 were allegedly involved in an assault on another inmate. CCA also designated, wholesale, the Colorado Department of Correction's SORT and ERT teams who responded to the riot. In striking all of the nonparties, the court adopted plaintiffs' arguments that the designations did not comply with C.R.S. 13-21-111.5(3)(b).

[8] On Jan. 1, 1999, Crowley County entered into an agreement with a Delaware company, Crowley County Correctional Services (CCS) to operate CCCF.

[9] Selman's deposition testimony at pages 14-16.

[10] Crouse deposition at pages 60-62.

[11] In a perverse system of kickbacks, prisons contract with private companies to operate the prison's phone systems. The private companies charge prisoners "commission fees" on every minute of each call. Those commissions create an incentive to select phone companies that charge the prisoners more. *See*, Drew Kukorwski, "*The Price to Call Home: State Sanctioned Monopolization in the Prison Phone Industry."* Prison Policy Inst., Sept. 11, 2012, and Justin Moyer, "*After Almost a Decade, FCC has yet to Rule on High Cost of Prison Phone Calls*," Wash. Post, Dec. 2, 2012.

For the 2.7 Million children who have one or more parents incarcerated, a phone call from mom or dad can cost $20.00 or more for just a few minutes, jeopardizing the finances of families already in peril. If the phone calls cease, it further isolates prisoners from family and friends.

[12] See, Terry Carter, *Prison Break: Budget Crises Drive Reform, But Private Jails Press On,* A.B.A. J., Oct. 2012, *quoting* Judith Greene, director of the non-profit Justice Strategies, who states that the profit margins of private prisons "depend mostly on spending less for the biggest business cost - personnel. That means paying less for prison guards, already an extremely low-paying occupation. One result is high turnover and the incompetence that inexperience brings. *Also see* Scott Cohn, *Private Prison Industry Grows Despite Critics,* CNBC Oct. 18, 2011, *quoting* Alex Friedman, ed., Prison Legal News, "Literally, you can put a dollar figure on each inmate that is held in a private prison. They are treated as commodities. And that's very dangerous and troubling when a company sees the people it incarcerates as nothing more than a money stream. . . . You have fewer guards that are less experienced, that are paid less, who get fewer benefits. . . ." Also, see Sheldon and Teji, *Collateral Consequences of Interstate Transfer of Prisoners,* Ctr. on Juvenile and Crim. Justice (July 2012).

[13] *See*, Colo. Dept. Corrs. After Action Report - *Inmate Riot: Crowley County Correctional Facility, July 20, 2004,* pub. Oct. 1, 2004, at 13-17.

[14] *Id*.

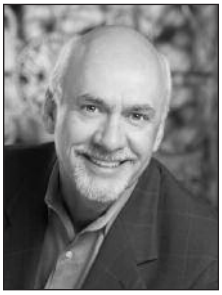
[15] We filed the motion for sanctions pursuant to C.R.C.P. 37, supporting it by *Aloi v. Union Pac. R.R. Corp*., 129 P.3d 999, 1002 (Colo. 2006) (The court has the inherent power to provide the jury in a civil case with an adverse instruction as a sanction for spoliation or destruction of evidence), and *see Pfantz v. Kmart Corp.,* 85 P.3d 564, 568-69 (Colo. App. 2003) (The court is not limited to imposing a sanction only for intentional spoliation, but may impose one based on gross negligence or recklessness.) The tendered instruction in the instant case provided:

> Colorado law required that the defendant, Corrections Corporation of America (CCA), produce a copy of the After Action Report resulting from the investigation of the riot by a team of five Wardens assigned by CCA to conduct an investigation. CCA was ordered by the Court to provide plaintiffs with a copy of the report and CCA did not do so. Therefore, you are instructed that you may conclude, in your deliberations, that the report was favorable to the plaintiffs and adverse to CCA.

[16] A typical bellwether approach selects some plaintiffs as representatives of the larger group(s) of plaintiffs and the selected plaintiffs proceed to trial. The verdict(s) for or against each group(s)'s representative binds the large group(s) of plaintiffs, and each member of a group receives the same damages as the group representative.

[17] Contracts and ethics bound the plaintiffs' counsel to treat each client's case individually and separately. Non-economic damages varied by individual; we could not group them. Even if we could place plaintiffs in clear and distinct categories, this technique could deprive non-parties to the exemplar trial of their Seventh Amendment right to a jury trial and violate substantive and procedural due process. *See*, *In re Chevron U.S.A,* 109 F.3d 1016 (5th Cir. 1997) ("this is not one case but 3000 cases filed individually, not as a class action, and aggregated for trial management. . . . The individual circumstances of each plaintiff's claim defy easy aggregated treatment." Also see, *Abbott v. Kidder Peabody & Co.,* 42 F. Supp. 2d 1046 (1999) (a violation of contractual and ethical obligations to clients) and *Hayes v. Eagle-Pitcher Industries, Inc.,* 513 F.2d 892 (1975).

[18] Colo. Sup. Ct. Case No. 12SA350. Pet. for Rule to Show Cause Pursuant to C.A.R. 21 denied en banc Dec. 21, 2012. Petition for rehearing denied Jan. 9, 2013.



Go Big?

By Charles Welton, Esq.

[Editor's note: The original purpose of Charley's column was to encourage you to write about who you are rather than to have him write for every issue. He's being provocative this month. Please accept his invitation to respond to his perception.]

Okay, I'll admit it. I have come to understand how any of us could react to the current context of personal injury practice and rationally decide to GO BIG with advertising.

The current jump – nationwide - is to TV and Billboard ads. It seems like an all or nothing proposition. Once committed, the increase in contacts means - staff up and push responsibilities to more mid-level providers: associate attorneys, paralegals, legal assistants, secretaries, clerks, interns. Some might see a real benefit in that it allows attorneys in such a practice to better focus and office staff to engage more closely. Each attorney and staff member may focus on or specialize in a particular aspect of representation, eg, intake, document collection, case evaluation, demand letters, pleadings, motions, deposition preparation, expert work, voir dire, jury instructions. It is a different way of delivering to firm clients, especially compared to us sole practitioners, to meet the same duties and standards of care that we all owe to our clients.

It might be that some clients like this model better - they have no need to get to know their lawyer or to work closely with their counsel. Instead they have a group of people guide their claim through what they perceive to be an "ugly process" that they must endure to obtain whatever modicum of justice they deem to be sufficient. Maybe that is the best we can expect for most clients these days in light of the gauntlet of challenges faced by clients in their efforts to be made whole for a wrong they suffered through no fault of their own. A remaining irony is that these advertisements have created one of the major challenges facing our clients and our practice, public perception.

I reach my understanding despite the fact that I don't like seeing the television ads and the billboards, not only because they compete for business, but also because they bombard our community with images and messages that reflect poorly on our profession in the eyes of the community – at least some of it. Granted, some advertisements are more sophisticated and less offensive. Also granted, the advertising is likely reaching many folks who should have a lawyer assist them with their claims but might not otherwise think of obtaining counsel or know how to go about it. Yet, reeling in business is a process very different from public service, public relations and image-making. In fact, for the largest target audience, these two goals may be incompatible. It's all about perception and framing. Studies show that people do not perceive themselves as potential victims. They feel alienated by TV ads framed as a pathway to "easy money" for victims.

There are many different ways of reaching out to our community to offer our services, each of which offers a different form of "service delivery." In fact, marketing methods continue to proliferate. It may even be in the near future that TV advertising and billboards will become passé for the majority of the community, as folks look more and more to electronic communication to find what they need or want. Now, in addition to websites, there are website

Continued on Page 57


Lobbyists Report

By Will Coyne & Adam Eichberg

At the midpoint of the 2013 legislative session, a number of hot button issues are ping ponging through the legislature, including some key CTLA priorities. The reenergized Democratic majorities, fresh off their sweeping election victories in November, have buoyed those issues. After all of the election dust settled, Colorado Democrats regained control of the State House and retained control of the State Senate. Along with Democratic Governor John Hickenlooper, the Democrats control all three levers of power in the Capitol for at least the next two years.

From gun control, to the passage of civil unions for gay couples, to in-state tuition for the children of undocumented immigrants, to sex education, progressive social issues have largely dominated the session to date.

Alongside those intense social debates, a couple of priority issues for CTLA are moving ahead quietly. First, CTLA championed Senate Bill 23, which raised the damage caps for claims under the Colorado Governmental Immunity Act for the first time in 20 years. The bill, as introduced, faced steep opposition from all levels of government in Colorado: cities, counties, schools, special districts and universities. CTLA worked with Senate Minority Leader Bill Cadman (R-Colorado Springs) , Senate President John Morse (D-Colorado Springs) and Speaker of the House Mark Ferrandino (D-Denver), Sen. Jeannie Nicholson (D-Black Hawk) and Rep. Claire Levy (D-Boulder) to build a powerful front of support for the bill. After weeks of intense negotiating, and with a few minor changes, many governmental entities dropped their opposition and have cleared a path for the bill to pass.

The bill passed 35-0 out of the State Senate. As amended in the State Senate, the bill moves the individual damage cap from $150,000 to $350,000 and the group occurrence cap from 600,000 to $990,000. The bill also includes a provision that will automatically adjust the caps for inflation every four years. The bill then passed on the floor of the State House with little debate and a vote of 63-0.

Another of CTLA's priority bills is on the move. Working with the Plaintiff Employment Lawyers Association and other coalition partners, CTLA is working to pass HB-1136, the Colorado Job Protection and Civil Rights Employment Act. The bill would create remedies for employment discrimination in state law. It also eliminates the limit of 70 years old for age discrimination cases. HB-1136 has passed through the House Judiciary Committee and awaits a vote in the House Appropriations committee. The bill is facing tough opposition from the Civil Justice League, the National Federation of Independent Businesses (NFIB) and the Colorado Association of Commerce and Industry, among other business groups. In recent years, a similar bill ran twice and failed in the legislature in Republican controlled committees. While hopes are much higher for the bills success this session, it remains an uphill climb against united opposition from the business community.

On another front, CTLA is working on a bi-partisan bill to improve Colorado's False Claims Act, which incentivizes whistleblowers to use a private right of action against contractors that defraud Colorado's Medicaid program. CTLA worked to establish the original False Claims Act in 2010. This year, CTLA is helping to make improvements to the act that will bring it into compliance with the Federal False Claims Act and make these suits more accessible.

At a little past the halfway mark, it is too early to tell how successful our 2013 legislative efforts will be, but so far so good. If you want to be more involved in CTLA's legislative effort, please get in touch with Kirpal Singh at the CTLA office. ▲▲▲

Dale H. Pugh, Esq.: Still Searching for His Hero

Some say he looked like Dobie Gillis from the popular 60's sitcom about a teenage dreamer looking for love. Imagine a high school senior in 1962 confidently dressed in a button-down sports shirt, slacks, penny loafers and a slide rule inside a leather case dangling from his belt. "That's my older brother, Maj. Dennis G. Pugh," explains CTLA member Dale Pugh with an unmistakable sense of brotherly humor – he jokingly calls him nerdy.

With quiet and sincere reflection, Dale stresses his brother Dennis always had that "something special" – the ambition, the natural charisma and a good heart. To Dale and countless others, Maj. Dennis Pugh is a true hero.

The Pugh brothers, and their sister Janet, grew up in the tiny hamlet of New Cambria, just outside Salina, Kansas, where Interstate Highways 70 and 35 intersect. In sixth grade, Maj. Pugh curiously asked his mother, "What does it take to be a jet pilot?" Hoping to encourage her son to do better in school, she made clear, "It's going to take getting really good grades." This turned out to be a defining moment in the life of this seemingly average kid.

"He became an over achiever," said Dale while describing his brother. "I don't know anyone who actually reached his or her full potential – except for Dennis. He was the nicest person you could ever meet," Dale added.

"To my brother, it didn't matter who you were, your stature in life or what click you belonged to in school. At 12 years old when someone gave Dennis a Christmas or birthday gift, he wrote a thank you letter – without being told! Who does that at 12 years old," Dale questioned.

From then on, Maj. Dennis Pugh consistently came in first. He took first place at the National Science Fair. He graduated first in his class from high school. He went on to be the first person from western Kansas to be appointed to the United State Air Force Academy and earned a 4.0 grade point average his last six semesters. He was a member of the ninth graduating class of 1967.

Maj. Dennis G. Pugh

Maj. Pugh also introduced his brother Dale to quite a few life changing "firsts." Right before Maj. Pugh graduated from the Air Force Academy, he drove Dale in his Dodge Dart to Elitch Gardens on 38th and Tennyson in Denver. "It was the first time I had been to an amusement park and the

first time I rode a classic, wooden roller coaster," Dale reminisced. "He told me if you don't ride in the front car, you aren't having the whole experience."

Attending UCLA with other students such as Lou Alcindor, later known as Kareem Abdul-Jabbar, Maj. Pugh earned a master's degree in quantitative analysis. "It's a study of some weird mathematical thing to figure out torque differentials for complicated technical military industrial uses," said Dale.

Afterward, Maj. Pugh finished first in flight school and began training at the George Air Force Base in California before being sent to Southeast Asia for the Vietnam War.

"It's the summer before my senior year in high school and Dennis flew me out to Los Angles for my first time on a plane to see him before he left," Dale recalled. "He shared the things he loved the most. We attended my first professional baseball game – the California Angels against the Oakland A's. We went to the Dorothy Chandler Pavilion – where they used to host the Oscars – and saw my first Broadway play, *George M!* starring Joel Grey as George M. Cohan who wrote 'You're a Grand Ole Flag' and 'Yankee Doodle Dandy.' We also went to some of my first live concerts at the Greek Theater to see Johnnie Mathis and The Kingston Trio, my brother's favorite group. Then, because I had just received my driver's license, Dennis had me drive along the Santa Monica Freeway for the first time – six lanes across and everyone went 60 mph and I was white knuckled and he sat there just grinning," Dale remembered.

Maj. Pugh climbs into his jet.

Dale saw his brother – and his hero – for the very last time during this incredibly fun adventure. Almost immediately after their time in California, Maj. Pugh headed to Southeast Asia and the Air Force assigned him to fly a B-52 bomber.

"He hated it," Dale stated. "He flew 25,000 feet in the air and dropped bombs on targets he didn't see. He did not know the results of his missions, and it bothered him greatly. He told me, 'I can't do this! I have to be accountable for my actions.' Dennis gave up some R & R time and volunteered for an assignment with the 'Wolf FAC' – the green berets of the Air Force. Airmen of the Wolf FAC fly phantom jets just 200 feet off the ground at 200 mph to identify targets for the B-52 bombers. It's the most dangerous job in the Air Force," Dale clarified.

On March 19, 1970, the enemy shot down Maj. Pugh's jet in Laos, near the western border of Vietnam.

Like a tragic and heart-stopping scene from a black and white war film, Maj. Pugh ejected, and luckily landed in a river. He climbed to safety in a nearby tree. He quickly spotted his severely injured co-pilot and immediately called the search and rescue (SAR) team for help on his radio. Maj. Pugh surprisingly knew one of the pilots with the SAR team – a classmate from the Air Force Academy. Just as longtime friends might casually talk to one another, Maj. Pugh carefully organized the rescue of his co-pilot, for which he was awarded the Silver Star, the third highest combat decoration for gallantry in action.

Maj. Pugh poses in front of his jet the day before the enemy shot him down.

"When SAR came back for Dennis, the enemy started to overtake him," Dale said. "He told SAR the enemy was 10 meters away and they needed to drop ordnance right on his position. Similar to being in the eye of a hurricane, when they dropped the bomb on Maj. Pugh's position – and he was in the eye of the hurricane – everything was okay. On the other hand, the enemy was blown away," he added.

At least, that was the plan.

The situation quickly changed however. The last thing heard over the radio was Maj. Pugh yelling, "NO, STOP, WAIT." At that point, he broke up his radio. SAR never had the chance to drop the bomb on his location.

And no one has heard from Maj. Pugh since.

"It was nine o'clock on a Thursday night in Salina," remembered Dale. "My family left the front door wide-open on that warm spring night. My dad and I watched a soap opera type show on television while my mom attended a high school play. My older sister Janet was attending the University of Kansas. I saw a dark sedan with no chrome, no whitewalls and little, yellow letters reading – United States Air Force

– pull up to our house. Two guys calmly came up to the front steps and I immediately went to the door. One was a lieutenant colonel and the other a chaplain. They quietly entered our house, sat down and asked my father if my mother was at home. He told them she would be home in an hour," said Dale.

The Air Force officers refused to tell Dale and his father anything while they waited. When Dale's mother came back, she saw the sedan.

"I cannot imagine what she thought when she saw the sedan out front," said Dale. "Exactly 25 years before, she had received a telegram mistakenly advising that my dad had been killed on Iwo Jima. She came into the house and saw them all sitting on the couch. The Air Force officers explained the enemy had shot Dennis down."

Dale's father and sister almost immediately accepted the fact that they would never see Dennis again. But Dale and his mother would not believe it and held out hope. That night, Dale went to bed and said, "This second marks the first day of the rest of my life and I'm going to dedicate that life to making sure when Dennis comes back he is proud of me."

Maj. Pugh had told his mother a while earlier he never wore a side arm while flying. The tight space in the jet made it uncomfortable. Most importantly, Maj. Pugh highly doubted he could kill someone face to face, even to save his own life.

Several disturbing questions arose. Without a side arm, Maj. Pugh had no way to defend himself. Did they just shoot him? Did they capture him? For a long time, Dale did not even know for sure who did it.

"Turns out an East German anti-aircraft gun operated by the Pathet Lao shot him down in Laos during a top secret mission looking for targets along the Ho Chi Minh Trail," Dale said. "The Pathet Lao, an enemy of everyone – America, China, North Vietnam – just started taking prisoners periodically at that point."

Maj. Pugh's POW bracelet and other POW/MIA bracelets and buttons.

In 1985, a reporter for *U.S. News and World Report* received access to the North Vietnamese Army archives. The reporter could look through everything, take notes, pictures, but not take any documents. Strangely, he found Maj. Dennis Pugh's identification card. Dale wondered, "How did it end up there when he was shot down by the Pathet Lao?"

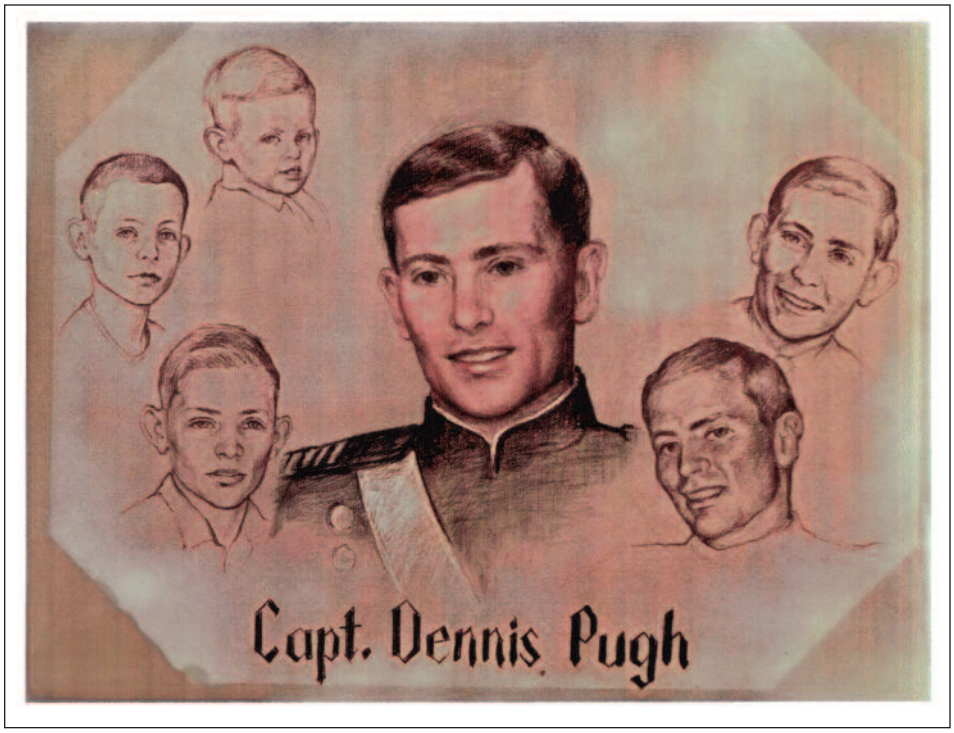
To this day, no one has been able to answer that question. Out of the 381 pilots shot down in Laos, the government has failed to account for any of them even though it still coordinates an active, ongoing program to find these men.

"After receiving conflicting information on what happened, the government located Maj. Pugh's jet; dug up the area and talked to all the area people," Dale described. "Whenever they found someone who knew about this incident, he or she had a very vivid description of the other guy being rescued but didn't have the slightest idea about my brother. At the same time, others talked about the rescue of one guy and the capture of the other one."

Sources also identified a prisoner of war camp about 10 miles from where the Pathet Lao shot down Maj. Pugh. In 1981, mercenary Hmongs, financed by Dale, travelled to this camp to investigate. They found solid clues that the camp had been in operation not too long before but could not locate anyone. Others sources have recounted an American bombing attack which ironically took out the camp and killed the prisoners in 1971.

The government found the Pathet Lao military unit that shot down Maj. Pugh and even the members of this unit didn't know anything about him. They were aware of the crash of a rescue pilot during the efforts to save Maj. Pugh, however.

"We never knew the rescue pilot's name and his family never participated in the outreach," Dale explained. "One day in 1996, the *Rocky Mountain News* ran a story about the rescue pilot's body being identified. His daughter lived in Denver and I called her. She was young and didn't know much about the incident. She asked me to contact her brother in Dallas. So I did. He answered the phone and I said, 'My name is Dale Pugh and I am the brother of Dennis Pugh and I wonder if I could …' and that was as far as I got before he said, 'I know exactly who you are and I do not want to talk to you, good bye.' Clearly, he blamed my brother for his dad dying. I had no argument with him. I never had a chance to talk to him and wanted to tell him how much I appreciated his



Dale Pugh commissioned a painting of Maj. Pugh for his mother's birthday.

father's efforts," Dale sadly expressed.

Dale always wears his brother's prisoner of war (POW) bracelet and in fact, it has never been off his wrist during the last 43 years. "Every day that goes by, whatever I'm doing I ask, 'Will my brother be proud of me' – he is my hero and the greatest influence on my life," Dale reflected.

After graduating high school in 1970, Dale received athletic scholarships to Stanford and Kansas. He declined and chose a path his brother always encouraged. He graduated from the U.S. Naval Academy in 1974 and became an officer in the U.S. Marine Corps where he was the Corps' first computer logistics officer and an aide to the President. He went on to serve as a special agent of the Federal Bureau of Investigation (FBI) and chief of Soviet counterintelligence in Washington, D.C. He has been a long time board member of the National League of Families of Prisoners of War and Missing in Action in Southeast Asia. Dale has earned master's degrees in forensic science and strategic intelligence and received his Juris Doctorate from the University of Denver Sturm College of Law.

Dale also testified at a hearing in 1979 on whether Maj. Pugh should be retained in the status of missing in action (MIA) or be declared killed in action. It was his first opportunity to make a persuasive argument and resulted in Maj. Pugh being the third to the last person declared killed in action in Southeast Asia in 1982.

"After being declared killed in action, the government stopped my brother's pay and my father took the money and set up a trust to provide three annual college scholarships called the Dennis Pugh Citizen and Merit Scholarship," Dale said with pride. "Our Freedom Tree Project plants trees in Dennis' honor as well. We have more than 280 trees planted throughout the country. The trust fund also purchases books for the Dennis and Dale Pugh Library at St. John's Military School in Salina, Kansas to encourage cadets to attend one of the service academies. Dennis' medals and memorabilia of his service are displayed at St. John's along with the panel from the original Travelling Wall of the Vietnam Memorial which bears his name."

"Over the years, we had situations where they found some remains and tied them to 10 or 12 different MIAs," Dale said. "They use my DNA to check the identity but I will only find out when it matches. Even now, they may have something but still cannot link it to Dennis."

"Because of my brother, I go to 40 baseball games a year, travel to every baseball park in the country, attend spring training in Phoenix and see all the musicals," Dale shared. "While in New York, I made it a point to see the original casts of *Man of La Mancia, Jesus Christ Super Star, Cats, Annie, Wicked* and *The Producers*."

Dale hopes to find closure one day. Until then, he keeps the memory of Maj. Pugh alive by sharing his deeply personal story about his brother and others missing in action for those interested individuals and groups. He provides informative presentations on the history of the POW/MIA movement, describes how it started, what it did and what it continues to do.

Through his dedication to his brother and his memory, Dale reaches out to others so they better understand the ultimate price paid by the thousands of heroes who courageously gave their lives in service to this country. ▲▲▲

Dale Pugh, Esq., a former deputy district attorney, now focuses his practice on a variety of personal injury cases such as auto accidents, product liability, premises liability and wrongful death. He continues to strive to make his brother proud.

Who Are We? *Continued from page 51*

access search tools, community billboards and other electronic social community vehicles beyond Facebook and Twitter. I hope each of us can find that path to communicate with those we want to serve in a manner that is most compatible with who we are and how we see ourselves serving our community.

This diversity in both marketing and "service delivery" may stem, at least in part, from the diversity of the CTLA community itself. CTLA is the one state organization through which we all perceive a common bond in our practice goals. Beyond that, we look in different directions.

Many Colorado personal injury lawyers look to the national organization, the American Association for Justice (formerly ATLA), to find guidance and inspiration beyond Colorado, perhaps striving for a nationwide practice outside the confines of our conservative state. There could be wisdom in that. The ATLA message never resonated with me for reasons that don't really matter here.

Others look more to their own communities, many and diverse, be it in rural Colorado or downtown Denver. Some more rural practitioners want to maintain contact with the Denver legal community to add richness to their environment, while some Denver practitioners reach out and seek to provide services in other parts of the state for the same reason. For me, including practice in rural Colorado has been energizing, fun and enlightening, even though I would warn against the risks attendant to the February weather in Gunnison. How we perceive our community and our role within it impacts how we choose to serve our community.

In this way, the CTLA community can strive to bring together, for the betterment of all, a diverse view of both who we are and how we go about our business. I invite those who have made that jump to GO BIG to share their thoughts about that decision-making process. What did you gain; what did you sacrifice? ▲▲▲

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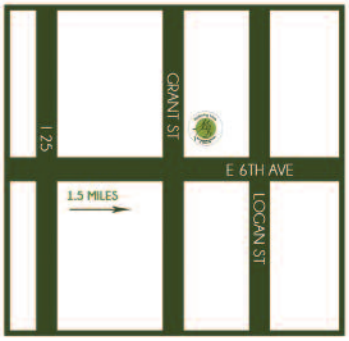

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— The Honorable Laurence H. Silberman,
United States Court of Appeals for
the District of Columbia Circuit

Walter Sargent has been an appellate advocate for over twenty years. In Colorado and other state appellate courts, he has successfully represented plaintiffs and defendants, appellants and appellees, and petitioners and respondents in matters as diverse as personal injury, municipal law, dissolution of marriage, probate, real estate, corporate governance, commercial torts, common-law contracts, employment, and insurance coverage. In the federal appellate courts, he has successfully represented individuals and entities in high-profile matters in the Third, Sixth, Ninth, and Tenth Circuits, and has successfully represented both petitioners and respondents in the Supreme Court of the United States.

In 1996, Mr. Sargent left a large firm to open his own appellate shop. The new firm was founded on a simple set of premises: that appellate practice is a specialty all to itself, that there is a need for appellate specialists in Colorado, and that – freed from the encumbrances and constraints of a larger firm – a first-rate appellate practice can offer cost-effective services to a wide range of clients. With the flexibility to provide appellate services through a variety of fee structures – from traditional hourly rate structures to contingent fees – the firm seeks to arrive at working relationships that are economically and professionally satisfying to all involved. If you are interested in finding out more about the firm's services, please call or write Mr. Sargent at his office in Colorado Springs.

Walter Sargent is a graduate of the Massachusetts Institute of Technology, where he received degrees in philosophy and computer science, and Harvard Law School, where he was a John M. Olin Fellow of Law and Economics, winner of the Olin Prize for outstanding writing in the field of law and economics, and articles editor for The Harvard Journal of Law & Public Policy. Mr. Sargent cofounded the Colorado Bar Association's subcommittee on appellate practice and, in 1998, was selected to chair the 850-member Appellate Practice Committee of the American Bar Association's Section of Litigation. In 2004, Mr. Sargent became one of only two Colorado lawyers elected to membership in the American Academy of Appellate Lawyers.