
Appellate Practice

Hot Topics 2009



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BIOGRAPHICAL INFORMATION

Matthew S. Holman, Esq., Program Chair and Moderator

Lila M. Bateman, Esq., is a senior associate in the litigation department of Morrison & Foerster LLP's Denver office. Ms. Bateman practices in both trial and appellate courts throughout the country, with an emphasis on appellate litigation, complex commercial litigation, and class action defense. She has worked extensively on appeals involving business contract disputes, securities law, franchise law, and various constitutional and criminal issues. She has also tried more than fifteen cases for the Denver City Attorney's office, including five jury trials. Before joining the firm in 2001, Ms. Bateman clerked with the Honorable Wade Brorby of the U.S. Court of Appeals for the Tenth Circuit.

Honorable Michael L. Bender is a Justice with the Colorado Supreme Court. He was appointed ten years ago. Before his appointment to the Court, Justice Bender was a trial lawyer in private practice for twenty years. He also worked for Gibson, Dunn & Crutcher in Los Angeles, the EEOC, and the State Public Defender System. Justice Bender received the University of Colorado School of Law Alumni Award for Distinguished Achievement in 2006 and the Outstanding Judicial Officer of the Year Award in 2000. He currently teaches Professional Responsibility at CU Law School as an Adjunct Professor.

Chief Judge Janice Davidson has been on the Colorado Court of Appeals for over twenty years and has been Chief Judge of that Court since 2003. She graduated with Highest Honors from Skidmore College in 1966, and from the University of Pennsylvania School of Law in 1969. From 1969-1971, Judge Davidson was an appellate attorney with the New York Legal Aid Society and was a Colorado State Public Defender from 1971-1973. She continued in public interest law, including nine years with the Colorado Attorney General's Office, until 1985, when she was appointed to the county court bench in Denver, where she served until her appointment in 1988 to the Colorado Court of Appeals. Chief Judge Davidson has been the Chairperson of the Colorado Supreme Court Standing Committee on Appellate Rules since 1988. She is also a member of the Colorado Supreme Court Standing Committee on Rules of Civil Procedure and the Colorado Standing Committee on Rules of Evidence. She was a contributing writer to the Colorado Appellate Handbook, First Edition, and is Managing Editor of the Second and Third Editions. She serves on numerous other boards and committees, and is a frequent lecturer and contributor to continuing legal education programs.

Honorable Allison H. Eid was sworn in as the 95th Justice of the Colorado Supreme Court on March 13, 2006. Before joining the Court, Justice Eid was the Solicitor General of the State of Colorado, serving as the chief legal officer to the Colorado Attorney General and representing Colorado officials and agencies in state and federal court. She was also a tenured Associate Professor of Law at the University of Colorado School of Law, teaching Constitutional Law,

Legislation, and Torts, and writing on the topic of constitutional federalism. Prior to joining the faculty of the University of Colorado School of Law, Justice Eid practiced commercial and appellate litigation with the Denver office of the national law firm of Arnold & Porter. She clerked for the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court, and for Judge Jerry E. Smith of the United States Court of Appeals for the Fifth Circuit in Houston, Texas. Justice Eid earned her bachelor's degree in American Studies (With Distinction and Phi Beta Kappa) from Stanford University in 1987. She then served as a Special Assistant and Speechwriter to U.S. Secretary of Education William J. Bennett. In 1991, she graduated with High Honors from The University of Chicago Law School, where she was Articles Editor of *The University of Chicago Law Review* and was elected to the Order of the Coif. In 2002, President George W. Bush appointed her to serve on the Permanent Committee for the Oliver Wendell Holmes Devise, established by Congress in 1955 to prepare the history of the U.S. Supreme Court. She is a member of the American Law Institute and studied comparative law in London as a Temple Bar Scholar.

Marcy G. Glenn, Esq., is a partner at Holland & Hart, LLP, resident in the firm's Denver office. Ms. Glenn specializes in appellate litigation and legal ethics. She is the immediate past-manager of the firm's Appellate Practice Group and she has represented clients in the United States Supreme Court, the federal courts of appeals, and state appellate courts in Colorado and many other states. As an appellate litigator, Ms. Glenn has been regularly selected for inclusion in Best Lawyers in America, Who's Who in American Law, and other attorney rating publications. She has chaired the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct since that Committee was formed in 2003. Ms. Glenn is a former chair of the Committee on Conduct of the United States District Court for the District of Colorado, and a current member and former chair of the Colorado Bar Association Ethics Committee. Before joining Holland & Hart, Ms. Glenn clerked for Judge Richard P. Matsch of the United States District Court for the District of Colorado. She is a graduate of Dartmouth College and Northeastern University School of Law.

Gregory J. Kerwin, Esq., is a litigation partner in Gibson Dunn's Denver office, experienced in handling major trials and appeals. Mr. Kerwin represents clients in complex commercial disputes, with emphasis on antitrust, securities, and business tort and contract disputes. He has served as lead or second-chair in approximately 20 jury trials, bench trials, and arbitrations, and has argued and briefed many cases in the Colorado appellate courts, Tenth Circuit and Ninth Circuit. Besides extensive work in state and federal court in Colorado, Mr. Kerwin has represented clients in trial courts in 18 other states besides Colorado: Alabama, Alaska, Arizona, California, Idaho, Kansas, Kentucky, Minnesota, Nevada, New Mexico, New York, Oklahoma, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. A native of Denver, Mr. Kerwin graduated from Colorado College in 1981 and the Duke University School of Law in 1984. He was Editor-in-Chief of the *Duke Law Journal* from 1983-84. He served as a law clerk for Judge James K. Logan of the U.S. Court of Appeals for the Tenth Circuit from 1984-85. Mr. Kerwin wrote chapters on appellate standards of review and preparing certiorari petitions in A. Gill, *Colorado Appellate Law and Practice* (West 2d ed. 2007). He co-chaired seminars on Colorado appellate practice in 1997 and 1999 and was a speaker or moderator on

Colorado appellate practice at programs in 2001, 2003, 2005, 2007, and 2008. He currently serves as Chairman of the Board of Directors of the Tenth Circuit Historical Society.

Andrew M. Low, Esq. has been one of the leading appellate lawyers in Colorado, in the U.S. Court of Appeals for the Tenth Circuit, and throughout the Rocky Mountain region for the past 20 years. He heads the appellate practice group at *Davis Graham & Stubbs LLP*, where he is a partner. He has handled a broad range of appeals, including cases involving employment relations, insurance, securities, real estate, legal and medical malpractice, products liability, income taxation, and pension plans, to name a few. Mr. Low has achieved a remarkable record of success and upon request can supply a list of his cases, with the outcome of each one. Mr. Low also has extensive experience in litigating commercial cases at the trial level including numerous administrative agency trials and appeals. Mr. Low writes a quarterly column on appellate practice for *The Colorado Lawyer*. He also edited the first and second editions of the *Colorado Appellate Handbook*, a loose-leaf text covering all aspects of appeals in the Colorado state appellate courts. Mr. Low is a member of the Colorado Supreme Court Joint Committee on Appellate Rules and is a past president of the Appellate Practice Subcommittee of the Colorado Bar Association Litigation Council. Mr. Low is also a member of the Colorado Civil Jury Instructions Committee and is the Colorado representative to the Tenth Circuit Advisory Committee. Mr. Low received his legal education at Cornell University, where he graduated magna cum laude in 1976. At Cornell, he was a member of the Cornell Law Review and the Order of the Coif. Mr. Low was awarded prizes for scholastic achievement in real estate and insurance, and he received the Herbert Reif award for best law review note. He is listed in *The Best Lawyers in America®* (Appellate Law, Commercial Litigation, and First Amendment Law) and *Who's Who in American Law*. Mr. Low is admitted to practice in Colorado and before the United States District Court for the District of Colorado, the United States Court of Appeals for the Ninth, Tenth and Federal Circuits and the United States Supreme Court. Mr. Low is a member of the American, Colorado, and Denver Bar Associations (Litigation Section).

Walter H. Sargent, Esq., is a sole practitioner in Colorado Springs, specializing in civil appeals. He 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 and recipient of the Olin Prize for outstanding writing in law and economics. Mr. Sargent is a past chair of the Appellate Practice Committee of the American Bar Association's Section of Litigation, a co-founder of the Colorado Bar Association's Appellate Practice Subcommittee, and a fellow of the American Academy of Appellate Lawyers.

Paul A. Schwartz, Esq.

John D. Seidel, Esq.

Honorable Daniel M. Taubman has been a judge on the Colorado Court of Appeals since 1993. Prior to his appointment, Judge Taubman was the Director of the Colorado Coalition of Legal Services Programs. He is an active member of the Appellate Practice Subcommittee, the Availability of Legal Services Committee, and the Ethics Committee of the Colorado Bar

Association; currently serves as a member of the Access to Justice Commission; and has served two terms on the Colorado Bar Associations Board of Governors. Judge Taubman received his undergraduate degree from Cornell University and his J.D. from Harvard Law School.

Mark G. Walta, Esq.

Honorable John R. Webb was appointed to the Colorado Court of Appeals in 2002. He graduated Phi Beta Kappa from the University of North Dakota in 1970 and from the University of Colorado School of Law in 1973, Order of the Coif. From 1973-1974, Judge Webb served as law clerk for Honorable Robert H. McWilliams at the U.S. Court of Appeals for the 10th Circuit. After his clerkship, he practiced in the areas of complex commercial litigation and employment, most recently with Jacobs Chase Frick Kleinkopf & Kelley, LLC. Judge Webb has served on the Colorado Supreme Court Standing Committee on Rules of Civil Procedure, the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct, the Judicial Ethics Advisory Board, and *The Colorado Lawyer* Board of Editors. Judge Webb is a frequent lecturer and contributor to continuing legal education programs on appellate practice and ethics. He has authored numerous articles, including: *Revisiting the Recovery of Attorney Fees and Costs in Colorado*, 33 Colo.Law. 11 (April 2004); *Fraud and Negligent Misrepresentation Tort Theories and Employment Law*, 29 Colo.Law. 79 (June 2000); *The Daubert Standard and Employment Law*, 28 Colo.Law 65 (Aug. 1999); *Wrongful Discharge Suits by In-House Counsel: Refining the General Dynamics Standard*, 11 Lablaw 35 (1995); *Discovery in Employment Discrimination Cases: The Employer's Perspective*, 4 Prac. Litigator 13 (Nov. 1993); *Recent Developments in the Law of Sexual Harassment*, 18 Colo.Law. 263 (Feb. 1989); *Conflict Between Workers' Compensation Exclusive Remedy and Common Law Actions For Psychic Injuries*, 14 Colo.Law. 1992 (Nov. 1985).

Jessica E. Yates, Esq., is an associate at Snell & Wilmer LLP, with a practice focusing on appellate services and commercial litigation. Prior to joining Snell & Wilmer, she clerked for the Honorable David Ebel of the Tenth Circuit United States Court of Appeals. She graduated from the University of Virginia School of Law. Prior to her legal career, she held various public policy positions in Washington, D.C. She also holds an M.A. in Public Administration and Public Policy from the University of York, England.

APPELLATE PRACTICE HOT TOPICS 2009

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THE RECORD ON APPEAL

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- I. The meaning of the “record”**
 - A. “The record” is traditionally understood to mean everything that transpired in the trial court (or administrative agency) “on the record,” including:**
 - 1. Transcripts of hearings and trial;**
 - 2. Pleadings;**
 - 3. Court orders;**
 - 4. Exhibits, both admitted and excluded; and**
 - 5. Jury instructions, both given and rejected.**
 - 6. *See* FRAP 10(a) (confirming traditional components of record).**
 - B. In the context of an appeal, “the record” assumes multiple meanings:**
 - 1. Sometimes it refers to the traditional record of what occurred in the lower court.**
 - 2. Other times, it refers to only those materials from the traditional record that the parties have designated for inclusion in the record on appeal.**
 - 3. This outline uses the phrase “designated record” to distinguish the record designated for appeal from the complete district court record.**

II. Overview of record issues in the Tenth Circuit

- A. The Tenth Circuit distinction between “designated record,” “pro se record,” and “appendix” cases:
1. In appeals in which any appellant is represented by appointed counsel – including companion and consolidated appeals – the Tenth Circuit requires a *designated record*. 10th Cir. R. 10.2(A).
 2. “In pro se cases, no designation is required.” 10th Cir. R. 10.2(C).
 - a. But a “pro se record” is transmitted to Tenth Circuit as if it were a designated record. 10th Cir. R. 10.2(C), 11.2(A).
 - b. Note that “pro se cases” refers only to cases where the appellant is pro se.
 3. In appeals in which all appellants are represented by retained counsel – including companion and consolidated appeals – the Tenth Circuit requires the appellant(s) to file an *appendix*.
 4. The contents of a designated record and an appendix will generally be the same, but the mechanics for designating, filing, and citing the two forms of record will often differ.
- B. Required contents of both a designated record and an appendix:
1. Generally:
 - a. “[A] record on appeal that is sufficient for considering and deciding the appellate issues.” 10th Cir. R. 10.3(A).
 - (1) “The court need not remedy any failure by counsel to designate an adequate record. When the party asserting an issue fails to provide a record sufficient for considering that issue, the court may decline to consider it.” 10th Cir. R. 10.3(B).
 - (2) “The appellant must file an appendix sufficient for considering and deciding the issues on appeal. The requirements of Rule 10.3 for the contents of a record on appeal apply to appellant’s appendix.” 10th Cir. R. 30.1(A)(1).

- g. Notices and calendars;
 - h. Procedural motions or orders;
 - i. Returns and acceptances of service;
 - j. Subpoenas;
 - k. Summonses;
 - l. Setting orders;
 - m. Unopposed granted motions;
 - n. Nonfinal pretrial reports or orders; and
 - o. Suggestions for voir dire.
- C. The mechanics of a *designated record* – *i.e.*, where any appellant is represented by appointed counsel:
- 1. Designations:
 - a. The appellant must file a designation of record within 10/14¹ days of filing the notice of appeal. 10th Cir. R. 10.2(A)(1).
 - b. The appellee may file an additional designation within 10/14 days after service of the appellant’s designation. 10th Cir. R. 10.2(A)(2).
 - 2. Transmission to the Tenth Circuit (including in pro se appeals):
 - a. The district court clerk will transmit the designated record to the Tenth Circuit when it is complete. FRAP 11(b); 10th Cir. R. 11.2(A), 11.3.
 - b. The transmission may be physical (a hard copy of the designated record is delivered to Tenth Circuit) or electronic. 10th Cir. R. 11.3, 11.4.

¹ On December 1, 2009, a number of deadlines set forth in FRAP and the Tenth Circuit’s Local Rules are expected to change. Whenever this outline includes a slash between two numbers, the first number refers to the pre-December 1 time limit, while the second number refers to the post-amendment time limit. Otherwise, this outline cites to FRAP and the Local Rules as amended effective December 1, 2009.

- c. **Practice tip: If the designated record has been physically delivered to the Tenth Circuit, appointed counsel may move to borrow the record from the court. See *Tenth Circuit Criminal Justice Act Attorney Handbook*, at 19 (Sept. 19, 1997).²**
3. Citations to the record:
- a. References should be through identification of the district court document and page number. 10th Cir. R. 28.1(B). (The December 1, 2009, rules change the previously accepted practice of referring simply to the document number in the district court docket.)
 - b. *E.g.*, Plaintiff’s Motion in Limine (5/19/08) at 6.
 - c. **Practice tip: Volume numbers will be useful for large designated records.**
- D. The mechanics of an *appendix* – *i.e.*, where all appellants are represented by retained counsel:
- 1. No designation of record is required. 10th Cir. R. 10.2(B).
 - 2. The record remains in the district court. 10th Cir. R. 30.1.
 - 3. Preparation of the appendix:
 - a. Copies of the included documents should show the district court’s electronic stamp (available on PACER). 10th Cir. R. 30.1(C)(1).
 - b. Order of contents, per 10th Cir. R. 30.1(C)(2):
 - (1) District court docket entries;
 - (2) Pleadings, in chronological order;
 - (3) Exhibits;
 - (4) Transcript excerpts, in chronological order.
 - c. Except for social security appeals, the appendix must be paginated consecutively. 10th Cir. R. 30.1(C)(3).

² Available at <http://ca10.uscourts.gov/downloads/cja-handbook.pdf>.

- d. **The appendix must include an index (akin to a table of contents) with page numbers. 10th Cir. R. 30.1(C)(3).**
- e. **Practice tip: Help the court navigate through the appendix by, *e.g.*:**
 - (1) **Use printed tabs to separate the docket sheet, pleadings, exhibits, and transcripts;**
 - (2) **Separate documents by unnumbered colored sheets;**
 - (3) **Include the index at the start of every volume; and**
 - (4) **Consider hyperlinking the brief, which renders the hard copy of the appendix secondary to the disc containing the hyperlinked brief and all cited record materials (also, potentially, all cited legal authority).**
- f. **Exemptions from appendix:**
 - (1) **Voluminous materials, pursuant to motion. 10th Cir. R. 30.3(A).**
 - (2) **Practice tip: Provide exempted voluminous materials on a disc, if possible.**
 - (3) **In pro bono appeals, if production of the appendix is too costly for the appellant to bear, pursuant to motion. 10th Cir. R. 30.3(B).**

4. Filing of the appendix:

- a. **Due at the time of filing the opening brief. 10th Cir. R. 30.1(D).**
- b. **The appellant must file two hard copies of the appendix. 10th Cir. R. 30.1(D). (At this time, appendices are never filed electronically.)**
- c. **Multiple appellants:**
 - (1) **Should attempt to file a single joint appendix. 10th Cir. R. 30.1(B).**
 - (2) **If multiple appendices are filed, they should not include duplicate materials. 10th Cir. R. 30.1(B).**

- d. **Supplemental appendix:**
 - (1) **May be filed by an appellee, with its answer brief. 10th Cir. R. 30.2(A)(1).**
 - (2) **Appointed counsel for an appellee may apply for reimbursement of fees and expenses incurred in preparing and filing a supplemental appendix. 10th Cir. R. 30.2(A)(2).**
- e. **No other appendix may be filed absent court permission. 10th Cir. R. 30.2(B):**
 - (1) **This rule applies to any appendix beyond the appellant’s original appendix and the appellee’s supplemental appendix, including an appellant’s supplemental appendix.**
 - (2) **Practice tip: A motion requesting leave should identify the contents of the proposed supplemental appendix.**

5. Citations to the appendix:

- a. **Should be by page number in the paginated appendix. 10th Cir. R. 28.1(A).**
- b. ***E.g.*, Aplt. App. at 27, or Aplee. Supp. App. at 14.**
- c. **Practice tip: Consider a footnote or preliminary section of the brief to inform the court of the citation conventions used in the brief, or to explain special circumstances related to the appendix. *E.g.:***
 - (1) **“Defendants’ opening brief is cited as ‘DOB.’ Citations to defendants’ appendix are prefixed with “A”; the first page would be cited as ‘A1.’ Citations to the paper volumes of plaintiffs’ supplemental appendix (Volumes I through III) are prefixed with ‘SA.’ Volume IV of the supplemental appendix is a CD ROM containing the entire trial transcript in searchable electronic form. A separate PDF file is included for each volume of the transcript. Citations to the transcript follow the format ‘Tr. 123.’”**
 - (2) **“App. refers to Plaintiffs’ Appendix. The second trial transcript sometimes does not provide the**

testimony and arguments of counsel in precise chronological order. For the Court's convenience, Plaintiffs provide a cross-reference table immediately following the Appendix's Table of Contents. The parties have filed a joint motion in the district court to correct the record, to include certain items that are not currently on file. Plaintiffs' Appendix includes those materials."

- E. Special issues involving transcripts, in all Tenth Circuit appeals:**
- 1. The appellant must order designated transcripts, or state that all designated transcripts are already on file or that no transcripts are necessary, within 10/14 days after filing notice of appeal. FRAP 10(b)(1); 10th Cir. R. 10.1(A)(2).**
 - 2. The appellee may designate additional transcripts within 10/14 days after service of the appellant's order certificate. FRAP 10(b)(3)(B)-(C).**
 - 3. The court reporter must acknowledge receipt of the order, state an anticipated date of completion, and promptly return the updated order form to the Tenth Circuit. 10th Cir. R. 10.1(B)(2).**
 - 4. "A transcript order is not complete until satisfactory arrangements have been made with the reporter." 10th Cir. R. 10.1(B)(3).**
 - 5. *See also* Appellate Transcript Management Plan for the Tenth Circuit (Appendix B to Local Rules).**
- F. Special issues involving sealed materials filed in the district court, in all Tenth Circuit appeals:**
- 1. Sealed materials must be separated and submitted to the Tenth Circuit under seal.**
 - 2. Designated record cases:**
 - a. The district court clerk will handle separation, will enclose sealed materials in an envelope clearly marked "Sealed," and will affix the sealing order to the outside of the envelope. 10th Cir. R. 11.3(D)(1).**
 - b. A party must file a motion to access sealed materials. 10th Cir. R. 11.3(D)(2).**

- c. Presentence investigation reports:**
 - (1) Presentence reports must be included in the designated record if the appeal is from a sentence imposed under 18 U.S.C. § 3742 (the typical vehicle for seeking appellate review of a sentence). 10th Cir. R. 10.3(D)(3).**
 - (2) Presentence reports are confidential and the clerk must treat them as if they had been sealed below, except that parties and their lawyers may examine the reports in the clerk's office without filing a motion with the court. 10th Cir. R. 11.3(E).**

3. Appendix cases:

- a. Sealed documents must be filed in a separate appendix volume, under seal. 10th Cir. R. 30.1(C)(4).**
- b. There is no provision regarding access to sealed materials in an appendix, because each party will have access in its own or served copy of the appendix.**

G. Not a record requirement, but a trap for the unwary – the addendum to the opening brief:

- 1. This is a distinct requirement from the designated record and appendix.**
- 2. In all appeals, under 10th Cir. R. 28.2(A), the addendum to an appellant's brief must include (even if also in the record):**
 - a. All pertinent written findings, conclusions, opinions, or orders;**
 - b. If any judicial pronouncement is oral, the transcript pages;**
 - c. In social security cases, the decisions of the ALJ and appeals council; and**
 - d. In immigration cases, written rulings of the Immigration Judge and Board of Immigration Appeals, plus the transcript of any oral rulings.**
- 3. The appellee's brief must include any required addendum items omitted from the appellant's brief.**

III. Overview of record issues in Colorado appellate courts

- A. Unlike the Tenth Circuit, all appeals are treated the same for record purposes.
- B. Contents of a designated record:
 - 1. Generally:
 - a. All items necessary to resolve the issues on appeal. *See, e.g., People v. Wells*, 776 P.2d 386, 390 (Colo. 1989) (where appellant fails to include relevant record, “[t]he presumption is that material portions omitted from the record would support the judgment”); *People v. Tippett*, 733 P.2d 1183, 1196 n.7 (Colo. 1987) (declining to address defendant’s claim regarding peremptory challenges due to absence of any record regarding the voir dire);
 - b. It is not always fatal if the record does not include every piece of testimony or evidence an appeal issue. *See, e.g., People v. Olson*, 921 P.2d 51 (Colo. App. 1996) (rejecting argument that record was insufficient to resolve appeal where the record contains at least some of the relevant evidence); *Aurora v. Webb*, 585 P.2d 288, 290 (Colo. App. 1978) (“There is no requirement that the record be all inclusive – that every folio with any conceivable relationship to an issue raised on appeal must be designated. Rather, C.A.R. 10(b) gives the appellant the discretion – in the interest of economy – to determine what is necessary.”).
 - c. **Practice tip:** Though not explicitly required in CAR 10, the designated record should include portions of the record where the party preserved its issues for appeal:
 - (1) CAR 28(k) requires the appellant’s brief to include “a citation to the precise location in the record where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.”
 - (2) CAR 28(k) further provides that “[a] citation of where the issue was preserved for appellate review shall include, if applicable, the record reference

where an objection, offer of proof, motion in limine, motion for directed verdict, or other relevant motion was made and ruled on.”

- d. “If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.” CAR 10(b). *See, e.g., People v. Morgan*, 199 Colo. 237, 606 P.2d 1296 (1980); *People v. Alberico*, 817 P.2d 573 (Colo. App. 1991).

2. Minimum requirements of the designated record, per CAR 10(a):

- a. The final pleadings that frame the issue in the district court;
- b. The findings of fact, conclusions of law, and judgment entered upon the findings and conclusions, for issues tried to the court;
- c. The jury verdict, answers by the jury to any special interrogatories, and judgment entered upon the verdict, for issues tried to a jury; and
- d. Motions for new trial and other post-trial motions, if any, and the district court’s rulings on those motions.

3. Permissive items:

- a. Any other record documents that any party designates, CAR 10(a)(1);
- b. Relevant portions of designated transcripts, CAR 10(a)(2); and
- c. Relevant designated exhibits and depositions, CAR 10(a)(2).

4. Transcripts:

- a. The appellant must designate desired transcripts, by date and court reporter, within 10 days after filing its notice of appeal. CAR 10(b).

- b. The appellee may designate additional transcripts within 10 days after service of the appellant’s designation. CAR 10(b).
- c. CAR 10(b) sets forth procedures for ordering and payment by the parties, and for required notices from the court reporter.

C. The mechanics of a designated record:

1. Designations:

- a. The appellant must file its designation within ten days after filing the notice of appeal. CAR 10(b).
- b. The appellee may file a designation of additional items within ten days after service of the appellant’s designation. CAR 10(b).

2. Preparation of the designated record:

a. By the district court clerk, in one of the following forms:

(1) Entirely paper record:

- (a) Originals of the designated items are organized into files and boxes, consecutively paginated, and indexed.
- (b) The parties may take turns checking out the original paper record from the Court of Appeals.
- (c) **Practice tip:** The Court of Appeals insists on absolute compliance with its procedures for checking out the record. *See Colorado Court of Appeals, Appellate Records Checkout Policy* (Jan. 1, 2004).³

(2) Entirely electronic record:

- (a) The designated items are copied onto a CD-ROM, with bookmarks that delineate the contents and effectively serve as an index. Colorado Court of Appeals, *Interim Policy*

³ Available at http://www.courts.state.co.us/userfiles/File/Court_Probation/Court_of_Appeals/record_checkout.pdf.

- (4) **Practice tip: Consider explanatory footnote regarding citation protocols, as discussed above for federal appeals.**
- b. **Electronic record:**
 - (1) **By the name of the bookmarked document and pinpoint citation to the unique CD-ROM page number, plus the line number where applicable. March 1, 2009 Policy; CAR 28(e).**
 - (2) ***E.g.*, Plaintiff’s Motion for Summary Judgment, CD page 7; or Trial Transcript, CD page 462:7-14.**
- c. **For either type of record:**
 - (1) **“When the reference is to the evidence, to the giving and refusal to give an instruction, or to a ruling upon the report of a master, the page and line number must be specific[.]” CAR 28(e).**
 - (2) **“[I]f the reference is to the exhibit both the page and line number at which the exhibit appears and at which it was offered in evidence must be indicated.” CAR 28(e).**

IV. When Things Go Wrong: Dealing with Record Issues:

- A. **You discover that the record in the district court is incomplete:**
 - 1. **Because it omits, *e.g.*:**
 - a. **Tendered but rejected jury instructions that were never formally filed; or**
 - b. **Exhibits that the district court returned to the parties at the end of the trial.**
 - 2. **In both the Tenth Circuit and Colorado state court appeals, if the parties agree as to the omitted items:**
 - a. **Either stipulate to their omission and the need to correct the record; or**
 - b. **Move in the district or appellate court to direct the clerk to include the omitted items. FRAP 10(e)(2)(A)-(C); CAR 10(e).**

- 3. In both the Tenth Circuit and Colorado state court appeals, if the parties cannot agree as to the omitted items, move the district court to settle the record. FRAP 10(e)(1); CAR 10(e).**
 - a. Relief under FRAP 10(e)(1) is limited to items that were before the district court at the time of judgment, and thus cannot include depositions that the district court never saw. *See, e.g., Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1474 (10th Cir. 1993).**
 - b. No motion to the appellate court is required.**
 - c. The Tenth Circuit's approach is that most record corrections can and should be resolved under FRAP 10(e)(1), as opposed to (e)(2) and (e)(3).**
- B. You realize, belatedly, that you failed to designate a necessary item for inclusion in the record:**
 - 1. Tenth Circuit appeals:**
 - a. This is unlikely to be a problem in appendix appeals, because the appendix is not filed until the brief is filed; but it can be addressed through a motion to file a supplemental appendix.**
 - b. In designated record (appointed counsel) appeals, you may move to amend the designation of the record. The preferred practice is to indicate in the motion the additional items to be included, rather than resubmitting a new designation of the record.**
 - 2. Colorado appeals:**
 - a. Before the record is transmitted: Move to amend your designation of record.**
 - b. After the record is transmitted:**
 - (1) Move to correct the record to add the accidentally omitted items. CAR 10(e).**
 - (2) Both the district court and the appellate court have jurisdiction to order correction. CAR 10(e).**

- (3) Or the parties may by stipulation direct the district court clerk to correct the error. CAR 10(e).**

C. The trial court has transmitted an incomplete designated record:

- 1. Tenth Circuit designated record (*i.e.*, appointed counsel) appeals:**
 - a. Move to correct or modify the record. FRAP 10(e).**
 - b. Both the district court and the Tenth Circuit have jurisdiction to order correction. FRAP 10(e)(2)(B)-(C).**
 - c. Or the parties may by stipulation direct the district court clerk to correct the error. FRAP 10(e)(2)(A).**
- 2. Colorado appeals: Move to correct or modify the record. CAR 10(e).**

D. The state court digital recording system failed, or for some other reason the transcript is unavailable or incomplete:

- 1. If only portions of the recording are inaudible and counsel can agree on what was said in the district court, move to correct or modify the record. CAR 10(e).**
- 2. Submit a statement of the evidence and proceedings. FRAP 10(c); CAR 10(c).**
 - a. The rules contemplate initiation by the appellant, but the appellee may object and propose amendments;**
 - b. The statement may be “based on [a party’s] memory, the memory and notes of trial counsel, or the memory and notes of counsel’s associate.” *Knoll v. Allstate Fire & Cas. Ins.*, 216 P.3d 615 (Colo. App. 2009).**
 - c. The trial court must settle and approve the statement or competing statements.**
- 3. Submit an agreed statement as to the record on appeal. FRAP 10(d); CAR 10(d).**
 - a. The rules permit, in lieu of the record on appeal as defined in FRAP 10(a) and CAR 10(a), the parties to submit a join statement of the case summarizing the**

relevant evidence and showing how the relevant issues were decided.

- b. The district court must approve the statement, which is then certified as the record.
 - c. Note that an agreed statement may be used even where the record is fully available. *See Almarez v. Carpenter*, 477 P.2d 792, 796 (Colo. 1970) (CAR 10(d) “provide[s] the means of furnishing a record other than by a reporter’s transcript” and was “promulgated specifically to reduce the cost of appellate review to the litigants and to conserve review time by the court itself”).
 - d. This option is rarely used.
4. If a transcript is unavailable because the proceedings were not recorded or reported in the first instance, submit a statement of the evidence or proceedings. FRAP 10(c); CAR 10(c). *See Halliburton v. Public Serv. Co.*, 804 P.2d 213, 218 (Colo. App. 1990).
 5. In Colorado courts, the absence of a transcript or other record materials generally will not result in a new trial in civil cases, but may in criminal cases:
 - a. Civil cases:
 - (1) Generally, the absence of a transcript will not entitle a losing party to a new trial: “It is the appellant’s job to ensure that the reviewing court has an adequate record. Therefore, when a complete transcript is unavailable, the appellant must obtain an adequate substitute.” *Knoll*, 216 P.3d at 615 (citations omitted).
 - (2) However, a court may award a new trial to the appellant in “rare circumstances” “in the interest of substantial justice,” if the appellant:
 - (a) Makes a specific allegation of error dependent upon the unavailable record materials;
 - (b) Shows that the unavailable materials materially affects the ability of the appellate court to review the alleged error, *i.e.*, that there are no substitute materials available

“missing portion of the record is ‘substantial and crucial’”)

V. Resort to Extra-Record Materials

A. Appellate courts may take judicial notice of “facts not subject to reasonable dispute.” FRE 201; CRE 201. See, e.g.:

- 1. *Olf v. East Side Union High School Dist.*, 404 U.S. 1042, 1044 n.2 (1972); *Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc.*, 497 F.3d 1096, 1107 n.18 (10th Cir. 2007). *But see West Coast Life Ins. Co. v. Hoar*, 558 F.3d 1151, 1156-57 (10th Cir. 2009) (declining to take judicial notice of automobile accident fatality statistics that party did not offer as evidence at trial, and striking portion of brief relying on those statistics: “Whether an appellate court will for the first time take judicial notice of a judicially notable fact rests largely in its own discretion.”).**
- 2. *People v. Stanley*, 170 P.3d 782, 793 (Colo. 2007); *Velarde v. Zavaras*, 960 P.2d 1162, 1163 (Colo. 1998).**

B. The Tenth Circuit has recognized its inherent equitable power to supplement the record “under some circumstances.” *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000).

- 1. Under *Kennedy*, 225 F.3d at 1191 (citation and quotation marks omitted), the court may apply the following “non-exclusive” factors:**
 - a. “[W]hether acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issue;”**
 - b. “[W]hether remand for the district court to consider the additional material would be contrary to the interests of justice and a waste of judicial resources;” and**
 - c. “[W]hether supplementation is warranted in light of the unique powers that federal appellate judges have in the context of habeas corpus actions.”**
- 2. See, e.g., *United States v. Balderama-Iribe*, 490 F.3d 1199, 1202-03 & n.4 (10th Cir. 2007) (where prosecution sent defendant a letter regarding mandatory life sentence, the Tenth Circuit allowed it to go into the record on appeal because the only reason it was not before the district court was defendant’s**

failure to object, and the only reason it was being presented on appeal was defendant's decision to raise the objection anew).

3. However, the Tenth Circuit rarely grants such a motion to supplement. *Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 Fed. Appx. 812, 817 (10th Cir. 2008).

C. **Practice tip:** When factual developments after entry of judgment in the district court moot an appeal, the preferred practice is to move to dismiss the appeal, and attach an affidavit or other factual material to the motion.

D. A Brandeis brief may rely on extra-record facts to make policy arguments.

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