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# Appellate Practice Fall Update 2010



COLORADO BAR ASSOCIATION CLE

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# **AGENDA**

- 8:30 – 9:00 am:**                    **Registration**
- 9:00 – 9:50 am:**                    **Finality of Judgments – When Does the Time to Appeal Start Running?**
- State Court Issues  
*Presented by Christina F. Gomez*
  - Federal Court Issues  
*Presented by Paul H. Schwartz*
- 9:50 – 10:40 am:**                    **Interlocutory Appeals in State and Federal Courts**  
*Presented by Marcy G. Glenn and Stephen G. Masciocchi*
- 10:40 – 10:55 am:**                    **Networking Break**
- 10:55 – 11:45 am:**                    **Winning and Losing – How Appellate Judges Decide Cases and What That Means for Your Appellate Strategy**  
*Presented by Andrew M. Low*
- 11:45 – 12:50 pm:**                    **Luncheon Roundtable with the Judges: Appellate Advocacy**  
Interactive Session with Lunch Provided  
*Honorable Allison H. Eid, Colorado Supreme Court*  
*Honorable David J. Richman, Colorado Court of Appeals*  
*Honorable Timothy M. Tymkovich, United States Court of Appeals*  
*Moderated by Walter Sargent*
- 1:00 – 1:50 pm:**                    **Ethical Issues for the Appellate Practitioner**  
*Presented by Honorable John R. Webb*
- 1:50 – 2:05 pm:**                    **Networking Break**
- 2:05 – 2:55 pm:**                    **Brief Writing – Using Often-Overlooked Sections to Persuade the Court**  
*Presented by Blain D. Myhre*
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**2:55 – 3:45 pm:**

**Sanctions, Costs and Attorneys Fees on Appeal**

*Presented by Geoffrey Klingsporn and Jessica E. Yates*

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# **BIOGRAPHICAL INFORMATION**

## **Chair/Moderator**

**Andrew M. Low, Esq.**

## **Faculty**

**Honorable Allison H. Eid**

**Marcy G. Glenn, Esq.**

**Christina F. Gomez, Esq.** is an attorney with the Denver office of Holland & Hart LLP. Her primary focus is civil appellate litigation, and she has worked on various matters in the Tenth Circuit Court of Appeals, the Colorado Supreme Court, and the Colorado Court of Appeals, as well as in other federal and state courts. Ms. Gomez graduated *summa cum laude* from Millsaps College in Jackson, Mississippi. She graduated *cum laude* from Harvard Law School, where she was a member of the Board of Student Advisers and was an author and editor for the Harvard Journal on Legislation. Prior to joining Holland & Hart in 2004, she clerked for two years with the Honorable Charles A. Pannell, Jr. of the U.S. District Court for the Northern District of Georgia.

**Geoffrey Klingsporn, Esq.** is an associate at Davis Graham & Stubbs, LLP. His appellate experience covers a broad range of cases for insurance, real estate, medical, pharmaceutical and manufacturing clients. Mr. Klingsporn also practices commercial litigation in the trial group at DGS, focusing particularly on products liability. His experience includes defending bicycle component manufacturers and appearing nationwide on behalf of a major pharmaceutical client. In addition, he has represented clients pro bono in election-law cases and before the Tenth Circuit as appointed counsel under the Criminal Justice Act. He currently serves as Secretary of the Election Law Task Force of the Colorado Lawyers Committee, and is a member of the Appellate Subcommittee of the Colorado Bar Association. Before joining DGS, Mr. Klingsporn was a professor of U.S. History. He received his BA from Columbia, MA and PhD from the University of Chicago, and joined the Social Sciences faculty at the University of Denver. While teaching at DU, Mr. Klingsporn entered the evening program at the Sturm College of Law, served on the Law Review, and graduated in 2007 with the Faculty Award for the highest grade point average in his class.

**Andrew M. Low, Esq.**

**Stephen G. Masciocchi, Esq.**

**Blain D. Myhre, Esq.**

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## **Honorable David J. Richman**

**Walter H. Sargent, Esq.** is a sole practitioner in Colorado Springs, specializing in civil appeals. He graduated from the Massachusetts Institute of Technology with degrees in philosophy and computer science, and received his law degree from Harvard Law School, where he was a John M. Olin Fellow of 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 H. Schwartz, Esq.** is a founding member of Shoemaker Ghiselli + Schwartz LLC, a boutique litigation firm based in Boulder. Since completing clerkships with U.S. Supreme Court Justices Stephen Breyer and Harry A. Blackmun (Retired) during the October 1994 Term of Court, Mr. Schwartz has handled a wide variety of complex matters in trial and appellate courts and before arbitrators in Colorado and throughout the United States. Among other areas of law, Paul has successfully represented public and private companies and individuals in cases concerning commercial contracts, fraud, securities law, corporate governance disputes, antitrust, internal investigations, white collar crime, real estate, Internet privacy, bankruptcy litigation, employment law, immigration, and constitutional law. Paul began his career in the private practice of law with Bondurant Mixson & Elmore, in Atlanta, Georgia. Before co-founding SGS in 2009, Paul worked for eleven years as a litigation associate and partner in a national law firm, Cooley Godward Kronish.

**Honorable Timothy M. Tymkovich** is a Circuit Judge on the U.S. Court of Appeals for the Tenth Circuit, serving in that position since 2003. Judge Tymkovich is a graduate of The Colorado College and the University of Colorado School of Law. After graduation, he clerked for Chief Justice William Erickson of the Colorado Supreme Court, and practiced law in Denver until 1991, when he became Colorado's Solicitor General. From 1996 until 2003 he practiced in his own firm, specializing in civil and constitutional matters, ranging from election law to water. Judge Tymkovich currently sits on several federal judicial committees and is a board member of the Federal Judges Association.

**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: *Consistency in Statutory Interpretation*, 38 Jun Colo.Law 67 (2009); *Revisiting the Recovery of Attorney Fees and Costs in Colorado*, 33 Colo.Law. 11 (April 2004); *Fraud and Negligent*

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*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. Her practice focuses on appellate services and commercial litigation, and she has argued before both federal and state appellate courts on many occasions. She is an active member of the Colorado Bar Association's Appellate Practice Subgroup. 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, where she served on the *Virginia Law Review* and was elected to Order of the Coif. 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.

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# **SECTION 7**

## **Sanctions, Costs and Attorneys Fees on Appeal**



*Presented by*

**Geoffrey Klingsporn**  
Davis Graham & Stubbs LLP  
Denver, CO  
&  
**Jessica E. Yates**  
Snell & Wilmer, LLP  
Denver, CO

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## Attorneys Fees on Appeal

By Jessica E. Yates, Esq., Snell & Wilmer L.L.P.

### Seeking Fees Post-Trial For Trial Or Other Lower Court Proceedings

- State court: Pursuant to Rule 121 § 1-22
  - File motion for fees within 15 days of entry of judgment.
  - Support with evidence of time spent, the fee agreement, and the reasonableness of fees.
  - Discovery allowed only upon “good cause shown.”
  - Hearing held if required by law or at court’s discretion.
- Federal court: F.R.C.P. 54(d)(2) and D.C.COLO.LCivR 54.3
  - If claiming fees under legal basis, Rule 54(d)(2) applies:
    - Must be made by motion “unless the substantive law requires those fees to be proved at trial as an element of damages.”
    - File motion for fees no later than 14 days after entry of judgment.
    - Opposing party gets a chance to respond, but not necessarily through a hearing.
  - If claiming fees for frivolous action under 28 U.S.C. § 1927:
    - Rule 54(d)(2) does not apply.
  - Local rule 54.3:
    - Affidavit required from each person claiming fees.
    - Must include a detailed description of the services rendered, the amount of time spent, the hourly rate, and the total amount claimed.

### A Request For Attorneys’ Fees Usually Does Not Affect Final Judgment, So It Does Not Toll The Time For Filing A Notice Of Appeal

- Usually a post-trial request for fees does not affect final judgment.
  - *Baldwin v. Bright Mortg. Co.*, 757 P.2d 1072, 1073 (Colo. 1988) (“a judgment is final for appeal purposes which has disposed of all of the issues on the merits even though issues regarding attorney fees remain undecided by the trial court”)
  - *Utah Women’s Clinic v. Leavitt*, 75 F.3d 564, 567 (10th Cir. 1995) (“an unresolved issue of attorney’s fees for the litigation in question does not prevent the judgment on the merits from being final” (quotation omitted).
    - And “a Rule 59(e) motion, challenging only the award of costs and attorney’s fees, does not toll the time for a merits appeal.” *Id.*
- State and federal court – Exceptions to rule re: final judgment
  - When attorneys’ fees are damages under substantive law:
    - Be sure to include evidence of these damages at trial!



- F.R.C.P. 54(d)(2) – Post-judgment motion for attorneys’ fees cannot include those that “substantive law requires . . . to be proved at trial as an element of damages.”
- If attorneys’ fees are damages, there is no final judgment until a fixed award of fees has been made.
  - “If attorney fees are ‘damages,’ then the merits of a lawsuit are not appealable until the amount of fees has been set.” *Ferrell v. Glenwood Brokers*, 848 P.2d 936, 941 (Colo. App. 1993).
  - If they are considered damages, attorney fees must be determined by the trier of fact and proven during the damages phase, and can be multiplied under statutes that permit doubling and trebling of damages. *Id.*
  - Post-judgment interest is awardable on attorney fees treated as damages. *Id.*
- How do you know whether attorneys’ fees are “damages”?
  - Look to case law regarding the elements of the claims at issue.
  - “Classifying attorney fees as ‘costs’ or ‘damages’ . . . depends on the context of the case. That is, such a determination is a fact-and context-sensitive one resting within the sound discretion of the trial court.” *Farmers Reservoir & Irrigation Co. v. City of Golden*, 113 P.3d 119, 134 (Colo. 2005).
- Examples of when fees are damages:
  - “If attorney fees are part of the substance of a lawsuit, that is, if the fees being sought are the legitimate consequences of the tort or breach of contract sued upon, such as in an insurance bad faith case.” *Ferrell*, 848 P.2d at 941.
    - *Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1117 (10th Cir. 2009) (similar).
    - Note: In Colorado, such fees may be considered “special damages,” which must be specifically pled pursuant to C.R.C.P. 9(g). See *Lawry v. Palm*, 192 P.3d 550, 568-569 (Colo. App. 2008).
  - “[W]here the attorney fees or costs are the subject of the lawsuit, as for example, where the suit is brought by an attorney to enforce a fee agreement.” *Steele v. Law*, 78 P.3d 1124, 1129 (Colo. App. 2003).
  - “Attorney fees and costs in removing the cloud on title also constitute special damages in a slander of title action.” *Skyland Metro. Dist. v. Mt. West Enter., LLC*, 184 P.3d 106, 131 (Colo. App. 2007).
- Examples of where attorneys’ fees are not damages:
  - When “the primary purpose of the fees award is to reimburse [a party] for the expenses incurred litigating the frivolous or groundless claims.” *Farmers Reservoir & Irrigation Co.*, 113 P.3d at 135.

- When the attorneys' fees award is "simply the consequence of a contractual agreement to shift fees to a prevailing party," and "the fee-shifting contract provision is not the subject of the dispute between the parties and the contract itself is proven to exist." *Ferrell*, 848 P.2d at 941-42.
    - Same, with respect to fee-shifting statute. *Stuart v. N. Shore Water & Sanitation Dist.*, 211 P.3d 59, 63 (Colo. App. 2009)
  - What happens if the fees are not damages?
    - No final appealable judgment until attorneys' fees decision is made.
- Federal court – Another exception to rule re: final judgment:
  - If the motion for fees is made pursuant to F.R.C.P. 54, and the district court extends the time for appeal under Rule 58, a motion for fees tolls the running of the time for appeal. See F.R.A.P. 4(a)(4)(A)(ii).
    - F.R.C.P. 54(d) – Motion for fees must be made within 14 days after entry of judgment.
    - F.R.C.P. 58(e) – "[I]f a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59."
      - E.g., where the district court's order stated: "[F]ollowing the resolution of the plaintiff's claim for an award of attorney fees . . . the court shall direct the entry of final judgment in this case," this was sufficient to trigger the tolling allowed by F.R.A.P. 4(a) and F.R.C.P. 58(e) for a motion for fees. See *Fincher v. Prudential Prop. & Cas. Ins. Co.*, 2010 U.S. App. LEXIS 8134 (10th Cir. Apr. 20, 2010) (unpublished).
      - So then the motion for fees is given the same effect as a motion made under F.R.C.P. 59. See *Yost v. Stout*, 607 F.3d 1239, 1242 (10th Cir. 2010)

### Appealing The Award Or Denial Of Attorneys' Fees

- Procedurally:
  - Where order on fees comes after entry of judgment on the merits:
    - Amend the notice of appeal if you're appealing the merits of the decision.
  - Or file new notice of appeal and move to consolidate appeals if necessary.
  - Exception: where appeal is of a fee award imposed as a personal sanction on an attorney.
    - Attorney is the appellant.

- Attorney should either file a new and separate notice of appeal or be added as a new party to an existing appeal. *See Maul v. Shaw*, 843 P.2d 139, 143 (Colo. App. 1992).
  - **However**, state case law provides a potential remedy if the attorney fails to file her own notice of appeal.
    - If the sanction had been imposed upon the party and the attorney, jointly and severally, and only the party appeals,
      - and if the court of appeals disagrees with the trial court's conclusion that the appeal is frivolous,
      - that conclusion is reversed to both the party and the attorney, even if the attorney failed to file his or her own notice of appeal. *See Elrick v. Merrill*, 10 P.3d 689, 699 (Colo. App. 2000).
    - This **does not apply** if the sanction had been imposed only on the attorney:
      - *See Anglum v. USAA Cas. Ins. Co.*, 166 P.3d 191, 192 (Colo. App. 2007) (where court of appeals had reversed a trial court's dismissal of a case, award of fees against individual attorneys could not be considered on appeal, because they failed to timely appeal the sanction)
- Finality requirement:
  - Even if the lower court has determined that a party is entitled to fees, an actual award is needed for appeal.
  - An "award of attorneys' fees is not final and appealable within the meaning of 28 U.S.C. § 1291 until it is reduced to a sum certain." *Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 924 (10th Cir. 2005).
- Lower court's denial of attorney's fees also is appealable.
  - Be sure if you're the appellee in an appeal on the merits of a case that you file a timely cross-appeal on that issue. *Amphibious Partners, LLC v. Redman*, 534 F.3d 1357, 1359 n. 1 (10th Cir. 2008).
- Standard of review on appeal:
  - Courts review a grant or denial of attorneys' fees for an abuse of discretion, including the court's decision on reasonableness of the fees, whether a party prevailed, and whether a claim was frivolous. *Miller v. Bd. of Educ.*, 565 F.3d 1232, 1247 (10th Cir. 2009); *Aerotech, Inc. v. Estes*, 110 F.3d 1523, 1527 (10th Cir. 1997); *Madison Capital Co., LLC v. Star Acquisition VIII*, 214 P.3d 557, 560 (Colo. App. 2009); *Munoz v. Measner*, 214 P.3d 510, 513 (Colo. App. 2009); *In re Marriage of Sanchez-Vigil*, 151 P.3d 621, 624 (Colo. App. 2006).
  - Courts review de novo any statutory interpretation or other legal analysis underlying the district court's decision concerning attorneys' fees. *Aerotech*, 110 F.3d at 1527; *Madison Capital Co.*, 214 P.3d at 560.
  - But where the United States Court of Appeals has decided to award fees for the appeal and remanded to the trial court to determine the amount of fees:

- “[B]ecause appeal-related fees are issued at the discretion of this court, our review of such fees determined by the district court will be de novo.” *Crumpacker v. Kansas*, 474 F.3d 747, 756 (10th Cir. 2007).

#### Seeking Fees On Appeal Pursuant To “Prevailing Party” Status

- If you were entitled to fees at trial, you can seek them on appeal, in accordance with your degree of success:
  - *Kennedy v. King Soopers, Inc.*, 148 P.3d 385, 390 (Colo. App. 2006) (“When a party is awarded attorney fees for a prior stage of the proceedings, it may recover reasonable attorney fees and costs for successfully defending the appeal. . . . However, if the party is not entirely successful in defending the appeal, its award of appellate attorney fees may be adjusted to reflect the mixed result.”).
- The same applies to a successful interlocutory appeal – you seek fees from the Court of Appeals, not district court:
  - *Crumpacker v. Kansas*, 474 F.3d 747, 756 (10th Cir. 2007)
- The Court of Appeals remands to the trial court to determine the amount of fees.
  - And this amount can be appealed. *See id.*

#### Procedure For Seeking Fees For a Frivolous Appeal Or Defending Fees Imposed

- Consider at trial court what you need to develop your record. For example:
  - Move for fees at trial court on basis of frivolous claim:
    - “Whether a claim lacked substantial justification is a question of fact for the trial court.” *Mitchell v. Ryder*, 104 P.3d 316, 320 (Colo. App. 2004).
    - It might held the court of appeals understand a later argument that the appeal is frivolous.
  - Preserve your objections to “unwarranted delay” or vexatious proceedings.
    - *See Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1220 (10th Cir. 2010) (reversing district court’s award of attorneys’ fees that had been premised on dilatory tactics, as defendant did not object to plaintiff’s motions to stay).
- BUT – even if the trial court applied fee sanctions for meritless claim, there is no per se rule or presumption that an appeal of the same is deemed frivolous.
  - *White v. General Motors Corp.*, 908 F.2d 669, 675 (10th Cir. 1990) (“We decline to hold that an appeal is frivolous per se if the presentation of the issues in district court was bad enough to be sanctionable. Such a draconian rule would make sanctions available in nearly every appeal of a case dismissed for failure to state a claim. . . This would constitute too great a chill of advocacy.”).
  - Just because the trial court awards fees in concluding that certain aspects of the case there were frivolous, it does not automatically entitle a party to fees on appeal. Fees are appropriate on appeal “only if the appeal itself

lacks substantial justification.” *J.D. Padilla & JDP, LLC v. Ghuman*, 183 P.3d 653, 665 (Colo. App. 2007).

- Federal authorities for seeking fees for a frivolous appeal:
  - 28 U.S.C. § 1927:
    - “Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”
  - F.R.A.P. 38:
    - “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”
      - “May” in both § 1927 and F.R.A.P. 38 – discretionary. *See Roth v. Green*, 466 F.3d 1179, 1188 (10th Cir. 2006).
      - Compare “shall” in state law – see below.
      - Federal courts applying federal law may be less likely to impose fees?
  - C.R.S. § 13-17-102(4) (text reprinted below):
    - Federal courts may rely on C.R.S. § 13-17-102 in imposing fees for a frivolous claim in diversity cases/ state law claims. *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1217 (10th Cir. 2010).
      - And district court need not have subject matter jurisdiction to do so. *See id.*; *see also Consumer Crusade, Inc. v. Clarion Mortg. Capital, Inc.*, 197 P.3d 285, 288 (Colo. App. 2008).
- State authorities for seeking fees:
  - C.R.S. § 13-17-102(4):
    - “The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5(3) that lacked substantial justification. As used in this article, ‘lacked substantial justification’ means substantially frivolous, substantially groundless, or substantially vexatious.”
    - “Shall” reduces discretion – and in fact makes it mandatory for the court to order fees if it concludes that that action “or any part

thereof” was frivolous. *See Hodges v. People*, 158 P.3d 922, 926 (Colo. 2007) (use of “shall” in statute invokes mandatory connotation).

- So C.R.S. § 13-17-102(4) may be a stronger basis for fees than its federal counterpart.
- Although Colorado law still provides courts discretion in deciding whether an action was frivolous.
  - Court may award fees on its own motion. *Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006)
- C.A.R. 38(d): “Sanctions for Frivolous Appeal. If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.”
  - Because of the ethical obligation to advocate for your client, “a lawyer may present a supportable argument which is extremely unlikely to prevail on appeal.” *Mission Denver Co. v. Pierson*, 674 P.2d 363, 365 (Colo. 1984).
  - C.A.R. 38(d) should be used only to penalize “egregious” conduct – i.e., only in the “clear cases.” *Id.* at 365-66.
- Procedure For Seeking Fees on Appeal:
  - Federal court:
    - For frivolous appeal: On motion, filed separately from the brief on the merits of the appeal. *See* F.R.A.P. 38.
    - When due to “prevailing parties” provision in contract or law – use motions as well.
      - Although prevailing party status might not be certain until after remand.
      - So the court would deny the motion for fees, but allow the motion to be renewed if prevailing party status obtained. *Gamble, Simmons & Co. v. Kerr-McGee Corp.*, 43 Fed. Appx. 205, 208 (10th Cir. 2002).
  - State court:
    - Regardless of basis of claim for fees, add claim for fees to the principal brief, not a motion. *See* C.A.R. 39.5.
    - And it must be the principal brief, not a reply brief. *Reed Mill & Lumber Co. v. Jensen*, 165 P.3d 733, 740 (Colo. App. 2006)
- Do you get fees for your work in moving for fees as a prevailing party?
  - Usually in federal court – but court has discretion:
    - “An award of reasonable attorneys’ fees may include compensation for work performed in preparing and presenting the fee application.” *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1205 (10th Cir. 1986).
    - BUT – not necessarily the fees expended in disputing the amount of a fee award. *Id.*

- And court has no obligation to award fees when fee request is outrageously excessive. *Case v. Unified School Dist. No. 233, Johnson County*, 157 F.3d 1243, 1254 (10th Cir. 1998).
- Do you get fees for your work in moving for sanctions?
  - Not automatically.
  - Court awarding fees in moving for sanctions:
    - *Sangui Biotech Int'l v. Kappes*, 179 F. Supp. 2d 1240, 1246 (D. Colo. 2002)
  - Court limiting fees only to blatant cases (no defense to the motion for sanctions):
    - “[F]ees may be awarded only if the trial court determines that the defense to the motion [for fees] lacked substantial justification.” *Parker v. Davis*, 888 P.2d 324, 327 (Colo. App. 1994).
  - Court awarding fees only after plaintiff was put on notice to withdraw a pleading advanced solely for the purpose of harassment:
    - *United States ex rel. Shough v. Maximus, Inc.*, 2000 U.S. Dist. LEXIS 21804 (D. Colo. June 7, 2000).

#### Whether Appealing A Sanction Or Seeking One: When Is An Argument Frivolous?

- Lacks “substantial justification” pursuant to C.R.S. § 13-17-102(4):
  - “An appeal lacks substantial justification and is substantially frivolous under § 13-17-102(4) when the appellant’s briefs fail to set forth, in a manner consistent with C.A.R. 28, a coherent assertion of error, supported by legal authority.” *Giguere v. SJS Family Enters.*, 155 P.3d 462, 474 (Colo. App. 2006).
- “An appeal is frivolous when the result is obvious, or the appellant’s arguments of error are wholly without merit.” *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987).
- An appeal is frivolous when appellant “has failed to present any legal theory which could conceivably refute the district court’s disposition.” *Davis v. Kansas Dep’t of Corr.*, 507 F.3d 1246, 1279 (10th Cir. 2007).
- Severely non-compliant brief:
  - In case involving fee dispute between attorney and client, the appeal as briefed was frivolous when it incorporated by reference more than 200 pages of trial court pleadings, lacked cogent argument and instead consisted of “tortured rhetoric,” cited to only two cases in the entire brief (*Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Dred Scott v. Sandford*, 60 U.S. 393 (1856)) – neither of which were relevant, yet still violated length limitations in C.A.R. 28(g).
    - *See Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006).
- “No rational argument” test:
  - “[A]n appeal should be considered frivolous if the proponent can present no rational argument based on the evidence or law in support of a proponent’s claim or defense.” *Mission Denver Co. v. Pierson*, 674 P.2d

363, 366 (Colo. 1984); *see also Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1219 (10th Cir. 2010) (similar).

- Does not include “meritorious actions that prove unsuccessful, legitimate attempts to establish a new theory of law, or good faith efforts to extend, modify, or reverse existing law.” *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984)
- “No credible evidence” test:
  - “[A] claim or defense is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial,” i.e., when “the proponent has a valid legal theory but can offer little or nothing in the way of evidence to support the claim or defense.” *Western United*, 679 P.2d at 1069.
- “Bad faith” test:
  - “[I]f the record reveals that counsel or any party has brought, maintained, or defended an action in bad faith, the rationale for awarding attorney fees is even stronger. Bad faith may include conduct which is arbitrary, vexatious, abusive, or stubbornly litigious. It also may include conduct aimed at unwarranted delay or disrespectful of truth and accuracy.” *Western United*, 679 P.2d at 1069; *see also Lorillard Tobacco Co.*, 611 F.3d at 1219 (similar).
  - Also – false misrepresentations on appeal. *See Garcia v. Berkshire Life Ins. Co. of Am.*, 569 F.3d 1174, 1183 (10th Cir. 2009).
  - The Tenth Circuit applies this rule to appeals from arbitration too:
    - *See DMA Int’l, Inc. v. Qwest Communs. Int’l, Inc.*, 585 F.3d 1341, 1346 (10th Cir. 2009).
      - Because under the Federal Arbitration Act, courts cannot “substitute [their] interpretation of the contract for that of the arbitrator,” appeals premised on a contrary assumption may be deemed frivolous.
      - Application of rule gives effect to national policy favoring arbitration as a meaningful alternative to litigation. *Id.*
- Warning: Attorney cannot claim he/she was “following client instructions.”
  - The proper response to a client’s instruction to pursue a frivolous claim is to withdraw from representation. *Parker v. Davis*, 888 P.2d 324, 325 (Colo. App. 1994).
- Examples of frivolous appeals:
  - *Southeastern Colo. Water Conservancy Dist. v. Cache Creek Mining Trust*, 854 P.2d 167 (Colo. 1993) and *O’Neill v. Simpson*, 958 P.2d 1121 (Colo. 1998):
    - Appellant, on third AND fourth times in front of the Supreme Court concerning a set of water rights;
    - Water court had concluded that rights had been abandoned;
    - First appeal was on the merits of that judgment;
    - Second appeal had claimed there was newly discovered evidence to warrant amendment of the judgment under C.R.C.P. 60(b)(5);



- Third appeal claimed the water district committed fraud – but the C.R.C.P. 60(b)(2) motion was untimely – fees assessed;
    - Fourth appeal claimed that the water court had no jurisdiction – fees assessed.
  - *People v. Fitzgibbons*, 909 P.2d 1098, 1103 (Colo. 1996)
    - Assessed fees for appeal when party seriously misrepresented the procedural posture of the case.
  - *Rogers v. Charnes*, 656 P.2d 1322 (Colo. App. 1982)
    - Appeal regarding a license revocation was found to be wholly lacking in credible evidentiary support and filed solely to delay revocation.
  - *Merrill Chadwick Co. v. October Oil Co.*, 725 P.2d 17, 19 (Colo. App. 1986)
    - Appeal lacked any rational justification, when party appealed default judgment, claiming “excusable neglect,” but provided no evidence related to the applicable standard for “excusable neglect,” i.e., indicating that its failure to respond timely to the complaint resulted from some unavoidable hindrance or accident.
  - *Sullivan v. Lutz*, 827 P.2d 626, 628 (Colo. App. 1992)
    - Although under C.R.S. § 13-17-102(7) fee sanctions cannot be imposed when the court determines a claim or defense was asserted in a good faith effort to establish a new theory of law in Colorado, “if a party fails to present plausible arguments in support of a novel claim, sanctions may be imposed under the statute, irrespective of the subjective state of mind of the party or the attorney at the time the claim was asserted.”
  - *Artes-Roy v. Aspen*, 856 P.2d 823, 828 (Colo. 1993)
    - Fees assessed where arguments rejected as frivolous by trial court were re-raised on appeal, in conjunction with arguments not raised below.
- Practice pointer: Consider the stringent threshold for being awarded attorneys’ fees for a frivolous appeal before moving for sanctions – notwithstanding client pressures.
  - Could undermine your other arguments. “The lady doth protest too much.”
  - Could undermine your effectiveness as an advocate.
  - Could put you on the defensive! *See Springer v. Comm’r*, 580 F.3d 1142, 1146 (10th Cir. 2009).
    - IRS Commissioner moved for sanctions for a frivolous appeal.
    - Court disagreed, noting that taxpayer had advanced some difficult legal issues.
    - Court then accused Commissioner, at great length, of making frivolous arguments by misrepresenting the procedural posture of the case and the status of the case law.

#### Are Pro Se Parties Held To A Different Standard?

- *Pro se* parties who are not attorneys are held to a more lenient standard in state court or applying state law:
  - C.R.S. § 13-17-102(6): Standard is that the court finds “the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious.”
    - It probably will be easier to prove that a *pro se* party’s case is “substantially vexatious” than “substantially frivolous” or “substantially groundless.”
    - *See Bockar v. Patterson*, 899 P.2d 233, 235 (Colo. App. 1994).
      - Fees affirmed in context defining a “vexatious claim” as “one brought or maintained in bad faith to annoy or harass. It may include conduct that is arbitrary, abusive, stubbornly litigious, or disrespectful of truth.”
      - After numerous delays, *pro se* plaintiff represented to defendant, on the day before his scheduled deposition, that he could not attend the deposition because he had to appear in court on an unrelated matter.
        - But the record showed that he did not personally appear for that other matter. And he did not appear for his deposition.
  - The Tenth Circuit will both award fees and impose filing restrictions on *pro se* litigants who file numerous lawsuits and appeals regarding the same issue.
    - *See Ford v. Pryor*, 552 F.3d 1174, 1181 (10th Cir. 2008)
      - Where *pro se* appellant brought three appeals raising same arguments on same claims, clerk ordered to return unfiled any additional civil appeals on the same topics.
  - **However**, Colorado attorneys representing themselves *pro se* are held to the usual standards for attorneys. *See Bockar v. Patterson*.

#### Due Process and Fact-Finding for Attorneys’ Fees Awards on Appeal

- As a matter of due process, court must give a party “notice and an opportunity to respond” to impose sanctions under C.A.R. 38(d). *Mission Denver*, 674 P.2d at 366.
  - Where Appellee has requested fees, Appellant can respond in briefing. This is sufficient due process.
  - This does not *necessarily* require a remand for a hearing. *See* C.A.R. 39.5 (“The appellate court may determine entitlement to and the amount of any attorney fees for the appeal. In its discretion, the appellate court may remand to the trial court or tribunal below the determination of entitlement to or the amount of any attorney fees.”).
    - No hearing: *See Rogers v. Charnes*, 656 P.2d 1322, 1323 (Colo. App. 1982) (imposed flat \$500 attorneys’ fees sanction when court concluded that appeal filed only to delay license revocation)

- Remand to trial court to determine amount of fees: *See Marietta v. Busto*, 691 P.2d 345, 347 (Colo. App. 1984) (reversed on other grounds by *Baldwin v. Bright Mortg. Co.*, 757 P.2d 1072, 1074 n.3 (Colo. 1988); *Castillo v. Koppes-Conway*, 148 P.3d 289, 293 (Colo. Ct. App. 2006); *Rogers v. Charnes*, 656 P.2d 1322, 1323 (Colo. Ct. App. 1982)
- “If the motion for attorney fees is predicated on the lack of a factual basis for an asserted claim for relief or defense, the trial court is obliged to make findings that will permit meaningful appellate review of its disposition of the motion.” *Board of County Comm’rs v. Auslaender*, 745 P.2d 999, 1001 (Colo. 1987)
  - *Auslaender* reversed the court of appeals’ decision to reverse the district court’s denial of an award fees
    - The trial court had never held an evidentiary hearing
    - The court of appeals effectively was acting as a fact-finder
    - “It was the prerogative of the district court to determine in the first instance whether the county’s condemnation action was or was not ‘without reasonable basis’ or ‘frivolous.’” *Id.* at 1002.
  - The trial court must make factual findings that support a conclusion that an action is frivolous, and explain the basis for its conclusion.
    - *Pedlow v. Stamp*, 776 P.2d 382, 386 (Colo. 1989)
- Remanding for fact-finding:
  - A necessary result of the above.
  - *Garcia v. Berkshire Life Ins. Co. of Am.*, 569 F.3d 1174, 1183 (10th Cir. 2009)
    - Court of Appeals remanded to district court “for the limited purpose of determining whether these three documents were fabricated and if so, whether the fabrication was intentional. If the district court answers both questions in the affirmative, we request that the district court calculate a reasonable award of attorney’s fees for the appeal.”
    - Retained jurisdiction to decide what fees to award under F.R.A.P. 38.
  - *See also Hoyt v. Robson Cos., Inc.*, 11 F.3d 983, 985 (10th Cir. 1993) (“[A]n application for appeal-related attorneys’ fees must first be made to our court. Should we decide that it is appropriate to award such fees, we may then remand to the district court to determine an award of reasonable fees.”).
  - *See also Bilawsky v. Faseehudin*, 916 P.2d 586, 591 (Colo. App. 1995) (remanding where the trial court made no findings indicating how it arrived at the amount of fees awarded).