Knowing When to Change Trains: The Ins and Outs of Interlocutory Appeals

by Jessica E. Yates

This article reviews various options in state and federal courts in Colorado for pursuing an interlocutory appeal, as well as the trends seen in these courts in terms of accepting and ruling on such appeals.

Every experienced trial attorney knows the feeling of facing an adverse pretrial order or mid-trial court decision that could make all the difference in the case. Unless the decision can be severed from the rest of the case and certified as final under Rule 54(b), the usual rule is that the party must continue litigating until final judgment. That said, there are exceptions. Some lawyers attempt an interlocutory appeal, even when the odds of success are extremely remote. Others do not pursue an interlocutory appeal even when their case warrants it.

Knowing whether and when it is time to "change trains" and pursue one of these interlocutory options can be critical to achieving a successful outcome. In state court, intermediate appeals can be brought before the Colorado Court of Appeals or the Supreme Court, but the standards for doing so are different for each court. Likewise, there are several paths to reaching the U.S. Court of Appeals before final judgment, which vary according to the type of question presented and the impact on the appellant if review is not granted.

Appeals Before the Colorado Supreme Court

The Colorado Supreme Court has initial appellate jurisdiction over certain types of cases pursuant to CRS § 13-4-102(1)—for example, a constitutional challenge to a statute. In contrast, Colorado Appellate Rule (CAR) 21—based on the Colorado Supreme Court's original appellate jurisdiction provided by the state constitution—is available for a variety of cases. However, the criteria are stringent: the rule grants original jurisdiction to the Colorado Supreme Court only when "no other adequate remedy," including an ordinary appeal or Colorado Rule of Civil Procedure (CRCP) 106 review, is available. The Supreme Court quickly reviews CAR 21 petitions, and if the Court accepts the petition by ordering a rule to show cause why the requested relief should not be granted, the underlying proceedings are automatically stayed.[1]

The odds of getting the attention of the Supreme Court under CAR 21 are small. The Clerk of the Supreme Court estimates that the Court receives approximately 300 CAR 21 petitions each year. In the five-year period of 2007 through 2011, the Supreme Court ruled on the merits of an average of eleven CAR 21 petitions each year.[2] The vast majority of petitions are not accepted, and sometimes an initial order to show cause is later deemed "improvidently granted" without ever reaching the merits of the petition.

According to the most recent five-year average of published cases in CAR 21 proceedings, the Court reversed in whole or in part the trial court's decision at issue nearly 87% of the time. So, if a practitioner is successful in persuading the Court to hear the CAR 21 petition, there is a strong chance of eventual success on the merits, as well, if the Court opts to reach the merits.

However, most pretrial rulings will not satisfy the CAR 21 requirement that no other remedy be available. Instead, an ordinary appeal generally is deemed to provide satisfactory relief, even when there is a chance the court of appeals will remand for further actions that might not have been necessary if the trial court did not err in the first instance. Where it appears that an entire proceeding might have to be relitigated due to trial court error, a CAR 21 petition is more likely to succeed.

For example, in the past five years, the Court has decided on eight occasions whether the trial court properly decided questions of jurisdiction or venue. In such cases, an ordinary appeal does not provide an adequate remedy, because a party could be subjected to litigation in the wrong forum. Likewise, in the past five years, the

Coordinating Editor

Timothy Reynolds, Boulder, of Bryan Cave HRO—(303) 417-8510, timothy.reynolds@bryancave.com

About the Author

Jessica E. Yates focuses her practice on appeals and commercial litigation at the Denver office of Snell & Wilmer L.L.P.—jyates@swlaw.com.

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Court has twice decided the propriety of a trial court order compelling arbitration.[3] After all, in most arbitrations, there is little opportunity to appeal the merits of the case, so a disputed order compelling arbitration must be resolved to avoid irreversible prejudice to the losing party. When the Supreme Court has used CAR 21 to address jurisdiction in recent years, it has tended to conclude that a Colorado court had jurisdiction to hear the case.[4]

The Supreme Court also has ruled three times in the past five years under CAR 21 that a trial court erroneously ordered a new trial. In such cases, the Court uses CAR 21 to obviate the need for the parties to litigate an entire proceeding that it deems not justified by law—and sometimes to avoid double jeopardy.[5]

The Court has not used CAR 21 in the past five years to review an allegation that the trial court improperly failed to order a new trial. Likewise, the Court has not recently looked to CAR 21 to overturn a trial court's decision not to compel arbitration. In other words, it appears to the Supreme Court that the court of appeals can correct any such error in the ordinary course, even though a party believing it is entitled to arbitration may feel prejudiced by being forced to litigate in court.

Four CAR 21 decisions in the past five years have questioned the lower court's imposition of a discovery-related sanction where the sanction could have a direct and adverse impact on trial proceedings. For example, the Court has taken up questions of whether a district court properly excluded the testimony of an expert whose report was not timely disclosed,[6] and whether a court erred in striking an answer as a sanction for discovery violations.[7]

Sometimes, it is not the procedural posture of the case but rather the gravity of the issue that persuades the Court to accept a CAR 21 petition. Statutory questions regarding damage caps are apparently of interest to the Court, which ruled on statutory damage caps in the CAR 21 context three times during 2007 and 2008.[8]

Although it may be less obvious that no other adequate remedy exists in such cases, because damages issues are frequently raised through the regular appellate process resulting in a new trial on damages, the Court apparently is sensitive to avoiding proceedings when they otherwise would be based on an erroneous rule for damages. Furthermore, because statutory damage caps are recurring issues, the Supreme Court has an incentive to pronounce clear rules for their application. Similarly, the Court has ruled through CAR 21 petitions on criminal sentencing issues twice in the past five years, generally when the issue turns on a question of law or statutory interpretation.[9]

The bulk of accepted CAR 21 petitions deal with issues that at first blush seem more mundane, such as questions of privilege, discovery disputes, or motions to suppress evidence at trial. The particular question at issue could make a difference at trial and thus is suitable to address under CAR 21 to avoid having a new trial following a successful appeal. The Court has issued CAR 21 decisions addressing privilege and/or work product protection five times in the past five years.[10]

The focus on privileged or confidential information makes sense in the CAR 21 context, because the bell cannot be unrung once the information is disclosed. Also, the policies underlying confidential information are undermined if the information is required to be disclosed even if an appeals court later reverses.[11]

An additional ten CAR 21 decisions in the past five years focused on whether the trial court's discovery order was correct. Many of these cases feature a question of production of information many would consider especially private, which, like privilege, touches on concerns of damage by the mere act of disclosure.[12]

Although the Court accepts CAR 21 petitions regarding the admissibility of evidence (seven were ruled on in the past five years), it seems the Court is more amenable to granting CAR 21 review on admissibility in criminal cases. The Court ruled in a CAR 21 context on a motion *in limine* in only one civil case in the past five years,[13] and affirmed the trial court's decision to exclude evidence of income tax liability. In contrast, the Court reversed a district court's order to suppress evidence in criminal cases four times in the past five years.[14]

Likewise, attorney disqualification occasionally is featured in the Court's CAR 21 decisions and warranted two decisions in the past five years. Criminal defendants have a Sixth Amendment right to conflict-free counsel, so the failure to remedy a conflict results in an ongoing constitutional violation, rendering ordinary appellate review ineffective. In both cases, the Court reversed a trial court decision disqualifying a criminal defendant's attorney.[15]

In summary, CAR 21 represents an extraordinary vehicle for interlocutory review. However, as discussed below, the frequency of granting review remains relatively high compared to the rate of accepting interlocutory appeals before the U.S. Court of Appeals for the Tenth Circuit.

Appeals Before the Tenth Circuit

The Tenth Circuit Court of Appeals, like other federal appellate courts, has discretionary review powers somewhat comparable to CAR 21 under the collateral order doctrine, which was explained in *Cohen v. Benefit Indus. Loan Corp.*[16] Under the collateral order doctrine:

> a litigant may only seek immediate review of orders that (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment.[17]

Therefore, although the collateral order doctrine is not identical to CAR 21, it shares the common criterion of focusing on cases that are "effectively unreviewable" in the normal course of an appeal. And although CAR 21 is phrased differently, the Colorado Supreme Court's decisions in the past five years illustrate that CAR 21 appellate jurisdiction also tends to involve "an important issue completely separate from the merits of the action," and focuses on orders that "conclusively determine the disputed question."[18]

Perhaps the most significant difference between the two avenues to interlocutory appellate jurisdiction is that CAR 21 remains discretionary to the Colorado Supreme Court, whereas federal jurisdiction under the collateral order doctrine is not discretionary. If the *Cohen* factors are met, the Tenth Circuit will accept the appeal. There may be a certain discretionary "feel" to the analysis of whether the *Cohen* factors are actually met, such as whether the appeal involves an "important issue."[19] However, any subjectivity that might be imputed to a *Cohen* analysis is a far cry from the wholly discretionary approach of CAR 21 or the federal writ of *mandamus*, discussed below, in which the reviewing court may decline to hear an appeal even if all of the factors are undisputedly met.

The Tenth Circuit reported seventeen cases in the three years from 2009 to 2011 in which it exercised jurisdiction over a nonfinal judgment by invoking the collateral order doctrine. However, this number is misleading to some extent: ten cases involved the

denial of immunity for government officials—a categorical instance in which collateral order review is widely accepted.[20] Three cases involved double jeopardy, another type of case that is categorically eligible for collateral order review.[21] Of the remaining cases, one involved substituting the U.S. government as a party, and one involved an order for forced medication.

Occasionally, a more typical civil case meets the *Cohen* criteria. For example, in *Montez v. Hickenlooper*,[22] the court accepted review of an individual claim for damages in a class action suit. In *SEC v. Merrill Scott & Assocs., Ltd.*,[23] the court accepted review of a district court order modifying a protective order after one of the parties allegedly violated it. However, based on a three-year snapshot of Tenth Circuit cases published on Lexis,® it appears the collateral order doctrine is rarely available in the ordinary private civil litigation context.

Certified Interlocutory Appeals in State and Federal Courts

In both state and federal courts, there are certain types of case situations that automatically and categorically give rise to the right to an interlocutory appeal. For example: 28 USC § 1292(a) and CAR 1(a) give a right of interlocutory appeal from trial court orders granting or refusing injunctions, and from orders appointing a receiver; 9 USC § 16 and CRS § 13-22-228 permit immediate appeal from certain court orders pertaining to arbitration. It generally is not too difficult for a trial attorney to quickly identify whether a district court decision qualifies for such categorical treatment.

The harder cases are those in which interlocutory appeal is discretionary and subject to district court certification. Before 2011, the federal courts were unique in offering an opportunity for such appeals under 28 USC § 1292(b). For parties to invoke this limited provision, the district court must state in writing that its

> order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.[24]

The party seeking review must petition the U.S. Court of Appeals within ten days of entry of the district court's order.[25] Even then, review by the court of appeals is completely discretionary.[26] It does offer, though, an opportunity for even broader review:

> [T]he appellate court may address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court.[27]

In 2011, Colorado began offering a similar avenue for interlocutory appeals through new rule CAR 4.2, promulgated pursuant to CRS § 13-4-102.1. CAR 4.2 allows an immediate appeal to the Colorado Court of Appeals "(1) [w]here immediate review may promote a more orderly disposition or establish a final disposition of the litigation; and (2) [t]he order involves a controlling and unresolved question of law."[28] The rule defines an "unresolved question of law" as one

> that has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals, or a question of federal law that has not been resolved by the United States Supreme Court.[29]

CAR 4.2 also requires district court certification within fourteen days of the order in question, but unlike its federal counterpart, the Colorado rule provides that if the parties stipulate to certification, the district court must provide it.[30] The Colorado Court of Appeals ruled in January 2012 that the fourteen-day deadline is jurisdictional, and a trial court has no authority to extend it.[31]

In 2011, approximately thirteen requests for review were made to the Colorado Court of Appeals under CAR 4.2, and the court accepted two cases for review. Several of the denied petitions reflect that many petitioners do not make their case as to why the district court's decision involves a "controlling" question of law, which is an

independent query (and a separate factor) from whether the decision involves an "unresolved" question of law. The court in *Adams v. Corr. Corp. of Am.*[32] declined to offer a settled definition of "controlling," but suggested that a "controlling question of law" may need to involve an issue of "widespread public interest" or have the potential to impact other litigation. However, *Adams* involved the appeal of discovery orders. It is not clear how those suggestions would be applied in, for example, a case involving pure statutory interpretation, which necessarily may have broader application.[33]

It might appear that the Colorado Court of Appeals is being too selective, but the number of reviews under CAR 4.2 thus far seems comparable to the number of reviews in the Tenth Circuit under 28 USC § 1292(b). Over the ten-year period from the beginning of 2002 through 2011, the Tenth Circuit decided and published twelve cases under the jurisdiction of 28 USC § 1292(b), averaging just slightly more than one a year. The vast majority involved legal questions interpreting or applying federal statutes.[34] Interpretation or application of the Employee Retirement Income Security Act was involved in three of those twelve cases.[35]

The relatively low numbers of cases decided under § 1292(b) review in the Tenth Circuit suggest that appellants struggle to meet all three prongs required for review: (1) the presence of a "controlling question of law"; (2) the question of law is one "as to which there is substantial ground for difference of opinion"; and (3) the procedural posture is such "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Moreover, as one commentator has observed, a request for § 1292(b) certification "would be pointless" if a party wants to challenge a decision as an abuse of discretion "because there is not a controlling question of law."[36]

The question of what constitutes a "substantial ground for difference of opinion" also can be tricky. One Colorado court has held that the mere fact that an issue is one of first impression does not qualify for a "substantial ground."[37] A split in authorities is far more helpful to gaining § 1292(b) review.[38] Accordingly, discretionary appellate review under either 28 USC § 1292(b) or CAR 4.2 appears to be less frequently granted than review under CAR 21 or the federal collateral order doctrine.

Writ of *Mandamus* Before the Tenth Circuit

Still another avenue for interlocutory review by the Tenth Circuit is the writ of *mandamus*. However, success on a direct writ for Tenth Circuit review is rare. "A writ of *mandamus* is an extraordinary remedy, one we grant only when the party seeking review is clearly and indisputably entitled to relief."[39] The Tenth Circuit does have the discretion to convert an improper non-final appeal into a writ of *mandamus*, but it is under no obligation to do so.[40]

Three conditions must be met for any court to issue a writ of *mandamus*. First, "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires."[41] Thus, in the appellate context, the ordinary appellate process must be effectively unavailable to provide relief. Second, "the petitioner must demonstrate that his right to the writ is clear and indisputable."[42] Third, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[43] 28 USC § 1651(a) "is meant to be used only in exceptional case where there is clear abuse of discretion or usurpation of judicial power."[44]

A writ of *mandamus* to the Tenth Circuit brought pursuant to 28 USC § 1651 is not to be confused with a request for *mandamus*

relief brought in the district court pursuant to 28 USC § 1361, which provides district courts with original jurisdiction to compel a requested action of a federal agency or officer. An appeal of a final judgment on a *mandamus* action under § 1361 is an ordinary appeal giving rise to jurisdiction under 28 USC § 1291.[45]

In contrast, writs brought under § 1651(a) can request the court of appeals to compel the district court to take a requested action. 28 USC § 1651(a) provides that:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Thus, Tenth Circuit consideration of a writ of *mandamus* brought directly to the court of appeals under § 1651 is not a review of a final judgment. Moreover, the court of appeals, as the issuing court, is afforded discretion in deciding whether a case merits *mandamus* review.[46] The Tenth Circuit has identified five "nonconclusive guidelines" for deciding whether a writ will issue:

1) whether the party has alternative means to secure relief;
2) whether the party will be damaged in a way not correctable on appeal;
3) whether the district court's order constitutes an abuse of discretion;
4) whether the order represents an often repeated error and manifests a persistent disregard of federal rules; and
5) whether the order raises new and important problems or issues of law of the first impression.[47]

Notwithstanding the seeming similarities to the standards applied for CAR 21 review before the Colorado Supreme Court, the application of the *mandamus* standards leads to dramatically different results. Under a review of published cases, decisions were issued from the grant of CAR 21 review fifty-five times in the past five years, and the trial court was reversed in whole or part 87% of the time. In contrast, the Tenth Circuit has granted the requested relief in a direct *mandamus* petition only three times in the past five years. Many *mandamus* petitions (the overwhelming majority of which comes from *pro se* inmates) are denied for a variety of reasons. Usually, some other form of relief is available. Moreover, when *mandamus* is sought on a question ordinarily reviewed for abuse of discretion, the Tenth Circuit has held that *mandamus* is appropriate only when there is a gross abuse of discretion by the district court; mere error is insufficient.[48]

The recent cases in which the Tenth Circuit has granted *mandamus* relief illustrate the unique circumstances required for such jurisdiction.[49] Some of this apparent rarity is no doubt due to the high bar required for *mandamus* review by the court of appeals. However, the existence of the collateral order doctrine also plays a role, because the court usually will deny *mandamus* relief if it can accept jurisdiction under the collateral order doctrine as an exception to the final judgment.[50]

Conclusion

Interlocutory appeals still are the exception to the rule, but it is always wise to consider such exceptions when a practitioner

encounters a major road bump before final judgment. If nothing else, the variety of such offerings from Colorado's appellate courts will continue to pique the interest of litigators and appellate advocates alike.

Notes

1. CAR 21(g)(2).

2. Except where noted, all case totals are derived from a review of cases available through Lexis,® including unreported cases. However, because Lexis may not contain all cases, the figures are intended to be illustrative only. For example, Lexis generally does not include cases based on CAR 21 review where such review is later deemed "improvidently granted" (in other words, where the Supreme Court changes its mind later about accepting the case).

3. *See, e.g., Radil v. Nat'l Union Fire Ins. Co.*, 233 P.3d 688 (Colo. 2010).

4. *See, e.g., Found. for Knowledge in Dev. v. Interactive Design Consultants, LLC*, 234 P.3d 673 (Colo. 2010) (trial court had personal jurisdiction over Rhode Island defendants); *Sanctuary House, Inc. v. Krause*, 177 P.3d 1256 (Colo. 2008) (venue proper in Colorado even though real property located in Costa Rica); *In re Goettman*, 176 P.3d 60 (Colo. 2007) (Colorado court had personal jurisdiction over Australian defendant). *See also In re Marriage of Dedie*, 255 P.3d 1142 (Colo. 2011) (New York had no jurisdiction to issue custody order, rendering the order unenforceable in Colorado).

5. *See, e.g., People v. Segovia*, 196 P.3d 1126 (Colo. 2008).

6. *See Garrigan v. Bowen*, 243 P.3d 231 (Colo. 2010); *Berry v. Keltner*, 208 P.3d 247 (Colo. 2009); *Cook v. Fernandez-Rocha*, 168 P.3d 505 (Colo. 2007).

7. *See Pinkstaff v. Black & Decker (U.S.), Inc.*, 211 P.3d 698 (Colo. 2009).

8. *See In re Lanahan,* 175 P.3d 97 (Colo. 2008) (non-economic damage cap applies on per-claim basis); *Stamp v. Vail Corp.*, 172 P.3d 437 (Colo. 2007) (ski act rather than wrongful death damage cap applied); *Pulsifer v. Pueblo Prof'l Contrs., Inc.*, 161 P.3d 656 (Colo. 2007) (statutory workers' compensation cap applied to contractor).

9. *See, e.g., People v. Day,* 230 P.3d 1194 (Colo. 2010); *People v. Carbajal*, 198 P.3d 102 (Colo. 2008).

10. *See, e.g., DeSantis v. Simon,* 209 P.3d 1069 (Colo. 2009) (confidentiality of medical professional review committee records); *Compton v. Safeway, Inc.*, 169 P.3d 135 (Colo. 2007) (attorney–client privilege).

11. *See Ortega v. Colo. Permanente Med. Group, P.C.*, 265 P.3d 444 (Colo. 2011) (in a case dealing with the physician–patient privilege, "When a trial court's order involves records which a party claims are protected by a statutory privilege, as here, an immediate review is appropriate because the damage that could result from disclosure would occur regardless of the ultimate outcome of an appeal from a final judgment.").

12. *See, e.g., Judd v. Cedar St. Venture*, 256 P.3d 687 (Colo. 2011) (addressing standards for discovery of private information like compensation); *Cantrell v. Cameron*, 195 P.3d 659 (Colo. 2008) (court order to produce personal laptop too broad); *Stone v. State Farm Mut. Auto. Ins. Co.*, 185 P.3d 150 (Colo. 2008) (no requirement to produce tax returns unless information cannot be obtained through other sources).

13. *Hoyal v. Pioneer Sand Co.*, 188 P.3d 716 (Colo. 2008).

14. *See People v. Smith*, 254 P.3d 1158 (Colo. 2011); *People v. Scott*, 227 P.3d 894 (Colo. 2010); *People v. Wright*, 196 P.3d 1146 (Colo. 2008); *People v. Wartena*, 156 P.3d 469 (Colo. 2007).

15. *See People v. Maestas*, 199 P.3d 713 (Colo. 2009); *People v. Shari*, 204 P.3d 453 (Colo. 2009).

16. *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541 (1949).

17. *United States v. Martinez-Haro*, 645 F.3d 1228, 1232 (10th Cir. 2011) (citations omitted).

18. *See, e.g., Judd v. Cedar St. Venture*, 256 P.3d 687 (Colo. 2011) (in case involving claims for legal malpractice and breach of fiduciary duty, resolving question of whether a personal right to privacy prevented litigant from compelling discovery of documents that would reveal opposing party's compensation).

19. *See, e.g., Lopez v. Admin. Office of the Courts*, 420 Fed.Appx. 794, 797 (10th Cir. 2011) (collateral order doctrine did not apply, in part because use of alternative dispute resolution did not qualify as an "important issue").

20. *See Howards v. McLaughlin*, 634 F.3d 1131, 1138 (10th Cir. Colo. 2011) ("a district court's denial of a qualified immunity claim is eligible for appeal under the collateral order doctrine insofar as it turns on an issue of law").

21. *United States v. Wittig*, 575 F.3d 1085, 1095 (10th Cir. 2009) ("The right at stake in a double jeopardy claim . . . is irretrievably lost if the district court denies a motion to dismiss and the defendants proceed to trial.").

22. *Montez v. Hickenlooper*, 640 F.3d 1126 (10th Cir. 2011).

23. *SEC v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262 (10th Cir. 2010).

24. *See* 28 USC § 1292(b).

25. *See id.*

26. *See id.*

27. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996) (quotation omitted).

28. CAR 4.2(b).

29. *See id.*

30. *See* CAR 4.2(c).

31. *Farm Deals, LLLP v. Colorado*, ___ P.3d ___, 2012 COA 6, 2012 Colo.App.LEXIS 17 (Colo.App. Jan. 5, 2012).

32. *Adams v. Corr. Corp. of Am.*, 264 P.3d 640, 646 (Colo.App. 2011).

33. *See* Webb, "Interlocutory Appeals in Civil Cases Under C.A.R. 4.2,"41 *The Colorado Lawyer* 67 (April 2012) (more information on CAR 4.2).

34. *See, e.g., Rodriguez v. City of Albuquerque*, 420 Fed.Appx. 845 (10th Cir. 2011) (interpreting the Fair Labor Standards Act); *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125 (10th Cir. 2009) (applying the Age Discrimination in Employment Act); *Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285 (10th Cir. Okla. 2005) (interpreting the Clean Water Act).

35. *See, e.g., Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004).

36. Pratt, 19-203 *Moore's Federal Practice—Civil* § 203.33 at [3] (2011).

37. *See Hill v. Gibson Dunn & Crutcher, LLP*, No. 06-cv-01233, 2008 U.S. Dist. LEXIS 86049, *4 (D.Colo. Oct. 1, 2008).

38. *See State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1224 (10th Cir. 2008).

39. *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1298 n.3 (10th Cir. 2011).

40. *See id.*

41. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (alterations, quotation omitted).

42. *Id.* (quotation omitted).

43. *Id.*

44. *La Buy v. Howes*, 352 U.S. 249, 257 (1957).

45. *See, e.g., Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995).

46. *See In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470 (10th Cir. 2011).

47. *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009) (citations omitted).

48. *Id.* at 1192.

49. *Clyma v. Sunoco, Inc.*, 594 F.3d 777 (10th Cir. 2010) (non-party appeal of district court order denying permission to talk to jurors for educational material, invoking First Amendment rights); *C & M Props., L.L.C. v. Burbidge*, 563 F.3d 1156 (10th Cir. 2009) (appeal of district court actions taken after the district court had lost jurisdiction of the case); *In re United States*, 578 F.3d 1195, 1199 (10th Cir. 2009) (the government's appeal of proposed jury instruction where double jeopardy meant district court decision was effectively unreviewable on appeal).

50. *See United States v. Bolden*, 353 F.3d 870, 878 n.2 (10th Cir. 2003). ■